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LABOR LAW—AGENCY SHOP VIOLATES FLORIDA CONSTITUTION

The defendant union entered into a collective bargaining agreement¹ with the co-defendant² which contained an "agency shop" provision requiring all non-union employees of the company to pay the union, as a condition of employment, an amount equal to the initiation and monthly service fees assessed to union members. The plaintiffs, non-union employees, filed a suit in equity to enjoin the enforcement of the contract on the grounds that the agency shop clause violated the "right to work" section of the Florida Constitution.³ The defendants moved to dismiss the complaint, claiming that the entire controversy was wholly within the jurisdiction of the National Labor Relations Board⁴ and that the agency shop provision was not violative of the right to work law. The trial court granted the motion⁵ and the plaintiffs appealed to the District Court of Appeal, which in turn transferred the cause to the Florida Supreme Court.⁶ *Held*, reversed: section 14(b) of the Taft-Hartley Act preserves the jurisdiction of the states in matters involving their right to work laws; and agency shop agreements do violate the right to work section of the Florida Constitution. *Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n*, 141 So.2d 269 (Fla. 1962).

The agency shop is one of several forms of labor-management contracts known as "union security agreements."⁷ These contracts are

1. By representing the majority, the union had gained the right to act as bargaining agent for all of the employees under the Labor Management Relations Act (Taft-Hartley Act) § 9(a), 61 Stat. 136, 143 (1947), 29 U.S.C. § 159(a) (1958). This law will hereafter be identified in the text by its popular name, *The Taft-Hartley Act*; or the *Act*.

2. Though the record showed no allegation or reference that the business involved (Food Fair Stores Inc.) was engaged in interstate commerce, the court assumed that it was, since the parties so treated it in argument. See *Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n*, 141 So.2d 269, 274 n.4 (Fla. 1962).

3. "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." FLA. CONST. Decl. of Rts. § 12.

4. Labor Management Relations Act § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158 (a)(3) (1958). All further references to this agency will be to either the *Board* or *NLRB*.

5. 47 L.R.R.M. 2300 (Fla. Cir. 1960).

6. *Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n*, 141 So.2d 287 (Fla. App. 1961). The court had reversed the trial court's ruling, but stayed the application of its decision based on the union's assertion that the supreme court had original appellate jurisdiction. They contended the decision of the trial court was one "construing a controlling provision of the Florida . . . Constitution," [FLA. CONST. art. V, § 4(2).] and therefore outside the appellate court's jurisdiction. When the supreme court assumed jurisdiction, the mandate of the district court of appeal was automatically vacated.

7. Among other types: the closed shop agreement, which requires that no person may be employed unless he becomes, and for the duration of the agreement, remains, a member of the union in good standing.

The union shop agreement, which does not require union membership as a condition

primarily designed to exclude the "free rider"⁸ from the bargaining unit, by imposing upon the employee the duty to acquire or retain union membership as a condition of employment.

Until 1947, there has been no legal restraints imposed on security agreements. Under the Wagner Act,⁹ a security agreement gave the union the power to terminate employment arbitrarily, by denying or expelling the employee from union membership. This non-restrictive policy often resulted in abuses to the individual.¹⁰ Consequently, when Congress enacted the Taft-Hartley Act¹¹ in 1947, it attempted to remedy this situation by amending several pertinent sections of the Wagner Act.¹²

before hiring, but requires that those hired become union members within a prescribed period of time, usually 30 days.

The "maintenance of membership" agreement is less comprehensive than the closed or union shop agreements and provides only that employees who are members of the union as of the date of the contract must retain their membership as a condition of continued employment, but until the consummation of the agreement, have a right to withdraw from membership.

The preferential shop agreement is the least restrictive form of security, providing that in the event of a vacancy, a member of the union be given first choice, and that non-union help be employed only in the event the union is unable to provide a qualified person.

See ROTHENBERG, *LABOR RELATIONS* 48-50 (1949), for a more detailed study.

8. A free rider (as the unions describe him) is an employee in a bargaining unit who has refused to join the union, and yet receives all the benefits won by the union without helping to defray its expenses as the legal representative of the majority.

The argument contra: The union asked Congress originally for the power to legally represent and bind all employees in a bargaining unit, including non-union members. They knew then, the value of being able to speak for non-union members, and so the present complaints that this valuable privilege they obtained is actually a burden, rings hollow. See Rose, *The Agency Shop v. The Right-to-Work Law*, 9 LAB. L.J. 579, 582 (1958).

