Florida Law Review

Volume 14 | Issue 3 Article 6

September 1961

The Agency Shop

Morton J. Perlin

In view of this exception to the general rule against the retroactive effect of a statute, section 734.01 of Florida Statutes 1959, as amended, should apply to any order allowing compensation subsequent to the date of enactment of the statute.[16]

In the express language of the amended statute, "A personal representative shall be allowed commissions upon the amount of the estate, real and personal, *accounted for by him* as compensation for his ordinary services . . . ." (Emphasis added.) This language seems to be in accord with the principle that the personal representative's right to remuneration accrues only at the time of final accounting and allowance of the petition for commission.

Conclusion

Logic and precedent support the rule that the compensation of personal representatives is governed by the law in effect as of the date of the final accounting and order allowing compensation. The arguments supporting this view gravitate toward a central theme. The thread of continuity that draws the arguments together is the theory that a personal representative is not entitled to any compensation until the final accounting is made and the order approving compensation is granted.

Although the Florida Supreme Court is in no way bound by the holdings of courts in other jurisdictions, their decisions are persuasive and Florida will probably follow the modern trend and weight of authority.

Dean Charles Houk, Jr.

THE AGENCY SHOP

Agency shop is a security agreement between an employer and a recognized union requiring the payment of union fees and dues as a condition of employment for all employees, both union and non-union, within the bargaining unit. The effect of such an agreement is to preclude non-union employees from being "free-riders" – employees who benefit from the collective bargaining process without supporting it financially. It should be noted that a closed shop agreement, which is now prohibited by the National Labor Relations Act

16. See Matter of Potter, *supra* note 16, a case before a New York surrogate in which these exceptions were specifically applied to the general rule.

as amended by the Taft-Hartley Act,[1] required membership in the contracting union as a condition precedent to employment and for the duration of employment. Another arrangement that should be distinguished from agency shop is union shop, which is a protected activity under the act unless barred by state law.[2] A union shop agreement requires an employee to become a union member, generally within thirty days after he is hired. Opponents of agency shop equate union membership with payment of fees and dues, and argue that agency shop can be prohibited by state law.

THE DEVELOPMENT OF SECTION 8 (a) (3)

During the debates on the Taft-Hartley amendments, Senator Taft, speaking of section 8 (a) (3)[3] and of union support by non-union employees, stated that "the rule adopted by the committee is substantially the rule now in effect in Canada."[4] Under a union shop agreement in Canada, if the union is the recognized bargaining agent all employees must pay dues, but the union cannot be compelled to admit every employee who applies for union membership. If an employee "pays the dues without joining the union, he has the right to be employed."[5]

---

1. 61 Stat. 136 (1947), 29 U.S.C. §158 (1958). The pertinent portions are as follows: "(a) It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . , (i) 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 . . . ; *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

2. 61 Stat. 136 (1947), 29 U.S.C. §158 (a) (3) (1958) (set forth in note 1 *supra*) and 29 U.S.C. §164 (b), which reads as follows: "(b) 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."

3. See note 1 *supra*.

4. 93 CONG. REC. 4887 (1947). The reference is to the joint congressional committee, and the act was passed with the rule as adopted by the committee.

5. See note 4 *supra*.

Following the Taft interpretation, the National Labor Relations Board, in *Public Service Co. of Colorado*[6] and *American Seating Co.*,[7] upheld contract provisions that required non-union employees to pay a specified amount each month for the support of the bargaining unit as a condition of employment. The payments were equal to the fees and dues paid by union members under the same contract. In *American Seating* the Board ruled:[8]

> "[B]ecause the legislative history of the amended Act indicated that Congress intended not to illegalize the practice of obtaining support payments from nonunion members who would otherwise 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."

In *Union Starch & Refining Co.*[9] the NLRB further clarified its position by ruling that proviso (B) of section 8(a)(3) extends job protection to an employee as long as he tenders periodic fees and dues. The union can prescribe any additional qualifications that may preclude the employee from membership, but his job is secure. The clear implication of this proposition is brought to light in *Radio Officers' Union v. NLRB*,[10] in which the United States Supreme Court cited *Union Starch* with approval and said that "Congress intended to prevent utilization of union security agreements for any purpose other than to compel union dues and fees."[11] Organizational rights must be distinguished from employment requirements, since membership in the union as a condition of employment is quite different from employment conditioned on the payment of fees and dues.

These cases, taken in conjunction with Senator Taft's expression of legislative intent, appear to stand for a single proposition — an employee has a right to accept or reject union affiliation, but under section 8(a)(3) he can be required to tender fees and dues to the union as a condition of employment.

