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LABOR LAW-LABOR-MANAGEMENT RELATIONS ACT-EFFECT OF AFFIRMATIVE DEAUTHORIZATION VOTE UPON EXISTING UNION-SHOP CONTRACT

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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—EFFECT OF AFFIRMATIVE DEAUTHORIZATION VOTE UPON EXISTING UNION-SHOP CONTRACT—One month after the employer and the union entered into a two-year contract containing a union-shop provision, a group of employees filed a petition under section 9(e)(1) of the NLRA as amended in 1951 seeking an election to rescind the union's authority to make a union-shop agreement. The union argued (1) that the contract was a bar to the election and (2) that even if an immediate election was ordered and an affirmative deauthorization vote cast, the existing union-shop clause should be held effective during the remainder of the contract term. The Board *ruled,* 3/2, that section 9(e)(1) as amended in 1951 specifically contemplated immediate union-shop deauthorization elections and therefore normal contract bar principles did not apply, and further that if an affirmative deauthorization vote was cast, the union-shop clause would be immediately rescinded. Members Murdock and Styles dissented. *Great Atlantic and Pacific Tea Co.,* 100 N.L.R.B. No. 251 (1952).

One purpose of the 1951 Taft-Humphrey amendments to the NLRA[1] was to eliminate the requirement that a union-shop clause in a collective bargaining

[1] 65 Stat. L. 601 (1951), 29 U.S.C. (Supp. V, 1952) §§158, 159.

agreement must be authorized by a majority vote of the employees in a Board-conducted election, a requirement that had proved to be administratively burdensome and unnecessary.[2] This was accomplished by the excision of former section 9(e)(1) and appropriate changes in the wording of section 8(a)(3), leaving former 9(e)(2)[3] to safeguard the employees by permitting a vote to rescind the union's authority to *make* a union-shop agreement. In ruling that this right to rescind the union's authority to *make* a union-shop agreement included the right to rescind an already existing union-shop clause, the majority of the Board justified its position by a resort to legislative history. Setting to one side the question whether the canons of statutory interpretation justify a resort to legislative history in the face of an apparently plain meaning,[4] an examination of the meager legislative history of this aspect of the Taft-Humphrey amendments discloses no clear mandate for the majority position.[5] Perhaps the most accurate conclusion that can be drawn from the congressional records and reports is that the precise problem of the principal case did not receive congressional attention.[6] A search of Board decisions as to the effect of deauthorization elections upon existing contracts prior to the 1951 amendments is equally unrewarding.[7] Abandoning speculation as to congressional intent, it is submitted that both the majority and minority constructions of the statutory provision have unfortunate practical consequences. Under the LMRA and its judicial and quasi-judicial gloss, even a valid union-shop clause does not bestow upon the union any disciplinary pow-

[2] 97 CONG. REC. 12855 (1951). Over 90% of the many thousands of elections conducted resulted in union-shop authorization. N.L.R.B., 14th ANNUAL REPORT, p. 6 et seq. (1950); N.L.R.B., 15th ANNUAL REPORT, p. 14 (1951).

[3] Renumbered as section 9(e)(1), the section reads "Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit *covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3)*, of a petition alleging they desire *that such authority be rescinded*, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer." 65 Stat. L. 601 (1951), 29 U.S.C. (Supp. V, 1952) §159. Emphasis supplied.

[4] Both the majority and minority opinions wrestled with this question, but limitations of space do not permit an exploration of the issue.

[5] The majority quoted from H. Rep. No. 1082, 82nd Cong., 1st sess., p. 3 (1951): ". . . the bill continues to safeguard employees against subjection to union-shop agreements which a majority disapproves. . . ." The next sentence of the House Report reads: *"To accomplish this* it is provided that the Board shall conduct elections on the petition of 30 percent or more of the employees in a bargaining unit to determine whether the union's *authority to enter into* a union-shop arrangement shall be rescinded." (Emphasis supplied). Reading the sentences together, it would seem that the minority of the Board was justified in charging the majority with quoting out of context.

[6] Debate attending the passage of the bill, 97 CONG. REC. 10463-10465, 12859-12863 (1951), throws no additional light upon the question.

