

## REGULATION OF UNION SECURITY CONTRACTS\*

THE main purpose of a union security agreement is to increase the union's bargaining power.<sup>1</sup> With greater control over dissident members, and with the employer tied to a union-dominated labor market, the secured union can more forcefully press its demands for better working conditions.<sup>2</sup> But the monopoly power conferred by such agreements has at times been seriously abused.<sup>3</sup> Racial discrimination, arbitrary denial of membership to qualified

\* *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949).

1. In 1946 over 75% of the fifteen million employees working under union agreements were covered by some form of union security. Of this number half were under closed and union shop agreements. 68 MONTHLY LABOR REVIEW 143 (1949).

Labor has long argued for the union shop (the term is used by unions to signify both closed shop and union shop, see note 2 *infra*) as the logical extension of collective bargaining. TONER, *THE CLOSED SHOP* 6 (1942). For an analysis of the arguments advanced by labor and management for and against union security see Douglas, *A Possible Method of Dealing With the Closed Shop Issue*, 14 U. OF CHI. L. REV. 386 (1947); Hammond, *The Closed Shop Issue in World War II*, 21 N.C.L. REV. 127, 136-41 (1943).

For a full discussion of other devices used to achieve security and their economic results see SLICHTER, *UNION POLICIES AND INDUSTRIAL MANAGEMENT*, cc. II, III, IV (1941).

2. A union security agreement compels individual employees to join a union or refrain from leaving a union as a condition of obtaining or retaining employment. These agreements are classified according to the point in the employment relation at which this compulsion begins. The closed shop requires union membership as a condition of obtaining employment, the union shop requires membership within a specified period after hiring as a condition of retaining employment, and the maintenance of membership agreement requires those who have once joined to refrain from leaving the union as a condition of retaining employment. Preferential hiring involves offering union members the first crack at job openings. A device to facilitate union financing, the check-off involves employer deduction of dues from pay and lump-sum payment to the union. For discussion of the types of security agreements and their evolution see TELLER, *A LABOR POLICY FOR AMERICA* 130-32 (1945); Hammond, *The Closed Shop Issue in World War II*, 21 N.C.L. REV. 127, 133 (1943); Pendleton, *The Union Shop Under the Taft-Hartley Act*, 36 GEO. L.J. 198, 201-2 (1948).

There has been much confusion of the labels "closed shop with closed union," "closed shop with open union," and "union shop." Because of the prejudicial connotations of "closed shop," management tends to refer to all three types as closed shops. Conversely, unions prefer the term "union shop" for all three situations. By discarding these much confused labels and spelling out the conditions under which a security agreement is permissible, the drafters of § 8(a)(3) of the Taft-Hartley Act, 61 STAT. 136 (1947), 29 U.S.C. §§ 141-97 (Supp. 1949), avoided these semantic difficulties.

3. Flagrant abuses of the secured position have included limiting the number of employees eligible for membership, restricting membership to relatives of present members, cutting down the number of apprentices, charging exorbitant initiation fees, expelling members for personal reasons, disregarding rights of minority members, and using official position for personal gain. SEN. REP. No. 105, 80th Cong., 1st Sess. 6 (1947); SEN. REP. No. 99, Part 2, 81st Cong., 1st Sess. 35-6 (1949). See also Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 425, 449 (1949); Summers, *The Right to Join a Union*, 47 COL. L. REV. 33 (1947).

applicants, expulsion without cause, and plain racketeering have buttressed the argument that the fate of persons seeking employment should not be left to the unregulated terms of union security contracts. Ideally, union self-discipline is the corrective for these abuses, but the unconcern of many labor groups<sup>4</sup> has caused both state and federal governments to step into the field.

