In reversing, the Appellate Court neither discussed the quoted lease provisions nor related the facts which describe the character of the breach.[81] Because the agreement to make improvements related to the original two tracts only, while the profit evidence admitted related to the complete business, the court held that the evidence was uncertain and, therefore, inadmissible for proving the loss.[82] This appears to be the first case in which a defendant's responsibility for destruction of a profitable business was not doubted and yet a recovery of damages for the loss of profits has been denied. It was clear that there was no additional evidence the plaintiff could have produced to prove his loss. The moral may be that the drafters of contracts should give more attention to liquidated damages provisions in order to preclude courts from invoking a ban against the profit interest. The holding is a departure from the *Hudnut* case in which the test of certainty was used to determine the probability that a business successful in the past would be successful in the future.[83] As such it was a test of the fact of damage and not one of mathematics or of measurement.

Under the certainty requirement the question of liability for lost profits can become one which is decided without reference to responsibility for the damage. The tendency of appellate courts to overlook facts which induce adherence to a theory of compensation, while vindicating the desirability of some check upon the jury's discretion, results in giving a wrongdoer the benefit of any doubt which surrounds the damages question. Greater emphasis is placed upon the courts' problem in review than upon the purpose of the damages remedy.

THE NEW UNION SHOP PROVISION IN THE RAILWAY LABOR ACT

For many years union security measures were unknown and to a considerable extent unwanted in the railroad industry, but in 1951 the Railway Labor Act was amended to permit union shop agreements be-

plaintiff's highly advantageous contract; a profitable business; the subsequent leasing of the property to plaintiff's competitor. *Id.* at 3-9.

81. See note 80 *supra.*

82. "[T]here was not any evidence given to the jury by which they could, with any degree of certainty, have made any estimate with a degree of accuracy as to what part of the profits from the whole . . . were attributable to that part consisting of items one and two." Indianapolis Rys. v. Terminal Motor Inn, Inc., 112 N.E.2d 596, 599 (Ind. App. 1953).

83. See note 30 *supra.*

tween carriers and railroad labor organizations.[1] These agreements had been illegal since 1934 when the RLA was extensively amended to set up the present adjustment and mediation procedure and to prevent carrier interference with the voluntary organization of employees.[2] One of the major purposes of this 1934 revision was to rid the industry of company unions[3] which then negotiated almost twenty-five percent of the labor agreements affecting mainly non-operating employees.[4] The company union was a device the employer used to organize employees and control their policies and practices, union officials usually being selected by railroad management. To eliminate competition from standard unions, membership in the company union was often a requirement of employment. The chances for any real collective bargaining were limited since the union was dominated by the carrier.[5] Although one of the standard railroad unions had a few union security agreements in 1934, the practice was not widespread.[6] It was evident that the then proposed amendments to the RLA would prevent any union shop agreements in the future. Some unions attempted to have the bill changed to ban union shops only with respect to company dominated unions, but the Congress decided that compulsory unionism either by the employer or the standard unions was undesirable.[7]

Freed from interference by the carriers and aided by the new mediation and union certification procedure, the standard unions grew and prospered. These unions are organized on a craft basis of which there

1. 44 STAT. 577 (1926), as amended, 45 U.S.C. § 152 (11th) (1952).

The companion to the union shop in the 1951 amendment was the checkoff provision. The checkoff is a payroll deduction by the employer for periodic union dues, initiation fees and assessments. The statute provides that fines and penalties will not be included and that the employee must furnish a written assignment to the employer before the checkoff is effective. 44 STAT. 577 (1926), as amended, 45 U.S.C. § 152 (11th) (b) (1952). Little interest has been shown in the checkoff since the passage of the bill. 20 NATIONAL MEDIATION BOARD ANN. REP. 9 (1954).

2. Railway Labor Act, 44 STAT. 577 (1926), as amended, 45 U.S.C. §§ 151-164 (1952).

3. 78 CONG. REC. 12554 (1934).

