NOTES

THE CASE FOR UNIFORM UNION-SECURITY REGULATION

The magnitude of labor forces, increasing concern over paralyzing strikes, and the influence of union-management relationships on the individual, community, and nation have pushed labor issues into prominence. Congress has established a national policy of encouraging labor and management to bargain collectively. While the Labor Management Relations Act[1] permits unions and employers to enter contracts that allow selection of workers without regard to their union or non-union status, the contract may require such employees to affiliate with the representative union after a probationary period. But the same Act further provides that states may enact more stringent union-security restrictions applicable to labor relations in enterprises which conduct operations in more than one state.[2] Thus, union-security agreements are subject to regulation by both national and state governments.[3] As might be expected, such concurrent legislation gives rise to conflicts between application of federal and state regulations, thus causing difficulty in determining the

1. 61 STAT. 136 (1947), as amended, 29 U.S.C. § 141 *et seq.* (Supp. 1952). Hereafter the Act is referred to as LMRA; section references are to that Act.

2. Conventional union-security measures pertinent herein are the closed and union shops. Closed-shop provisions provide absolute union protection; the employer obligates himself to hire only union members, and employees must maintain union affiliation to retain their positions. The congressionally—indorsed union-shop contract requires all employees to become union members and retain membership but permits the employer to select workers at will. The contract specifies a probationary period after which an employee must affiliate with the union or lose his job.

3. Section 14(b) of the Taft-Hartley Act states: "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."

In reviewing pertinent sections of the Act in the case of *Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board,* the United States Supreme Court left no doubt that the states are free to restrict union-security devices more severely than does the federal law. Mr. Justice Frankfurter, in delivering the Court's opinion, proclaimed: "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 § 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, § 14(b) was included to forestall the inference that federal policy was to be exclusive." 336 U.S. 301, 313-314 (1949).

Congress too has stated: "It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism."

proper groups of employees to be permitted to enter security agreements with their employers. In addition, conflicting federal and state laws permit some workers to demand and secure union benefits without any contribution to, or membership in, the union.

The LMRA, in addition to prohibiting closed-shop agreements,[4] prescribes rules concerning employer and union activity which affects the sanctioned forms of union security.[5] State legislation regulating union security invokes various means designed to prevent discrimination in hire or tenure of workers on conditions of union or non-union status.[6] While all such state acts proscribe employment dependent on union affiliation, some statutes declare the entire employment contract void,

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H.R. REP. No. 510, 80th Cong., 1st Sess. 60 (1947). See H.R. REP. No. 1147, 74th Cong., 1st Sess. 19-20 (1935); SEN. REP. No. 573, 74th Cong., 1st Sess. 11 (1935).

The Supreme Court asserted the validity of a Nebraska constitutional amendment and a North Carolina right-to-work statute, each more restrictive than Taft-Hartley union-security provisions, in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). The same day the Court affirmed the constitutionality of a similar Arizona enactment in American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949). However, the Court reversed without opinion a Wisconsin Supreme Court decision upholding the state labor board's jurisdiction in Plankinton Packing Co. v. Wisconsin Employment Relations Board, 338 U.S. 953 (1950), *reversing* 255 Wis. 285, 38 N.W.2d 688 (1949). The Court did cite Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1949) and LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949). The *Plankinton* decision has occasioned some controversy as to the meaning of the cryptic reversal. See 53 Col. L. Rev. 258, 260-265 (1953); 1 LAB. L.J. 419 (1950). Apparently *Plankinton,* in its denial of jurisdiction to the state agencies, indicates that federal policy remains supreme in other areas of congressional labor legislation, because both the *Bethlehem* and *LaCrosse* decisions relied in part on possible conflicts in the exercise of discretion between the NLRB and state labor boards. *See* Bethlehem Steel Co. v. New York State Labor Relations Board, *supra* at 775-776, and LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, *supra* at 25-26. See also International Union of United Auto. Workers, CIO v. O'Brien, 339 U.S. 454 (1949).

4. § 8(a)(3).

5. Section 8(a)(3) elaborately specifies the conditions under which an employer may enter a union-shop agreement. Section 7 guarantees to each worker the right to join or refrain from joining a labor organization except as that right may be abridged by § 8(a)(3). Union tactics are curtailed by § 8(b)(1) which restrains union activities as they affect workers' rights and by § 8(b)(2) which admonishes the union not to force the employer to violate § 8(a)(3).

6. The following state statutes prohibit employment conditioned on union status: ARIZ. CODE ANN. § 56-1302 (Supp. 1952); ARK. CONST. AMEND. XXXIV, § 1 (1947); COLO. STAT. ANN. c. 97, § 94(6)(1)(c) (1935) (all-union agreement permitted if authorized by three-fourths secret vote); FLA. DECLARATION OF RIGHTS § 12 (1951); GA. CODE ANN. § 54-804 (Supp. 1951); IOWA CODE ANN. c. 736A, § 736A.2 (1950); KAN. GEN. STAT. § 44-809(4) (1949) (all-union agreement permitted if authorized by majority vote of employees in bargaining unit); NEB. REV. STAT. § 48-217 (Supp. 1951) (laws to render operative NEB. CONST. Art. XV, §§ 13, 14, 15); 31 LAB. REL. REP. (Ref. Man.) 3009 (Nevada initiative petition approved Nov. 4, 1952); N.C. GEN. STAT. § 95-81 (1950); N.D. REV. CODE § 34-0114 (Supp. 1949); S.D. CONST. Art. VI, § 2 (1939); TENN. CODE ANN. § 11412.8 (Williams 1934); TEX. STAT. REV. CIV. art. 5207a, § 2 (1948); VA. CODE § 40-70 (1950); WIS. STAT. § 111.06(1)(c)1 (1951) (all-union agreement permitted if authorized by two-thirds secret vote).

unlawful, or illegal.[7] Two statutes stipulate that it is unlawful to enter into a contract which conditions job hire or tenure on the workers' organized status.[8] Several enactments permit employees to recover damages for denial or deprivation of employment[9] and some afford injunctive relief against threatened discriminatory action.[10] Four acts label violation of union-security restrictions a misdemeanor and inflict fines from $100 to $500[11] while one state provides for imprisonment not to exceed twelve months.[12]

Prior to the repeal of Section 9(e)(1) of the Taft-Hartley Act, the National Labor Relations Board confronted a chaos of union-shop elections in bargaining units stretching beyond state boundaries.[13] Complexity of determining employee units in which to hold elections to comply with this section created confusion not only on the Board but among employees as well because of the rigors of varying degrees of federal and state union-security regulation. Illustrative of this confusion is the *Northland Greyhound Lines* case where the Board was petitioned by a bargaining unit to hold an election in an area encompassing eight states and the Province of Manitoba, Canada.[14] Four states were silent on union-security regulation;[15] three states prohibited union security in any form;[16] one state required employee authorization of union-security agreements by a two-thirds vote.[17] The Board's solution was to establish the locus of the employees' headquarters as the criterion for determining which state's law is applicable in such situations.[18] In *Western Electric Co.,*

7. ARIZ. CODE ANN. § 56-1303 (Supp. 1952); N.C. GEN. STAT. § 95-79 (1950); TEX. STAT., REV. CIV. art. 5207a, § 3 (1948); VA. CODE § 40-69 (1950).

