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LABOR UNIONS-CLOSED SHOP AND ARBITRARILY CLOSED OR PARTIALLY CLOSED UNION-INJUNCTION

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LABOR UNIONS—CLOSED SHOP AND ARBITRARILY CLOSED OR PARTIALLY CLOSED UNION—INJUNCTION—The defendants appealed from an order of

the lower court awarding a preliminary injunction which restrained the defendants from discharging or causing the discharge of the plaintiff and other Negro employees because they were not members of a labor union with which their employer has a closed shop agreement, but which will not grant Negroes full membership privileges. The defendants were: the plaintiff's employer; the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America which is a labor union; and certain officials of the aforementioned union. There was a written contract between the employer and the International Brotherhood containing a provision for a closed shop. This union did not admit Negroes to membership, but in 1937 it established separate Negro local lodges. The defendants insisted that plaintiff and other Negro workers must be members in good standing in these Negro locals in order to obtain work clearances for employment in the defendant employer's shipyard. The non-Negro locals supervised and controlled the Negro locals, allowing representation for the Negro locals only through the business agents of the supervising locals, but the Negro locals had no voice in the selection of these agents. The lower court found that this, and other provisions which denied the Negroes a voice in determination of union policy and in job classifications, and which denied their locals a permanent status clearly established a substantial discrimination against Negro workers who accepted membership in the auxiliary locals. *Held*, the order awarding the preliminary injunction is affirmed. The union may not maintain both a closed shop and an arbitrarily closed or partially closed union membership. This is not a proper labor union objective. The holders of a monopoly, such as the defendant union has here, over the supply of labor of this type in this area, must not exercise their power in an arbitrary or unreasonable manner so as to bring injury to others. *James v. Marinship Corporation*, (Cal. 1944) 155 P. (2d) 329.

It is well settled that the objectives of concerted labor activity must be proper, and the means used to attain the objective must be lawful, or the persons injured by such activity may obtain damages or injunctive relief.[1] The *Marinship* case then raises the question as to whether a closed union coupled with a closed shop is a proper objective of organized labor activity, where the union holds a monopoly of labor opportunity in the locality. Under the common law, labor unions, like other voluntary associations, are held to have the inherent power to exclude arbitrarily from membership whomever they wish to so exclude.[2] And in California, as in many states, the legality of a closed shop agree-

[1] Markham & Callow, Inc. v. International Woodworkers, 170 Ore. 517, 135 P. (2d) 727 (1943); Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 48 N.E. (2d) 1 (1943); Opera on Tour v. Weber, 285 N.Y. 348, 34 N.E. (2d) 349 (1941), cert. den., 314 U.S. 716, 62 S.Ct. 477 (1941); 4 TORTS RESTATEMENT, §§ 775, 784 et seq. (1939); 41 MICH. L. REV. 1143-1164 (1943).

[2] Mayer v. Journeyman Stone-Cutters' Assoc., 47 N.J. Eq. 519, 20 A. 492 (1890); Greenwood v. Bldg. Trades Council, 71 Cal. App. 159, 233 P. 823 (1925); Murphy v. Higgins, (N.Y. S.Ct. 1939) 12 N.Y.S. (2d) 913; in the absence of statute, courts remain steadfast in refusing to compel a union to admit a qualified applicant to membership. See Williams v. Quill, 277 N.Y. 1, 12 N.E. (2d) 547 (1938); Kemp v. Division No. 241, 255 Ill. 213, 99 N.E. 389 (1912).