9. National Labor Relations Act (Wagner Act), 49 Stat. 449, 29 U.S.C. §§ 151-158, 159-166 (1935) allowed all types of union security agreements.

10. 93 CONG. REC. 4885-90 (1947).

11. Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947) as amended, 29 U.S.C. §§ 141-87 (1958).

12. Section 7 of the National Labor Relations Act (Wagner Act), 49 Stat. 449 at 452 (1935), originally gave the employee "the right to self-organization, to form, join or assist labor organizations, to bargain collectively . . ." It was later amended to give the employee "the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

Section 8(a)(3) previously had permitted all kinds of security agreements. It was completely altered to read: "(a) It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the

The effect was the abolition of the closed shop contract¹³ and the limiting of permissible security agreements to those which required membership in a labor union within thirty days after hiring.¹⁴ Furthermore, the condition of continued employment was not made dependent on union membership but upon the payment of dues.¹⁵

Congress, however, in considering the problem of union security, did not make federal law completely controlling. Section 14(b) of the act¹⁶ provides that "agreements requiring membership in a labor organization as a condition of employment . . ." are removed from exclusive federal protection when a state has laws prohibiting such agreements. Under this section, therefore, the free rider problem remains in those states which prohibit union shops.¹⁷ Consequently, the unions have tried to circumvent the right to work laws by drafting agency shop clauses into collective bargaining agreements, which condition employment solely on the payment of dues.

Section 14(b) has also caused a serious jurisdictional problem in this area by the fact that it creates an exception to the doctrine of federal pre-emption.¹⁸ The Supreme Court has set the major outline for

initiation fees uniformly required as a condition of acquiring or retaining membership." Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958).

13. See Note 7 *supra*.

14. *Ibid*.

15. It seems clear that by enacting this provision Congress intended it as a compromise between the free rider problem of the unions and the rights of the individual. See 93 CONG. REC. 4272 (1947), in which Senator Taft remarked: "The union could refuse the man admission to the union, or expel him from the union, but if he were willing to . . . pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him." Furthermore, Senator Taft made it clear that the payment of dues was made the condition of employment because it would be "a kind of tax, if you please, for union support, if the union is the recognized bargaining agent for all the men . . ." *Id.* at 4887. Several decisions are in accord with these views. See: *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *Union Starch and Ref. Co. v. NLRB*, 186 F.2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951).

16. Labor Management Relations Act (Taft-Hartley Act) § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

17. State laws dealing with union security vary. The following states proscribe agreements conditioning employment on "membership" in a labor organization: ARIZ. REV. STAT. ANN. § 23-1301 to -1307 (1956); FLA. CONST. Decl. of Rts. § 12; IND. ANN. STAT. §§ 40-2701 to -2706 (Supp. 1961); KAN. CONST. Art. 15 § 12; NEB. CONST. Art. XV, §§ 13-15; NEB. REV. STAT. §§ 48-217 to -219 (1952); NEV. REV. STAT. §§ 613.230-300 (1961); N.D. CENT. CODE § 34-01 to -14 (1960); S.D. CODE §§ 17.1101, .9914 (Supp. 1960); TEX. REV. CIV. STAT. Art. 5154g (Supp. 1960).

In addition to banning the union shop, the following states have provisions proscribing fees and dues, as the condition of employment (*i.e.*, agency shop): ALA. CODE tit. 26, § 375 (1958); ARK. STAT. ANN. §§ 81-201 to -205 (1960); GA. CODE ANN. §§ 54-901 to -905 (1961); IOWA CODE ANN. §§ 736A.1-.8 (1950); MISS. CODE ANN. § 6984.5 (Supp. 1960); N.C. GEN. STAT. §§ 95-78 to -84 (1958); S.C. CODE §§ 40-46 to -46.11 (Supp. 1960); TENN. CODE ANN. §§ 50-208 to -212 (1955); UTAH CODE ANN. §§ 34-16-1 to -16-18 (Supp. 1961); VA. CODE ANN. §§ 40-68 to -74.5 (Supp. 1960).

