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RECENT DECISIONS CONCERNING THE AGENCY SHOP

DELL BUSH JOHANNESSEN*

Recently the National Labor Relations Board ruled¹ that the agency shop was legal under section 8(a) (3) of the Labor Management Relations Act² and thereby reversed its prior decision³ in the same case. Although the case did not involve any dispute about the legality of the agency shop under the Indiana right to work law,⁴ the Board's decision left no doubt that where state right to work provisions permit, the agency shop is a mandatory bargaining issue. In a subsequent decision,⁵ the United States Supreme Court refused to review a Kansas Supreme Court determination that an agency shop provision in a collective bargaining agreement violated the Kansas right to work constitutional amendment.⁶ In denying a review, the Court indicated, as the NLRB had previously done, that the legality of the agency shop under the various right to work provisions is a matter for state determination. The legality of the agency shop, however, is still unsettled; hence, the Court may yet find itself deciding what has become a rather thorny union security issue.

DEVELOPMENT OF THE AGENCY SHOP

The agency shop is somewhat similar to the union shop. However, although all employees in an agency shop arrangement must pay union dues (and, in some agreements, initiation fees), they are not required to join the union. In other words, the dues are a form of service fee charged by the union for representing everyone in the bargaining unit (as required by statute)⁷ rather than just the union members.

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¹ General Motors Corp., 133 N.L.R.B. No. 21 (Sept. 29, 1961).

² 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a) (3) (Supp. II, 1961).

³ General Motors Corp., 130 N.L.R.B. 481 (1961).

⁴ IND. ANN. STAT. § 40-2701 to -2706 (Supp. 1961).

⁵ General Drivers Local 498 v. Higgins, 30 U.S.L. WEEK 3107 (U.S. Oct. 10, 1961).

⁶ KAN. CONST. art. 15, § 12.

⁷ 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

The agency shop is not new,⁸ but did not gain widespread use until recent years when it became a fairly successful device to outmaneuver the increasing number of state-enacted right to work laws outlawing union security devices.⁹ It is commonly believed that Justice Rand originated the agency shop in *Ford Motor Co. of Canada*,¹⁰ an arbitration proceeding; however, there were agency shop provisions in collective bargaining agreements in the United States before World War II.

Although it has been alleged that "several such provisions came into effect as early as 1942 under the auspices of the National War Labor Board,"¹¹ and that the War Labor Board "established precedence through its directive decisions,"¹² the War Labor Board's Reports indicate that the Board upheld such agency shop provisions only where they had been voluntarily agreed upon previously by the parties¹³ and the Board simply gave sanction to such agreements through its directive orders. The Board's policy was stated clearly in *Southern Colorado Power Co.*:¹⁴ the union is entitled to renewal

⁸ One of the forerunners of the agency shop was the work permit system used so extensively in the building and craft unions. In order to work, a non-union man paid a fee to the union and was issued a permit to work on a union job. He did not become a union member and when the job was finished the permit expired. See McConkey, *Was the Agency Shop Prematurely Scrapped?*, 9 LAB. L.J. 150 (1958). See also DEMPSEY, *THE OPERATION OF THE RIGHT TO WORK LAWS* 42 (1961), stating that an agency shop provision was prohibited under the 1934 amendment to the Railwork Labor Act, § 2, ch. 691, 48 Stat. 1186 (1934) (amended by 62 Stat. 909 (1948), as amended, 45 U.S.C. § 152 (1958)).

⁹ This type of union security has also been called by a variety of other names: *maintenance of dues payment*, 26 LAB. ARB. REP. 956 (1956); *support money clause*, Public Service Co., 89 N.L.R.B. 418 (1950); *bargaining agent fee*, Spielmans, *Bargaining Fee Versus Union Shop*, IND. & LAB. REL. REV. 609 (1957); *universal check-off*, McConkey, *supra* note 8, at 151; *Rand formula*, Jones, *The Agency Shop*, 10 LAB. L.J. 781 (1959).

¹⁰ 1 Lab. Arb. 439 (1946).

¹¹ Jones, *supra* note 9, at 785.

