

have recognized that the factual situation in *Mayflower* differs from those cases to which the principles had previously been applied.

The courts have many times considered the cooperation clause in a liability insurance policy as a protection for the insurer from collusion between the insured and the injured party;¹⁸ yet the doctrines of waiver and estoppel will be liberally applied to further the public policy of compensating the injured.¹⁹ Even though the insured has cooperated in the defense of one claim arising out of an accident, it is difficult to see how this operates as a waiver as to another claim where there has been a collusive submission to jurisdiction. With regard to these latter claims, the protection of the cooperation clause is still quite relevant. In the cases establishing the legal effect of a breach and subsequent waiver, the courts were dealing with situations in which the lack of cooperation extended to *all* claims covered under the insurance contract. Therefore, any waiver extended as far as the breach itself did—to *all* the claims. It is apparent that in factual situations such as the one presented in the instant case, multiple claims and several injured parties being present, the insurer can still be protected from collusion between the insured and any one injured party, and at the same time another injured person may recover when his own situation entitles him to compensation.

VINCENT A. SIANO

Labor Law—Agency Shop Agreements—Valid under NLRA—Subject to State Law.—*NLRB v. General Motors Corp.*;¹ *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerborn*.²—The Supreme Court recently handed down two decisions dealing with the agency shop.³ The first case originated shortly after Indiana ruled that an agency shop agreement did not violate its right-to-work law.⁴ The United Auto Workers Union (UAW) asked General Motors to negotiate for an agency shop provision to cover the Company's plant in Indiana.⁵ The Company refused, claiming that an agency

¹⁸ Supra note 4.

¹⁹ Supra note 13.

¹ 373 U.S. 734 (1963).

² 373 U.S. 746 (1963). Preemption issue decided on reargument, 84 Sup. Ct. 219 (1963).

³ As used in this note the term agency shop refers to a union-security arrangement under which all employees, as a condition of employment, are required to pay union dues and initiation fees but need not join the union.

⁴ *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959). The Indiana right to work law renders unenforceable any agreement conditioning employment upon union membership.

⁵ A 1958 nationwide agreement between the UAW and General Motors provided for a union shop arrangement. However, these provisions were not operative in states like Indiana where state law prohibited making union membership a condition of employment. After the *Meade* decision, the UAW proposed that General Motors amend the agreement so as to condition employment in the Indiana plant on the payment by employees to the union of sums equal to the initiation fees and periodic dues paid by union members. Union membership was left to the option of the employees.

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shop arrangement would violate the National Labor Relations Act (NLRA).⁶ The Union then filed a complaint with the NLRB,⁷ which ruled that the agency shop was a permissible form of union security within the meaning of Sections 7⁸ and 8(a)(3)⁹ of the NLRA.¹⁰ The Court of Appeals for the Sixth Circuit set aside the Board's ruling¹¹ and the Supreme Court granted certiorari to decide whether the agency shop is permitted under Federal law. **HELD:** The agency shop agreement does not constitute an unfair labor practice and is not prohibited by any of the provisions of the Act. Therefore,

⁶ 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958).

⁷ The Union claimed that General Motors had committed an unfair labor practice under section 8(a)(5) which provides:

(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees. . . .

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

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 158(a)(3) of this title.

⁹ 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958) provides:

(a) It shall be an unfair labor practice for an employer—

(3) 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:

[PROVISO UNDER WAGNER ACT]

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 or the effective date of such agreement, whichever is later. . . .

[PROVISO ADDED UNDER TAFT-HARTLEY ACT]

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 initiation fees uniformly required as a condition of acquiring or retaining membership. . . .

¹⁰ General Motors Corp., 133 N.L.R.B. 451, 48 L.R.R.M. 1659 (1961). The Board had originally upheld the Company's position by a 3-2 vote. General Motors Corp., 130 N.L.R.B. 481, 47 L.R.R.M. 1306 (1961).

¹¹ General Motors v. NLRB, 303 F.2d 428 (6th Cir. 1962), noted 4 B.C. Ind. & Com. L. Rev. 201 (1962). The court, construing the statute strictly, stated that the Act tolerates only "[A]n agreement requiring membership in a labor organization as a condition of employment. . . . (Italicized in original.) An employee involuntarily sub-

the Company committed an unfair labor practice by refusing to bargain with the Union.

