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court sensibly took the position that since the prohibition was phrased in the absolute, it meant exactly that. Any other decision would have led to a merry-go-round discussion of how much competition is too much.

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Labor Law—Agency Shop Agreements—Invalid under NLRA.—***General Motors Corp. v. NLRB.***[1]—General Motors had included in its national agreement with the United Auto Workers Union maintenance-of-membership and union shop provisions applicable where these arrangements would not contravene state law. Shortly after an Indiana decision upholding the validity of the agency shop under the law of that state,[2] the union requested that General Motors bargain with respect to adding such a provision to the national agreement to cover the company's plants within Indiana. The company refused to bargain alleging that such an agreement would violate the National Labor Relations Act.[3] The union filed a charge with the NLRB

[1] 45 C.C.H. Lab. L. Rep. ¶ 17,655 (6 Cir. 1962).

[2] Meade Electric Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959), noted 3 B.C. Ind. & Com. L. Rev. 91 (1961). The court decided that the state Right-To-Work Law prohibited only the union shop. Unlike some of these statutes, which also prohibit the payment of fees and dues, the Indiana law reads:

> No corporation or individual or association or labor organization shall solicit, enter into or extend any contract, agreement or understanding, written or oral, to exclude from employment any person *by reason of membership or non-membership in a labor organization*, to discharge or suspend from employment or lay off any person by reason of his refusal to join a labor organization. . . . Any such contract, agreement, or understanding, written or oral, entered into or extended after the effective date of this Act, shall be null and void and of no force or effect. (Emphasis added.)

Ind. Stat. Ann. § 40-2703 (Supp. 1959).

[3] 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958). The statute reads:

> 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 aid or protection, and shall also have the right to refrain from any or all 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 8(a)(3). (Emphasis added.)

61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) and (3) (1958), as amended 29 U.S.C. 158(3)(i) (1959) provides:

> 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 7;
>
> * * * *
>
> (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 Act, 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* on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . . 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

contending that, under federal law,[4] it was an unfair labor practice for an employer to refuse to bargain with a union over an agency shop agreement and the Board upheld the union's complaint.[5] On petition for review by the company and cross-petition of the Board for enforcement of its order, the order was set aside. HELD: An agency shop provision would violate Section 7 and Sections 8(a)(1) and (3) of the NLRA.[6]

By a strict, literal reading of the applicable statutes, the court in the instant case concluded that "the provision for an 'agency shop' would violate [the NLRA] as this type of arrangement is excepted from the Act."[7] This is the first court to construe the NLRA as precluding this type of union security arrangement.[8] The court stated that an agency shop was not a lesser form of security than a union shop, a concept previously held by many,[9] but was something entirely different. The former type of arrangement usually requires payments to the union in lieu of membership as a condition of employment, while the condition of employment comprising a valid union shop is union membership, normally within thirty days of the date of employment or the signing of the union contract.[10] The legality of

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 failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. (Emphasis added.)

[4] The union alleged that the company's refusal to bargain constituted a violation of Section 8(a)(1), cited supra note 3, and Section 8(a)(5) of the NLRA, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958), which provides:

It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees. . . .

[5] At first, the Board had agreed with the company, and in a somewhat divided opinion, General Motors Corp., 130 N.L.R.B. 481, 47 L.R.R.M. 1306 (1961), had held that there was no requirement to bargain. But upon rehearing, after President Kennedy had replaced two of the majority members, General Motors Corp., 133 N.L.R.B. No. 21, 48 L.R.R.M. 1659 (1961), the Board reversed the previous order in a 4-1 decision.

[6] It is surprising that the decision was a terse per curiam, considering its implications.

[7] Supra note 1, at p. 26,872.

[8] The union's proposal was that all present and new employees in the company's Indiana plants would be required within thirty days to pay the equivalent of the initiation fee and thereafter would pay the monthly dues required of union members as a condition of employment. This is a typical agency shop set-up.

[9] A case decided this year, infra note 10, stated that there was no difference between the agency and the union shop. Previously it had been thought that the agency shop was a lesser form of union security than the union shop (see the two NLRB orders preceding the instant case) probably because the former merely requires payment, but not "membership."