8. IOWA CODE ANN. c. 736A, § 736A.3 (1950); TENN. CODE ANN. § 11412.9 (Williams 1934).

9. ARIZ. CODE ANN. § 56-1306 (Supp. 1952); GA. CODE ANN. § 54-908 (Supp. 1951); N.C. GEN. STAT. § 95-83 (1950); VA. CODE § 40-73 (1950).

10. ARIZ. CODE ANN. § 56-1307 (Supp. 1952); GA. CODE ANN. § 54-908 (Supp. 1951); IOWA CODE ANN. c. 736A, § 736A.7 (1950).

11. ARK. STAT. ANN. § 81-204 (1947); IOWA CODE ANN. c. 736A, § 736A.6 (1950); NEB. REV. STAT. § 48-219 (Supp. 1951); TENN. CODE ANN. § 11412.12 (Williams 1934).

12. TENN. CODE ANN. § 11412.12 (Williams 1934). This enactment provides in addition that "[e]ach day that any person, firm, corporation or association of any kind remains in violation of any of the provisions of this act shall be deemed to be a separate offense, punishable in accordance with the provisions of this section."

13. Section 9(e)(1) originally empowered the NLRB to hold an election to determine whether a majority of employees in an appropriate unit desired a union-shop provision in their employment contract.

14. 80 N.L.R.B. 288 (1948).

15. Illinois, Michigan, Minnesota, Montana.

16. Iowa, North Dakota, South Dakota.

17. Wisconsin.

18. This particular petition fully awakened the Board to the effects of multi-security regulation. "The Employer in the instant case is directly engaged in the field of transportation, and the nature of its operations is such that some of its employees, particularly its drivers, continually travel between States which either permit without

where the employees labored in 45 states and the District of Columbia, the NLRB followed its *Northland Greyhound Lines* rule, stating "that the headquarters of the employees provide the best criteria because they represent the focal points of the employment relationship."[19] The difficulty with this mechanical approach appears in a finding of the Board that the employees "are frequently transferred from one job location to another in the same, or in a different, State."[20] Presumably, a new "headquarters" would be designated in every new area into which the employee is transferred. If no new "headquarters" were assigned, the employee could have a home office in a state which requires a two-thirds majority vote to authorize a union shop or which prohibits all union-security devices, yet he could perform work assignments in a state having no union-security regulation whatsoever.[21]

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restriction, regulate, or prohibit union-shop agreements. It therefore becomes necessary to determine initially which State law is applicable and then, in view of the language of Section 14(b), whether the particular State law or the national law is paramount. In resolving the question as to the applicable State law, such factors as the residences of the employees, the places where they were hired, their headquarters, the proportions of working time spent in the various States, and (with regard to the drivers), their routes, have been given consideration. In view of all the circumstances involved, we are persuaded that the headquarters of the employees provide the best criteria because they represent the focal points of the employment relationship. The headquarters are where the employees report to work, receive their instructions, and are paid their salaries. It is, therefore, in the States in which they have their headquarters that the provisions of any agreement between a union and an employer regarding the employees involved will be effectuated. In view of the fact that most of the essential matters with respect to the employment relationship will be dealt with in the States where the employees have their headquarters, we believe that application of this test to determine which State law shall control will result in the least amount of extra-territorial effect being given to the laws of one State as against those of another." 80 N.L.R.B. 288, 291 (1948).

Less acute three-state problems arose in Giant Food Shopping Center, 77 N.L.R.B. 791 (1948), and American Viscose Corp., 23 LAB. REL. REP. (Ref. Man.) 1359 (1949). In Giant Food Shopping Center, *supra* at 796, the Board decided (3-2) that "although the unit appropriate for the purposes of Section 9(e)(1) in most instances will be coextensive with the unit appropriate for the purposes of collective bargaining under Section 9(a) . . . it need not be identical in all cases with such unit." In dissent, Chairman Herzog warned "[t]his, I fear, may create more problems than it will resolve. In shunning Scylla, we may fall into Charybdis." *Id.* at 799. The holding of this case has been viewed dubiously by Congress. See SEN. REP. No. 99 Pt. 1, 81st Cong., 1st Sess. 18-19 (1949).

19. 84 N.L.R.B. 1019, 1020 (1949), citing Northland Greyhound Lines, 80 N.L.R.B. 288 (1948).

20. 84 N.L.R.B. 1019, 1021 (1949). An estimate by the employer set the number of such transfers during 1948 at 50,000. *Ibid.*

21. Indeed this contention was pressed on the Board by the employer who pointed out that the employee "momentarily in a State outlawing the union-shop, may, after the election, be transferred to a State which permits the union-shop, and thereupon become subject to the terms of a union-shop contract, although he had no chance to vote on the authorization of the contract. However, [the Board concluded], such an employee would be in the same position as any citizen of a State who finds himself bound by laws passed before his arrival there." 84 N.L.R.B. 1019, 1023 (1949).

While the Board's decision reached a practically expedient result, the individual worker's rights sought to be protected by both state and federal statutes were sacrificed

Since the repeal of Section 9(e)(1) the precise problem, administration of security elections, confronting the NLRB in the preceding cases is no longer encountered, but the chaotic situation described still exists to confuse the status of union-security provisions in employment contracts throughout the nation.

The incompatability of the state and federal security legislation assumes the greatest significance in application of these laws to area-wide bargaining units. The trucking industry vividly depicts the discordant effects of non-uniform regulation. Over-the-road affiliates of the International Brotherhood of Teamsters negotiate employment contracts on a multi-state basis.[22] In a representative group of contracts, each participating area included both states which allow and those which prohibit the conditioning of continued employment on the basis of union membership.[23] These agreements disclose that employees receive such union-security protection as is permitted by the laws of the states in which they are domiciled.[24] Multifarious union-security laws portend serious economic repercussions on both unions and their members in such situations. Since they need never join the union, which, as bargaining agent, must represent them,[25] employees domiciled in states outlawing union-

to provide a workable rule of thumb. Thus, the very statutes enacted to protect the employee's interests and to encourage his participation in determination of employment relation conditions actually prevent the protection they purport to guarantee.

22. Over-the-road affiliates connotes drivers of tractors and trailers for private, common, and contract motor carriers.

23. The International Brotherhood of Teamsters, AFL, supplied the INDIANA LAW JOURNAL with contracts revealing this condition. Those states which prohibit or regulate union security are italicized. *Arkansas,* Louisiana, Oklahoma, and *Texas,* comprise a collective bargaining area. Another area includes Illinois, Indiana, *Iowa, Kansas,* Michigan, Minnesota, Missouri, *Nebraska, North Dakota,* and Ohio. A third area encompasses Alabama, *Florida, Georgia,* Kentucky, Mississippi, and *Tennessee.*

24. The union-shop security provisions of these contracts contain the following stipulations. "As respects employees domiciled in those states covered by this Agreement in which required Union membership as a condition of employment is not prohibited by law, the following [union-shop] clause shall be applicable. . . .