The second case arose when petitioner Union and the Food Fair Stores, a supermarket chain in Florida, entered an agency shop agreement.¹² Employees of Food Fair brought suit to have the agreement declared void under the Florida right-to-work law.¹³ The trial court granted a motion to dismiss on the grounds that the agreement did not violate the state right-to-work law. The Florida Supreme Court reversed,¹⁴ holding that the law forbids the agency shop clause and remanded the case for further proceedings. Certiorari was granted by the Supreme Court to decide whether Section 14(b) of the NLRA¹⁵ gives to the state the authority to outlaw an agency shop agreement which is invalid under state law. HELD: The agency shop clause is within the scope of section 14(b) and is, therefore, subject to prohibition by Florida law. On reargument, the Court also decided that the Florida courts, rather than the NLRB, have jurisdiction to afford a remedy for violation of the state law.¹⁶

Under the Wagner Act,¹⁷ both the closed and union shops were allowed¹⁸ because of a proviso that was expressly added to section 8(3) of the statute.¹⁹ The Taft-Hartley Act of 1947²⁰ added another proviso,²¹ which abolished the closed shop, but still allowed employers to enter into agreements requiring

jected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it. 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. . . ." *Id.* at 430.

¹² The agreement left union membership optional with the employees but required as a condition of continued employment that nonunion employees pay "an initial service fee and monthly service fees for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees. . . ." *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, supra note 2, 373 U.S. at 748. These fees were to be equal to the initiation fees and periodic dues of union members.

¹³ Florida Constitution, Declaration of Rights, 25 Fla. Stat. Ann. § 12 (Cum. Supp. 1962):

The right of persons to work shall not be denied or abridged on account of membership or non-membership 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.

¹⁴ *Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n*, 141 So.2d 269 (Fla. 1962).

¹⁵ 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958). This section provides:

Nothing in this subchapter 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.

¹⁶ *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 84 Sup. Ct. 219 (1963).

¹⁷ 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

¹⁸ *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949), where the Court said: "The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." *Id.* at 307; cf. *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

¹⁹ Supra note 9.

²⁰ Supra note 6.

²¹ Supra note 9.

all employees in a bargaining unit to become members thirty days after being hired.²² On its face, then, this second proviso still allowed the union shop.

The validity of the agency shop under the two provisos, however, has not been quite as clear. There have been two approaches taken: (1) the membership requirement set forth in section 8 established the exclusive form of union security permissible and banished all other forms, in which case, the agency shop was prohibited because employment was not conditioned upon union "membership," but only on the payment of initiation fees and dues;²³ (2) the membership requirement of the section merely established the maximum form of union-security allowable and all less coercive forms, such as the agency shop, were encompassed within the provisos.²⁴

The Supreme Court in the *General Motors* case took the latter view. In reaching this decision the Court stressed the fact that the second proviso,²⁵ added by the Taft-Hartley Act, not only outlawed the closed shop but also changed the meaning of "membership" for purposes of union-security agreements. Thus it stated: "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues."²⁶ Construing this proviso broadly, and comparing it with the agency shop arrangement in issue,²⁷ the Court held: "We are therefore confident that the proposal made by the union here conditioned employment upon the practical equivalent of union 'membership', as Congress used that term in the proviso to § 8(a)(3)."²⁸ The Court thus concluded, that the agency shop was a permissible form of union security under the Taft-Hartley Act.

In the *Schermerhorn* case, the Court was again faced with the interpretation of the clause "agreements requiring membership," this time in

²² S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947).

²³ This was the approach taken by the court of appeals in the *General Motors* case, *supra* note 11; Jones, *The Agency Shop*, 10 Lab. L.J. 781 (1959); note, 1962 U. Ill. L.F. 480.

²⁴ This has been the view taken by the NLRB, *Public Serv. Co. of Colo.*, 89 N.L.R.B. 418, 26 L.R.R.M. 1014 (1950); *American Seating Co.*, 98 N.L.R.B. 800, 29 L.R.R.M. 1424 (1952); *General Motors Corp.*, 133 N.L.R.B. 451, 48 L.R.R.M. 1659 (1961). See the position of the District Court of Nevada in *Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Employees, Div. 1225 v. Las Vegas-Toponah-Reno Stage Line*, 202 F. Supp. 726 (D. Nev. 1962); position supported by legislative history of the provisos: S. Rep. No. 105, 80th Cong., 1st Sess. 7 (1947); 93 Cong. Rec. 3837 (1947) (Remarks of Senator Taft).

