Cornell Law Review

Volume 36
Issue 3 *Spring 1951*

Article 2

NRLB Opens the Union Taft Hartley Style

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THE NRLB "OPENS THE UNION", TAFT-HARTLEY STYLE*

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My own philosophy is that we have to decree either an open shop or an open union. The committee[1] decreed an open union. I believe that will permit the continuation of existing relationships . . . and yet at the same time it will meet the abuses which exist. (Senator Taft, in discussing provisions of S. 1126 which became provisos (A) and (B) of Section 8(a)(3) of the National Labor Relations Act, on the Senate floor. 80th Congress, 1st Session. (May 9, 1947) 93 Cong. Rec. 5088.

Among the new areas of regulation which the Taft-Hartley Act has commanded the National Labor Relations Board to enter is that concerning the grounds for discharge under a union security clause. Today, the employer and the union may agree, subject to considerable limitations, that membership will be a condition of employment, but they can enforce the agreement only in a very restricted fashion, under the penalty of unfair labor practice charges. Most people would agree that it was Congress' purpose to reduce union power over its membership, to limit control by the majority over the individual. Some would put it more strongly.[2] But clearly it was also the intention of Congress that the basic union security arrangement be preserved, that "existing relationships" continue while the "abuses" are being met, as Senator Taft said (see quote above). To steer this narrow course on the language of the Taft-Hartley amendments[3] is the challenge to the Board. The amendments dealing with this problem have been sufficiently interpreted in Board decisions to bring out their more precise meaning for labor relations. Some drastic changes have been wrought.

Under the original Wagner Act[4] the general rule was that where membership was compulsory by collective bargaining agreement, nonmembership for any reason was ground for legal discharge by the employer.[5] However, the Board had read into the Wagner Act some

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* Substantially all of this article was written before Mr. Macaluso joined the Staff of the National Labor Relations Board early this year. The views here expressed are entirely personal, and the Board is not to be deemed to take any responsibility for them.

† See Contributors' Section, Masthead, p. 503, for biographical data.

1 Senate Committee of Labor and Public Welfare.

2 Cox, *Some Aspects of the Labor-Management Relations Act,* 61 HARV. L. REV. 294, 296, 298-299 (1948); Meyer, *Labor Under the Taft-Hartley Act,* 15 SOC. RESEARCH 194, 202 (1948).

3 61 STAT. 136 (1947), 29 U.S.C. 141 *et seq.* (Supp. 1946).

4 49 STAT. 449 (1935), 29 U.S.C. 151 *et seq.* (Supp. 1946).

5 Under a recent Board decision, *non-payment* to the Union of an amount equivalent to the dues where the collective bargaining agreement requires such payment of all em-

limitations. Those who campaigned in the period near the end of the contract term for a different union to represent the employees in their bargaining unit could not be fired for their efforts.[6] Neither could they be excluded subsequently by a new contract which required membership in good standing during the period of the preceding election campaign.[7] In both representation cases and unfair labor practice cases the Board obliquely impelled unions to make membership available without discrimination against those formerly in a rival union, or on the basis of race, color, religion, or national origin.[8]

The Taft-Hartley amendments give to the union shop many characteristics of the agency shop, in which all of the employees under the agreement are liable for the amount of the dues but they need not join the union. In the amended Act the meanings of "membership" and "joining" undergo significant changes, as the cases will demonstrate. Section 8(a)(3), as it did also before the amendments, forbids discrimination by the employer when it is ". . . in regard to hire or tenure of employment . . . to encourage or discourage membership . . . ",[9] but an exception is allowed where the employer and the bargaining agent make an agreement requiring membership as a condition of employment. Limitations on union security arrangements are of two basic kinds. The first cuts down the scope of the condition attaching to employment status. Under the 1947 amendments they include requirements that the employee be given at least thirty days to join,[10] that a majority of the employees eligible to vote authorize the union to make the agreement,[11] that the check-off be authorized by the individual for no longer than one year.[12] The other type of limitation narrows the enforceability or implementation of the contract against the employee. It is this latter type with which we are concerned here. Provisos (A) and (B) of Section 8(a)(3) state that:

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ployees irrespective of membership is also legal ground for discharge under the Wagner Act. Public Service Company of Colorado, 89 NLRB No. 51 (April 1950). Such a requirement of "support money" for the Union from all employees makes this arrangement a type of agency shop.

6 Rutland Court Owners, Inc., 44 NLRB 587 (1942). This doctrine was later repudiated by the Supreme Court. See pp. 454, 455, *infra*.

7 Colonie Fibre, 69 NLRB 589, 71 NLRB 354, *enforcement granted*, 163 F.2d 65 (2d Cir. 1947).

8 Chamberlain, *Obligations Upon the Union Under the National Labor Relations Act*, 67 AM. ECON. REV. 170-177 (1947).

9 49 STAT. 452 (1935), 29 U.S.C. 159 as amended, 61 STAT. 140 (1947), 29 U.S.C. 158 (Supp. 1946).

10 *Ibid.*

11 61 STAT. 143 (1947), 29 U.S.C. 159 (Supp. 1946).

12 61 STAT. 157 (1947), 29 U.S.C. 186 (Supp. 1946).

> . . . 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 failure of the employee to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

A similar restriction is applied to unions in Section 8(b)(2). They cannot " . . . cause or attempt to cause . . . " an employer to discriminate against an employee in the manner described in proviso (B).