Limitations on Union Shop Security Agreements

Section 14(b)[12] limits the effect of section 8(a)(3) by allowing the individual states to place an additional restriction on union

---

6. 89 N.L.R.B. 418 (1950).
7. 98 N.L.R.B. 800 (1952).
8. *Id.* at 802.
9. 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951).
10. 347 U.S. 17 (1953).
11. *Id.* at 41.
12. See note 2 *supra*.

security agreements. Senator Taft, referring to section 14 (b) during the Taft-Hartley Act debates, said:[13]

> "[I]n the report of the Committee on Labor and Public Welfare to the Senate, we stated that in our opinion there was nothing in the bill as originally reported by the committee which in any way would invalidate the provisions of a State law prohibiting the closed shop."

The NLRB, in *Matter of Giant Food Shopping Center, Inc.*, expressly upheld this congressional opinion when it stated that "Section 14 (b) . . . in effect removes all Federal restrictions upon existing and future State legislation prohibiting compulsory unionism insofar as the National Labor Relations Act is concerned . . . ."[14] However, the states are not absolutely free to legislate with regard to union security. Section 14 (b) permits them to prohibit only those agreements requiring membership as a condition of employment. There is nothing in the section to suggest that the states can impose greater restrictions.[15]

In a recently decided case, *General Motors Corp.*,[16] Board Member Leedom expressed the opinion that in order to uphold the validity of an agency shop arrangement "one would have to conclude that Congress intended the word 'membership' in Section 7[17] and 8 (a) (3)

---

13. 93 CONG. REC. 6519 (1947). From the record it appears as if Sen. Taft continually used the term *closed shop* when in fact he meant *union shop*.

14. 77 N.L.R.B. 791, 793 (1948).

15. The following states have right-to-work laws that expressly prohibit exaction of union fees or dues: Ala., Ark., Ga., Iowa, Miss., Neb., N.C., S.C., Tenn., Utah, and Va. Note also that there have been state court decisions that have made agency shop illegal under their respective right-to-work laws: Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957); Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456, *cert. denied sub nom.* General Drivers Union, Local No. 498 v. Higgins, 82 Sup. Ct. 51 (1961). A Dade County, Fla., circuit judge held that an agency shop agreement was not in conflict with the state right-to-work law. Schermerhorn v. Local 1625, Retail Clerks, 47 L.R.R.M. 2300 (1960). The Third Dist. Ct. of Appeal, on Sept. 14, 1961, stayed issuance of its mandate and publication of its opinion pending a decision by the Florida Supreme Court on a question of jurisdiction. The substance of the Third District's opinion, although of no effect until the Supreme Court makes its ruling, was to reverse the lower court.

16. 133 N.L.R.B. ....., 48 L.R.R.M. 1659, 1663 (1961).

17. 61 Stat. 136 (1947), 29 U.S.C. §157 (1958): "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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except 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 158 (a) (3) of this title."

to encompass not only literal membership, but also other relationships between employees and the union, while at the same time intending that the same word in Section 14 (b) encompass only literal membership . . . ."[18] He asserted that a dual meaning of the word *membership* "runs counter to the basic Congressional purpose of establishing a uniform national labor-management relations policy . . . ,"[19] and concluded that he was not ready to accept such reasoning. This approach, nonetheless, may be a desirable course to follow. The NLRA should accomplish functional uniformity rather than semantic symmetry. Functional uniformity can be achieved only by strict construction of the substance rather than the form of section 14 (b). Without a literal interpretation of the word *membership* in 14 (b) each state can form its own policy concerning union security agreements.

Congress has adopted a general policy to eliminate industrial strife by promoting orderly and peaceful procedures in the conduct of labor-management relations.[20] Although Congress has sanctioned the union shop, it has not expressly provided for lesser forms of union security agreements. The NLRA, however, "did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause."[21] It is for the NLRB and the Supreme Court to give application to congressional incompletion. In *Local 357, Teamsters v. NLRB*[22] Mr. Justice Douglas, speaking for the majority, held that hiring halls are not outlawed by section 8 (a) (3) of the act. Hiring halls, like agency shop, are union security devices, but they condition employment upon union referral. Justice Douglas also stated that "there being no express ban of hiring halls in any provisions of the Act, those who add one . . . engage in a legislative act."[23] It appears that Justice Douglas compensated for congressional incompletion by classifying hiring halls as protected activities, although there is no express allowance therefor in any provisions of the act. The NLRB has also filled legislative gaps by interpreting the word *membership* in sections 7 and 8 (a) (3) to allow lesser forms of union security.[24] Thus the courts and the NLRB do in fact "legislate" in compensating for congressional incompletion. There should be no real objection to such judicial activity as long as the results do not exceed the national policies expressed by Congress.

