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State Right-to-Work Laws and Federal Labor Policy

Joseph R. Grodin* and Duane B. Beeson†

CONGRESS in the Labor Management Relations Act¹ has adopted a national policy toward labor-management relations, and has entrusted the administration of that policy "to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience."² In order to avoid the danger of state interference with national policy, state courts and agencies must yield to the exclusive jurisdiction of the National Labor Relations Board with respect to any activity that is "arguably" protected by section 7³ or prohibited by section 8⁴ of the Act. This is the general catechism of the federal preemption doctrine as taught by the Supreme Court.⁵

In the context of that teaching, the application of state "right-to-work"

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¹ 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1958), as amended, 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. IV 1963) [hereinafter discussed as the Act].

This article is concerned with only the status of the right-to-work laws under the Act. The union shop provisions of the Railway Labor Act, 64 Stat. 1238 (1951), 45 U.S.C. § 152 (1958), have been held to supercede state laws in the union security area. *Railway Employees' Dep't, AFL v. Hanson*, 351 U.S. 225 (1956).

² *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

³ Section 7 of the Act 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 8(a)(3)." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

⁴ Section 8 sets forth both employer and union unfair labor practices. 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158 (Supp. IV 1963).

⁵ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). See cases cited note 71 *infra*. For a general discussion of the preemption doctrine, see Hafer, *A Pragmatic Article Concerning Federal Preemption and Labor Law*, 1960 WIS. L. REV. 279; Ratner, *New Developments in Federal-State Jurisdiction*, 15 N.Y.U. CONF. ON LABOR 47 (1962); Wellington, *Labor and the Federal System*, 26 U. CHI L. REV. 542 (1959).

laws⁶ within the area of Labor Board jurisdiction⁷ is an anomaly, for Con-

⁶ The term "right-to-work" is normally used to describe statutes or constitutional provisions that prohibit the requirement of union membership as a condition of employment. Twenty states have such laws: Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Louisiana has a right-to-work statute applicable only to agricultural workers. For reference to the specific statutes, see 4 LAB. REL. REP. (1 S.L.L.) 16 (1963). The constitutionality of such laws was upheld in *Plumbers Union v. Graham*, 345 U.S. 192 (1953).

Right-to-work laws differ widely, however, with respect to scope and remedies. Some consist simply of a constitutional amendment to the effect that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor organization. *E.g.*, FLA. CONST. DECL. OF RTS. § 12; KAN. CONST. art. 15, § 12. Most laws declare agreements in conflict with that policy unlawful. *E.g.*, GA. CODE ANN. § 54-905 (1961); IOWA CODE ANN. § 736-A-3 (1950). In addition, some laws prohibit: (1) "combinations" or "conspiracies" to deprive persons of employment because of non-membership, *e.g.*, ALA. CODE tit. 26, § 375 (2) (1958); NEV. REV. STAT. § 613.280 (1957); (2) strikes or picketing for the purpose of inducing an illegal agreement, *e.g.*, ARIZ. REV. STAT. ANN. § 23-1303(B) (1956); S.C. CODE § 40-46.6(1) (1962); (3) denial of employment to any person because of membership or nonmembership, *e.g.*, VA. CODE ANN. § 40-68 (1953); UTAH CODE ANN. § 34-16-2 (Supp. 1963); (4) conspiracy to cause the discharge or denial of employment to an individual by inducing other persons to refuse to work with him because he is a non-member, *e.g.*, ARIZ. REV. STAT. ANN. § 23-1305 (1956); NEV. REV. STAT. § 613.280 (1957). With respect to remedies, most laws provide for damages to persons injured by a violation, *e.g.*, MISS. CODE ANN. § 6984.5(f) (1958); IND. ANN. STAT. § 40-2706 (Supp. 1963); many provide for injunctions, *e.g.*, IOWA CODE ANN. § 736.7 (1950); GA. CODE ANN. § 54-908 (1961); and some make violation a misdemeanor subject to criminal penalties, *e.g.*, S.D. CODE § 17.9914 (Supp. 1960); TENN. CODE ANN. § 50-212 (1955).