²⁵ *Supra* note 9.

²⁶ *Supra* note 1, at 742. This position has been supported by many previous cases which have held that under this proviso union security agreements could only be utilized to the extent of compelling payment of union dues and fees. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954); accord, *Union Starch & Ref. Co. v. NLRB*, 186 F.2d 1008 (7th Cir. 1951). See also, *NLRB v. Food Fair Stores*, 307 F.2d 3 (3d Cir. 1962); *NLRB v. Local 815, Int'l Bhd. of Teamsters*, 290 F.2d 99 (2d Cir. 1961).

²⁷ *Supra* note 5.

²⁸ *Supra* note 1, at 743. The Court felt that the agreement merely removed the option of membership from the union and placed it with the employee while still requiring the same dues and fees as the union shop. The Court concluded: "Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real." *Id.* at 744.

connection with section 14(b).²⁹ This section was designed to prevent other sections of the Act from extinguishing state power over certain union-security arrangements and its scope becomes important in states, such as Florida, which have outlawed certain types of union security arrangements. The few states that have dealt with the issue of whether the agency shop falls within section 14(b) have decided that it does.³⁰ The Court, consistent with its decision in the *General Motors* case, stated: "[T]he agreements requiring 'membership' in a labor union which are expressly permitted by the proviso [of sec. 8(a)(3)] are the same 'membership' agreements expressly placed within the reach of state law by § 14(b)."³¹ Inasmuch as the *General Motors* case ruled this one, and inasmuch as the agency shop was found to be within the proviso to section 8(a)(3) in that case, the Court held that the agency shop agreement in *Schermerhorn* was within the purview of section 14(b), and therefore subject to state law. The Court rejected petitioner's attempt to distinguish the agency shop arrangement in this case from the one in *General Motors* and decided that the two agreements were basically the same.³²

The Court's decisions in these two cases follow both logic and precedent. Although *General Motors* overrules the court of appeals, it follows the majority of courts which have likewise concluded that the agency shop is allowed under section 8(a)(3).³³ In addition, the determination that the agency shop is allowed by 8(a)(3) is a logical one because it would seem anomalous that Congress intended to permit the union shop while proscribing less oppressive union-security arrangements such as the agency shop.

Schermerhorn, by affirming the Florida Supreme Court's ruling, also adheres to the prevailing authority.³⁴ Furthermore, it is consistent with *General Motors*. If the agency shop was within the "membership" requirement of section 8(a)(3), it could not be outside the corresponding "membership" requirement of section 14(b).

In spite of the consistencies, the two decisions do leave some questions unanswered. In both cases, the agency shop agreements left membership optional with the employee. If, instead, membership were left to the discretion of the union, then the employees would be under an obligation to pay fees and dues without the right to claim membership so as to insure the enjoyment of all union benefits and rights. Such an agreement would be, in effect, an agency shop arrangement with a closed shop provision. Although the Court does not discuss what would result in such a case, it is submitted that the Court would strike down this type of arrangement because it would contain the very evils that the Taft-Hartley Law attempted to remedy, *i.e.*, an employee would be

²⁹ Supra note 15.

³⁰ *Amalgamated Ass'n* case, supra note 24; *Schermerhorn* case, supra note 14; *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456 (1961), cert. denied, 368 U.S. 829 (1961). In the *Meade* case, supra note 4, the court did not have to deal with the question whether it *could* outlaw the agency shop under section 14(b) because the agency shop was found to be valid under Indiana law.

³¹ Supra note 2, 373 U.S. at 751.

³² Supra notes 5 and 12.

³³ Supra note 24.

³⁴ Supra note 30.

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forced to pay union dues yet the Union could *arbitrarily* withhold from him the very benefits for which he was being compelled to contribute.