¹² *Ibid.* Jones also refers to Federal Shipbuilding & Drydock Co., 1 W.L.R. 140 (1942), as an early agency shop decision by the War Labor Board. Actually this case involved a maintenance of membership agreement on which a number of employees reneged before the contract expired. The action of the Board was simply ordering compliance with their pledge, and the payment of delinquent dues so ordered was not in the nature of a fee for bargaining services since it was predicated on the employees' voluntary membership in the union as a condition of employment for the duration of the contract.

¹³ The War Labor Board upheld agency shop provisions in the contracts in Alexander Primes Co., 21 W.L.R. 219 (1945), Southern Colorado Power Co., 18 W.L.R. 314 (1944), and Cambridge Tile Mfg. Co., 2 W.L.R. 271 (1942).

¹⁴ 18 W.L.R. 314 (1944).

of contract provisions requiring all employees, including non-union members, to pay stipulated union dues to maintain the bargaining agency, since the parties voluntarily agreed to such a provision in a prior contract, and it is established Board policy to extend union security provisions entered into through collective bargaining. There does not appear to be a single instance in which the Board ordered the inclusion of such provision in a collective agreement absent prior agreement between the parties.

NLRB Decisions Concerning the Agency Shop

The recent NLRB decision concerning the agency shop's legality under the Labor Management Relations Act is notable on at least two counts. First, it is a fairly rare occasion that the Board reviews one of its decisions, and second, probably even rarer for it to reverse one of its decisions. In the principal case, the Board ruled four-to-one that the agency shop was lawful under the act. One influential newspaper stated that "the vote by the board, which contains two recent Kennedy appointees, reversed an earlier 3-2 decision of a board dominated by Eisenhower men."¹⁵ Whether intentional or not, this casts the Board's decision in an unfavorable light, making it appear more a political decision than one based on the facts in relation to the law. The Board's action, however, does not deserve this kind of interpretation, as a brief review of NLRB decisions concerning the agency shop will disclose.

The agency shop issue was first squarely presented to the NLRB in 1950 in *Public Service Co.*¹⁶ The contract between the company and the union contained a support money provision calling for payment of two dollars monthly to the union by everyone in the bargaining unit. Petitioner Smith, having received notice from the union that he was two months delinquent in his payments, sent a check to the union for his back dues and initiation fee along with his application for membership in the union. For undisclosed reasons Smith was denied membership and his initiation fee was refunded. Thereafter, Smith refused to make any more support money payments and was subsequently discharged.

Since the proviso to section 8(a)(3) of the Labor Management Relations Act¹⁷ was controlling, the question involved was whether

¹⁵ The Wall Street Journal, Oct. 2, 1961, p. 7, col. 2.

¹⁶ 89 N.L.R.B. 418 (1950).

¹⁷ This proviso reads: "Provided, That nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organi-

the proviso to this section protected union security provisions other than actual membership.¹⁸ The trial examiner applied the principle that provisos are to be strictly construed and, thus, the proviso permitted no alternative to membership. The Board did not agree. It found the legislative intent of the proviso permissive rather than exclusive, and that it was reasonable to infer that any agreement legally consummated was immunized by the terms of the proviso, including agreements affording varying measures of security to a contracting labor organization, other than membership guarantees. Since the act was expressly designed to promote equality in bargaining power, to construe the term "membership" under the proviso as denoting the *sole* requirement that a union could obtain in a contract as a legitimate measure of security would restrict, rather than aid, collective bargaining. The Board therefore concluded that it was hardly likely that Congress could have intended that the bargaining agent be successful in obtaining only the stronger forms of union security (membership guarantees), and that lesser concessions on the part of employers would not be accorded the protection of the proviso.¹⁹

In 1952 the NLRB was confronted again with the agency shop issue in *American Seating Co.*²⁰ and again upheld the contract provision "because the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining support payments from nonunion members who would otherwise be 'free riders'" ²¹ Here the Board made reference to Senator Taft's statement before the Senate on April 23, 1947, concerning the union shop:

[I]f the man is admitted to the union, and subsequently is fired from the union for any reason other than nonpayment of dues, then the employer shall not be required to fire that man. In other words, what we do, in effect, is to say that no one can get a free ride in such a shop. That meets one of the

zation . . . 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, which ever is later" 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a) (3) (Supp. II, 1961).