Many right-to-work laws appear to go beyond a prohibition against making union membership or non-membership a condition of employment. For example, several laws prohibit "any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer or whereby any such union or organization acquires an employment monopoly in any enterprise," *e.g.*, ALA. CODE tit. 26 § 375(2) (1958); N.C. GEN. STAT. § 95-79 (1958). Similarly, some laws proscribe requirements of membership in or "affiliation with" a labor organization as a condition of employment, *e.g.*, ARK. STAT. ANN. § 81-202 (1960); TENN. CODE ANN. § 50-208 (1955). Many expressly prohibit a requirement that an individual pay "dues, fees, or other charges of any kind to a union as a condition of employment," *e.g.*, N.C. GEN. STAT. § 95-82 (1958); UTAH CODE ANN. § 34-16-10 (Supp. 1963). Several contain a prohibition against compelling a person to join a union or strike against his will by threatened or actual interference with his person, family, or property, *e.g.*, ARIZ. REV. STAT. ANN. § 23-1304 (1956); S.D. CODE § 17.1101 (4) (Supp. 1960). Even further afield, some laws appear to sanction individual bargaining in the face of collective bargaining, *e.g.*, ARK. STAT. ANN. § 81-201 (1960); TEX. REV. CIV. STAT. art. 5207a(1) (1962).

In addition to the right-to-work states, some states have laws regulating union security agreements more restrictively than does federal law, without prohibiting them. For example, Colorado and Wisconsin condition the validity of union shop agreements upon approval by a specified percentage of employees, in excess of a majority. COLO. REV. STAT. ANN. § 80-5-6 (1)(c) (1953); WIS. STAT. ANN. § 111.06(1)(c) 1. (1957).

⁷ Under the 1959 amendments to the Act, 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1)(2) (Supp. IV 1963), states may assert jurisdiction over labor disputes which the Board, applying

gress has adopted a national policy with respect to union security:⁸ Any activity directed toward conditioning employment on union membership is, depending upon whether it is channeled through a union shop clause permitted by the proviso to section 8(a)(3),⁹ either protected by section 7 or prohibited by section 8. It is an anomaly, however, that Congress was apparently willing to accept, for, at the same time that it enacted restrictions on union security in the Taft-Hartley Act of 1947,¹⁰ Congress also adopted Section 14(b), which provides:

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.¹¹

its monetary jurisdictional yardsticks, declines to accept. The jurisdictional yardsticks are listed in 1 CCH LAB. L. REP. ¶ 1610 (1963).

⁸ The term "union security" is used to refer to arrangements which require union membership as a condition of initial or continued employment. The term includes: (1) the closed shop, whereby an individual must be a union member to get a job; (2) the full union shop, whereby employees must join the union within a certain period, typically within 30 days of hiring; (3) the modified union shop, exempting old employees who are not already members, or allowing escape periods for withdrawal from membership; (4) maintenance of membership, requiring that persons who become union members remain so; or (5) equivalents.

⁹ Section 8(a)(3) makes it 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." 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958). Section 8(b)(2) makes it an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of 8(a)(3). 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(2) (1958). The proviso to 8(a)(3), commonly known as the "union shop" proviso, reads as follows: "Provided, That nothing in this Act, 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 the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: 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." 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958).

¹⁰ Under the Wagner Act, all types of union security clauses were permitted, including the closed shop, provided the union was the statutory bargaining representative and not established, maintained, or assisted by unlawful employer conduct. National Labor Relations Act (Wagner Act), ch. 372, § 7, 49 Stat. 449 (1935).