"The Employer in Texas and Arkansas agrees to give consideration to prospective employees furnished through the employment facilities of the Union when the Employer is in need of employees working in the various classifications covered by this agreement. . . . Should the Texas Anti-Closed Shop Law which became effective on September 4, 1947, or the Arkansas Anti-Closed Shop Law which became effective on February 19, 1947, be declared unconstitutional or unenforceable by a final judgment of a court of last resort, the Company and the Union agree that Article II, Section 1 [union-shop provision], shall become effective immediately for Arkansas and/or Texas.

"The above [union-shop provision] . . . shall not . . . apply in any state where prohibited by state law. If the [union-shop stipulation] hereof is invalid under the law of any state wherein this contract is executed, it shall be modified to comply with the requirement of state law or shall be renegotiated for the purposes of adequate replacement." The Ford Motor Co. and United Auto Workers, CIO, contract also contains a provision which renders the union-shop clause inoperative in states prohibiting security measures. See 5 CCH LAB. LAW. REP. (4th ed.) ¶ 53,160.009 (1952).

25. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

security devices receive the identical benefits as the unionized workers. Thus, in area-wide bargaining units, employees against whom union-shop rules may be legally enforced bear the added burden of the "free-riders,"[26] who occupy secure positions by virtue of the LMRA and restrictive state legislation.[27]

Union-employer agreements reflect attempts to reconcile collective bargaining and multiplicate security regulation. There is evidence that union and employer are confused by and wary of present state and federal union-security restrictions. The parties insert elaborate clauses in the employment contract in an attempt to provide maximum security under conflicting regulation and simultaneously prepare for possible invalidation of state statutes.[28] Several NLRB decisions have condemned security provisions as improper under applicable state law.[29]

Congress was not without warning of certain ramifications of concurrent union-security regulation.[30] Legislation which completely pro-

26. To combat the "free-rider," the Central States Area contract provides: "In those instances where the [union-shop] clause may not be validly applied, the Employer agrees to recommend to all employees that they become members of the Union and maintain such membership during the life of this Agreement, to refer new employees to the Union representative, and to recommend to delinquent members that they pay their dues *since they are receiving the benefits of this contract.*" (emphasis added)

27. This factor undoubtedly retards the growth of unions in interdictive jurisdictions because no worker wishes to pay the way of another by increased personal expenditures.

A second disadvantage not restricted to area-wide bargaining units is incurred by unions in those states which prohibit utilization of security devices. Reconciliation of union-management differences at the bargaining table necessitates concession of certain demands asserted by each party. The process is not unlike a sale in which certain demands are "sold," in return for which other demands are granted. Prohibition of union security removes a valuable demand which, although it might not have been granted, could have been "sold" for other substantial concessions.

28. See note 24 *supra.*

29. Green Bay Drop Forge Co., 29 LAB. REL. REP. (Ref. Man.) 1142 (1951). The parties added these clauses to their contract: "The Union Security Provisions here established shall be in effect when, and to the extent that, the applicable Federal and State laws have been fully complied with.

"Any provision of this agreement which shall be in conflict with any Federal or State law shall be and hereby is modified to conform to any State or Federal law." *Id.* at 1143. This stipulation did not cure a failure to comply with the 30 day grace period imposed by the Taft-Hartley Act on union-shop provisions in employment contracts.

In Hickey Cab Co., 88 N.L.R.B. 327, 329-330 (1950), the parties agreed to a complex security provision and then annexed this stipulation: "If any provision of this agreement is in violation of any Federal or Connecticut State Law, such provision shall be inoperative to the extent only that such provision may be at variance therewith." But the NLRB declared that union-security provisions are effective until deemed invalid by "the proper tribunal." Consequently, "[t]he very existence in the contract of the union-security provision therefore acts as a restraint upon employees desiring to refrain from union activities within the meaning of Section 7 of the [Taft-Hartley] Act." This same conclusion was expounded in Hazel-Atlas Glass Co., 85 N.L.R.B. 1305, 1306 (1949); Evans Milling Co., 85 N.L.R.B. 391, 392-393 (1949); Unique Art Manufacturing Co., 83 N.L.R.B. 1250, 1252 (1949).

30. See 93 CONG. REC. 6456 (1947). Senator Morse cautioned: "Thus, we lay down in the bill a very full and complete national policy as to closed- and union-shop

hibits union-security devices has the tendency to weaken unions. In those jurisdictions not restricting union security, unions can reasonably be expected to flourish, at least comparatively. Weak unions cannot enforce wage demands consonant with those of a secure, vigorous union; consequently, wage rates reflect the power and skill of the union bargaining for them. Skilled union leaders with faithful followers have consistently won wage increases at the bargaining table. Labor costs in states which do not regulate or do not severely restrict union-security measures will increase; labor costs in states which forbid union-security methods will remain at a relatively lower level. Employers engaged in business in the former states whose labor costs constitute a large proportion of the total product cost will discover that profit margins diminish, while comparable entrepreneurs in the latter jurisdictions will enjoy a competitive advantage and expanding profit margins. Competitive goods at lower prices will infiltrate the markets of the high-cost producer and capture consumer demand by their more attractive price. In an effort to reduce labor costs by weakening unions which represent their employees, employers in states not denying union security will urge adoption of laws proscribing security. Uniform regulation precludes this condition and the necessity for its extension.[31] Important as these considerations may

agreements. At the same time, the bill provides in section 1[4](b), however, that the national policy may be entirely disregarded and superseded by the States if they desire to impose a more restrictive policy on the same subject matter. A more pointed instance of antilabor bias could hardly be envisaged than this alleged minor change in the bill.

"Mr. President, we are dealing under a national policy with interstate commerce. The jurisdiction of the National Labor Relations Board is limited to interstate commerce cases and issues. But this amendment proposes that we except from the national policy, as it relates to interstate commerce, national jurisdiction over these matters as they involve the closed shops and union shops, in the case of any State which passes an anticlosed shop or antiunion shop bill. The bill provides in effect that we allow to employers in those States a State policy over interstate commerce contrary to a national policy that we would apply through the National Labor Relations Board in all other States which do not enact such State legislation.

"Mr. President, if anyone knows of a better example of unfair discrimination than that, I should like to hear about it. I say that when it comes to interstate-commerce policies, they should be uniform throughout the Nation, and we should not have a national policy in regard to closed shops and union shops in States X, Y, and Z, but then permit . . . a policy quite contrary to that policy under State laws in States A, B, and C. Many employers will not like that, either, Mr. President, because that has some interesting competitive implications connected with it, too. It will be rather interesting, if this measure becomes law, to hear from some employers who, when bound by the national policy, will come forward with allegations, and, I think, in due course of time will prove, that such discriminatory practices result in some unfair competitive factors for them in their competition with competitors in other States who are able to function under a different policy." See also *Hearings before Committee on Labor and Public Welfare on S. 249,* 81st Cong., 1st Sess. 1770 (1949).