In those states which have extensively regulated security contracts,<sup>5</sup> the measures vary from complete prohibition to a requirement that the number of workers desiring an agreement be certified. By statute or constitutional amendment the closed shop has been outlawed in sixteen states and closely regulated in five others.<sup>6</sup> Many states ban the compulsory check-off.<sup>7</sup> Fair

4. Union leaders say the abuses are too insignificant to justify legislation curbing them. SEN. REP. NO. 99, Part 2, 81st Cong., 1st Sess. 36 (1949). Though this may be true from the national union's standpoint, it is a poor answer to the individual arbitrarily denied the right to livelihood. SEN. REP. NO. 99, Part 2, 81st Cong., 1st Sess. 37-8 (1949).

5. Although the early tendency was for courts to hold security agreements void as an illegal restraint of trade, *Christensen v. People*, 114 Ill. App. 40 (1904), *aff'd* 216 Ill. 354, 75 N.E. 108 (1905), *Brennan v. United Hatters*, 73 N.J.L. 729, 65 Atl. 165 (1906), most courts now uphold these agreements. But even today some hold that a closed shop contract with a closed union is void if it affects substantially all the employees in the community. *Four Plating Co. v. Mako*, 122 N.J. Eq. 298, 194 Atl. 53 (Ch. 1937).

Individual employer-employee agreements not to join a union ("yellow dog contracts") were banned by legislation couched in terms which could also cover agreements to join a union. See, e.g., CAL. LABOR CODE § 921 (1943) (enacted in 1933). A group of "Baby Wagner" Acts enacted in the 1930's required the union requesting a security agreement to be the collective bargaining agent designated by vote of a majority of employees. See MASS. ANN. LAWS c. 150A, § 4(3) (1942) (enacted in 1937); DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY* 958 (5th ed. 1941). During World War II and after, state legislatures began extensively regulating all forms of security agreements. Dodd, *Some State Legislatures Go to War—On Labor Unions*, 29 IOWA L. REV. 148 (1944).

6. See, e.g., Ariz. Sess. Laws 1947, c. 81, p. 173; NEB. CONST. Art. XV, § 13; N.C. Laws 1947, c. 238, § 2. These statutes were upheld against the claim that they violated the equal protection and due process clauses of the 14th Amendment in *A. F. of L. v. American Sash Co.*, 335 U.S. 538 (1949), and *Lincoln Union v. Northwestern Co.*, *Whitaker v. North Carolina*, 335 U.S. 525 (1949). Other states outlawing all forms of union security are Arkansas, Delaware, Florida, Georgia, Iowa, Louisiana, Maryland, Nevada, North Dakota, South Dakota, Tennessee, Texas and Virginia. For citations see *A. F. of L. v. American Sash Co.*, 335 U.S. 554, n.12 (1949).

Three states require a supervised vote before security agreements are valid. COLO. STAT. ANN. c. 97, § 94(6) subsec. (1) (c) (Supp. 1947) (three-fourths majority); KAN. GEN. STAT. § 44-809(4) (Cum. Supp. 1947) (simple majority); WIS. STAT. § 111.06 (1) (c) subsec. 1 (1947) (two-thirds majority).

New Hampshire and Massachusetts allow a security agreement only if there is no discrimination. See notes 9 and 37 *infra*.

7. The statutes require that an employer deduct union dues or assessments only with consent of the employee. See, e.g., WIS. STAT. § 111.06(1)(i) (1947) (individual consent required); PA. STAT. ANN. tit. 43, § 211.6(f) (1941) (authorization by majority of bargaining unit as well as individual consent).

employment practice acts control membership discrimination in eight states;<sup>8</sup> other statutes make non-discrimination a condition of approval of a closed or union shop agreement.<sup>9</sup> In some states statutory regulation of internal union affairs includes measures which insure due process in expulsion cases and require financial statements to members and supervision of officer elections.<sup>10</sup> While most state courts have upheld union security agreements in the absence of statute,<sup>11</sup> one has held the closed shop illegal if the secured union discriminates against qualified applicants.<sup>12</sup>