[7] Research discloses no cases expressly dealing with the application of contract bar principles, normally applicable to decertification proceedings, to the question of deauthorization elections. Although the Board has ruled that an existing contract did not prevent a union shop authorization election, Utah Wholesale Grocery Co., 79 N.L.R.B. 1435 (1948), unless the contract expressly prevents further negotiation during its term, Brunswig Drug Co., 96 N.L.R.B. 451 (1951), the deauthorization question would seem to raise different problems.

ers over the rank and file members;[8] the sole value to the union of a union-shop clause is as a compulsory dues-collecting device.[9] Union security, in effect, means financial security. Under these circumstances, the majority ruling that the union, after undertaking certain contractual obligations which may involve considerable expense (such as the handling of grievances), should be subjected at any time to the possibility of an election which will cut off, to a large extent, its financial resources is indeed questionable.[10] And further, by subjecting the union's financial sinews to the whim of a shifting majority, the Board ruling would seem to militate against responsible labor relations by forcing the union to cater to the demands of the rank and file, however unjust and irresponsible these demands may be.[11] Moreover, it is difficult to justify these consequences in the name of protecting the members from oppression. To employ political analogy,[12] is it arguable that members of a social compact should be able, during the life of that compact, to express their dissatisfaction with their leaders not by changing the leadership, but rather by refusing to pay taxes? On the other hand, a literal reading of the statute, as advocated by the minority, raises competing considerations. Since the statutory provision by its terms does not permit the Board to conduct an election *until* a union-shop agreement has been made,[13] the application of contract bar principles would permit the union to enjoy at least one union-shop clause during the life of the contract whether the members consent or not.[14] As section 9(e)(1) now stands, it is submitted, neither interpretation

[8] Kingston Cake Co., Inc., 97 N.L.R.B. 1445 (1952) (union cannot request discharge of employee where expulsion from union due to his refusal to sign non-Communist affidavit); Pen and Pencil Workers Union, 91 N.L.R.B. 883 (1950), Electric Auto-Lite Co., 92 N.L.R.B. 1073 (1950) (union cannot request discharge of employee for failure to pay fines for violation of union rules); Westinghouse Electric Corp., 96 N.L.R.B. 522 (1951) (union cannot request discharge of employee for dual unionism).

[9] So long as the employee tenders his initiation fee and pays his regular dues promptly, he need not even join the union formally, Union Starch and Refining Co., 87 N.L.R.B. 779 (1949).

[10] It might be fairer to the union under the ruling in the principal case to set aside the entire contract if an affirmative deauthorization vote was cast. See the argument of the Board minority.

[11] It is recognized that these arguments shade over into the larger issue whether the LMRA approach to union democracy and the protection of individual employees is valid. For criticisms suggesting that weakening the unions is not the best solution see Cox, "Some Aspects of the Labor Management Relations Act, 1947," 61 HARV. L. REV. 1, 274 at 291-299 (1948); Sugerman, "The Rights of the Individual Employee under the Taft-Hartley Act," THIRD ANNUAL N.Y.U. CONFERENCE ON LABOR 355 (1950); Witney, "Union Security," 4 LAB. L.J. 105 (1953). For an analysis of possible direct approaches to the problem, see Summers, "Union Powers and Workers' Rights," 49 MICH. L. REV. 805 (1951).

[12] But see Petro, "External Significance of Internal Union Affairs," FOURTH ANNUAL N.Y.U. CONFERENCE ON LABOR 339 at 354 (1951), for a forceful argument that unions should not be accorded the privileges of government, such as compulsory dues payment analogous to the governmental taxing power.

[13] See text of §9(e)(1), note 3 supra.

[14] The recent Board decision that a 5-year contract is of reasonable duration and will therefore act as a bar so long as 5-year contracts obtain in a "substantial part of the industry" adds point to this consideration. General Motors Corp., Detroit Transmission Div., 102 N.L.R.B. No. 115 (1953).

can render it entirely satisfactory. A suggested solution is to amend section 9 so as to provide for an *optional* authorization election prior to contract negotiations, at the request of 30 per cent of the membership, leaving section 9(e)(1)'s provision for a deauthorization election as a supplementary safeguard by which union opinion can be canvassed shortly before the expiration of the old contract and the renewal of collective bargaining.

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