31. Conflicting laws on union security are ominously significant in another application restricted to intrastate commerce. Non-uniform state acts which impose various degrees of restrictiveness represent supreme regulation of business enterprises not interstate in character. Jurisdictional boundaries of the NLRB have vaccilated over certain

be,[32] the significant effect of union-security prohibitions on collective bargaining is revealed only by scrutiny of federal and state labor policies and their ramifications.

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portions of commerce so that amenability of the Board may include tomorrow what today it rejects. Difficulty in determining the bargaining unit and administering elections has made this circumstance necessary, even though it may be undesirable. SEN. REP. No. 1509, 82d Cong., 2d Sess. 3-7 (1952); *Hearings before Subcommittee on Labor and Labor Management Relations of Committee on Labor and Public Welfare on S. 1973,* 82d Cong., 1st Sess. 79-83 (1951). Also, conditions in certain other industries defy application of present law. *E.g., id.* at 80.

A recent case, NLRB v. Guy F. Atkinson Co., 195 F.2d 141, 143-144 (9th Cir. 1952), prophesied the effects of incidence of those circumstances. The Board there assumed jurisdiction over the building and construction industry contrary to the policy which it followed two years previously when the company and the union executed a closed-shop agreement. The union had not been certified as the employees' bargaining representative by the NLRB, and, therefore, had no authority to enter such an arrangement even though the closed shop was permitted under laws applicable at that time. The Board declared the company guilty of an unfair labor practice because it had entered a closed-shop agreement with the union. The court concluded that the facts did not warrant the exercise of discretion and therefore labelled the Board's order "arbitrary, capricious, and an abuse of discretion." *Id.* at 151. Thus, employment contracts containing closed-shop stipulations which are valid under many states' laws may render both employers and unions guilty of unfair practices if the shifting boundaries of NLRB jurisdiction envelop other enterprises now considered beyond the Board's scope of authority. The circuit court's judgment prevented injustice here, but nevertheless this case warns that lack of uniformity may plague those industries now considered not amenable to federal labor law. A realistic appraisal of labor relations justifies the opinion that the inclusiveness of NLRB jurisdiction will continue to fluctuate, providing fertile ground for similar litigation.

See NLRB v. Sterling Furniture Co., 21 U.S.L. WEEK 2419 (March 3, 1953). "Since the law of California does not prohibit union-shop or closed-shop arrangements, the language of the Board's order is so broad as to prohibit activity of the union which may be entirely lawful. The union says it has similar agreements with some 80 or 90 small establishments whose businesses do not affect interstate commerce. Moreover, in borderline situations, the union cannot know until the Board or this court has spoken whether its union-security agreements are valid or invalid, so it is required to proceed more or less in terrorem or, as an alternative, to forego freedom of action which in good faith it deems itself entitled to take." *Ibid.*

32. Labor relations scholars have not reached a unanimous opinion as to the desirability of all forms of union security. One of the nation's authorities on union security observed that "[f]rom labor's viewpoint, the closed shop is indispensable to successful unionization." TONER, THE CLOSED SHOP 6 (1942). But an equally authoritative scholar contends "[a] rule which would bar management's free access to the employment market . . . may, properly be regarded as an impairment of an essential management function." TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING 242 (1947). In arriving at their conclusions they consider, not incorrectly, the patent effects of union security on day-to-day union-management collaboration. This particular method of ascertaining the worth of security for the union permits observers to list both advantages and disadvantages. Consequently, regardless of the ultimate personal evaluation of the desirability of security, imposing substantiation of that judgment can be made. It would be well to recognize that significant numbers and authoritative members of management forces ally themselves with the proponents of union security. *E.g., Hearings, supra* note 30, at 2018; BRAUN, THE RIGHT TO ORGANIZE AND ITS LIMITS 191 (1950); TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS 63-65 (1948); Jansen, *The Closed Shop Is Not a Closed Issue,* 2 IND. AND LAB. REL. REV. 546 (1949).

Champions of union security contend that a secure labor organization cooperates

The Right to Work

That Congress failed to respond to such cogent arguments against the union-security provisions of the LMRA indicates that a consideration far more compelling than possible detrimental economic ramifications made passage of Section 14(b) imperative. This overriding factor can be detected in Senator Taft's contention that "either we should have an open shop or we should have an open union."[33] Previously the Senator had stated: ". . . apparently they [union members] feel that today they are at a great disadvantage in dealing with union leaders, and that

willingly with management because of assured existence. The union need not contest every exercise of employer discretion since no such exercise can cause discrimination due to union affiliation. Both union and management mutually attempt to improve efficiency to meet competition from non-organized and low-cost plants. When an entire industry has been organized and the union secures uniform wage rates, labor costs cease to be a competitive factor, thus permitting concentration of effort on improved production and distribution; the union can effectively "police" this form of industry-wide agreement. Union demands on management moderate with the realization that both parties have secured interests in the continuation of the business enterprise. Workers' interest and efficiency increase because they have no fear of arbitrary dismissals; and union discipline is more effective, thereby creating a more responsible labor organization. All of these effects tend to produce stable costs and production rates permitting accurate estimates of future expenditures and completion dates. All employees contribute to the union's support, eliminating the "free rider," and of course, jurisdictional disputes are impossible so long as the security provision remains in force.

Disparagers of union security claim that labor leaders tend to make unreasonable demands when employment contracts include security provisions. Labor costs rise because of increased, more enforceable union demands, and higher costs decrease the profit margin thus forcing high cost enterprises out of business. Worker efficiency is impaired because the employee, aware of his secure position, lacks incentive to do well. Unions exercise dictatorial power over workers, and consequently the organized laborer owes allegiance to the union and shop steward instead of to employer and foreman.

Fairness to critics of union security requires the observation that few labor-relations authorities favor abolition of all security devices. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 96 (1941); TELLER, *op. cit. supra*, at 240-241. Disagreement occurs over the particular form of provisions to be utilized to acquire security, not whether all security should be abolished. Respected scholars propose complete abandonment of the closed shop but assert the merits of retaining the union shop. The distinction is significant because it reveals that union security *per se* is not undesirable; in fact, many of their criticisms pertain uniquely to the closed shop. They contend that management's hiring prerogative is obstructed because non-union applicants cannot be considered for employment. Since available labor supply bulks no greater than union membership, union forces inadequate to furnish the employer's needs tend to increase wage rates, hours of overtime, and production costs. Management can be compelled to select less desirable workers. Furthermore, union membership as a prerequisite to employment antagonizes popular concepts of freedom and the right to work.