ment is recognized.[3] One can find many cases which have denied this right of a union to maintain a closed shop and at the same time arbitrarily and unreasonably to restrict its membership.[4] There are a few states which have taken legislative action on the subject, enacting statutes restricting closed shop agreements where there is an unreasonable refusal by the union to admit workers already employed at the time the agreement was made.[5] Possibly legislation is the solution to the problem, many courts refusing to compel a union to admit qualified applicants to membership even though the union has a closed shop agreement and a practical monopoly of the labor supply in the area. Apparently these courts feel that this problem is one for legislative determination more appropriately than for judicial determination.[6] This conflict between the applicant worker's right to work and the union's right arbitrarily to restrict its membership is steadily increasing in importance as the closed shop continues to gain judicial and legislative favor. Some courts, even in the absence of legislation, have sought to give the worker relief on the ground that the union's refusal to accept his application for membership and at the same time seeking to maintain the closed shop is tortious and contrary to public policy.[7] Certainly, the public policy argument should have some weight here, for the union's "asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living." [8] The preservation of that right seems to be of much greater importance than the right of a union arbitrarily to restrict its membership when that union also holds a virtual monopoly control in the locality due to closed shop agreements.[9] If the employee is a competent workman

[3] McKay v. Retail Auto Salesmen's Local Union No. 1067, 16 Cal. (2d) 311, 106 P. (2d) 373 (1940); Shafer v. Registered Pharmacists Union, 16 Cal. (2d) 379, 106 P. (2d) 403 (1940).

[4] Dorrington v. Manning, 135 Pa. Super. 194, 4 A. (2d) 886 (1939), where the court, at 102, held that "defendants' conduct, with no apparent lawful purpose, constituted a malicious and unlawful interference with plaintiffs' employment." In Carroll v. Local No. 269, 133 N.J. Eq. 144 at 147, 31 A. (2d) 223 (1943), the court said: " . . . although a monopoly of labor opportunity is a permissible objective . . . of a union, unions obtaining such monopolies must be democratic and admit to their membership all those reasonably qualified for their trade. . . . Otherwise such persons would be deprived of their constitutional right to earn a livelihood." For a good discussion of the problem see Newman, "The Closed Union and the Right to Work," 43 COL. L. REV. 42 (1943).

[5] New York Civil Rights Law, N.Y. Consol. Laws (McKinney, 1939) c. 6, § 43, N.Y. Laws (1940) c. 9, § 1; Wis. Laws (1939) 57, § 111.06(1). See 53 HARV. L. REV. 1215 (1940).

[6] See 40 MICH. L. REV. 310 (1941).

[7] 4 TORTS RESTATEMENT, § 810 (1939), says that, "Workers who in concert procure the dismissal of an employee because he is not a member of a labor union satisfactory to the workers are . . . liable to the employee if, but only if, he desires to be a member of the labor union but membership is not open to him on reasonable terms." See Shinsky v. O'Neil, 232 Mass. 99, 121 N.E. 790 (1919); Brown v. Lehman, 141 Pa. Super 467, 15 A. (2d) 513, 517 (1940); 49 YALE L. J. 754, 760 (1940).

[8] James v. Marinship Corporation, (Cal. 1945) 155 P. (2d) 329 at 335.

[9] See Newman, "The Closed Union and the Right to Work," 43 COL. L. REV. 42 (1943); 40 MICH. L. REV. 310 (1941).

and is willing to join the union, it is difficult to see how that union can justify its interference with his employment, unless it can prove his hostility to union purposes.[10] It would seem that in cases of this kind "the right to work" should take precedence over the union's right to restrict its membership just as a matter of public policy, if not as a matter of consitutional right.[11]

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[10] "If the union can force a closed shop upon all, or almost all, of the employers of an industry or area, the right to employment will depend upon union membership; and if union membership be refused the workman, he is more totally excluded from the opportunity to labor than he was before union recognition." Carroll v. Local No. 269, 133 N.J. Eq. 144 at 147, 31 A. (2d) 223 (1943). See also Dorrington v. Manning, 135 Pa. Super. 194, 4 A. (2d) 886 (1939), where it was held that evidence of a previous refusal to join the union was insufficient reason to deny membership to an applicant and to procure his dismissal from his employment.

[11] Carroll v. Local No. 269, 133 N.J. Eq. 144, 31 A. (2d) 223 (1943).