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Union Security Under Federal Statutes; a Primer

*by George Maxwell**

UNION SECURITY is a term with many ramifications, all of which stem from the basic right of a union to represent the employees of a business in their collective bargaining with the employer. A union is secure when its right to represent the employees is embodied in a contract between the union and the employer, containing a clause which assures the union a continuing right of representation. Such a contract clause protects the union from challenge by another union, from repudiation by the membership during the life of the contract and from a refusal by the employer to recognize the union as the collective bargaining agent of its employees.

The degree of security which a union possesses, or the absence of such security, is depicted by certain basic terms such as "open shop," "closed shop," "maintenance of membership," "union shop" and "preferential hiring," and may be affected, in addition, by the union's degree of control of the apprenticeship program in the trade.

Open Shop.

An "open shop" is one in which the employer may hire whom he pleases and whose employees need not belong to a union at any time during their employment. Where there is an open shop the employees are not represented by any union as their collective bargaining agent and the employer is free to employ, to discipline and to discharge employees without let or hindrance by a union. The employees in an open shop may belong to a union. The employer may pay wages in accordance with the union scale and may even deal with a representative of the union; but in the absence of any contract the union has no security.

The open shop as an element in interstate commerce has almost departed the scene of labor relations; however, there are certain outstanding exceptions. Some companies have been able, even up to the present, to withstand the efforts of the unions to

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organize their employees. The number of such establishments is constantly on the decline.

Closed Shop.

The opposite to an open shop is a "closed shop." Where a closed shop exists no employee may be hired unless he is a member of the union and all of the conditions of employment are controlled by the contract between the employer and the union. This type of relationship is forbidden today by the National Labor Relations Act which applies, however, only to businesses in interstate commerce or affecting interstate commerce.¹ The regulation of union-management relationship in intrastate commerce is, of course, beyond the powers of Congress and rests with the several states. Due to the limitations of the power to regulate commerce within a state and because there are businesses, manufacturing plants and commerce confined within the limits of a single state the closed shop may still be found in such situations.²

Union Shop.

Where the union cannot secure a closed shop it is most likely to seek a "union shop." A union shop is one in which the employer may engage the services of employees in the open market, without reference to their membership or non-membership in a union; but if an employee is retained on the payroll for thirty days or more, then he is required to become a member of the union and to maintain his membership in good standing for the duration of the contract.³

Maintenance of Membership.

A fourth type of situation is that called "maintenance of membership." This type of relationship exists when the employer is free to hire whomever he pleases without reference to membership or non-membership in a union; but all those who, at the time of the signing of the contract by the company and the union, are members of the union and those who thereafter become members of the union must maintain their membership in the union

¹ 49 Stat. 449 (1935), 29 U. S. C. § 151 (1946).

² *E.g.*, building trades.

³ This is the type of union security permitted by the Taft-Hartley Law, 49 Stat. 449, 29 U. S. C. App. § 151 (1946), *as amended*, 61 Stat. 151 (1947), 29 U. S. C. App. § 165 (Supp. 1947).

in good standing for the term of the contract. This type of union security came into prominence as a result of the "orders" of the War Labor Board during the second world war.⁴ It was an attempt to preserve the "status quo" of union membership in an employee unit in order to avoid the strife which might attend an organizing effort on the part of the union, and also to protect whatever membership the union might by persuasion enlist. The device was one of the results of the effort on the part of President Franklin D. Roosevelt to insure continuous production of goods needed for defense, and was a compromise arranged as a bargain between labor and management to avert strife and ensuing strikes. "Maintenance of management" was awarded to a union in settlement of a dispute with management only if the union had not been guilty of a work stoppage in its efforts to negotiate a contract. In other words it was made the policy of the War Labor Board to award some union security to a union which gave up its right to strike.

Preferential Hiring.

There is another circumstance in labor-management relations which provides some measure of security to a union without the necessity of a formal contract with each employer who employs members of the union. This is called "preferential hiring." It is most widely used in commerce passing over the highways of the seas. Because of the temporary nature of the stay in port of a ship, it is almost impossible to transact the work of loading and unloading cargo expeditiously if each shipmaster must negotiate a contract with the dock-worker's union on the occasion of each visit to a port. In this situation it is necessary to secure quickly a crew of longshoremen and the practice has grown up of looking first to the union for employees. Out-of-work employees register their availability for work at the union hall and when a ship docks a call is made to the union for workmen. If the union is unable to supply a sufficient force, then the shipmaster may hire whomever he pleases; but members of the union are given preference. The same sort of employment practice extends to the other types of employees needed in the shipping enterprise. The hiring hall, and preferential hiring, are practices generally prevailing in the shipping industry and attempts to enlarge the sphere of such practice have not been greatly successful and have

⁴ International Harvester Co., 1 War Lab. Rep. 112 (1942).

been impeded to a certain extent by some decisions of the National Labor Relations Board.⁵

Control of Apprenticeship Programs.

