Boston College Law Review

Volume 3 | Issue 1 Article 17

10-1-1961

Labor Law—Agency Shop Agreements—Federal Preemption Doctrine.—Higgins v. Cardinal Manufacturing Company

Edward A. Schwartz

Labor Law—Agency Shop Agreements—Federal Preemption Doctrine.— ***Higgins v. Cardinal Manufacturing Company.***[1]—The appellants, as non-union employees of the Cardinal Manufacturing Company (an interstate concern), are subject to a collective bargaining agreement which contains an agency shop provision. For an alleged violation of the Kansas right-to-work amendment[2] the appellants sought and received from the state district court a temporary restraining order which prohibited the president of the manufacturing company from discharging the appellants for their failure to pay the appellee union an amount of money equal to that paid by the union members for initiation fees, union dues, and assessments. The union and the employer thereupon filed a motion to dissolve the order alleging want of jurisdiction of the state court under the Labor Management Relations Act[3] and the insufficiency of the petition to state a cause of action under Kansas law. The trial court sustained the motion as to the petition failing to state a cause of action, but overruled it on the jurisdictional ground. On cross appeals the Supreme Court of Kansas HELD: The Kansas right-to-work amendment, having been properly adopted under the Taft-Hartley Act, serves to prohibit the application of an agency shop agreement. The court further stated that the enforcement of any violation of the amendment is not within the exclusive domain of the National Labor Relations Board by virtue of the federal preemption doctrine.

Since union security agreements[4] were not mentioned in the Wagner Act,[5] closed, union, or agency shops were legal tools in the hands of the union, and were wielded to secure and maintain the union as a strong and exclusive bargaining unit.[6] In 1947, this pro-union situation was sharply altered by the passage of section 8(a)(3) of the Labor Management Relations Act (Taft-Hartley Act).[7] This section declared it an unfair labor practice for an employer to discriminate in regard to hiring employees by conditioning said employment on membership in a labor organization. But this restriction was eased by a proviso in this section allowing an employer to make an agreement with a labor organization to require, as a condition

---

[1] 360 P.2d 456 (Kan. 1961).

[2] Kan. Const. art. 15, § 12 (1958).

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

[4] "Union security is a term of common usage not readily susceptible to precise definition, but as used here, the terms mean 'those provisions in a contract, and specifically in a collective bargaining agreement which are demanded by the Union for the protection of the Union as a separate entity.'"

"Union security provisions include those clauses relative to maintenance of membership, and check-off of dues, or other payments to the Union. In conflicts concerning union security provisions, the antagonists are organized labor and organized management, and no individual employee is involved, except in his capacity as a member of a group." 27 J.B.A. Kan. 348 (1959).

[5] National Labor Relations Act (Wagner Act), 49 Stat. 449, 29 U.S.C. §§ 151-58, 159-66 (1935).

[6] See Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 307-10 (1949).

[7] Supra note 3.

of employment, union membership after 30 days of work. By a further proviso, an employer would be discriminating if he discharged an employee for not being a union member, if said employee was denied membership for any reason other than the failure to pay dues and fees.[8] Under section 14(b),[9] Congress granted to the states authority to ban union shop agreements. Taken together, sections 8(a)(3) and 14(b) furnish the states with the choice of limiting conditions of employment to the payment of dues and fees, prohibiting union shops entirely, or doing nothing and thus letting section 8(a)(3) govern.

Union security agreements take many forms,[10] one such form being an agency shop provision, which is sometimes referred to as a "support money clause" or a "bargaining agent fee clause." This is an arrangement whereby all employees of a given company, whether union members or not, pay a sum of money to defray the expenses incurred by the union in acting as their bargaining agent. Agreements such as this were approved under the W.L.B.[11] and under the N.L.R.A., section 8(a)(3).[12]

The *Higgins* court was faced with the realization that, if Kansas could not prohibit an agency shop agreement under section 14(b), their right-to-work amendment would be left hollow and without effect. In the maze of the legislative history of the Taft-Hartley Act, the court found that Congress had intended to place the power to proscribe an agency shop agreement in the hands of the states, and based its decision on this finding.[13] Primary evidence pointed to the fact that Congress was aware of the varied pre-1947 state laws forbidding union security agreements, and that it passed section 14(b) in order to maintain the *status quo*.[14]

The important question as to whether or not a state, under the granted authority of section 14(b), can prohibit an agency shop agreement by means of a right-to-work law has never been litigated in the federal courts. Recently, however, the N.L.R.B., in a 3-2 decision, ruled that under federal law an employer need not negotiate an agency shop contract in a state (in this case Indiana) which has a right-to-work law.[15] In reaching this decision,

[8] Here Congress intended to distinguish "membership" from the payment of dues and fees, which resulted in the union being unable to compel the discharge of an employee who was willing to pay the dues and fees, but who was unable to comply with other requisites of "membership." Union Starch and Refining Co. v. National Labor Relations Board, 108 F.2d 1008 (7th Cir. 1951), cert. denied, 342 U.S. 815 (1951). See Radio Officers Union v. National Labor Relations Board, 347 U.S. 17 (1954).