¹⁸ 89 N.L.R.B. at 420.

¹⁹ *Id.* at 423-24.

²⁰ 98 N.L.R.B. 800 (1952).

²¹ *Id.* at 802.

arguments for the union shop. The employee has to pay the union dues.²²

These two decisions of the NLRB evidently settled the agency shop issue insofar as its legality under the Labor Management Relations Act was concerned for no further cases came before the Board until the recent Indiana case. Both the *Public Service Co.* case in Colorado and the *American Seating Co.* case in Michigan arose in jurisdictions not having right to work provisions. However, this proved a complicating factor in the Indiana case which first came before the Board in February 1961.

The Indiana Case

Although the right to work movement is purported to have started with the Florida constitutional amendment in 1944,²³ the real impetus for such state action²⁴ was provided by section 14(b) of the Labor Management Relations Act in 1947. This section permitted state laws having more restrictive provisions regarding union security to take precedence over the federal statute.

In 1959 *Meade Elec. Co. v. Hagberg*²⁵ presented the question whether an agency shop under the Indiana right to work law²⁶ was permissible. The company contended that it was not since there was no real difference between the payment of dues and actual membership in a labor organization.

Judge Kelley, writing for the Indiana Appellate Court, pointed out that the language of the Indiana statute contained no prohibition against the requirement of the payment of fees or charges to a labor organization, but applied only to agreements requiring union membership as a condition of employment, and was not intended to outlaw the agency shop. Noting that Indiana had enacted its law after most

²² 93 CONG. REC. 3837 (1947). See also *id.* at 3959; JOINT COMMITTEE ON LABOR-MANAGEMENT RELATIONS, 80TH CONG., 2D SESS., REPORT ON LABOR-MANAGEMENT RELATIONS 52 (Comm. Print 1948).

²³ Dempsey, *op. cit. supra* note 8, at 42. Also, Kansas enacted a statute in 1943 providing that employees had the right to form, join and assist labor organizations or to refrain from any or all such activities. KAN. GEN. STAT. ANN. § 44-803 (1950).

²⁴ Twenty-three states enacted some form of right to work statute; four of them later repealed (Delaware, 1959; Louisiana, 1956; Maine, 1948; New Hampshire, 1949). Of the nineteen remaining state statutes, eleven have specific provisions against forced payment of dues and fees to a labor organization. Indiana enacted its law in 1957. It contained no such prohibition.

²⁵ 129 Ind. App. 631, 159 N.E.2d 408 (1959).

²⁶ IND. ANN. STAT. §§ 40-2701 to -2706 (Supp. 1961).

states had done so and that two distinct types of right to work statutes then existed in this country,²⁷ Judge Kelley reasoned that had the Indiana legislature intended to make payments to unions illegal it would have so provided in the statute.

Subsequent to this decision, the United Automobile Workers asked General Motors Corporation to bargain concerning an agency shop in its Indiana plants. General Motors declined. Thereafter, the United Automobile Workers filed refusal to bargain charges with the NLRB. In February 1961, the NLRB dismissed the charges against General Motors with a bare majority opinion, three-to-two,²⁸ which upset prior Board decisions regarding the legality of the agency shop under the Labor Management Relations Act. Each of the three Board members forming the majority (Kimball, Jenkins and Leedom, Chairman of the Board) applied different reasoning. Kimball, taking the broadest position, stated that the agency shop was not a permissible form of union security under the act, whether or not the question arose in a right to work state.²⁹ Jenkins stated that support money could be considered lawful *only* if offered as an option to a valid contract provision requiring union membership.³⁰ Leedom stated that an agency shop arrangement, whatever its status under Indiana law, could not be considered lawful under the act in a right to work state.³¹ Leedom further stated that reliance by the General Counsel and the United Automobile Workers upon prior Board decisions was misplaced since neither case had arisen in a right to work jurisdiction. Therefore, there was no legal impediment to preclude the parties from entering into contracts requiring all employees to be union members, and they made such contracts.³² In the instant case, however, the parties were not free to so contract. They could not require membership as a condition of employment, and, therefore, could not waive a right they did not have to require a lesser form of union security.³³

²⁷ The distinction noted by Judge Kelley was that some state statutes expressly prohibited forced payment of dues and fees to a union. As pointed out in note 24 *supra* the Indiana statute contained no provision either prohibiting or permitting forced payment of dues or fees.