Balanced against this restrictive regulation is the affirmation of Congressional intent not to interfere with internal affairs. Section 8(b)(1)(A) provides that, although it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their right to self-organization or their right to refrain,

> . . . this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.[13]

This legislative scheme in the Taft-Hartley Act rides on the crest of a wave of legal attempts to deal with the three-way conflict of interests between employers, employees, and unions. Like all laws which are enacted to resolve hotly contested issues taken from the economic and political arena, this one must be examined closely. It is important to see not only if it will do what is intended, but *what else* it may do that may *not* be intended or desirable.

The Problem Stated

A question of public interest arises in every arrangement where union membership is a condition of employment.[14] Union security clauses are an expression of the right of association.[15] They also restrict the individual's opportunity to find and retain work. This restriction ideally results from an agreement in which all the employees have participated, and at least a majority have consented, through their union. There is no representation, of course, for the prospective employee. Should employees be protected by their government against their own unions? Should prospective employees be protected against exclusion from employment resulting from union security contracts?

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[13] 61 Stat. 140 (1947), 29 U.S.C. 158 (Supp. 1948).

[14] Spielmans, *The Dilemma of the Closed Shop*, 51 J. Pol. Econ. 113-134 (1934).

[15] See American Federation of Labor v. American Sash Co., 335 U.S. 538, 546 (1949) (concurring opinion).

There now seems to be no constitutional "right to work". Even where an individual was denied access to employment throughout an industry because of the admission policies of the exclusive bargaining agent, the Supreme Court recognized no such right.[16] Legislative sanctions reflect a public demand, however, for some curtailment of this control of the labor market, in favor of job security for the employee who is at odds with the union and the applicant who is the victim of a restrictive policy. The general problem has been labelled labor law's "new phase".[17]

Through its power under a union security contract, the union is given a share in the managerial function of selecting and dismissing employees. There is a broad spectrum of union behavior in this regard, from the craft union local which has admitted no one in ten years or which confers membership as an hereditary privilege upon legitimate sons of existing members, to the union control of the hiring hall with management's blessings, and to the large industrial union with a policy of including everyone in its membership and of leaving hiring to the employer. Employer satisfaction with this arrangement varies extensively;[18] of course, the employer can express his disapproval by refusing to sign a contract containing the union security clause. (To deny the reality of this power is to deny the effectiveness of the collective bargaining process itself.) Employer dissatisfaction has also been expressed by publicity campaigns, such as the open shop drive in the twenties; and by seeking legislation, a technique which has had increasing use since 1934. In the promotion of restrictive legislation, there are those who feel that without governmental protection individual disadvantage is greater than the mutual advantage afforded by some forms of union security. They have allied themselves with those who simply do not like the concept of union security, or indeed collective bargaining, and those who fear the union strength which it engenders.

To the union, security of membership is a second front. It needs protection against the inconstancy of the employee, especially in newly organized industries.[19] Security for the union here means, to the employees, the imposition of compulsory membership and obligations, as

[16] Courant v. International Alliance, 78 F. Supp. 72, 176 F.2d 1000, *cert. denied*, 338 U.S. 943 (1950); see also The Closed Shop and Union Security, Economic Brief of the A.F. of L., 68-79, submitted in Lincoln Federated Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949).

[17] Wallace Corp. v. NLRB, 325 U.S. 248 (1944).

[18] For some more and less favorable comments by employer representatives, see Buchsbaum, *The Closed Shop,* American Federationist 1 (Sept. 1947); *Hearings before the Senate Committee on Labor and Public Welfare on the Taft-Hartley Bill,* 80th Cong., 1st Sess. 2185, 2508 ( ).

[19] Stark, *Union Security and Its Implications,* 248 ANNALS 62-69 (1946).

well as the enjoyment of the benefits. There is an incidental benefit for management in the union's disciplinary functions, for a union will punish wildcatters when it is liable under a no-strike clause. The union desires also to keep out rival unions. Such a policy affords stability in labor relations, an important objective of management. Other reasons for union security are those in which the interests of the employees and the union more closely coincide. Compulsory union membership, when the union has the power to force delinquents off the pay-roll, can hold down anti-union activity of the employer through the use of company spies and "plants". More importantly, union security prevents undercutting of union standards and rates when the union can control the hiring.

The argument was made by Mr. Justice Holmes that such compulsion is within labor's legitimate area of self-interest, just as much as are its wage demands.[20] It is also argued that those who do not join are getting the benefits of unionism without "paying the freight". They are "free riders", and the Eightieth Congress decried them when writing the Taft-Hartley Act.[21]

Previous Legal Controls

There has been scanty judicial relief granted to the individual excluded from the union when the consequence is deprivation of a chance to earn a livelihood.[22] In 1938 the highest equity court in New Jersey did grant such relief where the union had a substantial monopoly on the jobs in the area. The union was ordered either to admit the complainant or to cease enforcing its closed shop contract.[23] Since 1944 California has been developing a similar common law doctrine. In that state one who is denied admission to a union holding a closed shop contract can now claim damages or get an injunction against the enforcement of the contract if the denial is not based on reasonable grounds.[24]

The first legislative ban on union security agreements was enacted in the 1934 amendments to the Railway Labor Act.[25] It seems ironical today that this provision was added at the insistence of the unions themselves who were afraid of being pre-empted by company unions.[26]

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20 Plant v. Woods, 176 Mass. 492, 57 N.E. 1011, 1016 (1900) (dissent).

21 93 Cong. Rec. 3953 (April 23, 1947) (Senator Taft's remarks on the Senate floor).