18. General Motors Corp., 133 N.L.R.B. ——, 48 L.R.R.M. 1659, 1663 (1961).

19. General Motors Corp., 133 N.L.R.B. ——, 48 L.R.R.M. 1659, 1663, n.28 (1961).

20. "Findings and Policies," National Labor Relations Act §1, as amended, 61 Stat. 136 (1947), 29 U.S.C. §151 (1958).

21. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955).

22. 81 Sup. Ct. 835 (1961).

23. *Id.* at 839.

24. American Seating Co., 98 N.L.R.B. 800 (1952); Public Serv. Co. of Colo., 89 N.L.R.B. 418 (1950).

The Impact of the General Motors Decisions

In 1960, the United Auto Workers filed charges against General Motors alleging that the company had refused to bargain collectively with the union with reference to the inclusion of any agency shop clause in their existing agreement. This supplementary clause was to cover employees represented by the union as well as those hired thereafter at the various General Motors plants in Indiana. By its terms the employees would be required to pay to the UAW an amount equal to the initiation fee charged by each of the local unions and a monthly sum equal to the regular dues required of union members. The existing contract provided for maintenance of membership[25] and for a union shop, but did not require membership or continued membership as a condition of employment in those states in which it is prohibited or otherwise unlawful. General Motors admitted the factual allegations but denied that its refusal to bargain amounted to an unfair labor practice.

Prior to the UAW-GM dispute the Indiana Appellate Court held that the Indiana right-to-work law[26] was not a bar to agency shop agreements, since the language of the law forbids only union membership or non-membership as a condition of continued employment.[27] The court reasoned that since an agency shop does not require membership, the Indiana statute did not apply to an agency shop arrangement.

The cause first came before the NLRB in February 1961.[28] The issue at that time was whether an employer violates sections 8 (a) (1)[29] and 8 (a) (5)[30] of the NLRA by refusing to bargain with a union concerning a proposed agency shop agreement that covers employees in a right-to-work state when the state's highest court has found an agency shop agreement lawful. The complaint was dismissed in a three-to-two decision. Board Member Leedom concluded in the ma-

25. A maintenance-of-membership clause requires that all employees who are members of the union at a specified time after the agreement is signed, and all who later join the union, must remain members in good standing for the duration of the agreement.

26. Ind. Laws 1957, ch. 19, §3.

27. Meade Elec. Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959).

28. General Motors Corp., 130 N.L.R.B. ....., 47 L.R.R.M. 1306 (1961).

29. 61 Stat. 136 (1947), 29 U.S.C. §158 (1958). The pertinent portion is as follows: "(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . ."

30. 61 Stat. 136 (1947), 29 U.S.C. §158 (1958): "(a) It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title."

jority opinion that "the agency shop clause concerning which UAW requested GM to bargain is, under the National Labor Relations Act, illegal in Indiana, and that GM was under no obligation to negotiate concerning such a clause with UAW."[31] Thereafter, motions for reconsideration filed by the UAW and the NLRB general counsel were granted.[32] On rehearing, since there was no conflict between state and federal law, the parties stipulated that the decision should be based solely on the federal act without regard to the law of any state. With the issue thus limited, the Board reversed its earlier decision,[33] stating that under section 8 (a) (3) agency shop "is a mandatory subject as to which General Motors is obliged to bargain."[34] Mr. Leedom, dissenting, argued that the agency shop agreement could have no other foreseeable consequence than to encourage membership in the UAW and discourage membership in any other union. The exaction of the same fees and dues from members and non-members was described by Mr. Leedom as a form of discrimination prohibited by the NLRA. He contended that it penalizes refusal to join, or illegally encourages joining, because members are entitled to many union benefits that are denied non-members.