4. In 1935 company unions or system associations constituted 23.7% of the total labor agreements; 24.1% of the total employees were in company unions, but only 0.8% of these employees were in operating crafts. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 634, CHARACTERISTICS OF COMPANY UNIONS 1935 at 58, 59 (1937).

5. For a discussion of company unions in the railroad industry see The Nation, Jan. 8, 1936, p. 48; DUNN, COMPANY UNIONS 90-147 (1927).

6. The Brotherhood of Railroad Trainmen had percentage contracts on 23 of the 140 class I railroads. These contracts provided that at least 75, 85, or 100 percent, as the case may be, of the yard trainmen and switchmen must belong to the Brotherhood. Letter from the Federal Coordinator of Transportation to the Chairman of the Committee on Interstate and Foreign Commerce, House of Representatives, June 7, 1934, reproduced in 78 CONG. REC. 12391 (1934).

7. 78 CONG. REC. 12390-98 (1934).

are two main types, the operating unions[8] and the non-operating unions.[9] Many of the unions are organized as brotherhoods or fraternal orders,[10] and most of them hold closed meetings.[11] Selective membership practices require a heavy majority of votes for admission.[12] The operating brotherhoods are among the oldest, wealthiest, and most exclusive labor unions in the country.[13] Railroad labor leadership has been noted at times for its self-reliance, conservatism,[14] and restraint in political affairs.[15] The brotherhoods take pride in the fact that their strength is due to carefully selected members proud of their trade and desirous of assisting in the promotion of labor unionism.[16] Voluntary union membership is encouraged by informally excluding any non-member from participating in the national grievance procedure. The National Railroad Adjustment Board which is the arbiter of labor grievances consists of eighteen representatives of the standard unions and eighteen employer representatives.[17] If the labor members vote not to hear a non-member, a procedural deadlock results. Since there is no judicial review in this instance, the deadlock is an effective means of withholding any remedy.[18]

The operating brotherhoods have never been as strong in advocating the union shop as have the non-operating groups,[19] chiefly because of the former's great strength[20] and the complete acceptance by the car-

8. Including engineers, firemen, hostlers, conductors, trainmen, and switchmen.

9. Including railroad shop trades, carmen, telegraphers, clerks, porters, maintenance men, freight handlers, tower and signal men, dispatchers, and dining car employees.

10. *Hearings Before the Committee on Interstate and Foreign Commerce House of Representatives on* H.R. 7789, 81st Cong., 2d Sess., at 119 (1950).

11. *Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate on* S. 3295, 81st Cong., 2d Sess., at 157 (1950).

12. *Hearings, supra* note 10, at 92.

13. For an early history of the operating brotherhoods see TONER, THE CLOSED SHOP 93-95 (1941). In 1949 the trainmen's brotherhood was the wealthiest labor organization in the nation, with the firemen's brotherhood second and the engineers' and conductors' near the top. Business Week, Nov. 19, 1949, p. 114.

14. Railway Age, April 1, 1950, p. 39.

15. Railway Age, Jan. 21, 1950, p. 42.

16. Transcript of Proceedings of the National Railway Labor Panel Emergency Board, 5358 (1943).

17. 44 STAT. 578 (1926), as amended, 45 U.S.C. § 153 (1952).

18. For a complete discussion and review of this board see Comment, 18 U. CHI. L. REV. 303 (1951); Northrup and Kahn, *Railroad Grievance Machinery: A Critical Analysis,* 5 IND. & LAB. REL. REV. 365, 540 (1952).

19. However the Brotherhood of Railroad Trainmen, which competes with the switchmen's union and the conductors' organization, requested a union shop amendment to the RLA in 1947. *Hearings Before the Committee on Education and Labor House of Representatives On Amendments to the National Labor Relations Act,* 80th Cong., 1st Sess., pt. 3, at 1552 (1947).