²⁸ 130 N.L.R.B. 481 (1961).

²⁹ *Id.* at 499.

³⁰ *Id.* at 487.

³¹ *Id.* at 485.

³² *Id.* at 486-87.

³³ The dissenting members, Fanning and Rogers, stated that the agency shop was a legal form of union security under the act since that statute only defines the maximum form of union security permissible and all lesser forms are therefore clearly legal. *Id.* at 502. This dissent accords with the two prior Board decisions. Public Service Co., 89 N.L.R.B. 418 (1950); American Seating Co., 98 N.L.R.B. 800 (1952). See text at notes 16 and 20 *supra*.

Shortly after this decision, President Kennedy appointed replacements for two of the Board members. Kimball, whose term expired, was succeeded by Frank W. McCulloch, who replaced Leedom as chairman. Jenkins, who resigned to take a job on a regional board, was succeeded by Gerald A. Brown. Immediately thereafter the United Automobile Workers requested that the case be reopened and that the Board reconsider its February decision.³⁴ The Board granted the request, and on September 29, 1961, reversed its February decision, holding that the agency shop was legal under the act.³⁵ The decision, however, does not apply to a situation in which a state law has been interpreted by state courts as forbidding agency shop clauses in union contracts.³⁶

The majority opinion, based on the dues delinquency proviso to section 8(a)(3), cited the 1951 Seventh Circuit Court of Appeals decision in *Union Starch & Ref. Co. v. NLRB*.³⁷ In this case the court upheld an NLRB ruling that a union cannot require anything other than the payment of dues and fees as a condition of employment. Employees who were willing to pay their union dues and initiation fees could not be required, under penalty of discharge, to apply for union membership or participation in union activities. The court said that Congress in writing the Labor Management Relations Act intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees.³⁸

The Board majority noted that it was never Congress' intention to give non-union employees a free ride and that under an agency shop agreement the individual employees would still have complete freedom to decide whether to join a union.³⁹ The Board ordered General Motors to bargain with the United Automobile Workers on the proposed agency shop in its nine Indiana plants.⁴⁰ Although a

³⁴ See *The Wall Street Journal*, Oct. 2, 1961, p. 7, col. 2.

³⁵ 133 N.L.R.B. No. 21 (Sept. 29, 1961).

³⁶ State right to work provisions interpreted by their respective attorney generals to preclude agency shop provisions: Kansas, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, and Texas. *PH LAB. SERV.* ¶ 46, 175 (1961).

³⁷ 186 F.2d 1008 (7th Cir. 1951). ³⁸ *Id.* at 1012.

³⁹ The sole dissenter, Leedom, contended that "for all practical purposes, the very thing is achieved . . . in a right to work state quite as effectively as if the union contract expressly provided for union membership as a condition of employment." 133 N.L.R.B. No. 21 (Sept. 29, 1961).

⁴⁰ The plants are located in Anderson, Bedford, Kokomo, Indianapolis, Marion and Muncie.

Board decision is subject to appeal, both General Motors and the United Automobile Workers had agreed prior to the Board's determination that they would accept it as final. Thus, there seems little doubt, as far as the Board and section 8(a)(3) are concerned, that the agency shop is a legal form of union security under the federal statute. However, the Board did not decide whether section 14(b)⁴¹ allows states to outlaw the agency shop.

