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Labor Law: Extent of State Power
To Enforce Right-to-Work Laws

Nonunion employees brought suit in a Florida State court to enjoin the enforcement of an agency shop provision entered into by their employer. The Florida Supreme Court held that the executed agreement violated the "right-to-work" provision in the Florida Constitution and granted the injunction.¹ On certiorari the United States Supreme Court *held* that section 14(b) of the Labor Management Relations Act (LMRA)² authorizes state courts to enjoin the enforcement of union security provisions pursuant to state law. *Retail Clerks Ass'n v. Schermerhorn*, 375 U.S. 96 (1963).

Section 7 of the LMRA makes clear that one of the aims of federal labor legislation is to secure for workers the right to engage in concerted activity.³ Section 8(a)(3) specifically provides that it is not an unfair labor practice by itself for a union and an employer to enter agreements requiring union membership of employees.⁴ Section 14(b) preserves the right of states to regu-

1. 141 So. 2d 269 (1962).

2. 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958). Section 14(b) 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."

3. Section 7 of the LMRA reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of 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).

61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

4. Under § 7 of the National Labor Relations Act (Wagner Act), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958), the closed shop and other forms of union security were not prohibited. With the enactment in 1947 of the Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1958), as amended, 29 U.S.C. §§ 154-88 (Supp. V, 1964), however, Congress expressly prohibited the closed shop. The union shop was then approved by implication as the maximum form of union security under federal law. Section 8(a)(3), the first proviso, assures that the employer is not precluded, under the onus of an unfair labor practice, from requiring union membership "after the thirtieth day following the beginning of such employment." The operation of these statutes establishes the extent of federal law in respect to union security arrangements. See

late these same union security measures. The States may restrict union security proposals, even forbid their execution, notwithstanding more permissive federal standards.⁵ The instant case makes it clear that state courts have the power to provide a remedy for violations of state proscription of union security agreements.⁶ The interplay of federal and state policy considerations, however, provide a broader background for considering the *Schermerhorn* decision.

The Court in *Schermerhorn* held that state power "begins only with actual negotiation and execution of the type of agreement described by § 14(b)."⁷ In right-to-work states, the policy denouncing union security measures would be more fully implemented if those States were permitted to enjoin activity in

Rains, *Construction Trades Hiring Halls*, 10 LAB. L.J. 363 (1959); Toner, *The Union-Shop Under Taft-Hartley*, 5 LAB. L.J. 552 (1954); Symposium, *Union Security Under the Taft-Hartley Act*, 11 SYRACUSE L. REV. 37 (1959).

5. The type of union security arrangement involved in the instant case was an "agency shop." Such an arrangement compels workers to pay the union dues and fees, but does not require them to obtain actual membership. Of the 20 jurisdictions having right-to-work legislation, 17 specifically outlaw the agency shop. See 30 FORDHAM L. REV. 530, 536 (1962). However, only 10 states explicitly prohibit by statute the conditioning of employment by the payment of dues and fees. For a case in which the legality of the agency shop is upheld in a state court, see *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959). On the federal level, the agency shop was held to be a legal form of union security within section 8(a)(3). See *General Motors Corp.*, 133 N.L.R.B. 451 (1961), *enforcement denied*, 303 F.2d 428 (1962), *rev'd*, 373 U.S. 734 (1963).

On the agency shop, see Jones, *The Agency Shop*, 10 LAB. L.J. 781 (1959); Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233 (1959); Note, *The Agency Shop, Federal Law, and the Right-to-Work States*, 71 YALE L.J. 330 (1961).

6. This case deals with the issue expressly left open for re-argument in *Retail Clerks Int'l v. Schermerhorn*, 373 U.S. 746 (1963). In that case the Court stated "that the contract involved here is within the scope of § 14(b) of the National Labor Relations Act and therefore is congressionally made subject to prohibition by Florida law." *Id.* at 747. The Court, however, expressly left open the issue of "whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the State's prohibition against such arrangements." *Id.* at 747-48.

Why the Court in the instant case dwelled on the problem of remedies is not entirely clear. The Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959), stated that "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." Since the effect of 14(b) is clearly to vouchsafe to the States the right to regulate union security proposals, the resultant relief does not seem disputable.

7. 375 U.S. at 105. (Court's emphasis.)

furtherance of illegal security agreements.⁸ If only the application of an executed agreement is enjoinable, a union would be free to engage in antecedent concerted activity in pursuance of such an agreement without judicial interference. There is little reason for allowing unions to exert economic pressure in furtherance of illegal ends. The state right-to-work laws are designed to insure workers absolute freedom to decide whether or not to join a union.⁹ Pre-agreement activity may thwart this policy. Workers may not be aware that the agreement the union seeks is illegal; even if they are, individual workers may yield to the pressure exerted and join to avoid union sanctions.

Schermerhorn, by not supporting the power of state courts to enjoin activity prior to the execution of an illegal union security agreement, appears to leave prior union activity solely within the control of the NLRB. The Court distinguishes union activity protected or prohibited by federal law from an agreement executed in violation of state law. Absent the agreement any activity resulting in a labor dispute would be subject to the exclusive control of the NLRB under the pre-emption doctrine.¹⁰

The Court cites *Local 438 Constr. Union v. Curry*¹¹ for the proposition that the pre-emption doctrine would not permit state court interference with union activities clearly protected or prohibited by the LMRA.¹² If the Court's reading of *Curry* is

8. State jurisdiction has always been upheld when the union activity has been violent or destructive of public property. For such situations, see *International Union, UAW v. Russell*, 356 U.S. 634 (1958) (malicious conduct); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (violent picketing); *Johnston v. Colonial Provision Co.*, 128 F. Supp. 954 (D. Mass. 1954) (mass picketing).