20. For a history of the reasons for the operating unions' strength and lack of interest in a union shop see TONER, THE CLOSED SHOP 93-114 (1941).

rier of these groups as the employees' bargaining agents.[21] A union shop in the operating crafts presents a distinctive problem because of the nature of the work. A man must serve an apprenticeship as a fireman or a trainman before he can be promoted to an engineer or a conductor. Depending on his seniority and the needs of the carrier he may alternate between the junior and senior jobs while building up enough seniority to make his promotion permanent.[22] A union shop would complicate this practice for the employer, union, and employee. Jurisdictional disputes might result from two unions requiring a certain employee to be a member, or the man might have to join two unions to avoid losing his job or brotherhood insurance benefits.[23]

To remedy the difficulty a special paragraph was added to the 1951 union shop bill allowing men in the operating crafts to fulfill union shop requirements by belonging to any one of the standard national unions.[24] After addition of this protective provision all of the operating brotherhoods except the engineers supported the union shop amendment.[25] Four years after the amendment, however, there are still few of these agreements among the operating crafts.[26] The Brotherhood of Locomotive Engineers feared new engineers would remain in the firemen's brotherhood because all inducement to join the engineers' brotherhood would be lost.[27] All the operating brotherhoods are traditional rivals for members whose jobs overlap craft lines. They try to make membership more attractive by bargaining for higher wages and better working condi-

21. Despres, *The Collective Agreement for the Union Shop*, 7 U. CHI. L. REV. 24, 53 (1939).

22. *Hearings, supra* note 11, at 316.

23. Trainmen News, Jan. 8, 1951, p. 2.

24. 44 STAT. 577 (1926), as amended, 45 U.S.C. § 152(11th)(c) (1952). If an employee in the operating crafts belongs to a union which is not one of the national standard unions and is not the bargaining agent, he may be subject to discharge under a union shop contract. The National Railroad Adjustment Board decides whether or not a union is national in scope. Pigott v. Detroit, T. & I. R.R., 221 F.2d 736 (6th Cir. 1955); United Railroad Operating Crafts v. Pennsylvania R.R., 212 F.2d 938 (7th Cir. 1954); United Railroad Operating Crafts v. Northern P. Ry., 208 F.2d 135 (9th Cir. 1953), *cert. denied*, 347 U.S. 929 (1954); Johns v. Baltimore & O. R.R., 118 F. Supp. 317 (N.D. Ill. 1954), *aff'd per curiam*, 347 U.S. 964 (1954) all held that the Board's determination is not subject to the court's jurisdiction even though five of the ten members of the operating crafts adjustment board were members of rival unions to the plaintiff's organization.

25. 96 CONG. REC. 16330 (1950). Previous to this the four large operating unions had written to the Senate Democratic Policy Committee in opposition to the union shop bill stating that "'this is clearly an attempt on the part of the non-operating organizations to pass legislation that would be detrimental to the membership of the operating railway labor organizations, and we earnestly urge you and our other friends in the Senate to oppose the adoption of this bill.'" Traffic World, Sept. 30, 1950, p. 47.

26. 20 NATIONAL MEDIATION BOARD ANN. REP. 9 (1954).

27. 96 CONG. REC. 16321 (1950).

tions.[28] If one brotherhood succeeds in recruiting more than half the members of a certain craft, it may supersede a rival brotherhood as bargaining agent.[29]

The non-operating labor organizations are split down craft lines and usually cooperate as a group in their lobbying and collective bargaining.[30] They have generally been the strongest advocates of the union shop. Non-operating unions did most of their original organizing during the first World War but lost heavily to company unions after their unsuccessful strike in 1922.[31] By 1942 non-operating organizations combined to request union shop contracts in connection with a nation-wide wage increase demand.[32] They claimed need for union security as protection from rival CIO unions who were attempting to organize railroad workers.[33] The request was rejected by the 1943 Presidential Emergency Board, disapproval being based upon the Attorney General's opinion that union shop agreements were illegal under the RLA[34] and the Board's view that the non-operating unions representing ninety percent of the non-operating employees needed no increase in membership or protection from rival labor organizations.[35]