The manifest effects of existing laws pertaining to union security provide no definite criterion by which to judge the value of present statutes notwithstanding the confusion and inconvenience they cause. In the discussion thus far the desirability of secure unions is moot; obviously then, no proper conclusion can be formed about the suitability of right-to-work laws which prohibit security. Consideration of the desirability of retaining present laws in light of the arguments for and against union security reveals that mere examination and comparison of advantages and disadvantages of union security affords no justifiable basis to condemn existing statutes.

33. 93 CONG. REC. 3837 (1947).

the power given to the leaders by existing legislation is so great that the individual is unable to exercise [his] right to free speech, his *right to work as he pleases,* and [his] general right to live as he pleases."[34] (emphasis added)

Compulsion in whatever form cannot easily be reconciled with popular American views of freedom and liberty. While this basic tenet of democratic society does not admit of precise delineation, a free people almost without exception abhor being compelled to do something. It is, therefore, understandable that many reject the contention that mandatory union membership is consistent with traditional notions of individual freedom.[35] Nor is it surprising that "the right to work" has received a considerable amount of academic attention, as well as avid public support.[36]

The right to work can be protected in two ways. Unions may be required to admit and retain all those who desire employment within their "jurisdiction," or employers may be ordered to employ applicants and retain workers without regard to their union status. The former is the open union; the latter is the open shop.[37] There is a vast distinction between the two methods. The closed-shop interdict imposed by the Act and the complete prohibition of security devices by various state statutes reveal that both Congress and state legislature selected, although not completely, the latter of Senator Taft's alternatives. To enforce the right to work they decided to restrict union security rather than to provide for the open union.[38] Congress rejected the open-union approach purportedly

34. *Id.* at 3835. Senator Taft also stated: "Even on the question of the closed shop, which the union leaders are most vigorously defending, the polls show that more than half their men are actually opposed to the position the leaders are taking. . . ." *Ibid.* Experience refuted the Senator's statements. Of the 44,587 union-shop elections conducted prior to discontinuance in 1951, the union shop was the workers' choice in 97% of the elections. 73 MONTHLY LAB. REV. 682 (1951).

35. The great surge of antipathy for union control of job opportunities has been of recent origin. Of the thirteen states which completely prohibit all forms of security, ten states enacted such legislation in 1947, one state in 1945, one in 1944. Nevada approved an interdictive constitutional amendment in 1952. Many states rejected similar legislation during the same period.

36. Other related topics, the right to join a union and admission and expulsion policies of unions, have been discussed, too. Summers, *The Right to Join a Union,* 47 COL. L. REV. 33 (1947); Summers, *Disciplinary Powers of Unions,* 3 IND. AND LAB. REL. REV. 483 (1950); Summers, *Admission Policies of Labor Unions,* 61 Q.J. ECON. 66 (1946).

37. For an examination of the problems encountered by attempting to enforce an open-union policy see Summers, *The Right to Join a Union,* 47 COL. L. REV. 33, 36 (1947).

38. "Confronted with the wealth of evidence on the abuses of individual and minority rights under closed-shop contracts, the framers of the Taft-Hartley Act faced the dilemma of either prohibiting the closed shop and protecting individual rights under other forms of compulsory membership in unions, such as the union shop, or else writing an elaborate statute protecting the rights of individual members of unions

in order to avoid governmental interference with internal activities of unions, although it could be argued that the LMRA does in fact regulate internal union affairs to some extent.

It is thus apparent that any pertinent inquiry into the propriety of existing federal and state union-security laws must include an examination of their effectiveness in guaranteeing the right to work. A failure to achieve this proclaimed purpose coupled with any harmful effects on collective bargaining which might be incurred as a result of concurrent federal-state regulation of union security would indicate that there is little justification for such legislation as it now exists.

The number of reported instances in which unions have denied admission to applicants is small.[39] Nor do litigated unreasonable expulsions from union membership occur often.[40] The total number of such incidents cannot be precisely determined, however, because many cases are tried in courts whose decisions are not reported. Many rejected applicants for union membership probably lack the financial resources necessary to litigate their alleged causes of action. But as a practical matter, unions maintain their effectiveness by controlling labor forces; therefore, wholesale rejection of membership-aspiring workers would tend to diminish union strength and power. No union would long adhere to such a policy. It must be remembered that unions have assumed

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against arbitrary or capricious expulsion. The solution of the dilemma was to reject the idea of having the Federal Government interfere and police the internal activities of unions." H.R. REP. No. 317 Pt. 2, 81st Cong., 1st Sess. 14-15 (1949). Nevertheless, Congress has given serious consideration to proposals regulating internal union affairs. See Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs,* 44 ILL. L. REV. 425, 631 (1949).

"H.R. 3020, as passed by the House, listed a number of union unfair labor practices relating to the conduct of union internal affairs; but these were stricken from the version of the bill passed by the Senate." *Id.* at 447 n.102. As the authors point out, the Labor Management Relations Act does actually impose some restrictions on union internal affairs. *Id.* at 447-451.

Three proposals have been presented to Congress purporting to regulate internal affairs of unions. One bill elaborately lists ten union unfair labor practices. Generally the provisions of all the bills attempt to protect the union member from unreasonable and arbitrary union action. *Id.* at 636-649.

39. Summers, *Admission Policies of Labor Unions,* 61 Q.J. ECON. 66, 67 (1946). The relatively small number of unreasonable refusals to admit workers to union membership are so contrary to common views of justice and democracy that no condemnation seems too vehement. Any number of such incidents, no matter how few, is too many.

"It is impossible to determine precisely to what extent the various 75,000 local unions close their membership books, for no systematic study has yet been made. A few horrible examples, such as Local 110 of the Motion Picture Operators in Chicago refusing to accept any new members for 15 years, have been widely publicized, but it is generally agreed that there are relatively few unions which engage in this practice." *Id.* at 79.

40. The frequency of reported unjustified dismissals has been determined as less than four per year. Summers, *Disciplinary Powers of Union,* 3 IND. AND LAB. REL. REV. 483, 487 (1950).

responsibility for the conduct of their members; proper execution of the duties imposed by that responsibility necessitates powers of control and censure over members. The most effective element of control lies in the organization's ability to terminate the workers' employment by withdrawal of their union membership. Of course, this cannot be accomplished unless union affiliation is a condition of employment and unless members can be expelled for unreasonable conduct. Present law prohibits the employer from dismissing a worker under a union-shop agreement if the cause of termination of union membership is other than a failure to pay union fees and dues.[41] Since many employment contracts provide for automatic check-off if the worker supplies the employer with a written authorization, a great number of organized employees are legally immune to union discipline.[42] Employees laboring under a union-shop contract with no check-off provision would seldom fail to pay dues if to do so would result in dismissal from employment.

The particular mode adopted by Congress to protect employment rights has proved extremely difficult to enforce. Notwithstanding proscription of the closed shop, it still exists in many employment relationships.[43] Those industries which utilized the hiring hall prior to Taft-Hartley continue that practice,[44] and undoubtedly many employers continue to hire only organized workers by custom or, perhaps, to cultivate the union's good will. Gentlemen's agreements not only achieve the precise practical effect of formal contracts, but make detection of improper relationships almost impossible. Strict closed-shop agreements can flourish because neither party to the illegal agreement will likely reveal its provisions.

