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has every advantage.”⁷⁹ The development of the defendant’s rights to discovery have included substantial rights to examine heretofore secret grand jury testimony. Unfortunately, concomitant rights of the grand jury witness have not developed as rapidly. Too often the courts, in denying the witness a copy of his own grand jury testimony, refuse to examine the present validity of the “historical” justifications for grand jury secrecy. Such an examination leads inexorably to the conclusion that these justifications are not viable where the witness is seeking his *own* testimony, and that the benefits of disclosure mandate it *as of right*.

ALAN A. HARLEY

Labor Law—Application of Right-To-Work Laws in Multistate Workforce Situations

Sections 8(a)(3)¹ and 14(b)² of the Labor Management Relations (Taft-Hartley) Act³ provide that union⁴ and agency⁵ shop agree-

79. 291 F. 646, 649 (S.D.N.Y. 1923).

1. 29 U.S.C. § 158(a)(3) (1970). This section provides in part:
(a) It shall be an unfair labor practice for any employer—

. . . .
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later

2. 29 U.S.C. § 164(b) (1970). This section provides: “Nothing in this subchapter 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.”

3. Act of June 23, 1947, ch. 120, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-187 (1970)).

4. Section 8(a)(3), passed in 1947 as a reaction to widespread abuses of closed shop agreements originally allowed under § 8(3) of the National Labor Relations Act, Act of July 5, 1935, ch. 372, sec. 8(3), 49 Stat. 452, bans the closed shop in industries covered by federal labor law, but continues to permit union shops subject to § 14(b). The union shop requires the employee to join the union within a specified time after hiring, whereas the closed shop requires union membership as a prerequisite to both initial and continued employment.

5. It is well settled that § 14(b) applies to the agency shop as well as the union shop agreement. See *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963).

ments are valid except when they conflict with a state's right-to-work law.⁶ Congress, by its passage of the Taft-Hartley Act, chose not to establish a uniform national rule allowing the union shop, and left the states free to pursue more restrictive policies concerning union security agreements.⁷ However, "the language of § 14(b) provides no clear guidance for determining" which, if any, state's law "should prevail in a multijurisdictional situation."⁸ In a case of first impression, *Oil, Chemical & Atomic Workers Union v. Mobil Oil Corp.*,⁹ the United States Supreme Court held that the employees' predominant job situs is the controlling factor in determining which state is empowered to prohibit agreements requiring union membership as a condition of employment.¹⁰

Mobil Oil Corporation Marine Transportation Department, Gulf-East Coast Operations (Company), is headquartered in Beaumont, Texas, from which it operates a fleet of eight ocean-going oil tankers.¹¹ The Oil, Chemical and Atomic Workers International Union, AFL-CIO, with its Local 8-801 (Union), is the exclusive collective bargaining representative of 289 unlicensed seamen who man the Company's

Under the agency shop, union membership is not a condition of continued employment; in lieu of such membership, however, employees are required to pay union dues and initiation fees as if they were members. The agency shop agreement was designed to curb the abuses of compulsory unionism while at the same time preventing "free riders" who benefited from union representation without having to pay union dues. S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407 (1948).

6. See generally Morgan, *Right-to-Work Laws: The Current State of Affairs*, 23 CASE W. RES. L. REV. 570 (1972); Skinner, *Legal and Historical Background of the Right-to-Work Dispute*, 9 LAB. L.J. 411 (1958).

7. See *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 313-14 (1949). Section 14(b) "was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements. . . . It was desired to 'make certain' that § 8(a)(3) could not 'be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy.'" *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963) (quoting H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 60 (1947)). "By [the enactment of § 14(b)], Congress has not only authorized multifariousness on [union security agreements], but practically guaranteed it." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 317 (1971) (White, J., dissenting). "There is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws . . ." *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963).

8. *Oil, Chem. & Atomic Workers Union v. Mobil Oil Corp.*, 96 S. Ct. 2140, 2151 (1976).