9. The Florida constitutional provision drawn into question in *Schermerhorn* indicates such a policy. "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union. . . ." FLA. CONST. declaration of rights § 12.

10. The Court indicates that absent the agreement, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), would be controlling, and any activity "would be a matter for the National Labor Relations Board. . . ." 375 U.S. at 105.

In *Garmon*, the Court develops the pre-emption doctrine, finding that it should be within the Board's power to hear all those disputes "arguably subject" to the act. 359 U.S. at 245. Since activity in support of a union security measure may well be "arguably subject" to the act, the Court adds the caveat that *without* the agreement *Garmon* would be controlling. 375 U.S. at 105.

11. 371 U.S. 542 (1962).

12. 375 U.S. at 105. In *Curry* the union objecting to a nonunion plant's wage scale placed a solitary picket at the entrance. The workers honored the picket and struck. The employer sought and gained an injunction against the

correct, states may implement their right-to-work laws only when (1) activity in respect to union security provisions is not subject to the jurisdiction of the Labor Board, (2) the state law has been violated, and (3) the union security agreement has reached the point of execution. The rationale for this position is the desirability of a uniform labor policy under federal law; therefore a minimum of state court interference can be tolerated.

Since section 14(b) explicitly allows the States to outlaw union security agreements, Congress perhaps has not felt as strongly about federal uniformity as the *Curry* decision might indicate.¹³ Section 14(b) indicates Congress's concern with state policy in the union security field.¹⁴ When the effect on federal policy is minimal there is no good reason to forbid state courts to implement their right-to-work laws. For example, if the union engages in concerted activity expressly for an illegal security provision, the States should be permitted to afford a remedy before the agreement is executed.¹⁵ However, if there is a question of proof involved — if the union justifiably insists that other goals are sought or is even camouflaging its true intent behind other genuine allegations — the determination should be made by the Board. Permitting the States to enjoin activity indiscriminately would result in vitiating a number of strong federal policies.

The LMRA itself contains many sections in which the federal policy is manifested that unions be free to exert economic pressures and engage in concerted activities. For example, section 13 specifically provides that the right to strike shall not be impaired. In sections 8(a)(1), (2), and (3) the employer is strictly enjoined

picketing. On appeal, the Supreme Court struck down the injunction finding that the union's action, although peaceful, was conjecturally a violation of LMRA § 8(b) and as such within the sole jurisdiction of the NLRB.

13. In fact, Mr. Justice Douglas speaking for the Court in *Schermerhorn* states: "Congress . . . chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of agreements authorized by § 14(b) and decided to suffer a medley of attitudes and philosophies on the subject." 375 U.S. 104-05.

14. For a discussion of the policy behind state right-to-work legislation see, Torff, *The Case for Voluntary Union Membership*, 40 IOWA L. REV. 621 (1955).

15. The union in this situation is making no claim to immunity from state law; the Board would have nothing to determine that would express a specific federal policy.

The Arizona Supreme Court in *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1959), took a different approach in allowing equitable relief with respect to a union security measure (an illegal strike). The court reasoned that since the strike was called for a purpose in contravention of the State right-to-work law, the strikers were no longer employees and were no longer protected under the LMRA.

from interference with union organizational and economic activities. In other sections such as 8(b)(4)(B) and the proviso to 8(b)(4), picketing is protected if conforming to certain conditions. In addition, there is a strong federal policy against the capricious exercise of state injunctive power over labor disputes.¹⁶ That danger is clear if states were permitted to exercise such power over pre-agreement activities. The result is that state remedial power over pre-agreement activities would collide with too many express federal considerations.

Nonetheless, a situation in which unions are permitted to apply economic pressures for illegal ends should not persist. An aggrieved employer should be granted recourse to the Board to prevent these abuses of union prerogatives when such activity occurs. A Board finding of an unfair labor practice would effectively mediate the competing federal and state policies.¹⁷ Although the Board must make an initial interpretation of state law on the question of violation of state right-to-work prohibitions, it is preferable to the situation in which a state may compromise strong federal policies through the implementation of state remedies.

Schermerhorn is a faithful reading of section 14(b). Perhaps it will lead to an expansion of Board jurisdiction into pre-agreement activities consonant with the federal and state policies underlying the decision.

Constitutional Law: Should Privilege Against Self Incrimination Be Available to Sole Shareholder Regarding Corporate Books and Records?

A special agent of the Internal Revenue summoned the president and sole shareholder of a corporation and demanded the

16. It must be noted that one of the reasons for the expression of federal anti-injunction policy rests in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958), which removes such injunctive power from the federal courts. State courts are not so bound.

17. Of course, a Board determination entails some delay during which the unions' purposes may be accomplished without injunctive relief. If this is the case, the Board should implement the § 10(j) injunctive power vested in it. The Board has never made extensive use of the section, but a situation in which the unions' motivations are clear should warrant its application. Section 10(j) reads: "The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order. . . ."