The majority met this argument by reasserting the *Union Starch* construction of section 8 (a) (3) that "even where 'membership' is specifically required in a valid union-security contract, the union . . . cannot enforce the actual membership requirement but can obtain at most the periodic dues and initiation fees."[35] It is submitted that the provisos under section 8 (a) (3) are in themselves discriminations against non-membership. In the landmark decision, *J. I. Case Co. v. NLRB*, Justice Jackson said:

> "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result."[36]
>
> ". . . The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group."[37]

In essence, all forms of union security, including agency shop, are

31. General Motors Corp., 130 N.L.R.B. ....., 47 L.R.R.M. 1306, 1310 (1961).
32. General Motors Corp., 133 N.L.R.B. ....., 48 L.R.R.M. 1659 (1961).
33. There was a change of personnel in the NLRB between the two decisions.
34. General Motors Corp., 133 N.L.R.B. ....., 48 L.R.R.M. 1659, 1662 (1961).
35. *Ibid.*
36. 321 U.S. 332, 339 (1944).
37. *Id.* at 338.

discriminatory. But the provisos of section 8 (a) (3) specifically legalize certain discriminatory acts that would ordinarily deny an employee his rights under section 7. The second *General Motors* decision places the agency shop within the purview of the section 8 (a) (3) provision by classifying it as a protected activity, at least in those states in which right-to-work legislation has not been enacted or there is no conflict between state and federal law. Unfortunately, the most important issue — the extent to which section 8 (a) (3) is limited by section 14 (b) — remains unresolved. Therefore, this decision amounts to little more than a reaffirmation of the *Public Service* and *American Seating* opinions.

The *General Motors* decisions are harbingers of the problems still to be faced. In both decisions Mr. Leedom stated that notwithstanding the appellate court ruling in Indiana, the agency shop agreement is illegal there by virtue of the National Labor Relations Act. If by *illegal* he means *prohibited by the act,* all states having right-to-work provisions are without jurisdiction to rule on an agency shop agreement, because any activity protected or prohibited by the act is preempted from state control.[38] If, on the other hand, *illegal* means *unprotected,* the states are free to legislate as they see fit. Recognition by Board Members Fanning and Rodgers of this fallacy in Mr. Leedom's argument is evidenced by their statement:[39]

> "[I]t is [not] . . . the Board's province to undermine a State court decision interpreting a State statute. Especially is this so in this case where the Indiana Appellate Court has already rendered a formal decision as to the construction of the Indiana statute."

In the first *General Motors* decision, Board Member Jenkins attempted to distinguish the *Public Service* and *American Seating* cases from the UAW-GM dispute, pointing out that the first two arose in states that did not have right-to-work laws. Thus he concluded that proviso (B) of section 8 (a) (3)[40] was applicable and that the non-union employees could retain employment by paying fees and dues. In the UAW-GM situation there could be no membership requirement because the Indiana right-to-work law prohibits membership as a condition of employment. Therefore, Mr. Jenkins believed that proviso (B) was not applicable and that the non-union employees had no alternative. Rodgers and Fanning retorted:[41]

38. Delony, *Good Faith in Collective Bargaining,* 12 U. FLA. L. REV. 378 (1959).

39. General Motors Corp., 130 N.L.R.B. ....., 47 L.R.R.M. 1307, 1315 n.38 (1961).

40. See note 1 *supra.*

41. General Motors Corp., 130 N.L.R.B. ....., 47 L.R.R.M. 1306, 1316 n.44 (1961).

"[I]f the provisos of Section 8(a)(3) only permit agreements requiring 'membership', then by a parity of reasoning all agreements requiring less than 'membership', whether or not they are rationalized as a 'waiver' or 'alternative' to a permissible membership requirement, would have to be considered unlawful. If parties can waive where they are allowed a 'membership' requirement, logically they can accomplish the same result absent such allowance so far as the discrimination and interference provisions of the Act are concerned. It is inconceivable to us that Congress had such an unrealistic and meaningless purpose as advanced by our colleagues."

Conclusion

All unions would like to operate under maximum security — closed shop or union shop. Under the present law, closed shop is a thing of the past and union shop is conditioned upon the absence of contrary state legislation. There are those, however, who maintain that our economic system should be based on a complete right-to-work philosophy. The agency shop has come into being somewhat as a compromise — a union security device tailored to satisfy federal labor legislation on the one hand and to reasonably restrict state legislation on the other. Its first function has been upheld. In the second *General Motors* case the NLRB classified the agency shop as a protected activity under the National Labor Relations Act. The Board went even further, saying that when there is no conflict between state and federal law, agency shop is a *legal* security measure under the act. Unfortunately, the NLRB left for another day the determination of whether agency shop is a protected activity in states that outlaw such a union security device.

The United States Supreme Court has said:[42]

"To leave the States free to regulate conduct . . . within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . . [T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."

Federal pre-emption should be the rule except when section 14(b) is applied by the states to prohibit agreements requiring membership in a labor organization as a condition of employment. Any state that places greater restrictions on union security agreements

42. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).