9. 96 S. Ct. 2140 (1976).

10. *Id.* at 2144.

11. *Id.* at 2143. Additionally, all personnel records are maintained in Beaumont, and all final hiring decisions are made there. *Id.*

tankers.¹² These seamen perform all of their duties aboard ship, and eighty to ninety percent of their work is performed while the ships are on the high seas, outside the territorial bounds of Texas.¹³

In 1969 the Company and the Union entered into a collective bargaining agreement that contained an agency shop clause.¹⁴ This clause compelled all employees to decide within thirty-one days from the date of employment either to join the union or pay the regular union dues and initiation fees.¹⁵ In 1971 the Company initiated a declaratory judgment action under section 301 of the Taft-Hartley Act¹⁶ to determine the validity of the agency shop clause. The Company contended that the clause violated the Texas right-to-work laws and was, therefore, void and unenforceable.¹⁷ In response, the Union asserted that the job situs of the seamen was predominantly on the high seas, outside the State's territorial bounds, and that the Texas right-to-work laws should not be applied to the union security provision.¹⁸

The district court, after a full evidentiary hearing, found that Texas was more closely connected with the company/seamen employment relationship than any other state, and, therefore, Texas law ap-

12. *Id.* at 2142 n.3, 2143. Of the 289 seamen in question, 123 were residents of Texas and 60 were residents of New York. The others were spread over 21 states. Sixty percent of the workers applied for their jobs in Beaumont and forty percent applied in New York. Beaumont, New York City and Providence, R.I., comprised the three cities designated by the seamen as "home port," but this designation was used solely for determining travel allowances to and from their residences. *Id.* at 2143.

13. *Id.* The seamen have the option of drawing their wages aboard ship, having allotments sent from Beaumont to designated payees, or both. *Id.*

14. *Id.* at 2142-43. The collective bargaining agreement was negotiated and executed in New York and was re-executed in Texas. *Id.* at 2143.

15. *Id.* at 2143; see note 5 *supra*.

16. 29 U.S.C. § 185 (1970).

17. 96 S. Ct. at 2143. It was conceded by the parties that Texas law forbids both union shop and agency shop agreements. *Id.* The following statutes are in point:

It shall be unlawful for any labor union, any labor organizer, any officer, any agent or representative or any member of any labor union to collect, receive or demand, directly or indirectly, any fee, assessment, or sum of money whatsoever, as a work permit or as a condition for the privilege to work from any person not a member of the union

TEX. REV. CIV. STAT. ANN. art. 5154a, § 8a (1971);

It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

Id. art. 5154g, § 1;

"No person shall be denied employment on account of membership or nonmembership in a labor union." *Id.* art. 5207a, § 2.

In addition, the Texas Attorney General has decided that union shop agreements violate the above statutes. OP. ATT'Y GEN. TEX. No. WW-1018 (March 14, 1961).

18. 96 S. Ct. at 2144.

plied to terms of the collective bargaining agreement.¹⁹ Accordingly, the court declared that the agency shop clause was invalid in contravention of the Texas right-to-work laws. A three-member panel of the Court of Appeals for the Fifth Circuit reversed.²⁰ On rehearing en banc,²¹ however, the full court vacated the panel's decision and held that Texas law was applicable despite the fact that the employees' job situs was on the high seas.²²

The Supreme Court reversed. Writing for a majority of five,²³ Justice Marshall stated that section 14(b) of the Taft-Hartley Act does not authorize the operation of a state's right-to-work laws to void a union security agreement, permitted under section 8(a)(3), when the employees' job situs is located outside the state having such laws.²⁴ The Court concluded that since the employees' predominant job situs was on the high seas, Texas' right-to-work laws could not apply to the agency shop provision.²⁵

19. *Mobil Oil Corp. v. Oil, Chem. & Atomic Workers Union*, 81 L.R.R.M. 2051, 2052 (E.D. Tex. 1972).