[10] Cf. Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Employees, Div. 1225 v. Las Vegas-Toponah-Reno Stage Line, Inc., 202 F. Supp. 726 (D. Nev. 1962). Although the question in this case concerned the validity of an agency shop agreement under state law as contrasted with the instant case where the problem is validity under federal law, the court was obliged to make a finding that the states could prohibit the agency shop. This was done only after a comprehensive perusal of the history of the specific sections with which the *General Motors* case deals. The court also reached the conclusion that in esse there is no difference between the union shop under the Taft-Hartley Act and the agency shop. But cf. 10 Lab. L.J. 781 (1959). Under both, argued the court, the maximum benefit to the union and detriment to the employee is payment

the agency shop under the NLRA has concerned the courts in only a small number of decisions,[11] and these have either not reached the question of federal legality or have found such without difficulty. They have all arisen in states with Right-To-Work Laws.[12]

The history of the agency shop idea has been a short and interesting one.[13] While the War Labor Board was in existence, agency shop provisions were allowed to be incorporated into collective bargaining agreements. The Wagner Act,[14] then in existence, made this possible by condoning all forms of union security agreements. An arbitration award in Canada in 1946[15] and the passage of the Taft-Hartley Act of 1947[16] renewed interest in the concept of the agency shop. In two instances,[17] the NLRB ruled that an agency shop provision did not violate the latter.[18] But this same act also contained section 14(b)[19] permitting the states to proscribe union membership or non-membership as a condition of employment, which in essence gave them the power to eliminate the union shop. Thus, eighteen states now have so called Right-To-Work Laws[20] which do not guaranty any right to work, but which merely make it illegal to condition employment on the membership or non-membership in a labor organization. Some of these statutes include provisos making it unlawful to condition employment on the payment of fees and dues to a labor organization, seemingly an attempt to make it illegal to have an agency shop.

The area has been clouded by additional factors. One, promulgated in two leading cases,[21] is the proposition that employment may only be con-

of dues and fees. It makes no difference whether the employee wishes to pay and not join or whether the union wants to accept payment but not membership.

[11] These will be discussed later in this note.

[12] Infra note 19.

[13] See Jones, The Agency Shop, 10 Lab. L.J. 781 (1959).

[14] National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

[15] I. C. Rand, decision of arbitrator re Ford Motor Company, Ontario, Canada, 1946. The agency shop was used as a solution to a severe strike by the U.A.W. against a Canadian subsidiary of Ford. The award was given much publicity and some called the arrangement the "Rand formula" after the justice who made the award.

[16] Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. § 141 (1958).

[17] American Seating Co., 98 N.L.R.B. 800, 29 L.R.R.M. 1424 (1952); In re Public Service Co., 89 N.L.R.B. 418, 26 L.R.R.M. 1014 (1950).

[18] The sections contained in supra note 3 are the ones with which the Board had to contend. There was no conflict found between an agency shop and the particular sections.

[19] "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 or Territory in which such execution or application is prohibited by State or Territory law."

[20] Ala. Code tit. 26 § 375 (Supp. 1955); Ariz. Rev. Stat. Ann. § 23-1302 (1956); Ark. Stat. Ann. § 81-202 (1960); Fla. Const. Decl. of Rts. § 12 (Supp. 1955); Ga. Code Ann. § 54-902 (Supp. 1958); Ind. Stat. Ann. § 40-2703 (Supp. 1959); Iowa Code Ann. § 736A (1950); Miss. Code Ann. § 6984.5 (Supp. 1958); Neb. Rev. Stat. § 48-217 (1952); Nev. Rev. Stat. § 613.250 (1957); N.C. Gen. Stat. § 95-79 (1959); N.D. Rev. Code § 34-9114 (Supp. 1957); S.C. Code § 40-46 (Supp. 1959); S.D. Code § 17.1101 (Supp. 1952); Tenn. Code. Ann. § 50-208 (1955); Tex. Rev. Civ. Stat. art. 5154(g) (Supp. 1959); Utah Code Ann. § 34-16-4 (Supp. 1959); Va. Code Ann. § 40-69 (1953).