18. In 1949 the Supreme Court held that by virtue of section 14(b) of the Taft-Hartley Act, the states had jurisdiction to enforce their prohibitions drafted under this

pre-emption of labor disputes under federal law by declaring that any activities prohibited,¹⁹ or protected²⁰ by the act are removed from state control. Even conduct arguably subject to the protection or prohibitions of the act must yield to the primary jurisdiction of the NLRB.²¹ In view of this mandate, two major jurisdictional questions evolve. First, can the agency shop be construed as falling within the protection or prohibitions of the act? If it is prohibited as a matter of federal law, then any further determination as to its validity under state law is moot.²² On the other hand, if it is held to be a permissible security agreement, does a state have the power, in view of section 14(b), to remove the agency shop from federal protection and ban it under state law? Any determination of either of these issues will depend largely upon the construction of the language, "agreement requiring membership,"²³ which is common to all the relevant sections of the act.

The validity of the agency shop under federal law²⁴ has been questioned in the *General Motors Corp.* case,²⁵ and the matter is now before the Supreme Court for final resolution. In that case, the UAW requested the company to bargain over a proposed agency shop agreement, after an Indiana court had held that such agreements did not violate the state's right to work laws.²⁶ When the company refused to bargain on the ground that the proposal would violate section 8(a)(3) of the Taft-Hartley Act, the union filed a complaint with the NLRB. The Board held that the act proscribed agency shops in right to work states.²⁷ The rationale of the majority in reaching this decision is difficult to ascertain, as each member wrote a separate opinion based on different grounds.²⁸ Generally, the Board adopted a literal interpretation of the

section. The Court noted that the "States are left free to pursue their own more restrictive policies in the matter of union-security agreements . . . and that § 14(b) was included to forestall the inference that federal policy was to be exclusive." *Algoma Plywood and Veneer Co. v. Wisconsin Labor Relations Bd.*, 336 U.S. 301, 314 (1949).

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

20. *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

21. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

22. Indicative of the problems involved is the decision of *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456 (1961), *cert. denied*, 368 U.S. 829 (1961), which held the agency shop prohibited in that state when at the time of its decision, the NLRB had already declared the agency shop federally prohibited in "right to work states." See notes 27, 38 *infra*.

23. See note 12 *supra*; see text preceding note 16 *supra*.

24. Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958). See note 12 *supra*.

25. *General Motors Corp.*, 47 L.R.R.M. 1306, *rev'd on rehearing*, 48 L.R.R.M. 1659 (1961), *enforcement denied*, *General Motors Corp. v. NLRB*, 303 F.2d 428 (6th Cir. 1962), *cert. granted*, 31 U.S.L. WEEK 3169 (U.S., Nov. 20, 1962).

26. *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959).

27. *General Motors Corp.*, 47 L.R.R.M. 1306 (1961). This was a 3-2 decision in which Chairman Leedom and members Kimball and Jenkins made up the majority with members Fanning and Rodgers dissenting.

28. Chairman Leedom concurred in the strict interpretation, but held the agency shop unlawful only in right to work states. He based this conclusion on the theory that in

language in the section and concluded "membership agreements" were the only forms of union security allowed under federal law.

Shortly after the decision,²⁹ the union filed a motion for rehearing and by a 4-1 vote³⁰ the Board reversed itself and held the agency shop within the protection of section 8(a)(3).³¹ The majority opinion essentially adopted the dissent in the prior decision, which construed the word "membership" very broadly. It was stated that the language "'agreement requiring membership' . . . merely set the *maximum* limits of union security which may be negotiated; and that lesser forms of union security, *e.g.*, an agency shop, were clearly permitted."³² The Board also reasoned that the proviso to section 8(a)(3) made failure to pay dues the *de facto* condition of employment,³³ and therefore, in reality, the union shop which is permissible under the law is nothing more than an agency shop.

On appeal, the court of appeals denied enforcement of the Board's decision.³⁴ In a significant holding the court struck down the agency shop as illegal under federal law. The court answered the Board majority by declaring:

We do not regard the "agency shop" arrangement as being something lesser than a "union shop." We believe it is entirely different. A Union security agreement is premised upon membership in a labor organization. An "agency shop" on the contrary is based upon an employee paying charges in lieu of union membership as a condition of employment An employee involuntarily subjected to the "agency shop arrangement" is not a Union member or the equivalent of it.³⁵

states allowing the union shop, employees had the right to waive this type of agreement for a lesser form of union security. But as this right was contingent on the right to bargain for a union shop, in those states which outlawed union shops, the agency shop was outlawed also.

Member Kimbal found this form of union security unlawful principally because non-union employees subject to the agreement would not be allowed an "economic voice" in forming union policies. See note 27 *supra*.

29. Members Jenkins and Kimball were replaced by members Brown and McCulloch, appointees of President Kennedy.

30. The four-man majority was composed of members McCulloch, Brown, Rodgers and Fanning. Former Chairman Leedom dissented.