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41. § 8(a)(3)(B).

42. An analysis of 602 contracts revealed that 72% of them contained check-off provisions. 13 CONFERENCE BOARD MANAGEMENT RECORD 352-353 (1951).

43. "The NLRB has been consistent in throwing out contracts that require union membership as a condition of employment. But despite the [B]oard and the law of the land, the closed shop in some form has continued to thrive in several sectors of the economy. . . . [S]ome equivalent of the closed shop is common in printing, longshore, maritime, building, clothing, and trucking among others." Fortune, Sept. 1951, p. 62.

"The exact number of bootleg (i.e., verbal) closed-shop agreements is unknown, but the NLRB believes them to be on the rise. It is actually a moot question whether more or fewer workers are under closed-shop conditions since Taft-Hartley." *Id.* at 64. See also SEN. REP. No. 99 Pt. 1, 81st Cong., 1st Sess. 20 (1949); SEN. REP. No. 374, 81st Cong., 1st Sess. 33 (1949); Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805, 807 n.5 (1951).

See United Ass'n of Journeymen Plumbers & Steamfitters v. Graham, 73 Sup. Ct. 585, 588 n.5 (1953).

44. *E.g., Hearings before Subcommittee on Labor-Management Relations of Committee on Labor and Public Welfare on Hiring Halls in the Maritime Industry*, 81st Cong., 2d Sess. (1950). It has been conceded that the hiring hall is merely a form of the closed shop. *Id.* at 7.

While the LMRA does not purport to regulate union admission and expulsion practices, it prohibits dismissal from employment of paid up workers notwithstanding their hostility toward the union. This mandate produces a peculiar anomaly. Heretofore, governmental policy encouraged union membership and worker participation in determination of employment terms. In effect, the federal government sponsored a program of industrial democracy by urging the employee to cast his vote in union proceedings and thereby share in prescribing employment relationship provisions. But the Taft-Hartley Act informs the worker that he need not actively participate in the union. In fact, the worker owes no allegiance to the union save monetary contribution because only for failure to pay dues can the union legally demand dismissal from employment.

Congressional and state legislation outwardly encourages union development but simultaneously denies union security in an effort to shield job opportunities from abusive union membership practices. Yet clearly, the measures adopted to protect the right to work neither admit of effective enforcement nor further the aim of industrial democracy. Therefore, since they fail to accomplish their intended purpose, if laws prohibiting union security impose any substantial detriment on other desirable policies, their retention cannot be tolerated.[45]

Intelligent appraisal of the security dilemma constrains reflection on the importance of collective bargaining and the latent effects of present statutes on the bargaining process.

The Function of Union Security in Collective Bargaining

Federal law declares that collective bargaining shall characterize labor-management relations.[46] There is but a single function of the

45. More extensive treatment of the topics, protection of the right to work and right to join a union, lies beyond the contemplation of this note. They have been extensively examined in other discussions. *E.g.*, Lenhoff, *The Right to Work: Here and Abroad*, 46 ILL. L. REV. 669 (1951); Summers, *supra* note 36.

46. "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ." § 1. This portion of the National Labor Relations Act's declaration of policy has remained unchanged since enactment in 1935. It is interesting to note the emphasis placed on collective bargaining by Taft-Hartley. Employees receive the assurance that they "shall have the right to . . . bargain collectively. . . ." § 7. The employer is admonished that he commits an unfair labor practice by refusal "to bargain collectively with the representative of his employees. . . ." § 8(a)(5). Similarly, the union is warned not "to refuse to bargain collectively with an employer. . . ." § 8(b)(3).

Popularly and superficially the bargaining process is restricted to negotiation of and agreement to employment contract provisions. That is a significant portion of

bargaining process: Resolution of labor-management controversies. All other accomplishments are complementary attributes of that process, rather than distinct functions. Some persons tend to regard bargaining as a cure-all which should invariably solve even the most acute disagreements without resort to strikes or other forms of economic coercion.[47] Indeed, proponents of collective bargaining concede that often the *threat* of such coercion promotes effectiveness in the bargaining process and expedites resolution of disagreements.[48] Collective bargaining embraces the possibility of coercion not as a bludgeon, but as a result of failure to resolve disagreements by cooperation.

Although collective bargaining does not guarantee perfect labor-management relations,[49] the undesirability of alternative approaches to resolution of employer-employee differences, governmental inaction or governmental regulation, justifies tolerance of the bargaining process. Governmental inaction produced the conditions prevalent previous to adoption of the National Labor Relations Act.[50] Reversion to that environment would merely re-create an industrial economy with no place for unions or union-management relations and, consequently, no hope for effective collective bargaining. Congressional regulation of industrial

collective bargaining practice and procedure, but the written agreement composed by union and management negotiators also creates the future rights and responsibilities of the parties to that agreement. Occurrences previous and subsequent to the formally executed contract constitute integral elements of collective bargaining and often exceed the agreement itself in significance.

47. Section 7 of the LMRA specifically affirms the employee's right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

48. "A right to engage in industrial warfare is essential to the cause of industrial peace under the collective-bargaining system." TAYLOR, *op. cit. supra* note 32, at 22.

49. Collective bargaining affords an imperfect process by which to solve union and management differences. Too often imperfection results from a lack of appreciation for the other party's position and circumstances. Not seldom the parties submit ultimatums which reveal no contemplation of the ramifications which their selfish desires impose on the public interest.

50. Prior to 1935 the federal government expressed no policy pertaining to negotiations or attempted negotiations between the employee or his representative and the employer. Of course, collective bargaining presupposes an employee representative with whom the employer can deal, but several factors made governmentally unencouraged bargaining improbable because unions' efforts to gain recognition as the employees' representative generally failed. Few employers welcomed unions into their employment relationship. Management developed several devices by which to impede union infiltration into working forces such as the company spy, yellow dog contract, and black list. Society shared management's unfavorable view of organized labor to no little extent, perhaps because unions relied on the strike to gain recognition (no other device sufficed). At times the strike degenerated into a pitched battle of violence, loss of life, and destruction of property necessitating use of the militia to restore order. Of course, unfavorable publicity followed. And too, courts justifiably deemed themselves obligated to protect life and property but often issued injunctive decrees which afforded the prayed for protection and, as well, sounded the death knell for organizational endeavors of the employee.

relations would obviate private negotiation and stifle voluntary cooperation and incentive. No advantage or recompense could accrue from collective bargaining because legislation would dogmatically resolve disagreements by mandate. Issues which now are resolved by bargaining would become controversies in political campaigns. But failure of the bargaining process to resolve disagreements between union and management will inevitably necessitate substitution of governmental mandate for private negotiation. The undesirability of legislatively pre-determined labor relations warrants utilization of every justifiable means to insure the effectiveness of collective bargaining.