The Kansas Case

Another phase of the controversy is exemplified by the Kansas case,⁴² which involved an agency shop clause in the Teamsters Local 498 contract with the Cardinal Manufacturing Company. A lower state court upheld the agency shop provision under the broad language of the Kansas right to work constitutional amendment. On appeal to the Kansas Supreme Court, Justice Schroeder, writing the majority opinion, noted that in the evolution of federal law on the subject, the Wagner Act placed no restraints on compulsory union membership under voluntary closed shop agreements.⁴³ The states, however, were allowed to pursue their own more restrictive policies.⁴⁴ With the enactment of the Labor Management Relations Act, however, closed shops were made illegal and union shops were sanctioned, but states were given the right under section 14(b) to enact more restrictive statutes regarding union security which should take precedence over the federal statute. Thus, in November 1958, Kansas adopted a constitutional amendment which provided that employees had the right to work regardless of membership or non-membership in a labor organization.⁴⁵

The union relied upon the Indiana decision, since neither the Indiana statute nor the Kansas constitutional provision specifically mention payments to a union. Justice Schroeder pointed out, however, that the Indiana law was a legislative enactment calling for a different rule of construction than is ordinarily applied to constitu-

⁴¹ This section provides: "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 Territorial law." 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

⁴² *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456 (1961).

⁴³ *Id.* at —, 360 P.2d at 461.

⁴⁴ *Ibid.*, citing *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relation Bd.*, 336 U.S. 301 (1949).

⁴⁵ KAN. CONST. art. 15, § 12.

tional amendments, and that it contained a penalty clause for non-compliance.⁴⁶ In drafting the constitutional amendment, Justice Schroeder stated, the Kansas legislature must have been fully aware of the only enforceable criteria of membership recognized by the act, *i.e.*, the payment of dues and initiation fees.⁴⁷

Therefore . . . the expression "membership in a labor organization as a condition of employment" in section 14(b) of the Taft-Hartley Act becomes synonymous with payment of union dues and fees *for enforcement purposes* under the union-security agreements so far as labor unions or employers are concerned.⁴⁸

The natural and logical interpretation of the Kansas constitutional amendment, prohibiting compulsory membership in a labor organization as a condition of employment . . . , includes by necessary implication a prohibition against forced payment of initiation fees, union dues and assessments, or the equivalent, by a worker to a labor organization as a condition of employment⁴⁹

In 1943 Kansas had enacted a statute which gave to employees the right to form, join, or assist labor organizations, to bargain collectively and to engage in concerted activities, and it also guaranteed their right to refrain from any or all such activities.⁵⁰ Justice Schroeder interpreted this enactment to mean that the right of employees to refrain from assisting labor organizations includes the right to refrain from giving it financial assistance as well as personal assistance.⁵¹ Since Kansas did not enact its constitutional amendment until 1958, the legislature was undoubtedly aware of existing laws and decisions and, according to the court, it must have decided that it was unnecessary to include a more explicit provision, or that to do so would be superfluous. The court stated: "The alternative *would* require this court to declare that the constitutional amendment serves no useful purpose at all. It would permit the appellees [the

⁴⁶ "Here the court is not confronted with a penal statute to be strictly construed, but a remedial constitutional amendment to be liberally construed to effectuate the purpose for which it was adopted." 188 Kan. at —, 360 P.2d 464.

⁴⁷ *Ibid.*, citing *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

⁴⁸ 188 Kan. at —, 360 P.2d at 465. (Emphasis added.)

⁴⁹ *Ibid.*

⁵⁰ KAN. GEN. STAT. § 44-803 (1950).

⁵¹ 188 Kan. at —, 360 P.2d 467.

union] to circumvent its natural and logical interpretation."⁵² The court therefore held that the agency shop was invalid under the Kansas constitutional amendment. And, by refusing to review the case, the United States Supreme Court left the matter as an open question. But the problems attendant on the agency shop issue have not been resolved by the Kansas decision, the Supreme Court or the NLRB.

UNRESOLVED PROBLEM AREAS

One problem left unanswered is the status of the agency shop in those states having right to work laws⁵³ with no specific prohibition concerning the payment of fees to a union (such as that in Indiana), but minus the penalty clause found in the Indiana statute.⁵⁴ If we assume that the canons of statutory construction amount to more than merely conventional judicial attitudes, what construction will be placed on these statutes? Without any specific legislative intent to guide them, it will depend upon the predilections of the state courts—toward liberal or narrow construction—or on the court's philosophy of labor relations.