[21] Radio Officer's Union, AFL v. NLRB, 347 U.S. 17 (1954); Union Starch & Ref. Co. v. NLRB, 87 N.L.R.B. 779, 25 L.R.R.M. 1176 (1949).

ditioned on the payment of fees and dues, even under a valid union shop contract. That is, even if a union contracts with a company that all employees must, as a condition of employment, become members within thirty days, this requirement is fulfilled if an employee tenders his fees and dues to the union. Although he may lose his "membership," he may not lose his job for any reason other than nonassumption of these financial obligations. Thus, it would appear that the only right a union has under federal law as interpreted by the courts is to receive its money. Another factor is the problem of federal pre-emption in the areas of state legislation and jurisdiction to hear labor cases.[22] It will suffice to say that this problem has, perhaps more than any other, made it difficult to find solutions in the area of union security. In addition, under federal law, since a union must bargain for all employees, members and non-members,[23] if all need not pay, some would be receiving a "free ride," that is, some would reap the benefits of the collective bargaining process without having to pay for it. The argument to the contrary is that it was these same unions who now complain of the burdens of exclusive bargaining that fought for its inclusion in the federal statute. The unions contend that if they may not compel "membership" (*i.e.*, payment) in states with Right-To-Work Laws, then the problem of "free riders" will burden them unfairly.[24]

As of 1957, no court case had specifically ruled on the validity of an agency shop under either state or federal law. To make such a holding, a court would have been faced with an onerous task of interpretation. Under the NLRA, union shops were legal except in those states having laws to the contrary. But even in states without such statutes, the maximum a union could demand under a union shop contract would be payment of fees and dues. And would such payment violate the policy of a state with a Right-To-Work Law? Would the answer lie in the fact of whether the particular statute had outlawed merely the union shop, or both this and the agency shop? Did the states have the power to outlaw the latter? And

[22] It is not within the purview of this note to discuss this area; see Bernstein, Complement or Conflict: Federal State Jurisdiction in Labor-Management Relations, 3 How. L.J. 191 (1957); Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297 (1959); Cox & Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211 (1950); Gregory, Constitutional Limitations on the Regulation of Union and Employer Conduct, 49 Mich. L. Rev. 191 (1950); Hall, The Taft-Hartley Act v. State Regulation, 1 J. Pub. L. 97 (1952); Isaacson, Federal Pre-emption Under the Taft-Hartley Act, 11 Ind. & Lab. Rel. Rev. 391 (1958); Meltzer, The Supreme Court, Congress, and State Jurisdiction Over Labor Relations, 59 Col. L. Rev. 6, 269 (1959); Petro, Participation by the States in the Enforcement and Development of National Labor Policy, 5 N.Y.U. Ann. Lab. Conf. 1 (1952); Ratner, Problems of Federal-State Jurisdiction in Labor Relations, 5 N.Y.U. Ann. Lab. Conf. 77 (1952); Reilley, State Rights and the Law of Labor Relations, in Labor Unions and Public Policy 93 (1958); Rose, The Labor Management Relations Act and the State's Power to Grant Relief, 39 Va. L. Rev. 765 (1953).

[23] NLRA, 65 Stat. 601 (1951), 29 U.S.C. § 159(a) (1958).

[24] This problem is handled rather well in Switzerland where, under an agency shop agreement, non-members pay only the approximate costs of collective bargaining, normally around 50% of what the union members pay. See Dudra, The Swiss System of Union Security, 10 Lab. L.J. 165 (1959). Of course, obtaining the exact costs of the collective bargaining is difficult, if not impossible, but is well worth the effort when the effect of such a compromise is considered.

how should the problem of "free riders" be handled? What of the public interest and congressional intent with regard to the labor-management situation? The first court faced with the validity of an agency shop provision found it a moot point when the union dropped its demand for such.[25]

The first court to decide on the issue was an Indiana appellate court,[26] the decision which brought on the controversy in the instant case. The court concluded that since Indiana's Right-To-Work Law prohibited merely a union shop, an agency shop was lawful. The reasoning of the court was that since the state legislature knew of the existing statutes which banned either the union shop or both union and agency shops, the failure to mention the latter made it a lawful arrangement. Two years later, a Kansas court held that under Kansas law, an agency shop was invalid.[27] The pertinent statute outlawed both types of union security agreements. This court not only decided that Congress intended the states to regulate the area of union security, but that the state courts were not pre-empted in this area and had jurisdiction to hear cases involving agency shop provisions. In deciding the instant case, the court considered these two cases, but stated that they were inapplicable since both were decided under state law and the present controversy concerned only federal law.