Successful collective bargaining basically requires both a suitable environment and union and management personnel who share a proper state of mind. These seemingly easily supplied prerequisites have not yet been attained. The Wagner Act was based on the premise that when an environment conducive to negotiation had been supplied the parties would resolve their differences by the bargaining process.[51] That this result did not follow was largely due to the fact that the parties exhibited neither the reciprocal consideration and understanding of the other party's position nor an appreciation of the public's interest in peaceful resolution of labor controversies. Fortunately, Congress, in passing the Wagner Act, apprehended that proper bargaining attitudes could not be created by legislation. Unfortunately, in the Taft-Hartley Act, Congress sought to substitute regulation of collective bargaining for the deficiency of proper attitudes.[52] While attainment of proper bargaining attitudes

51. Advocates of collective bargaining promulgated the notion that a balance of power between union and management would propitiate their differences. Unfortunately, the balance of power ideology found no more success in labor relations than in international relations. Perhaps this arrangement could have effected complete attainment of congressional intent to assure successful private negotiation of differences but for the philosophy that the parties gathered at the bargaining table as essential preparation for disagreement. This philosophy injected bellicose attributes into collective bargaining and prepared union and employer for an economic conflict and display of stamina. Admittedly not all attempts to bargain resolved themselves in this manner, but many did and often in industries with which the public interest was inextricably involved. The schism between this practice and the sought for successful private negotiation procedure widened until remonstrance made alteration imperative because unions abused their power which now often exceeded that of the employer.

In November, 1945, a Labor-Management Conference was convened to afford all interested parties an opportunity to resolve controversies and determine plausible courses of action for future labor relations. The Conference was not without success, but it fell far short of evolving a workable procedure by which to insure peaceful union-management relations. For an extensive analysis of this step in the development of union-management collaboration see TAYLOR, *op. cit. supra* note 32, at 205-244.

52. The LMRA reveals a mutation of government policy, from the premise that union and management can better resolve all issues of the employment relationship by private negotiation to the notion that some facets of the relationship (*e.g.*, union security) can more appropriately be determined by mandate.

depends largely upon the parties involved, creation of an atmosphere conducive to that end rests with Congress.[53]

Recognition of the union as the representative of the employees essentially precedes all bargaining relations. The Taft-Hartley Act, as did the Wagner Act, provides for union-recognition elections,[54] thus precluding the necessity for recognition strikes which were prevalent prior to federal encouragement of collective bargaining.[55] The employer commits an unfair labor practice by refusing to bargain with an NLRB certified union.[56] The employees possess authority to decertify their union bargaining representative by election.[57] This power presumably assures that the union will remain responsive to employee demands and needs. Manifestly, union conduct is directed toward perpetuation of recognized status, for without it the union has no collective bargaining utility. Comprehension of this phenomenon explains union efforts to secure a permanently recognized position in industrial government. Anything which threatens a union's recognition jeopardizes its existence and, because bargaining requires a union, threatens the very process of collective bargaining.

Subsequent to enactment of the Wagner Act, union security supplanted union recognition as the primary goal of the labor movement.

53. Note well the paradox which Congress effectuated. Collective bargaining, which presumed that private negotiation can better solve labor-management discord than can governmental fiat, underwent direct statutory regulation. Union and management cannot obey statutory decrees to negotiate freely when subsequent decrees prohibit bargaining for certain employment provisions. Section 302, regulation of welfare funds, constitutes an excellent example of governmental control of heretofore privately determined stipulations. If collective bargaining affords a superior process for settlement of employee-employer conflicts, full support should be accorded that process; but if statutory determination contributes better results, resort to that method should prevail. Current practice attempts to combine both procedures with remarkable unsatisfactoriness.

France has recently begun a return from governmentally regimented labor relations to free collective bargaining. Sturmthal, *Collective Bargaining in France,* 4 IND. AND LAB. REL. REV. 236 (1951).

54. Section 9(c) of the Wagner Act and §9(c)(1) of the Taft-Hartley Act designate the election process.

55. There can be no collective bargaining if the employees have no representative with which management can negotiate. Pre-Wagner Act union-management relations did not often develop into a bargaining process because the employer seldom recognized the union as the representative of his employees. If the union had not the allegiance of sufficient workers, the employer would be picketed to gain employee support and to induce the employer to acknowledge the union. When the employees were already faithfully organized, a recognition strike endeavored to persuade the employer that the union represented his workers. Neither contributed consistent success as is evidenced by membership in the American Federation of Labor which never rose as high as three million members at any time during the period 1923 to 1932. Source of membership data: 37 MONTHLY LAB. REV. 1128 (1933).

56. §8(a)(5). Before certification of the union as bargaining representative, it must receive approval by the majority of workers in the unit. §9.

57. §9(e)(2).

Unions desire security because it means control of job opportunities, but, of even larger significance, union security performs functions essential to the effectiveness of collective bargaining. Union security devices provide the *only* means by which the union can achieve continued recognition, which is, of course, a prerequisite to collective bargaining. Thus, union security has a dual function indispensable to collective bargaining: It promotes acquisition of proper bargaining attitudes, and it guarantees recognition of the union throughout the employment contract period.

Realization of the effects of state prohibition of union security on federal collective bargaining policy clothes such legislation with a far deeper significance than mere disruptive infiuences which naturally ensue as a result of state divergence from congressional policy. Concurrent state and federal union-security regulation does not directly cause current deplorable industrial conditions. But, present laws hamper efforts to eliminate these conditions by collective bargaining. Though the distinction may seem narrow, the consequences which flow from it are broad. State laws which deny unions the use of security measures compel retrogression of union-management relations to conditions corresponding to the pre-Wagner Act environment. By prohibiting union security, the states compel unions to resort to protection of their recognized bargaining status through picketing and strikes. Furthermore, in jurisdictions permitting union-security agreements, collective bargaining receives encouragement because unions can more easily maintain a recognized status, whereas in states prohibiting such devices, union-management relations reflect an unstable union position and consequent obstruction of collective bargaining.[58]

Federal union-security policy depicts a unique departure from conventional congressional action. Rarely does Congress designate a particular national policy and simultaneously encourage the states to legislate so as to impair its effectuation. The practical effect of Section 14(b) of LMRA is congressional authorization of state sabotage of federal collective bargaining policy. Yet recent developments indicate that Congress is aggravating the union-security conflict.