Another problem of greater magnitude is whether a right to work statute which specifically prohibits an agency shop arrangement violates section 14(b) of the Labor Management Relations Act. This is not a question to which state courts can give the final answer. As Judge Kelley stated in the Indiana case:

The Labor Management Relations Act . . . by section 14(b) . . . specifically authorizes and recognizes the validity of Right to Work Laws of the several states. Now, whether or not such authorization and recognition would extend to or authorize a state legislature to validly "outlaw" such "agency shop" clauses would perhaps require and necessitate an extensive exploration of the doctrine of federal preemption [*sic*]⁵⁵

⁵² *Id.* at —, 360 P.2d 466. (Emphasis is by the court.)

⁵³ States having right to work constitutional amendments are: Arizona, 1946; Arkansas, 1947; Florida, 1944; Mississippi, 1960; Nebraska, 1946; and South Dakota, 1946.

⁵⁴ IND. ANN. STAT. § 40-2705 (Supp. 1961).

⁵⁵ *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, —, 159 N.E.2d 408, 411 (1959). This quotation does not indicate, as has been suggested in Jones, *supra* note 9, at 785, "that a statute barring an agency shop would be invalid under sec. 14(b) of the NLRB, as amended . . ." It simply indicates the possibility that such a question might arise.

Justice Schroeder examined the problem at some length in the Kansas decision. In summary he found that inasmuch as there were a number of specific state laws prohibiting payment to unions prior to the enactment of section 14(b), Congress must have had these statutes in mind when it took such action. He called particular attention to the report of the House Managers, with reference to section 13 of H.R. 3020 and section 14 of the conference committee amendments:

Under the House bill there was included a new section 13 of the NLRA to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, *maintenance of membership*, or any other form of *compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State law.⁵⁶

With this background and expressed intent of Congress to leave the states free to prevent all forms of compulsory unionism, and taking into consideration detailed state statutes, as well as the broader constitutional amendments adopted by others such as Kansas,⁵⁷ Justice Schroeder concluded that there is little question that Congress and many state legislatures have construed the words "membership in a labor organization as a condition of employment" as including forced payments to unions.

Obviously, if this were not true and the "agency shop" provision in a union-security agreement is not within the compass of section 14(b), statutes in those states in which the more detailed language has been used prohibiting forced payments to unions of dues, fees and other charges would fall by their own weight.⁵⁸

Since the unions are working for the repeal of right to work laws in a number of states, this is the problem area that could conceivably furnish the next test case, and since federal pre-emption is involved, the United States Supreme Court would have to furnish an answer.

Individual rights is another troublesome problem which many

⁵⁶ 93 CONG. REC. 6378 (1947). (Emphasis added.)

⁵⁷ KAN. CONST. art. 15, § 12.

⁵⁸ *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, —, 360 P.2d 456, 468 (1961).

feel should be reviewed.⁵⁹ To proponents of right to work legislation it is incomprehensible that a man who has demonstrated his unwillingness to join a union, who has never authorized a union to negotiate and contract for him, who has not participated in such negotiation or its preparation, or ratified its results, should be forced to pay support money to that union. In other words, they do not agree with the majority rule principle of collective bargaining. It is hardly likely, however, after more than three decades of federal legislation embodying the majority rule concept—and the subsequent tests of constitutionality—that any court would find that the agency shop abridged the rights of non-union employees.

By analogy to the political process, each employee, union and non-union alike, who falls within the unit over which the elected representative has jurisdiction, is subject to all provisions respecting his employment upon which the representative and his employer agree. Like the changes in law effected by the legislative branch of government, changes in the employment agreement bilaterally determined bind the employee to each change regardless of his individual wishes in the matter.⁶⁰ Thus, the majority rule in collective bargaining is firmly established.