22 Newman, *The Closed Shop and the Right to Work*, 43 Col. L. Rev. 42-67 (1943).

23 Wilson v. Newspaper and Mail Deliverers' Union, 123 N.J. Eq. 347, 197 Atl. 720 (1938).

24 Dotson v. International Alliance, 34 Cal. 2d 362, 210 P.2d 5 (1949); Williams v. International Brotherhood of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903 (1944); James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329 (1944).

25 44 Stat. 577 (1926), 45 U.S.C. 152, as amended, 48 Stat. 1186 (1934), 45 U.S.C. 152.

26 Millis and Montgomery, Organized Labor, 471 (1945); a law authorizing the union

The real wave of this type of restrictive and regulatory legislation began at the state level in 1939; eighteen states had passed this kind of law by the time the 1947 amendments to the National Labor Relations Act were written. Fourteen proscribed all or some types of agreement; four required a referendum.[27] Seven states had forbidden exclusion from membership based on discrimination as to race, color, creed, or national origin, without reference to union security agreements.[28]

Several states have used the same basic statutory scheme as that employed by the Eightieth Congress.[29] Massachusetts provides for a union shop in language similar to the first proviso of Section 8(a)(3) of the federal act and then adds " . . . but no such agreement shall be deemed to apply to any employee who is not eligible for full membership and voting rights in such labor organization."[30] But no state legislation attempted to open the union by cutting out all the grounds on which employees can be discharged for nonmembership except failure to pay initiation fees and periodic dues. Nor did any state, by legislation or administrative interpretation, reduce the meaning of membership to a mere tender of these tariffs.

No Admission Requirements Except Tender

Provisos (A) and (B) on their face are overlapping and seemingly inconsistent. The "terms and conditions" which may be imposed without denying membership are acceptable under (A) if they are equally available to the employees. But (B) can be invoked whenever membership is denied "for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required." Why did Congress bother to stipulate the requirement in (A) if failure to tender were the only legal reason, discriminatory or nondiscriminatory, for discharge because of rejection or expulsion? Harmony of these two provisos without distorting either is the seemingly impossible task which the Board faces under the 1947 amendments.

Proviso (A) has not yet come squarely before the Board for interpretation. Hence it is not even certain whether the employer must refuse to act where membership is not available on the same terms and conditions as those offered to other members *of the bargaining unit* or *of the union.* However, under the *Union Starch* doctrine, *infra*, the issue would arise

shop has, at this writing, been passed by both Houses and is virtually certain of the President's signature. 20 LRRM 3042 (1947).

27 Killingsworth, State Labor Relations Acts, Appendix A, 276-282 (1948).

28 *Id.* at 287-288.

29 *Id.* at 280, 288.

30 Mass. Ann. Laws, c. 150A, § 4 (1949).

only in the rare case where the employee had not made a tender of his fees and dues.

Union Starch, 87 NLRB 779 *enf'd.* 186 F. 2d 1008 (7th Cir., Feb. 1951), arose on charges by three dischargees of violations of Section 8(a)(3)(B) and 8(b)(2) by the employer and union, respectively. After the execution of a valid union-shop agreement, a group of non-member employees, including the later complainants, went to union headquarters to sign up as members. They tendered a sum equivalent to the initiation fees and accrued dues. The agent told them that they had to be members before those charges were payable. He explained that the process of joining the union was as follows: 1. The filing of an application. 2. An appearance at a union meeting, to be voted upon. 3. The taking of the oath of loyalty. 4. The payment of fees and dues. The three did not take any further action toward joining the union, except that one requested the agent to make out an application for her. The agent refused to accept their tender of money until they had actually become members.

No further contact was made with the union by the three employees. Eventually their discharge was requested by the union. After an investigation of its own, the company did discharge them. The Court of Appeals enforced the Board's three-to-two decision that under proviso (B) the tender of an amount equal to the initiation fees and accrued dues, as made here, was sufficient to protect these employees from discharge.

Examination of the langnage of the provisos shows that it is the non-member who is to be protected. But proviso (B) applies when *membership* is denied or terminated. The Trial Examiner, stressing this point, looked for a *willingness to join* the union, did not find it in these facts, and recommended that the employees not be protected. The Board majority held that the issue was only whether a *tender* was made. It found the tender and ordered reinstatement. The dissenters on the Board, Members Houston and Reynolds, felt that the majority read subsection (B) out of context and that a willingness only to tender was not enough to protect an employee where there was a contract requiring membership as a condition of employment. The Court found, in the enforcement proceedings, that "The principal question involved is whether *employees who request membership and tender* initiation fees and dues, but fail to comply with other union-imposed conditions . . . (are protected)." (Italics added.)[31]

The Board majority sought to make each proviso meaningful by inter-

[31] Union Starch, 186 F.2d 1008, 27 LRRM 2342, 2343 (1951).

preting (B) as protecting employees who tendered the money but who were denied membership for any other reason, even though that reason be non-discriminatory.[32] This leaves (A) to protect any employee from being discriminatorily excluded from membership even though no tender is made.[33] The company and the union argued that (A) applies only to acquisition of membership, (B) only to retention.[34] The Circuit Court found that the Board majority " . . . construed the statute in a reasonable manner . . .".[35]

The concept of the agency shop haunts the proviso. The agency shop gives the employee the choice of joining the union or not. If the employee chooses not to join, he must pay to the union the amount of his dues. Variations have been adopted so as to allow those who do not wish to contribute to the union, to donate an equivalent amount to a stipulated charity.[36] Both the agency shop and an agreement for compulsory union membership eliminate the "free riders". The former insures only dues. The latter insures membership. Section 8(a)(3), permitting the union shop, did not expressly provide for changing relationships so drastically that the union shop would actually become the agency shop. Unfortunately, in some of the legislative history and the broad language, the difference between the agency shop and the union shop does not seem to be completely appreciated.