31. General Motors Corp., 48 L.R.R.M. 1659 (1961). Technically, this decision did not affect the validity of the agency shop in a right to work state as the parties stipulated that the case would be decided solely on the basis of federal law.

32. *Id.* at 1662. The opinion further stated that the Board "was unable to distinguish so far as its legality is concerned," the agency shop proposal from any other union-security proposal which predicates a right of discharge *only* upon an employee's failure to tender the equivalent of regular union dues and initiation fees. *Ibid.*

33. The majority cited four previous Board decisions as precedent for this proposition. Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); American Seating Co., 98 N.L.R.B. 800 (1952); Union Starch & Ref. Co., 87 N.L.R.B. 779 (1949); 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951); Public Serv. Co. of Colorado, 89 N.L.R.B. 418 (1950).

34. General Motors Corp. v. NLRB, 303 F.2d 428 (6th Cir. 1962).

35. *Id.* at 430. Apparently, the court has drawn a distinction between dues paying

Having adopted the strict interpretation of the first Board decision, the court went on to emphasize that the clear language of the act permitted no other conclusion.³⁶

Relatively few decisions have considered the question as to whether section 14(b) of the Taft-Hartley Act grants to a state the authority to proscribe agency shop agreements. However, the majority have answered affirmatively.³⁷ In *Higgins v. Cardinal Mfg. Co.*,³⁸ Kansas was the first state to pass on this question. The Kansas court recognized immediately that the literal language of the section only reserves to the states the right to prohibit agreements requiring union membership as the condition of employment. However, the court pointed out that the Supreme Court and the NLRB had previously equated membership with the tender of dues under section 8(a)(3).³⁹ Thus, the court reasoned, the expression "agreement requiring membership" in section 14(b) should also be synonymous with the payment of dues and fees.⁴⁰ Referring to the legislative history of section 14(b), the court indicated that Congress at the time of enactment of the law was well aware of the broadly drafted state right to work laws.⁴¹ In accord with this decision is *Amalgamated Ass'n v. Las Vegas-Tonopah-Reno Stage Line*,⁴² in which a federal district court sitting in Nevada declared that "a literal construction of section 14(b) would frustrate the very purpose for which it was enacted

as a condition of employment in a union shop and dues paying used as a substitute for union membership in an agency shop.

36. "If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this statute." *Id.* at 430.

As pointed out in the text preceding note 22, an affirmance of this decision by the Supreme Court could make the question presented in the instant case moot.

37. All the majority decisions will be discussed in the text. Two Arizona cases touched upon the issue but cannot be held to have decided squarely on it. In one, a lower court issued an injunction against a union which was picketing an employer to gain certain objectives, among which was an agency shop. The trial court found the agency shop violated the state right to work law, but on appeal the state supreme court upheld the injunction on other grounds and declined to rule at all on the agency shop issue. *Arizona Flame Restaurant v. Baldwin*, 26 CCH Lab. Cas. § 68647 (Ariz. Super. Ct. 1954), *modified and aff'd on other grounds*, 82 Ariz. 385, 313 P.2d 759 (1957). In *Sheet Metal Workers Int'l Ass'n v. Nichols*, 360 P.2d 204 (Ariz. 1961), the Arizona Supreme Court held that 14(b) of the Taft-Hartley Act gave state courts jurisdiction to enforce violations of their respective right to work laws, but the facts of the case were substantially different as it was an action for conspiracy and there was never any mention of an agency shop involved.

38. 188 Kan. 11, 360 P.2d 456, *cert. denied*, 368 U.S. 829 (1961).

39. See text accompanying note 33 *supra*.

40. *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, 465, *cert. denied*, 368 U.S. 829 (1961).

41. *Id.* at 468; See 93 CONG. REC. 6378 (1947); See 1 NLRB, LEGISLATIVE HISTORY OF LABOR MANAGEMENT RELATIONS ACT, at 324-25, 564 (1948). In the *Chicago Tribune*, Feb. 1, 1960, co-sponsor Fred Hartley stated he was "utterly astonished" by the interpretation that states have no power under 14(b) to ban union shops. See 35 NOTRE DAME LAW. 547, 549 n.16 (1960).

42. 202 F. Supp. 726 (D. Nev. 1962).

and would create a patently absurd result."⁴³ The court recognized that any broader construction would validate the agency shop and consequently render the right to work law useless.