[9] Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136, (1947), 29 U.S.C. § 164(b) (1958).

[10] See Union Contract Clauses, §§ 51075-84, C.C.H. (1954); Witney, Government & Collective Bargaining, c. 13 (1951).

[11] See 12 War Labor Board Reports 510; 21 War Labor Board Reports 219.

[12] American Seating Company, 98 N.L.R.B. 800 (1952); In re Public Service Company, 89 N.L.R.B. 418 (1950).

[13] N.L.R.B., Legislative History of the Labor Management Relations Act, vol. 1, pp. 324, 564 (1948).

[14] 93 Cong. Rec. 6378 (1947).

[15] General Motors Corporation, 1961 C.C.H., N.L.R.B. § 9663, rev'd, 133 N.L.R.B. 21, 48 L.R.R.M. 1659 (1961), in a 4-1 decision on the basis of the *Radio Officers* case,

Chairman Leedom interpreted "membership" as used in sections 7 and 8 of the Taft-Hartley Act to mean literal membership. This he felt was the only proper definition of "membership" in light of a recent Indiana holding[16] which so defined "membership" as used in that state's right-to-work law (as passed under section 14(b)), since it was Congress' intent to define "membership" consistently throughout the Taft-Hartley Act. This decision is not in accord with the *Radio Union* and the *Union Starch* cases[17] as to the interpretation of "membership" as used in sections 7 and 8; and as to the interpretation of "membership" as used in section 14(b); it is in accord with *Meade Electric Co. v. Hagberg*,[18] but not with the *Higgins* case. The *Higgins* court distinguished *Meade* on the ground that there a penal statute was the subject of interpretation and not a constitutional amendment. But the *Higgins* court failed to distinguish the *General Motors* case; rather it cited the case for a proposition which it does not support.[19]

Having decided the propriety of the state's enacting a right-to-work amendment, the *Higgins* court posed the issue of whether or not an agency shop agreement violated the Kansas amendment. Article 15, section 12 of the Kansas constitution forbids any person to enter into an agreement whereby employment must be obtained or retained "because of membership . . . in any labor organization." To ascertain the meaning of "membership," the court sought the common understanding of the word, and examined the circumstances attending the adoption of the amendment.[20] By employing a liberal interpretation of the amendment, as suggested by a noted jurist,[21] the Kansas court found no difficulty in concluding that an agency shop provision was encompassed within the prohibition of article 15, section 12.

Does the Kansas court have jurisdiction to grant injunctive relief under the right-to-work amendment? The Supreme Court of the United States has held that states are precluded from granting injunctive relief for conduct clearly prohibited[22] or regulated[23] by federal law. The Court has further stated that this preemption doctrine is necessary to avoid conflict between state and federal remedies applicable to the same conduct.[24] To insure the

supra note 8. Although the majority claimed to be deciding solely on federal law, and not on § 14(b) or right-to-work laws, there are overtones to the contrary.

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

17 Supra note 8. Dissenters Rodgers and Fanning rested their decisions on this fact.

18 Supra note 16.

19 The *General Motors* case was abstracted in the same paragraph in which this quotation appears: "But for the Kansas 'right-to-work' law the agency shop provision would presumably be a proper subject of negotiation in a collective bargaining agreement under the Taft-Hartley Act." 360 P.2d 456, 467 (Kan. 1961). Chairman Leedom specifically did not rule on the legality of an agency shop in a state with no right-to-work law.

20 State v. Sessions, 84 Kan. 856, 115 Pac. 641 (1911).

21 1 Story on the Constitution, § 451 (5th ed. 1905).

22 United Mine Workers v. Arkansas Oak Floor Covering Co., 351 U.S. 62 (1956).

23 Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776, 346 U.S. 485 (1953).

24 Weber v. Anhauser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Union, supra note 23.

continued absence of conflict in this area, primary jurisdiction has been given to the N.L.R.B. in cases which involve conduct "arguably" subject to the N.L.R.A.[25] At first glance this doctrine appears clearly to delineate its area of application. Upon closer examination, the doctrine, especially in the field of union security agreements, is anything but clear.

In 1949 the United States Supreme Court, in *Algoma Plywood & Veneer Co. v. Wisconsin Labor Relations Board*,[26] ruled that by virtue of section 14(b) of the Taft-Hartley Act the states do have jurisdiction, save in those areas "where State and federal laws have parallel provisions."[27] However, the *Plankington*,[28] *Farnsworth*,[29] and *Youngdahl*[30] cases reveal a possible restriction of, or overruling of, the *Algoma* decision, as in those cases the Court indicated disapproval of the attempts of various states to exercise restrictive policies in the area of union security agreements. Yet another reverse in the position was indicated when *Algoma* was cited with approval in subsequent landmark cases.[31] Then in 1959 the Court seemingly emasculated *Algoma* a second time by its decision in *San Diego Building Trades Council v. Garmon*,[32] wherein it ruled that the states lack jurisdiction in

---

[25] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

[26] Supra note 6.