In the days when unions, as such, had only the legal status of unincorporated societies certain skilled trades were able to establish a precarious kind of union security through the control of apprenticeship programs. By virtue of the fact that knowledge of the trade was usually controlled by the union and union members would refuse to work with non-union employees, such unions could secure favorable terms for their members from employers needing the skills which the members possessed. In an historic case in point a union was able to prevent the employment of a non-member artisan,⁶ effectively denying his right to gainful occupation in the trade. However, the security of the union in its control of such conditions was at best tenuous because, if the employer could find sufficient artisans for his purpose, he might make membership in a union the reason for discharge of the employee.⁷

The Wagner Act.

Such was the status of union security until the passage of the "Wagner Act" in 1935.⁸ This piece of legislation was the first attempt to bring the matter of labor relations into a settled and regulated condition. It attempted to bring out of the twilight zone of conflict between common law and legislation, and into the field of social recognition, the regulation of relations between employees and employers. Prior to this time an unscrupulous employer had almost unlimited freedom in handling employees and this naturally and frequently led to abuse. The employer by reason of his control of employment opportunities in most instances need not have paid any heed to the desire of his employees for collective bargaining. The Wagner Act was intended to restore some measure of equality in the bargaining relationship between employer and employee and to this end it was designed to encourage the organization of employees into unions.

⁵ Basic Vegetable Products, Inc., 75 N. L. R. B. 102 (1948); Julian Freirich Co., 86 N. L. R. B. 75 (1949).

⁶ Mayer v. Journeyman Stonecutter's Ass'n., 47 N. J. Eq., 20 Atl. 492 (1890).

⁷ Hitchman Coal Co. v. Mitchell, 245 U. S. 229 (1917).

⁸ See note 1 *supra*.

Maximum union security was possible under this Act; but union membership had been so decimated as a result of the depression which began in 1929 that unions were not able, immediately, to take full advantage of the benefits of the new legislation. It was first of all necessary for them to enlarge their membership before they could write into contracts with management the provisions which gave them the measure of union security called the closed shop. The organizational effort was at its height when the second world war interrupted this activity. The need for production of defense materials brought about the compromise referred to earlier under the designation of maintenance of membership, which was substituted for the closed shop.⁹ The National War Labor Board, after much discussion on policy, adopted as a general practice the awarding of "maintenance of membership" to a union provided there was not a strike in the immediate background. This practice resulted in the inclusion in many contracts, both initial and renewal types, of this type of union security.¹⁰

The Taft-Hartley Law.

Expiration of the War Labor Board in 1945 left the unions free to pursue their original purpose with respect to union security. This resulted in a considerable number of strikes and a great deal of public discussion of the "right to work" and the extension of the power of unions to deprive non-member employees of work. As a result of the resentment directed toward the increasing influence of the unions, certain amendments to the Wagner Act were passed by Congress under the popular name of the "Taft-Hartley Law."¹¹ The chief effect of these amendments was to place restrictions of the right of the unions to require membership as a condition of continued employment, and the proscription of the closed shop in commerce under federal regulation. While denying to unions the security of the closed shop, the Taft-Hartley Act did permit the establishment of the union shop in certain circumstances.¹² One important condition to the union's right to a union shop was the holding of an election under National Labor Relation Board procedures so that employees could decide whether they wanted a union shop. Be-

⁹ 1 N. W. L. B. Termination Rep. 81 (1946).

¹⁰ See note 4, *supra*.

¹¹ See note 3, *supra*.

¹² *Id.* at § 159 (a) (3).

cause of the overwhelming approval of the union shop in such elections Congress in 1951 again revised and amended the Labor Relations Act and by the so-called Taft-Humphrey amendments removed the requirement of an election among the employees before a union shop could be lawfully a part of the labor-management contract.¹³

A labor union may now demand the inclusion of a union shop clause in its contract and provide that after thirty days of employment every employee must join the union and continue to be a member in good standing for the term of the contract.

One word of caution should be inserted here. While the Labor Management Relations Act permits the degree of union security described as the Union Shop, it further provides that where any State or Territorial statute further limits the degree of union security than does the N. L. R. A. the greater limitation shall prevail.¹⁴ Thus strangely does federal legislation yield to state legislation in this matter even with respect to interstate commerce.

The National Picture.

The closed shop, the union shop and even maintenance of membership are prohibited by statutes or constitutional provision in Arizona,¹⁵ Arkansas,¹⁶ Florida,¹⁷ Georgia,¹⁸ Iowa,¹⁹ Nebraska,²⁰ Nevada,²¹ North Carolina,²² North Dakota,²³ South Dakota,²⁴ Tennessee,²⁵ Texas²⁶ and Virginia.²⁷ It is interesting to note that the requirement of elections to determine the wishes of the employees involved on this matter and that a stated percentage of votes must be in favor of union security before the

¹³ 49 Stat. 449, 29 U. S. C. App. § 151 (1946), as amended, 65 Stat. 601 (1951), 29 U. S. C. App. § 159 (Supp. 1951).

¹⁴ Taft-Hartley Amendments, see note 3 *supra*.