In 1947, after the trainmen's brotherhood had requested a union shop amendment to the RLA, the Railway Labor Executives' Association reported to Congress their opposition to any union shop proposal. The Association at that time represented all of the railroad unions except the trainmen's and engineers' brotherhoods.[36] By 1950, however, the Association reversed its position and gave wholehearted support to the proposed amendment.[37] This may have been due to a slight loss in membership after the war and increased CIO activity in the railroads.[38]

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28. For example, conductors are eligible for membership in the trainmen's brotherhood, and trainmen may join the conductors' union. See Levinson, *Railway Labor Act—The Record of a Decade,* 3 LAB. L.J. 13, 27 (1952). For a view on why this rivalry discouraged union shops see Railway Age, April 1, 1950, p. 39.

29. *Hearings, supra* note 10, at 172.

30. Most of the non-operating unions are affiliated with the American Federation of Labor. The operating brotherhoods are all independent. INTERNATIONAL LABOR DIRECTORY xxxvi-xl (1950).

31. *Hearings, supra* note 10, at 3.

32. Transcript, *supra* note 16, at 5325-5326.

33. Transcript, *supra* note 16, at 5358-5386.

34. 40 Ops. ATT'Y GEN. 255-256 (1942). The Attorney General reviewed the precise wording of the statute and the legislative intent in reaching his decision.

35. Transcript of Proceedings of the National Railway Labor Panel Emergency Board, Supplemental Report to the President, 28 (1943).

36. *Hearings, supra* note 19, pt. 5, at 3724.

37. *Hearings, supra* note 11, at 3.

38. The CIO claimed 20 out of 25 elections conducted by the National Mediation Board in 1949. 1949 PROCEEDINGS OF THE 11TH CONSTITUTIONAL CONVENTION OF THE CIO 82. Subsequently the United Railroad Workers of America, CIO, again claimed increases over AFL rivals. 1951 PROCEEDINGS OF THE 13TH CONSTITUTIONAL CONVENTION OF THE CIO 109.

In the industries covered by the Labor Management Relations Act union shops were much desired by the employees as shown by the successful union shop elections.[39] The union representatives extolled the advantages of union security at the committee hearings. Under them carriers could be sure that all employees were taking part in union policy making,[40] contracts would meet with the approval of a greater number of workers, there would be improved morale, union raiding would be reduced, unions would be better able to comply with labor contracts, and there would be fewer individual grievances.[41] In addition the union leaders pointed out that the reason for elimination of the union shop privilege in 1934, the problem of the company union, was no longer a threat to legitimate collective bargaining.[42]

Employers are required to give non-union employees the same benefits that union members receive under the contract. The certified bargaining agent is required to equally represent all employees in his craft regardless of union membership.[43] Labor leaders wanted non-union employees, or, in union terminology, "free riders" or "no bills," as well as the large number of seasonal workers, to be required to join a union and help pay for the benefits received from expensive bargaining and lobbying activities and elaborate grievance procedure.[44]

The employers had been opposed to all amendments made to the 1926 RLA. They did not want to lose company unions,[45] and are still dissatisfied with the 1934 procedure for settling labor disputes.[46] In 1950 management opposition to the union shop amendment was vigorous. Plagued by a wave of post-war labor disputes[47] the carriers did not favor legislation which would give a powerful group a chance to bargain for even greater strength.[48] They saw no new conditions which would justify a change in the 1934 open shop provision.[49] The carriers felt that the employee who is free to quit the union represents the best incentive to responsible union leadership. Union leaders would have to satisfy

39. Union shop elections were required by the LMRA for four years, 1947-1951. During this time 91.4% of those voting for a union shop, and this was 77.5% of those eligible to vote. Labor Information Bull., December, 1951, p. 11.

40. The employee who was refused membership in the union, of course, could not take part. See p. 158 *infra*.

41. *Hearings, supra* note 10, at 11.

42. *Hearings, supra* note 11, at 13.

43. Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232 (1949).

44. *Hearings, supra* note 11, at 15, 16.

45. 78 CONG. REC. 12372 (1934).