Shortly before the Taft-Hartley debates, the "Rand Formula", a standard type of agency shop, was invented in a Ford arbitration case in Canada. *Ford Motor v. UAW*, 17 LRRM 2782 (1946). Specifically rejecting the union shop clause, Justice Rand set up a shop with voluntary unionism but compulsory check-off. The Taft-Hartley union shop, of course, involves compulsory unionism with a voluntary check-off.[37]

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[32] Union Starch, 87 NLRB 779, 783 (1949).

[33] The minority of the Board contended that by such a reading (B) would cancel (A) out. It preferred to read (B) as conditioned by (A) so that, under (B), "an employee has not been 'denied' membership if he is unwilling to comply with the non-discriminatory 'terms or conditions' permitted under . . . [(A)]." Union Starch, 87 NLRB 779, 793 (1949).

[34] Not merely relying on the words of the proviso, which leave little room for doubt that (B) refers to acquisition also, the opinion discussed the history of a House amendment which was rejected in favor of the present language from the Senate Bill. The probative value of this history was demonstrated, according to the Court, by the fact that "The House Conference Report noted no difference in the import of the language used in the Senate Bill." Union Starch, 186 F.2d 1008, 1012, 27 LRRM 2342, 2346 (1951).

[35] *Id.* at 1012, 27 LRRM 2342, 2345.

[36] Bambrick, *Agency Shop to the Fore,* 11 CONF. BD. MANAGEMENT REC. 198-200 (1949).

[37] The majority opinion suggested a plan to avoid the check-off limitation. "Plainly a plan under which employees pay their dues directly to the union instead of through the employer is unlike the compulsory check-off proscribed in Section 302 of the Act." Union Starch, 87 NLRB 779, 786 (1949).

Nevertheless, Senator Taft said: (and the Board majority quoted with the following emphasis,[38])

> Mr. President, while I think of it, I should like to say that the rule adopted by the committee (Senate committee) is substantially the rule now in effect in Canada. Apparently by a decision of the justices of the Supreme Court of Canada in an arbitration case, the present rule in Canada is that *there can be a closed or union shop, and the union does not have to admit an employee* who applied for membership, *but the employee must,* nevertheless, *pay dues even though he does not join the union. If he pays the dues without joining the union, he has the right to be employed.* That, in effect, is a kind of a tax, if you please, for union support, if the union is the recognized bargaining agent for all the men, but there is no constitutional way by which we can do that in the United States.
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> I may say that the argument made for the union shop and against abolishing the closed shop, is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, than (sic) the man who does not pay dues rides along freely without any expense to himself. Under the Canadian rule, and under the rule of the committee, we pretty well take care of that argument. There is not much argument left. (Emphasis supplied.) 93 Cong. Rec. 5088.

According to the Board decision, "The statements of Senator Taft . . . (set forth above) . . . establish that he thought the bill in its final form successfully and constitutionally protected not only the union from 'free riders' but also protected those employees willing to pay for their ride."[39] A closer examination of this statement seems to indicate that 1. He was discussing the terms of the agency shop set up by Justice Rand, as distinguished from a union shop. (This is especially obvious in the assertion that such a "tax" would be unconstitutional in the United States). 2. His statement is internally inconsistent since he describes a closed or union shop in which an employee need not apply for membership. This is contrary to the essence of a closed or union shop. 3. The Board majority, in failing to italicize the phrase "who applied for membership" among the other phrases which it does italicize, follows or tolerates the position which Senator Taft took. 4. An open shop is implicitly endorsed by the Board when it accepts this statement with the meaning which it attaches to it. The underscoring by the Board of an alternative plan which achieves the same result, i.e., eliminating "free riders", suggests that this statement may be the source of their emphasis upon the employee's paying rather than upon his joining the union.

The Court did imply its awareness of the distinction of the union shop and the agency shop, by including the fact of the request for union mem-

38 *Id.* at 785-786.

39 *Ibid.*

bership in its statement of the issue.[40] It is noteworthy also that the judicial opinion avoided using the remarks of Senator Taft in which he discusses the Canadian rule (quoted above). Where it did cite from the legislative history to support its adoption of the Board interpretation of (B), the Court quoted a passage in which it was stated that "Willingness to enter the union" is a requisite to protection.

The Board members who dissented would, in effect, have applied a rule of reason to the situation, allowing the union to impose, at the penalty of discharge, the "mere procedural rules" at issue here.[41] Implying that the effect of the majority's decision was to provide for agency shops, the dissenters said, "We find no evidence of an intent to distort union-ship agreements into mere devices by which unions can insure that all employees *pay* for the right to work. Yet that is the clear effect of the decision."[42] But this, too, does not seem to be entirely correct because the *union may have to refuse the tender,* as in the *Union Starch* case. It may feel that if it wipes out all admission requirements, even the merest procedural requirements, it will have lost its hold on the old members.[43]

The Board opinion has been amended, or at least clarified, by the Court. The opinion, of course, would not preclude the Board from finding in an appropriate fact situation that an employee is covered by tendering without requesting membership, assuming the Board is so inclined, for the Court did not hold that tender alone is insufficient. The Court has followed the reasoning of the Trial Examiner, although differing with his interpretation of the facts, and it has given some recognition to the importance of membership. It has also answered part of the argnment

[40] Union Starch, 186 F.2d 1008, 1010, 27 LRRM 2342, 2343 (1951).