20. *Mobil Oil Corp. v. Oil, Chem. & Atomic Workers Union*, 483 F.2d 603 (5th Cir. 1973), noted in 11 Hous. L. REV. 709 (1974). The panel was divided with Judge Thornberry dissenting. The majority emphasized the predominant importance of the employees' job situs. Since state right-to-work laws can only apply to employees of that particular state and since the seamen's principal place of employment was on the high seas, the majority concluded that the seamen were not employees of Texas or any other state for the purposes of the collective bargaining agreement and, therefore, that state right-to-work laws could not apply. 483 F.2d at 610.

21. *Mobil Oil Corp. v. Oil, Chem. & Atomic Workers Union*, 504 F.2d 272 (5th Cir. 1974) (en banc), noted in 88 HARV. L. REV. 1620 (1975) and 44 U. CIN. L. REV. 384 (1975). Judge Thornberry wrote for the majority in an eight to six decision. Judge Ainsworth wrote a dissenting opinion, and Chief Judge Brown wrote a separate dissent. Brown, joined by Judge Dyer, stated that the case should rest in the primary jurisdiction of the NLRB. 504 F.2d at 287-89.

22. 504 F.2d at 275. After a careful analysis of the relevant contacts that Texas had with the seamen in question and the purposes of the Taft-Hartley Act, the court held that "the federal labor legislation, the predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right-to-work law to this employment relationship warrant application of the Texas law and, consequently, invalidation of the agency shop provision." *Id.*

23. Justice Stevens joined the majority except for the suggestion that federal policy favors permitting union security agreements. 96 S. Ct. at 2147-48. Chief Justice Burger concurred in the majority's judgment, *id.* at 2147, as did Justice Powell. Powell, however, stated in a separate opinion that the job situs test is neither appropriate nor required. He felt that seamen, as wards of admiralty, maintain a special status with respect to the regulation and control of their employment, and that they should be exempt from the operation of § 14(b). *Id.* at 2148; see text accompanying notes 51 & 52 *infra*. Justice Stewart, joined by Justice Rehnquist, dissented, stating that the place of hiring is a more appropriate test in determining the choice of law for union security agreements. *Id.* at 2148-55; see text accompanying note 33 *infra*.

24. 96 S. Ct. at 2144. The Court held that "it is the employees' predominant job situs rather than a generalized weighing of factors or the place of hiring that triggers the operation of section 14(b)." *Id.*

25. *Id.* at 2147. The Court emphatically concluded that if the employees' predomi-

To reach this result without any explicit statutory basis, the majority relied first upon its statutory interpretation of section 14(b) as it applies to section 8(a)(3). To the Court, section 8(a)(3), in dealing with union and agency shop agreements, directly relates to post-hiring conditions, both in "effect and purpose."²⁶ The Court reasoned that section 14(b) is simply a reflection of section 8(a)(3) in that the former section focuses on state regulation of the post-hiring employment relationship, the center of which is the job situs.²⁷ Additionally, the majority ascertained from the legislative history to the Taft-Hartley Act a congressional intent that the job situs was of central concern to section 14(b).²⁸

The Court was impressed by two practical considerations for the use of the job situs test. First, it concluded that the test minimized "the possibility of patently anomalous extra-territorial applications of any given State's right-to-work laws."²⁹ Secondly, the job situs test was

nant job situs is outside the bounds of any state, then no state has "sufficient interest" in the employment relationship to be able to apply its own right-to-work laws. *Id.* This conclusion effectively excludes all seamen in the maritime industry from state right-to-work laws. Although the Court stated that under this test it has not created an exemption for the entire maritime industry (*e.g.*, longshoremen and other workers whose job situs is still ashore), *id.*, it has done judicially for the majority of maritime workers what the 1951 Railway Labor Act Amendment, 45 U.S.C. § 152(11) (1970), did legislatively for railway and airline workers, that amendment having exempted rail and air transport unions from state right-to-work laws. By the mere fact that the Court settled on the job situs test, rather than a substantial contacts or place-of-hiring test, it excluded the operation of § 14(b) from the mobile maritime industry, for under the other tests state right-to-work laws would be allowed to extend out on the high seas.