For the large number of states which do not regulate security agreements, the problem has been left to Congress. Congressional entry into the field with the Wagner Act<sup>13</sup> in 1935 was not accompanied by a positive national policy favoring union security,<sup>14</sup> but since the Act required employers to bargain

8. CONN. GEN. STAT. §§ 7400-7407 (1949); MASS. ANN. LAWS c. 6, § 56 and c. 151b (Supp. 1948); N.J. REV. STAT. § 18:25 (Cum. Supp. 1945); N.M. LAWS 1949, c. 161; N.Y. EXECUTIVE LAW §§ 125-136; ORE. LAWS 1949, c. 221; R.I. LAWS 1949, c. 2181; WASH. REV. STAT. ANN. §§ 7614-20 to 7614-30 (Supp. 1949). Under these acts an appointed commission is charged with investigating all cases of discrimination because of race, color, religion or national ancestry. Upon complaint by an aggrieved person, hearings are held and necessary orders issued; court enforcement may follow if required.

9. Some require a contract clause against discrimination. KAN. GEN. STAT. ANN. § 44-809(14) (Cum. Supp. 1947); N.H. REV. LAWS c. 212, § 21-a (1942). Others require termination of agreements when the state labor board finds the union guilty of "unreasonably" refusing to admit members. COLO. STAT. ANN. c. 97, § 94(6) subsec. (1) (c) (Supp. 1947); WIS. STAT. § 111.06(1) (c) subsec. 1 (1947). As to discrimination provisions generally, see Murdock, *Some Aspects of Employee Democracy Under the Wagner Act*, 32 CORN. L.Q. 73, 87 (1946).

10. For a discussion of the legal and practical problems of controlling internal union affairs see Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 425 (1949); Comment, *State Regulation of Labor Unions*, 42 ILL. L. REV. 505 (1947).

11. See note 5 *supra*.

12. California courts refuse to enforce closed shop contracts when they are used against racial minorities denied equal membership in the union. *James v. Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329 (1944); *Williams v. Int'l. Brotherhood of Boilermakers*, 27 Cal.2d 586, 165 P.2d 903 (1946). The Supreme Court has held that the certified bargaining representative must represent all employees without hostility and in good faith even though they are not eligible for union membership. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). But decisions of this kind seldom eliminate union discrimination. See Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 425, 435-8 (1949).

13. National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C. §§ 151-66 (1946).

14. While the proviso of § 8(3) of the Act permitted discharge of employees pursuant to a security clause without such action constituting an unfair labor practice, Congress denied an intent to sanction the closed shop, to impose it on all industry, or to legalize it in a state where it was against public policy. SEN. REP. No. 573, 74th Cong., 1st Sess. 11 (1935); H.R. REP. No. 1147, 74th Cong., 1st Sess. 19 (1935). The Supreme Court has interpreted the proviso as merely disclaiming a national policy hostile to the closed shop. *Algoma Plywood Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307 (1949). See also 93 CONG. REC. 6519-20 (1947).

collectively, many security agreements resulted.<sup>15</sup> During World War II the War Labor Board resolved bickerings over union security by imposing maintenance of membership agreements regardless of state statute.<sup>16</sup> Since then, congressional views on union bargaining power have been less benign. The Taft-Hartley Act<sup>17</sup> makes a closed shop agreement unenforceable and permits the union shop only if a majority of the bargaining unit approves.<sup>18</sup> The Act further restricts membership policing by abolishing the compulsory check-off<sup>19</sup> and by allowing unions to require dismissal only of members expelled for non-payment of dues.<sup>20</sup> While the Act specifically provides that nothing in it should be construed as making union security agreements legal in jurisdictions which prohibit them,<sup>21</sup> until recently there was some question whether states may regulate security agreements with statutory provisions falling short of complete prohibition, but more stringent than those of the federal act. In *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*,<sup>22</sup> the Supreme Court held that they could.