[41] The "rule-of-reason" approach of the dissent is no panacea, however. First, why should the Board assume that Congress meant to allow the unions any more control of discharges for failure to become a member than for expulsion from membership? With expulsion it is clear that no discharge can be requested by a union unless the employee was expelled for a delinquency in his payment of initiation fees and periodic dues uniformly required. Second, it would be difficult to set up standards for rules of admission, on which the interests of employees, employers, and unions would be equitably served. The Union Starch case itself contains a collateral issue which would test this point. Two of the dischargees claimed that taking the oath of loyalty would have conflicted with their religious convictions. 87 NLRB 779, 781 (1949). Third, a test of reasonableness would also put a formidable burden on the employer. Besides having to decide if reasonable grounds exist for believing that the employee was not properly treated under (A) and (B), he would have to decide if the rules of admission themselves are reasonable.

[42] Union Starch, 87 NLRB 779, 794 (1949).

[43] The union will be able to afford to refuse the tender if only a few employers refuse to go through the rituals, and it may feel that it is necessary so to refuse, to preserve its social structure. The union may close itself to all but a bare majority whose membership it feels to be necessary to keep its NLRB certification. If it did so, the only consequence would be a loss of revenue. Desire for revenue may induce it to open to all employees.

of the Board dissenters by distinguishing the Taft-Hartley union shop from the agency shop. But a request of the kind found sufficient here is a minimal utterance. It does not require the employee to undertake the merest element of the process of joining beyond the indication of his desire.

Limitation on Dues Liability

The second major Board principle on the interpretation of the provisos in question was enunciated in the Spring of 1950 in *New York Shipbuilding Corp.*, 89 NLRB No. 197 (May 1950), and *General American Transportation Corp.*, 90 NLRB No. 36 (June 1950). The Board decided that (B) is to have no "retroactive" effect, *i.e.*, no discharge can be justified by an employer when union membership was terminated for a delinquency of initiation fees or dues which accrued before the current contract. In *New York Shipbuilding Corp.*, the Board dealt with a discharge made upon the union's request during the term of the current contract, where the member had failed to pay his dues when there was no contract at all, during a strike which had preceded and led up to the present contract. In a one-page unanimous panel decision, the Board held that the employee was protected under the second proviso. The same result was found in the companion case, *General American Transportation Corp.*, in which two employees owed the union for periods before the current contract, during which time they had left the employ of the company but had not taken out withdrawal cards with the union. The Trial Examiner dealt with the legal significance of the failure to take out withdrawal cards under the union constitution as well as with the requirement of membership in this situation. The Board based its holding on the fact that the delinquency accrued before the contract was in effect.

The Board theory emphasizes the contractual nature of the shop conditions set up by both law and contract. Since membership is a condition of employment under the collective bargaining contract, it reasons, that condition cannot be applied to a situation which occurred before the contract was executed. It is interesting to compare this reasoning with that of the majority in *Union Starch*, in which the literal interpretation of the statute was favored against the suggestion of the dissent that the contractual nature of the relationship be the guide in interpretation.

The section itself does not give any positive indications of contractual limitations on the operation of proviso (B). The language in the first proviso in which an employer and a union may agree "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 later . . . " has been found by the Board in the *New York Shipbuilding* case to excuse membership obligations which antedate the agreement. The adjective modifying "dues" in (B), "periodic", was inserted in the final draft by the Conference Committee and no comment on its significance is in the record.[44]

The Board relies on three cases which came up under the original Wagner Act. In reconciling the right of self-organization and the union security provision, the Board had set up a "buffer period" toward the end of the term of a contract, when the employee could not be fired for activity on behalf of a rival union. *Rutland Court,* 44 NLRB 587 (1942). The union which won the majority and made the contract sometimes used the technique of dating back its union security clause in the next contract to catch and have fired those who had been active on behalf of the rival union during the campaign. This accomplished the same thing as the abuse which the *Rutland Court* doctrine covered, and it was also outlawed in *Colonie Fibre,* 69 NLRB 589, 71 NLRB 354, *enf'd,* 163 F. 2d 65 (2d Cir. 1947). In this case two employees had "severed their connection" with the contracting union during the buffer period, and their discharge under the new contract for non-membership in the prior period was held to be an unfair labor practice. It is of course a different thing to fire an employee for not being in good standing when he had the express legal privilege not to be and to fire an employee who is expelled under the current contract because he is not in good standing for a legitimate reason which antedates the current contract.

The Board pointed out that the rationale for the *Colonie Fibre* decision was that there can be no contract liability of the employee to the union which antedates the contract. This factor was clearly the ground on which the order was enforced in the Second Circuit. The same principle had been followed in two subsequent cases under the Wagner Act, in both of which dual unionism, again, was the main issue.[45] In one the dues accrued during the current contract but while the employees had been laid off for their dual activities; in the other, discharge occurred because an employee refused to pay a fine levied by the union for dual union activities before the current contract at a time when, as the Board emphasized, these activities were protected.