Recent Legislative Developments

The building and construction industry, because of the peculiar intermittent nature of its production process, could not adjust to the LMRA union-security requirements. Employees do not often remain in the employ of one contractor for the 30-day period necessary to make

58. For an examination of the economic repercussions of this condition by Senator Morse see note 30 *supra*.

union affiliation mandatory. More important, this same condition renders certification of a union as a recognized bargaining representative impossible, because the work force rarely becomes sufficiently stabilized to warrant an NLRB certification election. Senate Bill 1973 was introduced to alleviate this condition by exempting the building and construction industry from the operation of Section 14(b).[59] Although the bill was approved by the Senate, adjournment prevented action by the House of Representatives. It is problematical whether the Eighty-third Congress will enact this legislation, but if passed, it would add another discriminatory provision to federal union-security regulation.[60] Congress will have displayed partiality to the building and construction industry in its attempt to compensate for a defect in previous legislation if this proposal becomes law.[61]

Conditions in the building and construction industry warrant remedial legislation, but antagonization of the union-security problem is implicit in the proposed act. If the House of Representatives had concurred with the Senate, the scope of discrimination would have been broadened from that invoked by the states to that of federal partiality for a certain industry as well.[62] Members of building and construction

59. The portion of S. 1973 pertinent here would attach this proviso to § 9(a) of LMRA: *"Provided further,* That nothing in this section or any other section of this act or of any other statute or law of the United States *or of any State or Territory* [emphasis added] shall preclude an employer primarily engaged in the building and construction industry from making an agreement . . . to require, as a condition of employment, membership in such [union] organization on or after the seventh day following the beginning of such employment. . . ." 98 CONG. REC. 5109 (May 12, 1952).

60. The Railway Labor Act has been amended so as to immunize the railway brotherhoods from state union-security bans. 64 STAT. 1238 (1951), 45 U.S.C. § 152 (Supp. 1952). While the Railway Labor Act amendment is equally discriminatory, the railroad industry and its unions have long been the subject of special legislation. For that reason, exemption of the railway unions will probably not have the same effects as S. 1973 would have if it became law.

61. There can be no doubt that the proposed amendment is intended to overrule § 14(b). Acting Chairman Reynolds of the NLRB inquired of the legislators: "Would this language, then, have the effect of overriding State law as to union-security agreements in this one industry?" Senator Humphrey, Chairman of the Subcommittee on Labor and Labor-Management Relations, rejoined: "Well, it would seem to me that that word 'nothing' is rather all-inclusive and comprehensive. I think we could define that word. That means that section 14, so far as this is concerned, is kaput. It is out." *Hearings, supra* note 31, at 74. See also SEN. REP. No. 1509, 82d Cong., 2d Sess. 7 (1952).

62. Some Congressmen are aware of the situation created by concurrent union-security restriction. See note 30 *supra.* In a discussion concerning the efficacy of § 14(b) under another bill, Senator Humphrey uttered this judgment of concurrent security regulation: "Of course, I think that is a sort of distortion on Federal jurisdiction. . . .

"I cannot understand how the United States can legislate in a field in which it declares it has no prerogative to legislate, and can then play footsie and say, 'If North Carolina wants to pass a law regarding union security, the Congress will just retreat.'

unions would be permitted to enjoy the security and benefits of a union shop in every state; but other workers and unions would remain subject to the ramifications of Section 14(b).

The influence of S. 1973 cannot be appraised precisely, but the apparent injustice could be expected to impair collective bargaining in industries not granted special exemption from state laws. Union leaders will quickly comprehend that a failure of the bargaining process nearly brought nation-wide union security to the building and construction trade. They may reason that similar failure in another industry might well make more special relief essential.[63] The Senate has merely rewarded an industry which could not bargain under the restrictions imposed by Section 14(b). Workers and unions may sincerely doubt the good faith of Congress when statutes deny them privileges granted to others, privileges obtained by unsuccessful attempts to bargain.[64] There is little incentive to bargain when greater benefits accrue to those who do not. When failure of collective bargaining commands a premium in the form of special legislative treatment, failure will be commonplace. More unfavorable publicity for collective bargaining shall weaken already skeptical public faith in the bargaining process. And still, Congress depends on the success of collective bargaining to solve union-management discord.

Since collective bargaining seems the most desirable process by which to resolve industrial conflict, the importance of assuring its success cannot be over-emphasized. Congressional labor legislation must encourage the

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That is just the candid opinion of one member of the committee." *Hearings, supra* note 31, at 75.

63. While testifying before a Senate Subcommittee on Labor, the Acting Chairman of the NLRB answered a question as to the effect of all S. 1973 provisions on the long range stability of the construction industry with this admonition: "I think that if the Congress sees fit to make an exception of the building-construction industry, you are going to have the same request before you to make exceptions of a number of other industries." *Id.* at 80.

The Acting Chairman forewarned: "The problems which have been confronted in this industry are also confronted in the application of the Taft-Hartley law to the maritime industry. They are confronted to a great extent in the motion-picture industry. . . .

"And in the television industry, a new industry, also. . . .

"These problems of the building construction industry are tremendous. There isn't any question about it. But they are also tremendous in a number of other industries. And I am just rather concerned that the Congress will be met with a request to exempt other industries as you go along." *Ibid.* The motion-picture industry did plead its case before the Subcommittee. *Id.* at 106.

64. Note how applicable the following excerpt is to all other industries, as well as the building and construction industry. "The needs of contractors, labor organizations, and employees in this industry are the *same throughout the country.* Failure to meet these needs have resnlted in problems which are *Nation-wide and indivisible.* Their impact upon the national economy, and especially upon defense activities, *does not vary from State to State.*" (emphasis added) SEN. REP. No. 1509, 82d Cong., 2d Sess. 7 (1952).

practice and development of bargaining and, correlatively, must remove obstacles which impede, as well as prohibit, fruition of federal labor policy. Union security has an essential function to perform before labor and management can acquire continued successful collective bargaining. Congress undermines every effort to promote effective bargaining by endorsing provisions which permit state prohibition of union security.

Repeal of Section 14(b) is imperative. It should be replaced with a stipulation denying validity to state action more restrictive than federal union-security regulation. National uniform policy would prevent state obstruction of collective bargaining. Purely local bias could not impair or destroy the expressed will of the nation. Problems encountered in modern interstate commerce require solution on a country-wide basis, and collective bargaining represents a national solution to national labor-management problems. Interference by the states cannot be tolerated if effective private negotiation is the goal of federal labor legislation.

Congressional apprehension of the serious impairment administered collective bargaining by encouragement of anomalous state prohibitions of union security will surely incite legislative remedy of this labor law paradox. Uniform state laws could produce a partially adequate remedy. But even if the states would agree to repeal their right-to-work provisions, which is not likely, the time essential for individual state action warrants rejection of this possibility.[65] Congress should enact the proposed remedy immediately. Realistic solution of national labor problems requires a foundation of uniform union-security legislation.

VOLUNTARY FALSE CONFESSIONS: A NEGLECTED AREA IN CRIMINAL ADMINISTRATION

Exclusionary rules relating to criminal confessions find their basis in a single premise, insulation of the adversary system of jurisprudence from introduction of false and unreliable evidence. Such false testimony, when undetected, can only result in a fraud upon society—conviction of the innocent and freedom for the guilty.[1] Justifiable concern is ex-

65. Such a remedy would only be partially adequate because judicial interpretation commonly destroys the uniformity of identical statutes.

1. "There has been no careful collection of the statistics of untrue confessions, nor has any great number of instances ever been loosely reported, but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt." 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).