Section 302 of the Labor Management Relations Act⁶¹ presents another problem which might arise in connection with an agency shop provision. This section prohibits employer contributions to unions other than "money deducted from the wages of employees in payment of membership dues in a labor organization." Here the question is squarely presented: what constitutes membership in a

⁵⁹ William T. Harrison, Chairman of the National Right to Work Committee, wrote to Roger Blough concerning the agency shop provision in the 1960 steel contract: "It is difficult to understand why the steel companies saw fit to impose upon fellow Americans the requirement that they must support a private association whose services they do not seek. . . . We trust that negotiators of subsequent contracts will exhibit more concern for individual rights." *The Durham Sun*, Feb. 9, 1960, p. 2, col. 1.

⁶⁰ See Weyand, *Majority Rule in Collective Bargaining*, 45 COLUMN. L. REV. 556, 561 (1945): "Nor can the employee by any individual contract alter the rules governing his employment fixed by the collective agreement entered into by the union elected by a majority of the employees in the unit any more than a citizen by private contract can alter the laws enacted by the legislature." The legislative adoption of the majority rule principle as the central concept of the collective bargaining structure constitutes a complete repudiation of all previous efforts to deal with the problem. In contrast to the concern of the common law with the assumed intent of each employee, the majority rule principle makes the intent of any or all of the individual employees immaterial.

⁶¹ 61 Stat. 157 (1957), 29 U.S.C. § 186(c)(4) (1958).

labor organization? If it is determined that the forced payment of dues and fees does not constitute membership, then any arrangement for a universal check-off would involve the employer's deducting dues from the wages of non-union employees and turning it over to the union, which is forbidden. Inasmuch as section 302 carries a penalty provision, enforceable by the United States Attorney General, the employer places himself in jeopardy of a criminal action.⁶² On the other hand, assuming that the majority rule in collective bargaining is controlling, and further, that union membership and the payment of dues are synonymous as far as the enforcement provisions of the act are concerned, a problem could arise concerning the voluntary individual written authorization for the check-off of union dues. Since a man cannot be forced to agree to a check-off of his dues, the union faces the problem of exacting such dues from an employee hostile to the union without "restraining, coercing and intimidating" such employee in his rights under the act.

On the surface, it appears that the threat of discharge for dues delinquency would be sufficient. However, an interesting situation existed from 1956 to 1959 in North Dakota which has twice ruled that the agency shop is a valid form of union security under its right to work law. In January 1956, the Attorney General of North Dakota ruled that such an agreement, while valid, could not be used as a basis for discharging or refusing to hire an employee who refused to pay a union fee for the services and benefits he received under the union contract.⁶³ Therefore, the agency shop was unenforceable. In August of 1959 the North Dakota Attorney General ruled again that the agency shop was legal and dues and fees could be collected from non-union employees in the bargaining unit provided that such charges were based on the actual costs of representation.⁶⁴

In Nebraska a contractual agreement for an agency shop does not constitute a misdemeanor, but any attempt to enforce it is unlawful since its purpose is illegal and a misdemeanor under the right to work statute and the constitutional amendment.⁶⁵ Under the

⁶² See McConkey, *supra* note 8, at 151.

⁶³ PH LAB. SERV. *N.D.* ¶ 46,175 (Jan. 13, 1956).

⁶⁴ *Id.* at ¶ 46,175 (Aug. 24, 1959).

⁶⁵ NEB. CONST. art. 15, § 13; NEB. REV. STAT. § 48-217 (1960); *Lincoln Fed. Union v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 31 N.W.2d 477 (1948), *aff'd*, 335 U.S. 525 (1949). For a discussion of the Nebraska statute, see Swindler, *The Right to Work, A Decade of Development*, 36 NEB. L. REV. 276 (1957).

South Dakota right to work law, a union cannot contract to become the sole bargaining agent for all employees "including non-union, non-consenting employees, working in the departments which it is trying to organize."⁶⁶ However, an individual employee may voluntarily agree to an agency shop arrangement, but reprisal by either the company or union against an employee refusing to give his consent would violate the law. Ostensibly, it would also be a violation to try to force the employee to live up to his voluntary agreement.