The value of these Wagner Act cases may be questioned in this connection, first, because of the *Colgate-Palmolive-Peet v. NLRB* case, 338 U. S. 355 (1949). The Supreme Court repudiated the Board's *Rutland Court*

44 H. R. REP. No. 510 on H. R. 3020, 80th Cong., 1st Sess. 6 (1947).

45 Hamilton-Scheu and Walsh Shoe Co., 80 NLRB 1496 (1948); Selig Mfg. Co., 79 NLRB 1144 (1948).

doctrine, finding no justification for setting up the buffer period. Thus the theory which subtends the main rationale in these three cases has been held erroneous. This of course does not detract from the contract rule in those cases, that is, that under the Wagner Act past membership cannot be a condition of employment. It does, however, seem somewhat abrupt for the Board to say, without much more, that ". . . the considerations which led to the decision in the *Colonie Fibre* case are equally applicable to the decision in the instant case. (*New York Shipbuilding*)." Since in the *New York Shipbuilding* case the employee had *not* quit the union, as the two had done in the *Colonie Fibre* situation, but had enjoyed membership in good standing during that period, a distinguishing set of facts would seem to be presented.

Far more cogent in determining whether the Board is justified in this limitation upon the union's dues-collecting powers is the legislative history of the act itself. Unlike the original NLRA, the Taft-Hartley Act set up unfair labor practices for unions. If the Board's attempt at "administrative legislation" in the case of the *Rutland Court* doctrine has been denied under the Wagner Act, it would seem that this reason is even stronger where Congress did set out certain specific unfair labor practices for unions. Neither of the bills which led up to the final one, in any forms, expressly indicated such a limitation on the dues requirement.[46] The only modification of "dues" in this section was the requirement that dues be "regular", in an earlier form, and "periodic" in the final bill. Here, as so often, the problem seems not one of determining what the legislature had in mind but what it would have intended if it had anticipated this problem.

There is a stronger, more positive approach to the question of legislative intent and the retroactivity doctrine. The dominating thought of the sponsors, in abolishing the opportunity for the parties to make a closed shop contract and in setting up this limited form of union security, was to give the union protection against the "free rider".[47] Congress took care of the dual unionism question by imposing a strict limitation upon the power of discharge in the second proviso which makes a union security provision mean a far different thing than it meant under the Wagner Act. As the Board itself said in *Union Starch*, "The statute plainly contemplates that, under a valid union-shop contract, non-union

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[46] Sen. 1126, H.R. 3020, 80th Cong., 1st Sess. (1947) in 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 1947 (Gov. Printing Off. 1948) 57, 58, 111, 184, 185, 238.

[47] Joint Committee on Labor-Management Relations, REP. No. 986, pt. 3, 80th Cong., 2d Sess. 52 (1948).

employees may be required at least to offer to bear a fair share of the maintenance of the union."[48] In the *New York Shipbuilding* doctrine the Board qualifies that interpretation so that the employee is required only to offer to bear a fair share of the maintenance of the union *during the term of the contract.*[49] Again the concept of the agency shop shows through the frame-work of the union shop. The employee is seen as paying for a month-to-month service and his account is collectible only when the union has a contract. This gives a rather narrow meaning to "maintenance" of the union.

Distinguishing Fines from Dues

If the *Union Starch* and the *New York Shipbuilding* doctrines have at least the advantage of simplicity of application, that cannot be said of the other interpretations which the NLRB has thus far made of provisos (A) and (B). In determining whether an employee, carried on the union books as a member, has been delinquent in his initiation fees and dues within the meaning of proviso (B), the Board has been forced to look extensively into union internal affairs. Each delving by the Board into these affairs increases the employer's burden of deciding whether he has "reasonable grounds for believing" that an employee is protected by (A) or (B). Unions have shown various forms of adaptive behavior to this intrusion into their affairs, from pressure on the employers in spite of the law[50] to vigorous contests before the Board.

Difficulty in defining "dues" was perhaps to be expected. Former General Counsel Denham seems correctly to have anticipated the Board by stating that fines and assessments are not included and that part (B) is a "narrow ground" for justifying a discharge.[51] The unions may have gained some encouragement, on the other hand, from the fact that the Department of Justice opined that "membership dues" in Section 302 (check-off) does include assessments.[52] At least one union changed its constitution to include all charges under the term "dues".[53]

The first Board proceeding in which the meaning of "dues" in proviso (B) came into issue, was settled in a stipulation in which reinstatement was given to an employee whose delinquency had consisted of refusing

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48 Union Starch, 87 NLRB 779, 786 (1949).

49 New York Shipbuilding, 26 LRRM 1124, 1125 (1950).

50 This leads to a charge based on § 8(b)(2); see Retail Clerks, 25 LRRM 24 (1949) (settled by stipulation); International Brotherhood of Teamsters, Case No. 9-CB-51 (uncontested).

51 Address, 22 LRRM 52 (1948).

52 Daily Labor Report, 96: A-1 (May 17, 1948).

53 International Fishermen and Allied Workers, CIO, 22 LRRM 16, 17 (1948).

to pay an assessment.[54] That fines are not included in the meaning of "periodic dues" or "initiation fees" now seems settled after the opinion in *Pen and Pencil Workers,* 91 NLRB No. 155 (Oct. 1950). In this case the union was ordered to pay the back wages of the complainant whose discharge it had brought about when she refused to pay union fines incurred during a previous period of employment with the company as a price of admission. It is notable that the respondent did not even contend that fines come within the above-mentioned language.