46. *Hearings, supra* note 11, at 321.

47. For a review of railroad labor disputes 1941-1951 see Levinson, *supra* note 28.

48. *Hearings, supra* note 11, at 156.

49. *Hearings, supra* note 11, at 314.

the average member or be faced with loss of his membership and financial support. Conversely, when union chiefs obtain a union shop contract, they no longer need fear loss of membership and are apt to become tyrannical.[50] The much regulated carrier was very much opposed to a non-regulated union that could force membership on all employees.[51] The RLA contains none of the provisions for regulating labor unions that are found in the LMRA.[52]

Employers also feared that if all their supervisory employees were forced into unions under a union shop contract, the loyalty of these minor officials would be transferred from them to the labor organizations.[53] Labor representatives already claimed a substantial number of supervisors as members, however, and the brotherhoods contended that a man could be both a good supervisor and a good union member.[54] The unions point proudly to high railroad officials who came up through the ranks and still retain their union membership.[55]

Congress decided that there was no substantial reason to deny railroad workers the right to establish a union shop. Industries covered by the LMRA, including many railroad competitors, had been allowed by statute to make union shop agreements since 1935. The carriers' argument did not convince the legislators that railroad organizations should be treated differently with respect to union security.[56] The ex-

50. Railway Age, Feb. 25, 1952, p. 38.

51. *Hearings, supra* note 11, at 161.

52. One of the policies of the LMRA is to prevent obstruction to the free flow of commerce by eliminating forms of industrial unrest practiced by some labor organizations. 49 STAT. 449 (1935), as amended, 29 U.S.C. § 151 (1952). Subchapters II and III of the LMRA do not apply to employers and employees covered by the RLA. 49 STAT. 450 (1935), as amended, 29 U.S.C. § 152 (2)(3) (1952); 61 STAT. 156 (1947), 29 U.S.C. § 182 (1952). Consequently, the railroad unions are exempted from the jurisdiction of the NLRB. They are not required to file copies of their constitutions, annual reports, or non-communist affidavits by officers. They do not have to answer for unfair labor practices by labor organizations. Railroad unions are not subject to strike injunctions. The only duty of railroad employees is to exert every reasonable effort to make agreements and settle disputes. 44 STAT. 577 (1934), as amended, 45 U.S.C. § 152(1st) (1952).

53. An employer under the LMRA may exempt his supervisors from all aspects of collective bargaining, including the union shop. 49 STAT. 457 (1935), as amended, 29 U.S.C. § 164(a) (1952).

54. *Hearings, supra* note 10, at 252.

55. *Hearings, supra* note 10, at 250.

56. Carriers' opposition did not end with the passage of the Amendment. After enactment of the union shop amendment the non-operating unions immediately demanded nation-wide bargaining for union shop contracts. The railroads refused, and the mediation board referred the dispute to a Presidential Emergency Board. The unions could not strike because in 1951 the railroads were under federal control. The emergency board in 1952 recommended that the railroads grant union shops. 18 NATIONAL MEDIATION BOARD ANN. REP. 10, 47 (1952). By 1953 the non-operating unions had over 800,000 employees in union shops. 19 NATIONAL MEDIATION BOARD ANN. REP. 10 (1953).

istence of a union shop in the railroad industry now depends solely upon the collective bargaining process.

Although the RLA union shop amendment was patterned after the LMRA provision, there is one major difference. The railroad provision expressly prohibits state laws to the contrary from interfering with union shop contracts.[57] The policy of the LMRA, on the other hand, was not to preempt the field of union security but to allow states to proscribe compulsory unionism.[58] At the present time eighteen states including eleven from the South have right-to-work laws which outlaw union shop agreements.[59] These state laws became popular after World War II, and it has been contended that they were passed for the purpose of drawing industry away from the northern industrial states where powerful labor groups and high wages are prevalent.[60] Because the LMRA provision allows state right-to-work laws to prevent any union shop contracts in that jurisdiction,[61] the policy has been the subject of much controversy,[62] and there have been attempts to repeal the

57. "Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class. . . ." Railway Labor Act § 2, 44 STAT. 577 (1926), as amended, 45 U.S.C. § 152(11th) (1952).