The Wisconsin Board had ordered the Algoma Company, which was engaged in interstate commerce, to reinstate an employee discharged in accordance with a maintenance of membership agreement. The Board declared the security contract invalid unless approved by two-thirds of the workers as required by the Wisconsin Employment Relations Act.<sup>23</sup> Both employer and union protested that the Taft-Hartley Act suspended the Wisconsin Act for businesses engaged in interstate commerce; and that the security contract was valid because a majority of the workers had voted in favor of the agree-

15. See Note, 33 VA. L. REV. 521 (1947).

16. With the advent of World War II unions demanded closed and union shop agreements to maintain their position in rapidly expanding war plants while management asked for a moratorium on union security. As a compromise the Board forced adoption of maintenance of membership agreements. These agreements were upheld despite contrary state legislation. *E.g.*, *Int'l Brotherhood of Paper Makers v. Wisconsin Employment Relations Board*, 245 Wis. 541, 15 N.W.2d 806 (1944). For a full discussion see Hammond, *The Closed Shop Issue In World War II*, 21 N.C.L. REV. 127, 169-200 (1943).

17. Labor Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C. §§ 141-97 (Supp. 1949) (Taft-Hartley Act).

18. Modifying the proviso of § 8(3) of the N.L.R.A., § 8(a)(3) of the Taft-Hartley Act allows only those compulsory membership agreements which are approved by a majority of the employees affected and which allow the lapse of a thirty day period after hiring before the new employee must join the union.

19. 61 STAT. 136, § 302(c)(4) (1947), 29 U.S.C. § 186(c)(4) (Supp. 1949).

20. 61 STAT. 136, § 8(a)(3) (1947), 29 U.S.C. § 158(a)(3) (Supp. 1949). In restricting discharge to those cases in which expulsion was for failure to pay dues, § 8(a)(3) and § 8(b)(2) limit what has been traditionally called a "union shop," *i.e.*, one in which union expulsion for any reason worked automatic discharge. See Pendleton, *The Union Shop Under The Taft-Hartley Act*, 36 GEO. L.J. 198, 211-12 (1948).

21. 61 STAT. 136, § 14(b) (1947), 29 U.S.C. § 164(b) (Supp. 1949).

22. 336 U.S. 301 (1949).

23. WIS. STAT. § 111.06 (1)(c) subsec. 1 (1947).

ment as the federal Act required.<sup>24</sup> The Court upheld the Wisconsin Board on the ground that Congress had not completely occupied the field. Since only two states now have requirements for greater than majority approval of union security agreements,<sup>25</sup> the immediate effect of the decision is limited; but in the field of union abuse of its monopoly position the implications of the decision are large. Under the *Algoma* decision state regulation can now invalidate security agreements of a union even though the employer is engaged solely in interstate commerce and the agreements are made in strict compliance with federal law.

While this decision opens the way for constructive state legislation, prior history gives little indication that the opportunity will be realized. Whether motivated by an estimable desire to further the interest of prospective employees, or merely by the desire to cripple unions, state regulation has overlooked the different functions performed by security agreements in different industries. In short-term skilled occupations such as the building trades, and in short-term unskilled occupations such as stevedoring, the closed shop with union hiring serves both employer and employee.<sup>26</sup> In relatively permanent, mass production employment, union hiring is unfeasible and unions have sought security agreements only to enhance their bargaining power.<sup>27</sup> Ignoring these differences and overlooking the very real contribution union security has made to industrial peace<sup>28</sup> and union responsibility in some in-

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24. The company and union contested the jurisdiction of the Wisconsin Employment Relations Board on the ground that the NLRB had exclusive authority under § 10(a) of the Labor Management Relations Act, 61 STAT. 136 (1947), 29 U.S.C. § 160(a) (Supp. 1949), and asserted that the Wisconsin statute, Wis. STAT. 111.06 (1)(c) subsec. 1 (1947) was repugnant to § 8(a)(3) of the L.M.R.A., 61 STAT. 136 (1947), 29 U.S.C. 158(a)(3) (Supp. 1949), because the federal statute required a smaller majority than the state act.