In two cases ostensible dues have been called fines. Although the *New York Shipbuilding* case was decided on the ground discussed above, it involved also a nice question relevant here. The Local set up a rule that during the strike there would be a waiver of dues only for those who did strike duty. Others owed dues of $1.25 a month. The International constitution contained a provision that "unemployed members" would pay dues of twenty cents a month. The Examiner found that the local had in substance forged a fine for those who did no strike duty, and therefore a failure to pay such "dues" later on was not ground for a legal discharge. The constitutional provision for unemployed members, he found further, covered those on strike; the broad discretion given to the Local's strike committee by the International did not prevail against this provision, as interpreted. Finally, these charges were not "uniformly required", because the Local was "arbitrarily discriminating between members who had performed strike duties and those who had not."[55] Such interpretation would have major significance in a lawful strike where there is an existing contract.

In *Electric Auto-Lite Co.,* 92 NLRB No. 121 (January 1951), the Auto-Lite Unit of the UAW-CIO adopted a motion at a regular meeting to increase the "dues" by fifty cents a month. The announced object of this increase was to encourage attendance. Members present at meetings were exonerated from the increase. Additional evidence, which the Examiner noted, was that the union failed to notify the company of the increase in dues, and that the International constitution provided for fines for non-attendance. The complainant's check-off provision, executed about a year after the motion, did not reflect the increase. The Examiner, relying heavily on the legislative history, found that a fine had been levied and that the employee who refused to pay this fine should be reinstated.[56] A four-member majority of the Board agreed in the result, but based its reasoning strictly *upon the evidence.* The crucial fact was that the

[54] Retail Clerks, 25 LRRM 24 (1949).

[55] New York Shipbuilding, Intermediate Report 14.

[56] Electric Auto-Lite, Intermediate Report 8-10.

additional charge did not become due until *after* the meeting had been held.[57] This is a narrow holding, but a shadowy precedent is now available for a ruling that the use and effect of money obtained by the collection of dues is open to the scrutiny of the Board. It is even conceivable that an increase in dues in order to pay a debt which the union had incurred before the current contract might be successfully contested by an employee, if the Board follows through with its concept of the agency shop!

The Board rejected a union defense that at the time of the suspension of the complainant he was delinquent only in the payment of regular monthly dues because the union had properly applied the monies checked-off from his earnings *first* to pay his outstanding indebtedness in respect to the non-attendance charges.[58] In effect, the Board majority read into the check-off authorization a limitation which partially fills a loophole in the law on enforcement of union charges against members. The authorization had not specified the purpose for which the $1.50 a month would be deducted. Under section 302 the employee can authorize the payroll deductions of charges other than initiation fees and periodic dues. Therefore, the employee had bound himself by personal authorization to pay union charges for which he cannot, under proviso (B) of Section 8(a)(3), be discharged for failure to pay. In *Electric Auto-Lite* the Board has stipulated that check-off charges other than the regular monthly dues must be specifically authorized. This is surely an extension of the restrictions of proviso (B) to section 302.

Member Styles dissented on both the finding that the charge is a fine and the rejection of the union defense based on the check-off authorization. He felt that the illegality of the charge found by the majority could be corrected merely by the collection of two dollars before the monthly meeting and the return of fifty cents to those who attended the meeting. As to the authorization for the check-off, the complainant had waived his right to complain, in Styles' opinion, because of his previous acquiescence to the charge in dispute.[59]

The Employer's Role

The employer acts at considerable peril and under a formidable burden. It is ironic that the simplicity of the employer's test was stressed by proponents of the amendments, as a virtue of the provisos.[60] For now

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57 Electric Auto-Lite, 27 LRRM 1205, 1206 (1951).

58 *Id.* at 1207.

59 *Id.* at 1210.

60 "The tests provided by the amendment are based upon facts readily ascertainable and

his duties of finding reasonable ground for believing that discharge is justified involves investigation of union constitutions, by-laws, procedures and records, as well as interviewing the parties. The difficulty in ascertaining the simple fact of membership status at a particular period is not easily overcome. Although the union carried certain employees on its books as members, one examiner inferred that the union had allowed their membership to lapse, upon evidence that they had not been included in membership lists sent to the War Labor Board.[61] Where check-off is used, an examination of the pay-roll deductions will not suffice to determine whether the employee has failed to pay the charges which bring him under the protection of proviso (B).[62] According to one examiner recently, when an employee told the employer in a discharge interview that he was actually willing to pay his dues but that the union was holding a fine over him, the employer violated Section 8(a)(3) by firing the man without further investigation. The situation was aggravated here by the fact that a shop steward who was present at the interview did not deny the employee's contention nor did the employer inquire of him.[63]

The phrase "reasonable grounds for believing", which is the employer's test of responsibility under the provisos, seems clearly to call for a subjective test. Yet in *Pressed Steel Car Co.*, 89 NLRB No. 36 (April 1950), the majority in a panel decision found a discharge legal where the employee was six months in arrears, in spite of uncontradicted evidence that no discharge would have been requested had he agreed to sign a check-off authorization or to pay current and future dues in cash. The refusal to pay was not ground for legal discharge here because he would not lose his good standing on that account for three months, under the International constitution. This decision suggests the use of an objective standard for determining the legality of the discharge. The real reason for discharging the employee, in the minds of the parties, was an illegal one. A dissent was based, in part, upon this ground.[64]

Since provisos (A) and (B) refer to non-members, union members do not enjoy this protection of the Act.[65] Several examiners have ruled,

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do not require the employer to inquire into the internal affairs of the union." SEN. REP. No. 105, 80th Cong., 1st Sess. 20 (1947).