Another unresolved issue concerns the possibility that a union-security contract may not fall within the scope of both sections 8(a)(3) and 14(b). Since the two sections use similar language, there is a strong presumption that they have the same meaning. Yet, the Court hints that the two sections may not coincide. Though it seems inconceivable that a union-security arrangement could fall within one section and outside the other, the decisions in these two cases leave the possibility there.³⁵

Finally, some of the perplexities of federal pre-emption remain unresolved. In the *Schermerhorn* case, the Court was faced with this question: assuming that a union-security arrangement was found to be within 14(b) and subject to state prohibition, did a state court have jurisdiction to afford a remedy, or was the power to afford relief left exclusively to the NLRB? Because of the conflict of authority on this question,³⁶ the Court, rather than decide the question in its original determination of *Schermerhorn*, preferred to dispose of the matter only after a full argument on this single question. On reargument, the Union took the position that a violation of a state right-to-work law was an unfair labor practice under the NLRA and, therefore, only the NLRB could afford relief.³⁷ Furthermore, the Union contended, the divergent state remedies would interfere with a uniform national labor policy.³⁸

The Court, however, took the opposite view and concluded that a state could enforce its own right-to-work laws. In so deciding, it stated: "[I]t would be odd to construe § 14(b) as permitting a state to prohibit the agency clause but barring it from implementing its own law. . . ."³⁹ After reviewing the legislative history of section 14(b), it concluded:

Congress, in other words, 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.⁴⁰

Nevertheless, the Court indicated that state enforcement recognized by

³⁵ Brief for petitioner, pp. 38-39, *NLRB v. General Motors Corp.*, supra note 1, discusses several possible arrangements that might be within 8(a)(3) but outside 14(b).

³⁶ See supra note 30 for cases holding that the state has jurisdiction; contra, *Garner v. Teamsters Union*, supra note 18; *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947). In the *Algoma Plywood Co.* case, supra note 18, the Supreme Court stated: "States are left free to pursue their own more restrictive policies in the matter of union-security agreements." *Id.* at 314. However, in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court said that when an activity is arguably subject to Sections 7 or 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the NLRB if the dangers of state interference with national policy is to be averted.

³⁷ Brief for Petitioner on Reargument, *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, supra note 16, pp. 4-9.

³⁸ *Id.*, pp. 9-19.

³⁹ Supra note 16, at 219.

⁴⁰ *Id.* at 223.

section 14(b) deals *only with the actual negotiation and execution* of agreements proscribed by state law, whereas the enjoining of any conduct which the State finds *has a tendency* to bring about the execution of a union-security contract remains exclusively in the federal domain.⁴¹ This interpretation would result in the incongruous possibility that a State might enjoin an employer from executing a union-security contract proscribed by state law, yet the State would be powerless to prevent a union from exercising economic pressures, such as picketing, to compel the employer to violate the state court's decree.⁴²

The Court's line separating federal and state power is a tenuous one, at best, and it may take several more decisions before the demarcation line is clearly and conclusively established. In defense of the Court, it is submitted that, by enacting section 14(b), Congress did not intend to allow states *only* to enact substantive law prohibiting union-security contracts while reserving the enforcement of such laws to a federal agency; thus, the Court was correct in ruling that states may enforce their right-to-work laws. On the other hand, if the Court concluded that states *also* had the power to enjoin activity such as picketing, which might eventually *lead* to a violation of a state's right-to-work law, then it would have had to overrule the many cases in which it had previously held that a state cannot interfere with the exercise of the federal right to engage in strikes, peaceful picketing or other concerted activities.⁴³ Consequently, the line of demarcation drawn by the Court, while tenuous, is perhaps a most practical one.

EDWARD M. BLOOM

Labor Law—Railway Labor Act—Procedure for Settlement of Minor Disputes.—*Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R.*¹— Injunctive relief was sought by the railroad to enjoin a strike threatened by the union to enforce an award granted to the union by the National Railroad Adjustment Board under the provisions of the Railway Labor Act.² An employee of the railroad had been fired for misconduct and his union protested. Confronted with a strike, the railroad submitted the dispute to the Adjustment Board,³ which rendered an award ordering the railroad to rein-

⁴¹ Ibid.

⁴² Reply Brief for Petitioner on Reargument, Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, *supra* note 16, p. 21.

⁴³ E.g., *Farnsworth & Chambers Co. v. Local Union 429*, 201 Tenn. 329, 299 S.W.2d 8 (1957), *rev'd*, 353 U.S. 969 (1957); *Local Union 438, Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542 (1963).

¹ 373 U.S. 33 (1963).

² 44 Stat. 587 (1934), 45 U.S.C. §§ 153-159 (1958). Section 151(a) provides: The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

³ 44 Stat. 587 (1934), 45 U.S.C. § 153 First(i):