25. Wisconsin and Colorado. See note 6 *supra*.

26. In the building industry the closed shop benefits the employer by providing a pool of skilled labor for jobs of short duration and of changing work crew. Many employers in these trades actively favor union hiring. See, *e.g.*, N.Y. Times, June 23, 1949, p. 17, col. 5.

In stevedoring and maritime occupations, employer sanction of the union hiring hall is not unanimous but their prime interest is in obtaining employees. The individual has a great interest here in a system for equitably spreading the work. And even here there has been employer action for preserving the features of the hiring hall. See N.Y. Times, Nov. 21, 1949, p. 45, col. 2.

27. The strong employer protest against the closed shop has come from these mass production industries. N.Y. Times, Feb. 19, 1949, p. 1, col. 5. But in these industries unions have shown little desire to control hiring, being interested only in such security provisions as the union shop. (Before Taft-Hartley there was only one CIO union with a closed shop agreement.) So insistent has been the opposition to union hiring by the mass production industries that these industries have often managed to identify their interests with the interests of all industries—even those in which opposition to union hiring would normally be minimal or non-existent.

28. Peaceful collective bargaining has resulted from long standing security provisions in such trades as clothing, building and printing. See remarks of Senator Cape-

dustries, states have bracketed together and outlawed as "monopolistic" all types of union security without any attempt to attack particular evils.<sup>29</sup> This all-or-nothing regulation has disrupted industrial stability and led to uncertainty in collective bargaining relations.<sup>30</sup>

Failure to distinguish between the institution of union security and union abuse of its secured position has influenced adoption of these arbitrary state policies. Most opposition directed at union security has arisen because of undemocratic union practices and membership discrimination following adoption of a security agreement.<sup>31</sup> Lopping off the foot to save the toe, states often have attempted to regulate these post-security contract abuses by abolishing security contracts.<sup>32</sup> Moreover, even these drastic measures often fail to correct the abuse, since most unions strong enough to engage in abusive practices are able to do so even without a security agreement.<sup>33</sup>

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hart in 95 CONG. REC. 8878 (June 30, 1949). Employer sentiment in this regard is typified by the editorial in the Chicago Tribune, Nov. 22, 1947: "When the [Taft-Hartley] law was under discussion in Congress . . . we advised against outlawing the closed shop. We did so, among other reasons, because we know that the closed shop worked well in our plant and had worked well for a half century or more. . . ."

29. See Dodd, *Some State Legislatures Go to War—On Labor Unions*, 29 IOWA L. REV. 148 (1944); Comment, *State Regulation of Labor Unions*, 42 ILL. L. REV. 505 (1947).

30. Operation of the Taft-Hartley ban on the closed shop illustrates the disrupting effect of "all-or-nothing" legislation. Before the Act, for example, the history of the International Typographical Union was a record of nearly a century of bargaining without serious dispute, constant gains for its members, and increasing public confidence. But since the Act's passage the ITU has strenuously resisted the attack on its security. Long strikes and extensive litigation have already cost the union \$11,000,000. Despite this alarming cost to both the union and the public the Act has completely failed to eliminate the union's abuses and to protect the public interest in establishment of non-discriminatory admission policies. SEN. REP. NO. 99, 81st Cong., 1st Sess., 16-17 (1949).

31. See the remarks of the Taft-Hartley "watchdog" committee: "If there is to be a closed shop (union hiring), then we can hardly permit a closed union." SEN. REP. NO. 99, Part 2, 81st Cong., 1st Sess. 36 (1949). See also TELLER, *A LABOR POLICY FOR AMERICA* 138 (1945).

32. State bans on the closed shop have hit hardest in occupations where union hiring is most important to employer and employee. The public interest in these occupations centers not on who controls hiring but rather on ensuring that qualified individuals are admitted to the union. Rather than outlaw union hiring—which is useful—rational legislation would best serve this public interest by keeping the union "open" to new members.