61 See United Auto Workers, CIO, Local 291, Case Nos. 31-CB-2, 13-CB-51 (May 1950).

62 Electric Auto-Lite, 27 LRRM 1205, 1208 (1951).

63 Baltimore Transfer Co., Case Nos. 5-CA-240, 5-CB-35 (Jan. 1951).

64 25 LRRM 1571, 1572 (1950). This would seem to be supported by Senator Murray's estimate that the Board is under the duty to determine "not a state of facts but a state of mind." 93 CONG. REC. 4152 (April 25, 1947).

65 VAN ARKEL, ANALYSIS OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, 31, 47 (1947).

however, that a failure formally to expel the member is not a bar if the discharge is otherwise legal.[66] Thus the employer's duty of scrutinizing union procedure is minimized here, for the employer is protected against the employee's defense that he had not been actually expelled. Nor can the employee rely on the contract which requires merely "membership", rather than "membership in good standing", if the employer and union both interpreted it as meaning the latter. The Board, according to several examiners, will read it as the employer and union do.[67]

Concluding Appraisal

An appraisal of the effect of these provisos, as interpreted by the Board, brings into question the "continuation of existing relationships" which Senator Taft, as one of the main sponsors of the Act, intended the provisos to allow, while meeting "the abuses which exist". At the outset, it is clear that they have not single-handedly resulted in an upset of union-shop arrangements. On the contrary such shops have increased in number, largely by taking the place of maintenance-of-membership shops.[68] Furthermore, they are expected soon in steel and railroads where the union shop has not existed in recent times, if at all.

The general legal framework of the union shop is of course radically changed by the provisos on their face. The right to discharge for non-membership where there is a union shop has never been circumscribed so severely.[69] The 1947 Act is considered the first federal attempt to regulate the iternal affairs of labor unions, in spite of the protestation of Congress in Section 8(b)(1)(A).[70]

The union holding a union shop contract is certainly *induced* to open its doors. It knows that if it does not make membership "available"

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66 See New York Shipbuilding, Intermediate Rep. 8-11; Chisolm-Ryder Co., Case Nos. 3-CA-84, 3-CB-20 (July 1950).

67 New York Shipbuilding, *supra* note 66, see cases relied on therein.

68 Rubenstein, Nix, Gary, *Union Security Provisions in Agreements, 1950,* 71 Mo. Labor Rev. 224-227 (1950).

69 If the employee chooses to "join", as he almost universally does, he need not fear the consequences of expulsion upon his job, even if he is expelled for wildcatting or being a Communist, so long as he tenders his fees and dues. Both the Taft and Wood Bills in 1949 sought to expand the group of persons subject to discharge, to include wildcatters and Communists; the Wood Bill also would have added those expelled for disclosure of confidential information of the union, for conviction of a felony, for having engaged in conduct subjecting the union to civil damages or criminal penalties. H.R. 4290 and Sen. 249, 81st Cong., 1st Sess. (1947). Each passed the chamber where it originated. See also the statement of D.A. McCabe before the Senate Labor Committee. Daily Labor Rep. 28: E-1-3 (Feb. 10, 1949).

70 Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs,* 44 Ill. L. Rev. 425, 446-448 (1949).

within the meaning of the Act, it cannot have an employee discharged. But what happens to the meaning of "membership" and "joining" here? They are not recognizable if the union cannot even require that the applicant give his name. It is extremely doubtful that Congress meant the Board to open the door of the union by taking the door off its hinges. The rule now obtaining does not require the employee to undertake the process of joining. It is only *tendering* and probably a request for membership. Under the old Act the union could make a contract by which it could reject an applicant and still require, under the penalty of discharge, the payment of an amount equal to the fees and dues.[71] It would seem that this "junior membership" concept brought about by the *Union Starch* case gives *all* employees only this financial obligation, under the strongest union security agreements. Any such bare tender and request to almost any union in the United States today would be insufficient for membership status. But since it protects the employee, he can, having made that tender and request, continue to work without fear of loss of employment for nonmembership. It is not apparent that the result of eliminating mere procedural rules relates to any "abuse" which Congress had in mind.

The Board follows its agency shop theory by ruling that dues delinquency shall be enforceable by discharge only in the period of the current contract. Thus the "free-rider" becomes one who refuses to pay for the administration of the contract, rather than to support the union in a broader sense. No such qualification is dictated by the legislative history of the Act and, it is submitted, no such interference in internal union affairs was intended. Congress did not mean to limit the member's liability under a union shop to the term of the contract. Fiscal matters in any such organization cannot be broken down so discretely, and union dues are not adjusted to the pay-as-you-go formula. It is a basic tenet of American trade unionism that financing be planned for a sound long run. The abuse aimed at here is more obvious, however. Some unions would probably dig up old records of dues delinquencies to use against undesirable members so they might be fired when expelled.

After three years experience in which this amendment to the original NLRA has been in effect, it cannot be said that the conflict of interests has been successfully resolved. More interpretation and clarification is necessary before the full implications can be appreciated. Dissident members of unions have a stronger position. The employer has some difficult problems of administration. Legally, union rights and powers have been significantly circumscribed. The union's responsibility must be cut

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[71] See note 5 *supra*.

down correspondingly as its power of discipline is removed. This means increased reluctance to give no-strike promises.

The union shop under this Act has been described as "primarily a dues-collecting device."[72] But there is no corresponding evidence that this proviso has proved a "Bill of Rights" which has significantly advanced the position of the employee. The Board decisions already indicate that the proviso is leading to other results than the opening of the union.

[72] MILLIS and BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY, 435 (1950).