Another facet of the problem concerns the amount that may properly be charged non-union employees under an agency shop arrangement for bona fide collective bargaining services. As indicated above, the Attorney General of North Dakota stated that if, as claimed by a union representative, all dues, assessments, and initiation fees paid by union members are legitimate costs of bargaining and representation furnished by the union to members and non-union employees alike (only insurance, health and welfare benefits and pensions not being part of such costs), and are used solely for such purposes, then the union can base its charge to non-union employees upon such dues, assessments, initiation fees and other charges which are used only for union bargaining and representation.⁶⁷ However, the charges were not spelled out specifically.

In *International Ass'n of Machinists v. Street*,⁶⁸ arising under the 1951 amendment to the Railway Labor Act,⁶⁹ the Georgia Supreme Court held that it was unconstitutional to compel a man to contribute money through a union to support political or economic programs which he opposes. In a similar case in North Carolina,⁷⁰ the court reached a different conclusion. As a result of these conflicting opinions, the *Street* case went to the United States Supreme Court⁷¹ which remanded the case to the Georgia court, but in its remand order it decided that railroad unions could not support political activities, against the expressed wishes of a dissenting employee, with dues money exacted from him under a union shop contract. The Georgia court was ordered to devise the specific remedy in this case. In turn, the Georgia Supreme Court⁷² remanded the case to

⁶⁶ S.D. CODE § 17.1101 (1960), LAB. REL. REP. S.D. 52:267 (Sept. 3, 1958).

⁶⁷ PH LAB. SERV. N.D. ¶ 46,175 (Jan. 13, 1956).

⁶⁸ 215 Ga. 27, 108 S.E.2d 796 (1959).

⁶⁹ 64 Stat. 1238 (1951), 45 U.S.C. § 152(11) (1958).

⁷⁰ *Allen v. Southern R.R.*, 249 N.C. 491, 107 S.E.2d 125 (1959).

⁷¹ *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

⁷² *International Ass'n of Machinists v. Street*, 122 S.E.2d 220 (Ga. 1961).

the trial court to try to devise a practical method of refunding past dues payments and reducing future payments so that dissenting members contribute to the cost of collective bargaining alone. But if this could not be done, the lower court was told to enjoin the union from all spending for political activity. Until these "legitimate costs" of collective bargaining are spelled out in greater detail, the union can approach the problem only on a trial and error basis.

CONCLUSION

At the present time there seems no doubt that the agency shop is a legal form of union security under the Labor Management Relations Act. As to whether the agency shop is valid under state right to work laws, both the Supreme Court of the United States and the NLRB seem to leave this to the states to determine. However, among the state courts there is considerable confusion as to whether section 14(b) of the federal statute grants to the states the authority to outlaw the agency shop.

Currently, three right to work states—Indiana, Florida and North Dakota—none of which specifically prohibits support payments, interpret their statutes to allow the agency shop. Of these, only Indiana is heavily industrialized and heavily unionized. Arizona, Kansas, Nebraska, Nevada and South Dakota—more agricultural and less unionized, but similarly silent as to support money payments—hold the agency shop invalid under their right to work provisions. Alabama, Arkansas, Georgia, Iowa, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Utah and Virginia specifically outlaw the payment of dues, fees and charges to a labor organization as a condition of employment. The Louisiana law, which was repealed in 1956 for all except agricultural employees, also contains a specific prohibition of the agency shop.

There is still one aspect of the agency shop issue that has not been explored but deserves some mention. Viewed in the larger perspective of the long run trend of unions to gain a greater degree of security, the agency shop appears more as a "tempest in a teapot" than a major issue. As a stop-gap measure on the road to greater security—a temporary detour around the right to work road-block until it can be removed by outright repeal—it will undoubtedly work for the unions. However, if the unions lose sight of their major goal, and the agency shop becomes an end in itself, then it could work

against them, weaken their fight for security and dissipate their energies and financial resources which might be spent more profitably in organizational campaigns.

While repeal efforts are underway in most of the right to work states, the unions have not been very successful in their endeavors. Since the southern states comprise the major right to work bloc, with their tradition of anti-unionism, the outlook for repeal is not bright. Meantime, the agency shop is outlawed successfully in these states so that, unless the unions can overturn these statutes under section 14(b), union security in the South is a lost cause.