58. H. R. REP. No. 510, 80th Cong., 1st Sess. 60 (1947). "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organizations as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Labor Management Relations Act § 14, 49 STAT. 457 (1935), as amended, 29 U.S.C. § 164(b) (1952).

59. ALA. CODE tit. 26, § 375 (Supp. 1953); ARIZ. CODE ANN. § 56-1302 (Supp. 1952); ARK. CONST. Amend. XXXIV, § 1 (1947); FLA. DECLARATION OF RIGHTS § 12 (1951); GA. CODE ANN. § 54-804 (Supp. 1951); IOWA CODE ANN. § 736A.2 (1946); LA. REV. STAT. § 23:881-888 (Supp. 1954); MISS. CODE ANN. § 6984.5 (Supp. 1954); NEB. REV. STAT. § 48-217 (1952); Nev. Sess. Laws 1953 c. 1 § 2; N. C. GEN. STAT. § 95-81 (1950); N. D. REV. CODE § 34-0114 (Supp. 1953); S. C. CODE §§ 40-46 (Supp. 1954); S. D. CODE § 17.1101 (Supp. 1952); TENN. CODE ANN. § 11412.8 (Supp. 1952); TEX. STAT., REV. CIV. art. 5207a, § 2 (1948); UTAH CODE ANN. § 34-16 (Supp. 1955); VA. CODE § 40-70 (1950).

60. For a discussion of the campaign of the south to attract industry by means of right-to-work laws see Cohen, *Labor, Taft-Hartley and the Proposed Amendments,* 5 LAB. L.J. 391, 403 (1954); see also 100 CONG. REC. 6109 (1954).

61. The right-to-work laws were held valid in Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). For a discussion of these cases see Notes, 36 VA. L. REV. 477 (1950); 35 CORNELL L.Q. 137 (1949); Annot., 6 A.L.R. 2d 492 (1949).

62. See Rosenthal, *The National Labor Relations Act and Compulsory Unionism,* 1954 WIS. L. REV. 53; Witney, *Union Security,* 4 LAB. L.J. 105 (1953); Morgan, *Union Security-Federal or State Sphere?,* 4 LAB. L.J. 815 (1953); Note, 28 IND. L.J. 355 (1953).

provision.[63]

Railroads and their employees have traditionally been the subject of special legislation[64] because their operations are not reasonably adapted to regulation by forty eight states. Railroads are direct instrumentalities of interstate commerce. Disputes in one location of the railroad industry have nation-wide repercussions without parallel in any other industry in the country. Railroad labor contracts are required to be on a system-wide basis with a single bargaining unit for each craft or class.[65] To attempt multiple bargaining on a system within one craft or class as a result of differences in state laws would unnecessarily burden both the carrier and the union.[66] It was argued that there are others, like the telephone, telegraph, pipeline, trucking, and maritime industries actively and intimately engaged in interstate commerce, whose union contracts are nevertheless governed by the LMRA.[67] These industries, however, are not nearly as complicated in their operation, regulation, and labor structure as the railroads, and a lesser percentage of their employees actually move from state to state. The argument as to movement of railroad workers did not overly impress some legislators because of the fact that the strongest advocates of union shop were non-operating employees constituting eighty percent of the railroad industry whose residence and place of work is as stable as those of men in any industry.[68] But, though these employees do not cross state lines in their work, they are part of a nation-wide system that cannot be subjected to local interferences.