26. 96 S. Ct. at 2145. This view is contrary to that of Judge Thornberry in his opinion for the Fifth Circuit, 504 F.2d at 277, and to that of Justice Stewart in the Supreme Court dissent, 96 S. Ct. at 2153, both of which saw the emphasis on the hiring process itself. The Court here properly concluded that the abuses of the hiring process were eliminated with the outlawing of the closed shop and with it, the hiring hall, and that, therefore, Congress' concern over the hiring process was exhausted upon its passage of § 8(a)(3). *Id.* at 2144-45; *see note 1 supra.* The focus is no longer on the hiring process but on conditions to be imposed upon an employee only after he is hired. *See S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407 (1948).* *See also NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41 (1963). The post-hiring conditions concern the benefits to be gained by union representation during the employment period, while the worker is on the job. 96 S. Ct. at 2145.

27. 96 S. Ct. at 2146. The Court emphasized the importance of the job situs to the employment relationship in describing it as that "place where the work that is the very *raison d'être* of the relationship is performed." *Id.*

28. *Id.* The House Committee Report on the Taft-Hartley Bill concluded that union or agency shop agreements would be valid "only if they are valid under the laws of any State in which they are to be performed." H.R. REP. NO. 245, 80th Cong., 1st Sess. 34 (1947), *reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 325 (1948).* The Court held that union security agreements are "performed" on the job situs. 96 S. Ct. at 2146.

29. 96 S. Ct. at 2146.

recognized as facilitating the determination of the validity of a union security agreement by parties who are in the collective bargaining process.³⁰

In his dissent, Justice Stewart, on the other hand, felt that the place of hiring is the critical factor in the analysis of the choice of state law.³¹ He buttressed this position with the conclusions: (1) the legislative intent of the Texas right-to-work laws focused on the hiring process;³² (2) the state of the place of hiring is most deeply concerned with the conditions of hire; and (3) the state of the place of hiring normally provides the largest portion of the workforce.³³

Although the Supreme Court majority in *Mobil* presented a tenable argument that Congress in 1947 intended for the job situs to be the focal concern of the operation of section 14(b), the dissent presented an equally plausible argument that Congress simply neglected to confront the choice of law problems in multistate workforce situations. Hence, reliance on the language of the statute and legislative history of section 14(b) as an approach to this issue results in tenuous legal conclusions at best. Therefore, the determination of which test to apply is better understood in light of the historical background and practical considerations that underlie the right-to-work controversy.

The National Labor Relations Act of 1935 (Wagner Act),³⁴ through the legalization of union security agreements, especially the

30. *Id.* at 2146-47.

31. *Id.* at 2152-53.

32. *Id.* at 2152. Finding no guidance from the language or legislative history of § 14(b), the dissent turned to the Texas statutes for assistance, weakly rationalizing that since § 14(b) allowed the individual states to prohibit union security agreements in accordance with their own state's policy, an analysis of Texas' policy concerning such agreements could shed light on how § 14(b) should be applied. *Id.* at 2152-53. Just because Texas right-to-work laws reflect a state concern over the hiring process, however, one cannot infer that all other states with right-to-work laws enacted them primarily because of the same concern. It appears to be arbitrary and capricious to impose upon all states a test that merely reflects one state's purpose in enacting its own right-to-work laws and to ignore the many and varied policies of the other right-to-work states. Otherwise, to allow the dissent's approach would be to narrow this decision to the application of Texas right-to-work laws only. Accordingly, the Court would subsequently have to analyze the right-to-work policies of every other state with a right-to-work law and formulate a test for each state in accordance with those policies. Needless to say, there could be as many tests as states, and the result would be an unworkable mixture of conflicting state policies being applied in a criss-cross fashion over the entire nation.