The only court to express a contrary view side-stepped the pre-emption question posed by section 14(b) and limited its decision to a determination of the validity of the agency shop in relation to the state's right to work law. In *Meade Elec. Co. v. Hagberg*,⁴⁴ the statute in issue was penal in nature. This factor, the court said, called for a strict interpretation and, coupled with the fact that there was no express prohibition of dues paying in the law, provided the basis for holding the agency shop valid.

The instant case has placed Florida clearly with the majority on the jurisdictional issue. The court relied heavily on the language of *Higgins* and *Amalgamated* in holding that section 14(b) confers power to the states to ban the agency shop.⁴⁵ They agreed that it would "frustrate the congressional intent to construe [literally] that section [14(b)] so as to prevent the states from also prohibiting agency shop agreements."⁴⁶ The court also grounded its decision on the *Algoma* case⁴⁷ and rejected the argument that the decision had been expressly overruled in later cases of the Supreme Court dealing with the pre-emption question.⁴⁸

On the merits, *Schermerhorn* again sided with the majority⁴⁹ in

43. *Id.* at 729.

44. 129 Ind. App. 631, 159 N.E.2d 408 (1959).

45. The court also adopted as its own the unpublished opinion prepared by Judge Carroll of the Third District Court of Appeal. *Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n*, 141 So.2d 269, 274 (Fla. 1962).

46. *Id.* at 273.

47. See note 18 *supra*.

48. *Local 429, International Bhd. of Elec. Workers v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *Plankinton Packing Co. v. Wisconsin Employment Relations Bd.*, 338 U.S. 953 (1950), are usually argued as the decisions that have impaired the validity of *Algoma*. However, they can be effectively distinguished by the fact that in all the cases the activities which the state courts attempted to enjoin were prohibited or protected in other sections of the Taft-Hartley Act. Consequently the states had no powers under section 14(b) in relation to these matters.

Not as easy to distinguish is *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), because of the exceptionally broad language used in the holding (all activities arguably subject to § 7 or § 8 of the Act must defer to the exclusive competence of the NLRB). However, assuming that 14(b) operates to remove union shop agreements already under the federal protection of section 8(a)(3), it may be asked how it can be argued that 14(b) does not operate to remove agreements arguably subject to the same protective clauses.

49. The Florida decision brings to a total of 8 the number of states which at some level have declared the agency shop illegal: *Ariz.*—*Arizona Flame Restaurant Inc. v. Baldwin*, 26 CCH Lab. Cas. § 68647 (Ariz. Super. Ct. 1954), *modified and aff'd on other grounds*, 82 Ariz. 385, 313 P.2d 759 (1957); *Kan.*—*Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, *cert. denied*, 368 U.S. 829 (1961); *Neb.*—*Op. of Neb. Att'y Gen. No. 173*, March 2, 1960; *Nev.*—*Amalgamated Ass'n of St. Ry. Employees v. Las Vegas-Tonopah-Reno Stage Line*, 202 F. Supp. 726 (D. Nev. 1962). The Attorneys General of *North Carolina*, *South Dakota* and *Texas* have concluded in respective opinions that the

holding the agency shop violative of the state right to work provision. Generally, the wording of the individual statute is of major importance in determining the validity of an agency shop agreement in a given state,⁵⁰ and the court placed particular emphasis on the word "abridge" in the Florida provision.⁵¹ The court further emphasized that "such an arrangement is palpably and totally inconsistent with the freedom of choice contemplated . . ." by the right to work law.⁵²

The U.S. Supreme Court has granted certiorari in the instant case.⁵³ It would seem, however, that a final disposition would rest on the Court's resolution first of the question presented in the *General Motors* case. For if the lower court is upheld and the agency shop is found illegal under federal law, then by virtue of federal pre-emption the decision would end the controversy on all levels. On the other hand, if the Court holds the agency shop a protected security agreement under section 8(a) (3) of the act, then the jurisdictional question raised in *Schermerhorn* must be resolved. Assuming the latter decision, it is submitted that the instant case will be affirmed for the following reason. For the Court to find the agency shop valid under federal law in *General Motors*, of necessity, its construction of the words "agreement requiring membership" in section 8(a)(3) must be broad. Consequently, as the language is the same in section 14(b), the construction there should be similarly broad. This interpretation would authorize a state acting under section 14(b) to proscribe not only the union shop, but all lesser forms of union security as the agency shop. To find to the contrary, the Court would have to construe the language narrowly and by so doing, place itself in the position of creating a dual meaning for the phrase and an inherent inconsistency between two related sections.