So far in 1962, three cases have decided that agency shop provisions were invalid. The first, a Nevada district court decision,[28] after an exhaustive review of the hearings before and after passage of the Taft-Hartley Act, held that section 14(b) gave to the states the right to proscribe agency shop agreements. The court went on to hold that the Nevada Right-To-Work Law did outlaw the agency shop. The second, a Florida supreme court decision,[29] cited the reasoning of the first case and held that the Florida Right-To-Work Law similarly banned the agency shop. Neither state statute mentions the payment of fees and dues to a labor organization as a condition of employment, but merely "membership."

When the Sixth Circuit decided the instant case, it did not have a wealth of material with which to deal. The only Supreme Court expression in the area was a denial of certiorari in the Indiana case. No decision had explicitly dealt with the validity of the agency shop under federal law, although the Nevada case had found a Congressional intent to leave the area to the states. This seems a logical conclusion from a reading of the applicable matter. One finds that the intent of the Taft-Hartley Act was to prohibit the closed shop and to permit union shops where states had not spoken to the contrary. Whether the existence of an agency shop defeats the purpose of a state Right-To-Work Law or whether a state has the right to legislate in the area concerning agency shops at all, which the instant decision presumes that it doesn't, would still appear to be unanswered. If, as some say, the pendulum has fully swung from management

[25] Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957).

[26] Supra note 2.

[27] Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456, cert. denied, 368 U.S. 829 (1961).

[28] Supra note 9.

[29] Schermerhorn v. Retail Clerks Int'l Ass'n, AFL-CIO, Local 625, 141 So. 2d 269 (Fla. 1962).

to labor, perhaps the demise of the agency shop is the start of its return. But even such a result would leave many controversies still simmering. Since a petition for certiorari is to be filed in the instant case,[30] perhaps the Supreme Court will determine not only the future of the agency shop under federal law, but a policy to be followed in the future in the area of union security.

RICHARD L. FISHMAN

Labor Law—Collective Bargaining Agreement—No Strike Clause—Specific Enforcement.—***Sinclair Ref. Co. v. Atkinson.***[1]—This is an action brought under Section 301 of the Taft-Hartley Act, wherein petitioner oil company seeks an injunction restraining the respondent union's breach of a "no-strike" clause contained in a collective bargaining agreement between the parties. The provisions of the contract called for compulsory and binding arbitration of "any differences regarding wages, hours or working conditions," and also a promise by the union that there would be no strikes, slowdowns or work stoppages over any matter which could be the subject of a grievance.[2] It does not appear that the grievance here involved (concerning the docking of the pay of three employees in the amount of $2.19) was submitted by the union to the grievance and arbitration procedures. It is known, however, that the union did strike petitioner's plants. Petitioner brings this action to prevent the breach of that clause, and in a companion case seeks damages from the same strike under the same section.[3] HELD: This case clearly involves a labor dispute within the meaning of the Norris-LaGuardia Act, and absent an express repeal of that section, the anti-injunction provisions of that act apply. Thus, the federal courts have no jurisdiction or power to grant the requested injunction.

Absent statutory provisions to the contrary, it has been held that the courts have the power to prevent work stoppages by labor unions.[4] With the passage of the Norris-LaGuardia Act, containing specific anti-injunction provisions,[5] Congress set forth a national policy of encouragement of the growth of labor unions.[6] While this has consistently been the policy of the federal government since the passage of that act, the Taft-Hartley Act was

[30] Letter From Stuart Rothman, General Counsel for the National Labor Relations Board, to the B.C. Ind. & Com. L. Rev., August 13, 1962.

[1] 370 U.S. 195 (1962).

[2] Article 3 of the contract provides that "there shall be no strike . . . (1) for any cause which is or may be the subject of a grievance. . . ."

[3] Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962).

[4] Loewe v. Lawlor, 208 U.S. 274 (1914); In re Debs, 158 U.S. 564 (1894).

[5] No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating in or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

(a) ceasing or refusing to perform any work or to remain in any relation of employment. . . .

47 Stat. 70 (1932), 29 U.S.C. § 104 (1958).

[6] See 47 Stat. 70 (1932), 29 U.S.C. § 102 (1958).