That Congress had the power to limit the states in their efforts to ban compulsory unionism was not denied by any of the legislators. This is an area of interstate commerce where the Federal Government can exercise exclusive control.[69] An attempt was made to add to the RLA

63. See 95 CONG. REC. 8712 (1949); 99 CONG. REC. 5230 (1953); 100 CONG. REC. 6109 (1954).

64. See Railway Labor Act, 44 STAT. 577 (1926), as amended, 45 U.S.C. §§ 151-164 (1952); Railroad Retirement Act, 49 STAT. 967 (1935), as amended, 45 U.S.C. § 228 (1952); Hours of Service Act, 34 STAT. 1415 (1907), as amended, 45 U.S.C. §§ 61-66 (1952); Railroad Unemployment Insurance Act, 52 STAT. 1094 (1938), as amended, 45 U.S.C. §§ 351-367 (1952); Safety Appliances Act, 27 STAT. 531 (1893), as amended, 45 U.S.C. §§ 1-46 (1952); Interstate Commerce Act, 24 STAT. 379 (1887), as amended, 49 U.S.C. §§ 1-124 (1952); Federal Employers' Liability Act, 35 STAT. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).

65. The National Mediation Board certifies bargaining representatives. 44 STAT. 577 (1926), as amended, 45 U.S.C. § 152(9th) (1952). The Board's decision that there will be a single bargaining unit for each craft on a given system was upheld in Switchmen's Union v. National Mediation Board, 135 F.2d 785 (D.C. Cir. 1943), *rev'd on other grounds,* 320 U.S. 297 (1943).

66. *Hearings, supra* note 10, at 12.

67. 96 CONG. REC. 16262 (1950).

68. 96 CONG. REC. 16271 (1950).

69. 96 CONG. REC. 16261-62 (1950).

a provision similar to that in the LMRA which would allow state laws to proscribe railroad union shop contracts. By rejecting this proposal Congress clearly indicated its intent;[70] uniformity was desired in railroad labor relations and by express statutory provision state laws were not to prevent railroad labor unions from contracting for a union shop.[71] In spite of this express provision in the statute and the clear legislative history there have been attempts to enjoin enforcement of railroad union shop contracts when in conflict with state right-to-work laws. With one exception[72] these attempts failed, and the federal act was permitted to operate without state interference.[73]

A more basic problem under railroad union security is that of union discrimination practices. The brotherhoods have been notorious for their discriminatory practices, precluding from membership employees who did not appeal to them or expelling members who displeased them. The railroad unions, especially the operating brotherhoods, have systematically excluded negroes from their organizations by constitutional provision or by the blackball method. Not satisfied with banning the negro from the unions, some of the operating brotherhoods conducted a concerted campaign to eliminate the negro entirely from the industry.[74] Through ingenious union contracts forced on employers they have attempted to reduce seniority rights of negroes,[75] to make negro firemen non-promotable and subject to discharge,[76] or even to eliminate negro train porters as an entire class.[77] Instead of using the bargaining authority under the RLA to bargain for all workers, these unions used their position to instigate and preserve discriminatory practices. The Brotherhood of Locomotive Engineers opposed the union shop amendment fear-

70. 96 CONG. REC. 16371-76 (1950). For LMRA provision see note 58, *supra*.

71. See note 57 *supra*.

72. A Nebraska court felt that the federal power to regulate interstate commerce could not take away from the state the power to prohibit compulsory unionism. It held that the requirement of union membership violated the First and Fifth Amendments of the Constitution. Hanson v. Union P. R.R., 160 Neb. 669, 71 N.W.2d 526 (1955). See 40 VA. L. REV. 496 (1954) for a discussion of this case in the lower court.

73. Allen v. Southern Ry., 114 F. Supp. 72 (W.D. N. C. 1953); Sandsberry v. Gulf, C. & S.F. Ry., 114 F. Supp. 834 (N.D. Tex. 1953); *In re* Florida E. C. Ry., 32 L.R.R.M. 2533 (S.D. Fla. 1953); Moore v. Chesapeake & O. Ry., 34 L.R.R.M. 2666 (Va. Hustings Ct. 1954); International Association of Machinists v. Sandsberry 227 S.W.2d 776 (Tex. Civ. App. 1954); Hudson v. Atlantic Coast Line R.R., 24 U.S.L. WEEK 2193 (N.C. Oct. 12, 1955).