[27] Algoma Plywood & Veneer Co. v. Wiscinsin Labor Relations Board, supra note 6 at 313. In this case the Wisconsin Board ordered an employer to cease and desist from enforcing a "maintenance of membership" clause in a collective bargaining agreement on the grounds that such clause was in violation of a state statute. The opinion notes that 95% of the employer's production was sold in interstate commerce. It was here said: "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union security agreements. Because sec. 8(a)(3) of the new act forbids the closed shop and strictly regulates the conditions under which a union shop agreement may be entered, sec. 14(b) was included to forestall the inference that federal policy was to be exclusive." Supra note 6, at 313.

[28] Plankington Packing Co. v. Wisconsin Employment Relations Board, 338 U.S. 953 (1950). In this case the lower court held it to be an unfair labor practice where the union engaged in tactics to coerce the employer to discharge an employee for exercising his right to refrain from union membership. The United States Supreme Court reversed in a per curiam decision.

[29] Local Union 429, International Brotherhood of Electrical Workers, A.F. of L. v. Farnsworth and Chambers Co., 353 U.S. 969 (1957). In this case management was alleged to have refused to hire union labor in violation of the Tennessee right-to-work law. The union then picketed peacefully. Management sought and received an injunction from the state court which was approved by the supreme court of the state. On appeal the Supreme Court reversed citing the *Weber* and *Garner* cases, supra notes 23, 24.

[30] Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957). In this case the employees struck and picketed a plant in an effort to compel the employer to recognize the union as the bargaining agent of the employees. Picketing was accompanied by conduct calculated to provoke violence. The Arkansas Supreme Court affirmed a blanket injunction against all conduct as issued by the lower court. The United States Supreme Court reversed to the extent that the injunction prohibited peaceful picketing regulated by the Taft-Hartley Act.

[31] Garner v. Teamsters Union, supra note 23; Weber v. Anhauser-Busch, Inc., supra note 24; and Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

[32] Supra note 25.

areas "arguably" subject to the N.L.R.A. Faced with the shifting tides of federal preemption in this area, the *Higgins* court used the *Algoma* case as precedent, and the legislative history of section 14(b)[33] as supporting evidence, to sanction the jurisdiction of the lower court. In reaching this conclusion, the court reported that all of the cases[34] which the union alleged to have caused the decline and ultimate reversal of the *Algoma* decision, were concerned with independent conduct which was either prohibited or regulated by section 8 and not the application of a union security agreement. A recent case in the State of Arizona seems to be in full accord with this conclusion.[35] The *Higgins* court felt the pressure of the wording of the *Garmon* case,[36] for it made mention of its existence and then cursorily dismissed it as not controlling. Can it be said that an agency shop provision is not "arguably" under the Taft-Hartley Act?

A petition for certiorari in the *Higgins* case is now pending before the Supreme Court.[37] If the Court should grant this petition, its final decision will be noteworthy. Here in one case the Court will be presented with two issues of great contemporary importance in the field of labor law. The doctrine of federal preemption has been both important and controversial since the founding of our Federal Government. State judicial powers are jealously guarded, especially powers to enforce their own laws. Of no less importance is the place of the agency shop in collective bargaining. If the Court, in its wisdom, concludes that the Taft-Hartley Act does not grant to the states the power to proscribe an agency shop, twenty right-to-work[38] statutes will become almost useless. It is hoped that the Supreme Court will seize this opportunity to clarify at last part of these two much disputed areas.

EDWARD A. SCHWARTZ

---

[33] See S. Rep. No. 105, 80th Cong., 1st Sess. 9, 34, 40, 44; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60; 93 Cong. Rec. 3554, 3559, 4904, 6383-84, 6446; H.R. 3020, 80th Cong., 1st Sess., as reported, § 13.

[34] See supra notes 28-30.

[35] Sheet Metal Workers International Association v. Nichols, 360 P.2d 204 (Ariz. 1961). Here the Arizona Supreme Court held that § 14(b) of the Taft-Hartley Act gave state courts jurisdiction to enforce any violations of their right-to-work law, despite the recognized fact that the defendant company in this case was concerned with interstate commerce and the conduct involved was clearly violative of the Taft-Hartley Act.

[36] Supra note 25.

[37] Letter from J. D. Lysaught, Esq., Counsel for Kansas State Chamber of Commerce (amicus curiae), to the B.C. Ind. and Com. L. Rev., July 19, 1961.

[38] 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).