33. *Id.* at 2153. The dissent seems to have misinterpreted the Texas statutes as even applying to the hiring process, for concern over the hiring process as controlled by union security agreement was eliminated with the banning of the closed shop. Right-to-work laws reflect concern over conditions of employment *after* hiring. See note 26 *supra*.

34. 29 U.S.C. §§ 151-168 (1970).

closed shop, increased tremendously the power of labor unions at the expense of management by allowing the unions to control the hiring process.³⁵ By 1947, Congress felt that this authority had created an oversifting of power in labor's favor and that a necessary realignment should be imposed upon union/management relations in order to readjust this imbalance.³⁶ As a result, Congress passed the Taft-Hartley Act, which specifically outlawed the closed shop and, through the controversial section 14(b), allowed the individual states to outlaw all other forms of union security agreements.³⁷ The passage of the Taft-Hartley Act, viewed by the labor unions as a large set-back to their movement,³⁸ created the impetus for the current right-to-work controversy.³⁹

Debate on the right-to-work laws has flourished ever since.⁴⁰ Proponents of these laws bridle at the thought of compulsory union membership.⁴¹ The fact that federal labor policy⁴² allows for fifty-one percent of the employees in an employment relationship to impose union membership upon the remaining forty-nine percent without the latter's consent raises for right-to-work proponents an emotional issue primarily based on morality and individual freedom.⁴³ Opponents of these laws argue that without the authority to make union security

35. See also Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. II), 61 HARV. L. REV. 291 (1948); Skinner, *supra* note 6, at 416.

36. 96 S. Ct. at 2150; see S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407 (1948). See also notes 4 & 26 *supra*.

37. See notes 2 & 5 *supra*.

38. See generally Cox, *supra* note 35, at 296; Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233, 242 (1959).

39. See notes 6 & 7 *supra*. In fact, the nation's first right-to-work law was passed in Florida in 1944, three years before the Taft-Hartley Act. FLA. CONST. OF 1885, Declaration of Rights, § 12 (1944) (now FLA. CONST. art. I, § 6). The constitutionality of the right-to-work law was sustained by the Supreme Court in *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), and *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949). In *Lincoln Federal* the Court stated, "States have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of a federal constitutional prohibition or federal law." 335 U.S. at 536.

40. See generally Cox, *supra* note 35; Dempsey, *The Right-to-Work Controversy*, 16 LAB. L.J. 387 (1965); Eissinger, *The Right-to-Work Imbroglio*, 51 N.D.L. REV. 571 (1975); Morgan, *supra* note 6; Pollitt, *supra* note 38; Skinner, *supra* note 6; Warshal, "Right-to-Work," *Pro and Con*, 17 LAB. L.J. 131 (1966). Eleven years after the enactment of the Taft-Hartley Act, one index contained 23 typewritten pages on articles dealing with the right-to-work issue. See Hutchinson & Patterson, *List of Publications on the Right-to-Work Question* (1958), cited in Pollitt, *supra* note 38, at 234.

41. Eissinger, *supra* note 40, at 575.

42. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

43. See Pollitt, *supra* note 38, at 264.

agreements, unions become ineffective and unable to represent properly their members because of a dilution of their economic strength and power base.⁴⁴

With the passage of section 14(b), Congress determined not to force a uniform union security policy upon the states, but to allow each state to enact laws to reflect its own policy.⁴⁵ Under the authority of section 14(b), nineteen states⁴⁶ have enacted right-to-work laws with the power to interpret and enforce union and agency shop restrictions within their own jurisdictions.⁴⁷ Yet until *Mobil* no case had discussed the applicability of a state's right-to-work laws when the situs at which all the employees covered by a union security agreement performed the bulk of their work was located outside the state having such laws.⁴⁸ An analysis of the Court's selection of the job situs test as opposed to a "place of hiring" or a "substantial contacts" test⁴⁹ results in a realization that the job situs test is the only practical solution to this right-to-work issue if the national labor policy,⁵⁰ as legislatively enacted, is to continue as intended.