74. For a historical review of discrimination by the railroad brotherhoods and for an account of the Supreme Court's treatment of union discrimination see Comment, 1953 WIS. L. REV. 516. For a general discussion of discriminatory union membership policy see Note, 4 WESTERN RES. L. REV. 370 (1953).

75. Steele v. Louisville & N. R.R., 323 U.S. 192 (1944).

76. Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944).

77. Brotherhood of Railway Trainmen v. Howard, 343 U.S. 768 (1952).

ing resulting pressure would prevent them from selecting their own members.[78] A 1952 Presidential Emergency Board, in recommending that carriers sign disputed union shop contracts, also requested a showing by the non-operating unions that they maintained an open membership.[79] This action might explain the operating brotherhoods' reluctance to obtain union shop contracts.[80]

The danger of permitting a union shop to labor organizations known to be arbitrary and discriminatory was emphasized by the carriers[81] and evident to congressmen.[82] A negro or anyone whom the union opposed should not lose his job in a union shop simply because the union arbitrarily refused him membership. Neither should the union be permitted to use the threat of expulsion resulting in automatic discharge as a method of controlling the actions of its members. To eliminate these dangers the union shop provision in the RLA states that union membership is a condition of employment unless membership was denied for some reason other than the failure to meet union financial obligations.[83]

Though this provision protects his job, the negro in the railroad industry may legally be denied union membership or be relegated to a powerless union auxiliary.[84] In this manner a negro who wants to join a union is effectively prevented from taking an active part in collective bargaining because he has no vote in the selection of his bargaining

78. *Hearings, supra* note 10, at 193.

79. When the discrimination question was brought up at the emergency board hearings the non-operating unions claimed good progress toward eradicating discrimination. Traffic World, Feb. 23, 1952, p. 56.

80. A representative of a union of predominantly negro railroad employees was asked what would happen if the union shop amendment were enacted. He stated: "It would be a tremendous incentive toward an acceleration of this trend of opening the doors of the unions to all members regardless of race, color, or creed." *Hearings, supra* note 10, at 70.

81. *Hearings, supra* note 10, at 120, 123.

82. S. REP. No. 2262, 81st Cong., 2d Sess. 3, 4 (1950).

83. *"Provided,* That no [union shop agreement] shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 44 STAT. 577 (1926), as amended, 45 U.S.C. § 152 (11th) (a) (1952).

84. The union shop amendment to the RLA does not prevent the unions from determining their own membership requirements. In Taylor v. Brotherhood of Railway & Steamship Clerks, 106 F. Supp. 438 (D. C. 1952), the union and the railroad had contracted for a union shop and the plaintiff, a negro, feared discharge because he was eligible to join only an auxiliary union. Because the plaintiff had not been discharged or refused membership in the white local union, his request for injunctive relief was dismissed.

representatives, and he has no voice in making union policy.[85] The nonmember negro may even be blocked from the statutory grievance procedure because of the adjustment board's policy of hearing only individual cases supported by the union.[86] An open union requirement was proposed for the RLA, but it was not adopted. Supporters of the proposal felt that if the railroad brotherhoods wanted to increase their strength by means of a union shop they should be willing to open their membership and abandon discriminatory practices.[87] The provision was defeated by those who felt that it was neither the time nor place to initiate federal action in this direction.[88]

With the clear intent of establishing a uniform federal policy, Congress permitted the railroad brotherhoods to contract for the union shop, a valued form of union security. Having clearly in mind the long history of discriminatory conduct on the part of these organizations, Congress sought, at the same time, to insure against any increase in such practices. That the legislators were not prepared to take more affirmative steps to preclude such activity indicates merely that they considered such piecemeal legislation an improper approach to a problem that is certainly not unique to railroad unions.

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85. 96 CONG. REC. 16266 (1950).
86. See p. 150 *supra;* Northrup and Kahn, *supra* note 18, at 374; Comment, 18 U. CHI. L. REV. 303, 311 (1951).
87. 96 CONG. REC. 16267 (1950).
88. 96 CONG. REC. 16377 (1950).