The problem of the "free rider" is a serious one to the unions. On the other hand, the rights of the individual should not be sacrificed to

agency shop is illegal in their states. See, 3 State Laws (CCH Lab. L. Rep.) ¶ 49,513 (Sept. 24, 1962).

States in which the agency shop is legal: *Ind.*—Meade Elec. Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959); *N.D.*—The Attorney General has ruled that the agency shop is not unlawful, but dues and fees charged non-union employees for representation must be limited to the actual cost of representation and bargaining. Op. of N.D. Att'y Gen., Aug. 24, 1959, as cited in 3 State Laws (CCH Lab. L. Rep.) ¶ 41,025 (May 21, 1962).

50. See note 17 *supra*.

51. "Under § 12 of the Declaration of Rights of Florida what is prohibited is the denial or abridgement of one's right to work on 'account of membership or non-membership in any labor union, or labor organization.' When, because of his non-membership, an employee is required to pay labor union dues, or sums equal to dues, as a condition of employment or continued employment, his right to work is 'abridged.'" *Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n*, 141 So.2d 269, 276 (Fla. 1962). In Nebraska, the Attorney General relied on the word "affiliation" in the state statute to find the agency shop illegal. See Op. of Neb. Att'y Gen. No. 173, March 2, 1960.

52. *Id.* at 273.

53. 31 U.S.L. WEEK 3169 (Nov. 20, 1962).

the majority. It is submitted that the wisest position is taken by those who advocate a compromise agency agreement, where the amounts charged non-union employees are limited to the *actual* costs of representation.⁵⁴

DONALD H. ROSS

TAXATION OF PAYMENTS TO WIDOWS OF DECEASED EMPLOYEES

At the time of his death, after forty-two years of service, deceased was president of a company, drawing an annual salary of 42,000 dollars. Four days after his death, the board of directors passed a resolution¹ to pay his widow the sum of 42,000 dollars in twenty-four semi-monthly installments. The resolution indicated that the payment was being made in the best interests of the company, and was made as additional compensation and in consideration of the services rendered by the deceased.² The corporation made the payments to the widow, and withholding taxes were withheld. The corporation deducted the payments on its corporate tax returns as employee salary expense. The widow excluded the payments from her tax return, and the commissioner

54. See North Dakota position, note 49 *supra*.

1. The resolution was as follows:

"WHEREAS, Martin C. Kuntz, Sr., our beloved brother, who died January 3, 1955, had completed 42 years of faithful service to The Peter Kuntz Company, and

"WHEREAS, Martin C. Kuntz, Sr. as President of this company from August 5, 1954 until his death, and prior thereto as executive Vice-President and Secretary, did direct the affairs of the company in a highly successful manner,

"BE IT RESOLVED, that the directors of the Company hereby record their deep appreciation for the many contributions of Martin C. Kuntz, Sr., his loyalty, boundless energy, untiring efforts, excellent judgment and splendid leadership.

"It was moved by Elizabeth K. Wickham, seconded by John J. Kuntz, and upon vote unanimously passed, that because of Martin C. Kuntz, Sr.'s service of Forty-Two (42) years to The Peter Kuntz Co., in an executive capacity, as outlined in the above Resolution, and because during this entire period until his death he devoted all of his time, skill and knowledge to the welfare of this corporation; it is to the best interests, and benefit of the corporation to pay to Isabelle M. Kuntz, the widow of Martin C. Kuntz, Sr., Deceased, the sum of \$42,000.00 which was the amount of his yearly salary for 1954, payable in twenty-four semi-monthly installments beginning January 15, 1955. This payment is made as additional compensation and in consideration of services heretofore rendered to this corporation by the late Martin C. Kuntz, Sr. as hereinbefore stated." Estate of Kuntz v. Commissioner, 300 F.2d 849, 850 (6th Cir.), *cert. denied*, 31 U.S.L. Week 4116 (U.S. Nov. 8, 1962).

2. A second resolution for the payment of 5,000 dollars to the widow was also passed, which declared that the sum was not taxable to the recipient under § 101(b) of the Internal Revenue Code of 1954. Estate of Martin Kuntz, 29 P-H Tax Ct. Mem. 1531 (1960). The exclusion by the widow of this amount was not being contested. Estate of Kuntz v. Commissioner, *supra* at 851.

All sections hereinafter cited will be to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.