33. The closed shop was outlawed by the Railway Labor Act in 1926 but the brotherhoods continue as bulwarks of racial and other discriminatory practices. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 425, 428-38 (1949).

After two years of struggle and many attempts the International Typographical Union, hardest hit by the Taft-Hartley Act ban, has reached a solution. Foremen, who are not covered by the act, have a closed shop and do the hiring. Supposedly they will hire any qualified applicant—but the foremen are strong union men. N.Y. Times, Oct. 29, 1949, p. 1, col. 4.

"Bootleg" closed shop agreements, which are just oral understandings, have been widespread since the Taft Act ban. N.Y. Times, March 21, 1949, p. 23, col. 2.

The national policy favoring collective bargaining and guaranteeing the right of organization<sup>34</sup> becomes meaningless if states are left free to impose arbitrary restrictions on collective bargaining. Industrial peace, the goal of national legislation in the labor-management field, is best achieved by leaving union and management free to come to whatever security agreement they will, provided only that the union represents a majority of the employees.<sup>35</sup> This free collective bargaining policy would require uniform national legislation forbidding state invalidation of bargained-for security contracts. Legislation of this kind would protect established national labor policy; and, because Congress would then have preempted regulation of security contracts as such, state efforts would be necessarily directed toward proscription of post-security abuses.<sup>36</sup>

Ideal state regulation would prohibit discriminatory admission and exclusion practices in secured unions. Without destroying the effectiveness of union leadership, these regulatory measures should ensure that all qualified applicants are admitted to the union. This could be achieved by forbidding discharge of an employee for non-membership in a secured union—except for bona fide occupational disqualification or the administration of discipline—and by giving all discharged employees an appeal to a labor relations board for a determination of the legality of the suspension or expulsion.<sup>37</sup> A similar

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34. National Labor Relations Act, § 1, 49 STAT. 449 (1935), 29 U.S.C. § 151 (1946); Labor Management Relations Act, § 1, 61 STAT. 136 (1947), 29 U.S.C. § 141 (Supp. 1949).

35. Restoring such agreements to collective bargaining was the plan of the Thomas Bill, S. 249, 81st Cong., 1st Sess. (1949), which would repeal the Taft-Hartley Act and re-enact the Wagner act with modifications. SEN. REP. No. 99, 81st Cong., 1st Sess. 61, 69 (1949).

The Wagner Act took selection of the collective bargaining representative out of the realm of bargaining and it has been proposed that union security likewise be made automatic on approval of a sufficient majority of the employees. For a suggestion that a union shop be automatically imposed when approved by a majority of the employees, see Douglas, *A Possible Method of Dealing with the Closed Shop Issue*, 14 U. OF CHI. L. REV. 386, 390-91 (1947). A similar suggestion, requiring a three-fourths majority, has been made by Senator Malone. 93 CONG. REC. 4876 (1947).

36. Present national regulation fails to prevent abuse of the secured position. While parts of the Taft-Hartley Act seem to be worded so as to proscribe discriminatory admission, exclusion, and expulsion practices by unions, that result has not been achieved. See Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 425, 449 (1949). Effective national regulation of these abuses would require a statutory mechanism similar to that employed under state fair employment acts. Note 8 *supra*. But the already demonstrated tenor of congressional minority bloc feeling makes adequate national legislation in the near future unlikely. During the first session of the Eighty-first Congress thirteen such bills were introduced. House bill No. 4453 was reported by committee in August but no action taken. Senate bill No. 1728 was reported without recommendation in October but no action taken. In view of congressional apathy, the task of eliminating post-security abuses may devolve entirely upon the states.

37. This is essentially the provision of the Massachusetts Labor Relations Law, MASS. ANN. LAWS c. 150a, § 4(6) and § 6A (Supp. 1948). If the employee has exhausted all his