¹⁵ ARIZ. CODE ANN. § 56-120 (1939).

¹⁶ ARK. STAT. § 81203-81205 (1947).

¹⁷ FLA. CONST., Declaration of Rights, § 12.

¹⁸ GA. SESS. LAWS 1947, Act 140, § 4, 5.

¹⁹ IOWA CODE § 736 A-1, 2, 3 (1950).

²⁰ NEB. REV. STAT. § 13, 14, 15 (1943).

²¹ NEV. SUPP. and SESS. LAWS 1951, c. 95.

²² N. C. CODE § 95-78 to 95-84 (1943).

²³ N. D. REV. CODE § 34-0114 (Supp. 1947).

²⁴ S. D. CONST. Art. VI, § 2.

²⁵ TENN. CODE § 11412.8 (1932).

²⁶ TEX. REV. CIV. STAT. 5207a, § 1-5 (1947).

²⁷ VA. CODE § 40-68 to 40-75 (1950).

inclusion of a union security clause can be lawfully included in the contract is provided for in the laws of Colorado,²⁸ Kansas²⁹ and Wisconsin.³⁰

Despite the requirement of an election for approval of the union shop it is significant that in 76% of the cases involving the American Federation of Labor and in 50% of the cases involving the Congress of Industrial Organizations the union shop provision was included in contracts concluded in the 1950-51 period.³¹ With the elimination of the requirement of an election, late in 1951, union shop provisions may now be enforced and it seems highly likely that the inclusion of such a provision will soon become a prevailing condition before negotiation of contracts with the unions can be successfully concluded. The only obstacle in the way of such a condition, so far as the law goes, is the restriction by state legislation of the right to include such clauses in contracts with unions.

It may be well to pause for a moment to look at an apparent conflict of trends in the matter of union security and law. A growing tendency to permit an increase of union security can be discerned in federal legislation. At the same time there seems to be a tendency further to *restrict* union security in state legislation. Attention has been called above to the fact that federal legislation yields to the greater restrictions of union security contained in state law. It ought also to be noted that the majority of states which have restrictive legislation can be termed predominantly agricultural in their economy. However, some of these states, notably those in the southeastern portion of the United States are now being increasingly industrialized. In these states there is already evidence of a movement by labor unions to have the restrictions on union security removed. This may result in the bringing of federal and state legislation in such areas into conformity; but as yet the outcome cannot be predicted.

Further evidence that federal law is gradually reducing the limitations on obtaining union security, and the union shop, may be found in the amendments to the Railway Labor Act which were passed on January 10, 1951.³² These amendments spe-

²⁸ COLO. STAT. ANN., c. 131, § 6(1)(c) (1943).

²⁹ KAN. GEN. STAT. ANN. c. 191, § 44-809 (4) (1943).

³⁰ WIS. STAT. c. 57, § 111.06(c)1 (1939).

³¹ Laborgraph, Jan. 4, 1952, P. 3-6 (B. N. A.).

³² 44 Stat. 577, 45 U. S. C. App. § 151 (1946), *as amended*, 64 Stat. 1238 (1951), 45 U. S. C. § 152 (Supp. 1951).

cifically permit union shop agreements between unions and employers under coverage of this act. This was a radical alteration of position, because up to this time union security clauses of any sort were specifically forbidden by the Act. Since the amendment the union shop clause has been included in a number of the contracts between the railroads and the "operating" unions. There is considerable pressure at the present time to have the clause included in some of the contracts with the "non-operating" unions representing railroad employees.

That the influence of the federal government seems to be in favor of the granting of the union shop to further groups of employees is borne out by recent actions of the Wage Stabilization Board. In the matter of the Steelworkers (CIO) and the major steel companies the Board recommended the inclusion of the union shop provision in the contract.³³ A similar recommendation has been made in other cases submitted to the Board.³⁴

In passing note should be taken of the fact that federal regulation of union security has been almost wholly by statute during the past twenty years. Case law on the matter has been slow to develop except as it relates to interpretation of the statutes already enacted. There is a dynamism in the press of the unions to gain the maximum measure of union security which will not wait for the development of law by trial in the courts. Pressure is brought upon legislatures, as is evidenced by the amendments to the Wagner Act in succeeding sessions of Congress, in order to expedite the attainment of the goal and there is an impatience with the slow accretive process of judicial interpretation of the will of society. The impatience of the Unions with court procedure is further evidenced by their reluctance to press for their rights in judicial tribunals; but to go rather to the administrative agencies in which to try their charges. If decisions run unfavorably to the unions involved there is again another appeal to legislation. The remarkable change in federal legislation during the past twenty years is evidence of the increasing power, politically, as well as economically, of the unions and we may look for further efforts on their part to amend and enact legislation favorable to the cause of union security.

³³ *In re*: United Steel Workers of America (CIO) and Various Steel and Iron Ore Companies, CCH Emergency Lab. Law ¶ 40,059 (1952).

³⁴ WSB Release, No. 215, April 17, 1952.