44. See *id.* at 266. The issue is seen as a "conflict . . . between labor's right to organize, solidify its strength and preserve the group interest [and] the individual worker's right to obtain and keep his job . . . unfettered by organizational entanglements he may not want." Eissinger, *supra* note 40, at 575.

45. See note 7 *supra*.

46. Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Four states—Delaware, New Hampshire, Maine, and Indiana—passed and then repealed right-to-work laws. Twenty states have specifically rejected them. Louisiana's law pertains only to agricultural workers. Two states, Colorado and Wisconsin, allow union security agreements; however, they have enacted regulatory laws over such agreements. See Morgan, *supra* note 6, at 572-575; Skinner, *supra* note 6, at 419.

47. See Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963); Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963); NLRB v. General Motors Corp., 373 U.S. 734 (1963).

48. The cases that can be labelled closest to precedent on this issue were decided under § 9(e)(1), 29 U.S.C. § 159(e)(1) (1970), which requires the NLRB to supervise employee elections to authorize the negotiation of union security agreements. In Giant Food Shopping Center, Inc., 77 N.L.R.B. 791 (1948), and Western Elec. Co., 84 N.L.R.B. 1019 (1949), the Board held that the job situs at the time of the election determines which state law applies to multistate workers, and that a state's laws outlawing such agreements could not apply to workers whose job situs was in another state. See note 65 *infra*.

49. In addition to the dissent's place of hiring test and the Fifth Circuit's substantial contacts test, other discussed solutions besides the job situs test were: (a) maritime exemption for seamen, supported both by Justice Powell, 96 S. Ct. 2148; see note 23 *supra*, and Judge Ainsworth in his dissent, *Mobil Oil Corp. v. Oil, Chem. & Atomic Workers Union*, 504 F.2d 272, 282 (5th Cir. 1974); (b) the laws of the state where the bargaining agreement was negotiated, 96 S. Ct. at 2153 (dissent); see note 62 *infra*; and (c) the laws of both places of hire, in this case, Texas and New York. See 88 HARV. L. REV. 1620, 1629-30 (1975). See also note 62 *infra*.

50. See text accompanying note 42 *supra*.

Although *Mobil* involved a labor dispute in a maritime work environment, the maritime element was merely secondary to a broader issue. Primarily at issue was the application of a state's right-to-work laws on an employment relationship involving workers who perform their jobs outside the bounds of that state. The job situs test relied upon by the Court is applicable to both terrestrial and maritime labor relations. An approach to this case solely on the maritime issue, as advocated by Justice Powell in his concurring opinion,⁵¹ would have affected the maritime industry in exactly the same manner as the majority's decision,⁵² but it would have done no more. The *Mobil* majority did not view the case as a decision concerning the imposition of state laws in the maritime field only, and the absence of discussion related to maritime law in the majority's decision is relevant in appreciating their expanded view of the problem.

This broad perspective⁵³ places heavy emphasis on the policies and purposes of the national labor laws, which allow for conflicting policies among the states concerning the applicability of right-to-work laws within each state.⁵⁴ Because the right-to-work law greatly affects conditions of employment among the workers in a state, this national policy can be interpreted to express the importance for each state to have the power to control employment conditions according to its view of its own commercial and business affairs. If the federal government fully recognizes state authority to legislate right-to-work laws,⁵⁵ it follows that state governments are also required to recognize another state's authority in this area.

The job situs test is the only one of the proposed tests that fully recognizes state jurisdiction over union membership as a condition of employment within state boundaries. Before *Mobil*, the nineteen states with right-to-work laws had the power to enforce them within their own boundaries.⁵⁶ The remaining thirty-one states either favored or allowed under certain conditions the formation of union security agree-

51. 96 S. Ct. at 2148; see notes 23 & 49 *supra*.

52. Under Justice Powell's approach, the seamen would be placed in an exceptional status, under the regulation of federal statutory and admiralty law removed from the operation of § 14(b). The practical result is that union and agency shop agreements would be permissible, which is the same result reached by the majority. See note 25 and accompanying text *supra*.

53. Both the Supreme Court dissent, 96 S. Ct. at 2148, 2150-55, and the court of appeals, 504 F.2d at 274-82, viewed the issue from this broader perspective.

54. See note 7 *supra*.

55. The only exception to this is the Railway Labor Act. See note 25 *supra*.

56. See generally Morgan, *supra* note 6, at 572-73; Skinner, *supra* note 6, at 419.

ments within their territorial bounds.⁵⁷ No state had imposed its right-to-work law on a non-right-to-work state. After *Mobil*, with a job situs test for multistate workforce situations, the same nineteen states can apply their right-to-work laws to employment relationships with predominant job sites within their territorial bounds, and the same thirty-one states without right-to-work laws cannot be affected by the right-to-work laws of the other nineteen. With this test, right-to-work laws cannot be forced upon employee-employer relationships in states that, under section 8(a)(3), have permitted the existence of union and agency shop agreements. This result appears to be a rational conclusion of congressional intent reflected in sections 8(a)(3) and 14(b) of the Taft-Hartley Act.

Not only does the job situs test maintain the intent of the national labor policy, but also it provides for certainty in application of the law.⁵⁸ If the predominant job situs is located within a particular state, that state's laws on union security agreements will apply. This predictability of law allows collective bargaining parties to determine in advance whether a union security agreement will be permitted to cover employees at a certain job situs.⁵⁹

The place of hiring test advocated by the Supreme Court dissent is at least equally certain of application.⁶⁰ If this test were to be applied, however, it is conceivable that the right-to-work states, if they were the places of hiring, could impose their right-to-work laws on all the other non-right-to-work states.⁶¹ The place of hiring test could induce employers to forum shop to establish their place of hiring in a right-to-work state.⁶² In effect, this test would defeat the purpose of section 14(b) to allow the states to govern union security agreements

57. See Morgan, *supra* note 6, at 572; Skinner, *supra* note 6, at 419.

58. 96 S. Ct. at 2146-47.

59. *Id.* at 2147.

60. See note 32 *supra*, however, for a criticism of the dissent's rationale in reaching this test as one to be applied uniformly to all union security agreements regardless of the state.

61. 96 S. Ct. at 2146.

62. *Id.* The dissent claims that there is nothing illegal or unethical about a company's relocating to seek more favorable labor laws, 96 S. Ct. at 2153 n.10; however, in criticizing a test based upon the state where the bargaining agreement was negotiated, the dissent attacks it as one that would encourage forum shopping. 96 S. Ct. at 2153. Admittedly, a corporate relocation entails a much greater burden than the selection of a site to negotiate a new employment contract; yet, the dissent still appears to condone forum shopping in support of the place of hiring test while attacking it in criticizing an opposing test. *Id.* Also, a company could legitimately locate its place of hiring separately from its corporate location with very little burden and without taint of evasion of labor laws.

since the employer, by its choice of place of hiring, could govern which state's laws would control its employment relationships regardless of the job situs. Forum shopping under the job situs test would be a useless procedure, for regardless of the employer's forum, its employees would be subject to the laws of the state of their job situs.

Application of the place of hiring test would also create the question of which state law should apply to the employment relationship upon a change of the place of hiring.⁶³ Such a change, if made between a right-to-work state and a non-right-to-work state, "could easily disrupt the management of labor relations and would create unjustifiable uncertainties in the law."⁶⁴ Such disruptions, as a result of the place of hiring test, would definitely not promote "[t]he goal of national labor policy, [which] is to promote industrial peace and stability."⁶⁵

The Fifth Circuit's substantial contacts test, with its weighing of factors approach,⁶⁶ provides for a more flexible resolution of this issue

63. For example, if employees were hired in Maryland to work predominantly at a Virginia job site, they would be bound, under the place of hiring test, by their union shop agreement despite Virginia's right-to-work laws. If the employer then changed its place of hiring to Virginia, a determination would have to be made on whether the place of the employees' actual hiring or the new location of the hiring office would be the controlling factor on which state's law applied. Under the former alternative, the union shop could continue to exist even when Maryland no longer had any interest in the employment relationship. Additionally, any new employees would be hired in Virginia subject to Virginia right-to-work laws and would be working alongside employees compelled by Maryland law to have joined the union. Under the latter alternative, with the abrupt change of the place of hiring, the union shop agreement would be abolished, an event that would also create problems for management of labor relations in addition to distrust and uncertainty between collective bargaining parties over the formation of union security agreements.

64. 96 S. Ct. at 2153 n.9 (dissent). The dissenters argue against this frictional situation in opposing a solution that would allow the law of more than one state to apply to union security agreements. For the solution they were opposing, see 88 HARV. L. REV. 1620 (1975).

65. Eissinger, *supra* note 40, at 593. The *Mobil* decision covers only the situation where *all* of the employees under a union security agreement perform most of their work outside a state having right-to-work laws. 96 S. Ct. at 2144. In this manner the Court has assured that uniformity of laws will exist for all of the employees of the collective bargaining unit, a result that aids in the peace and stability of labor relations.

A collective bargaining unit consisting of employees, some who work in a right-to-work state and others who work in a non-right-to-work state, cannot practically all be subject to one union security agreement. A possible solution to this dilemma facing the union that desires to organize under such an agreement is to create smaller bargaining units to encompass those areas whose right-to-work laws are similar in purpose and application. This approach was suggested under a different fact situation by the NLRB. See note 48 *supra*. The majority in *Mobil* noted that their job situs test was consistent with that of the NLRB's construction of the application of § 14(b) under § 9(e)(1) of the Wagner Act. 96 S. Ct. at 2147 n.11.

66. See note 22 *supra*.

than the rigid job situs test; and concededly, the substantial contacts test could often produce results parallel to those of the job situs test.⁶⁷ Despite its favorable points, however, the substantial contacts approach is hampered by the uncertainty of the identification and balancing of factors in each employment relationship.⁶⁸ Such uncertainty gives rise to an unpredictability in the determination of the validity of proposed union security provisions. For this reason, reliance on the job situs standard, with its certainty of application, is more desirable, since it enables collective bargaining parties to know in advance what laws will apply to their employment relationship.

Despite its practicality, the job situs test cannot possibly cover every conceivable employment relationship, and even when the standard is utilized, courts may be called upon to determine which job situs in an employment relationship is the predominant one. In some situations, courts may conclude that no job situs is so predominant as to be the controlling factor in the determination of state right-to-work law applications, and therefore, some reliance on a substantial contacts approach may be necessary. As long as right-to-work laws remain valid, however, the job situs test represents the best practical solution that recognizes the intent of the Taft-Hartley Act and the national labor policy to deal with multistate workforce situations.

JONATHAN ADAMS BARRETT

Labor Law—J.P. Stevens: Searching for a Remedy To Fit the Wrong

The stated purpose and policy of the National Labor Relations Act (NLRA or Act)¹ is to prescribe the rights of employees and employers in their interactions and to encourage the collective bargaining process.² Section 7 of the NLRA³ guarantees to employees the right

67. The Supreme Court majority conceded this possibility in its criticism of the substantial contacts approach. See 96 S. Ct. at 2147.

68. *Id.*

1. 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975).

2. *Id.* § 151.

3. *Id.* § 157.