¹¹ 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

By 1947 twelve states had adopted right-to-work laws, and it is clear that the general intent of 14(b) was to allow some effect to such state legislation. More specifically, Congress contemplated that 14(b) would permit states to outlaw union shop agreements, otherwise protected under federal law.¹² The federal preemption doctrine, however, was still in its infancy at that time, and it would be unrealistic to assume that the members of Congress had in mind the variety of questions that might arise concerning the interpretation of 14(b) and its practical application.¹³ Even now, some seventeen years, eight states, and several court decisions later, the answers to many of the questions are far from clear.

In *Retail Clerks Ass'n v. Schermerhorn*¹⁴ the United States Supreme Court recently grappled with some of the problems presented by 14(b). In the 1962 term it ruled that an "agency shop" agreement (one requiring as a condition of employment that nonmembers pay to the union amounts equal to initiation fees and dues),¹⁵ though otherwise valid under federal law,¹⁶ was the equivalent of an "agreement requiring membership in a labor organization as a condition of employment" within the meaning of 14(b), and therefore subject to Florida's right-to-work legislation.¹⁷

In the 1963 term, having continued the case for further argument, the Court ruled that Florida courts had jurisdiction to enforce that state's right-to-work law to the extent of enjoining enforcement of the invalid

¹² See text accompanying notes 74-76 *infra*.

¹³ "Many of these problems [of preemption] probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined." *San Diego Bldg. Trade Council v. Garmon*, 359 U.S. 236, 240 (1959) (Frankfurter, J.).

¹⁴ 375 U.S. 96 (1963); 373 U.S. 746 (1963) (Separate opinions of same case).

¹⁵ The clause in *Schermerhorn* read: "Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union . . . shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union . . . and such sums shall in no case exceed the initiation fees and membership dues paid by those who voluntarily choose to join the Union." *Id.* at 748-49. The nonmembers were in fact required to pay the equivalent of initiation fees and membership dues. *Id.* at 749.

¹⁶ *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). See text accompanying notes 18-24 *infra*.

¹⁷ In addition to Florida, courts have held agency shop clauses in violation of right-to-work laws in Kansas, *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456 (1961), and Nevada, *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Las Vegas-Tonopah-Reno Stage Lines, Inc.*, 319 F.2d 783 (9th Cir. 1963) (applying state law); *cf.* *Baldwin v. Arizona Flame Restaurant, Inc.*, 40 L.R.R.M. 2375. (Ariz. Super. Ct., 1955), *aff'd on other grounds*, 82 Ariz. 385, 313 P.2d 759 (1957); *contra*, *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959). State attorney general rulings are to the same effect in Nebraska, OPS. ATT'Y GEN. NEB. No. 173, March 2, 1960; 1958 S.D. ATT'Y GEN. BIENNIAL REP. 221; and Texas, OPS. ATT'Y GEN. TEX. No. WW-101B, March 14, 1961. *But cf.* OPS. ATT'Y GEN. N.D. No. 135, Aug. 24, 1959 (holding service fee valid if limited in amount to costs of representation and bargaining. For a discussion, see Note, *The Agency Shop and State Right-to-Work Laws*, 35 NOTRE DAME LAW. 547 (1960).

agreement.¹⁸ In doing so, the Court rejected the union's contention that the only effect of 14(b) in a right-to-work state was to remove the agreement from the protection of the 8(a)(3) proviso and render it an unfair labor practice subject to the exclusive jurisdiction of the Labor Board.¹⁹ In addition, the Court reaffirmed its prior holding in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*²⁰ to the effect that a state has jurisdiction under 14(b) to reinstate with back pay an employee discharged pursuant to an invalid union security provision covered by that section. By implication, a state might also have jurisdiction to enjoin economic action to enforce such an agreement. But, the Court made clear, a state court would have no jurisdiction to enjoin or grant damages for picketing or other activity designed to *obtain* such an agreement, for the reason that state power under 14(b) "*begins only with actual negotiation and execution of the type of agreement described by § 14(b).*"²¹ Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the Labor Board under general preemption doctrine.

These rulings are helpful, but there remain serious unanswered questions that go to the practical effectiveness and scope of state law in this field.²² First, what type of agreements, if any, in addition to the union shop and the agency shop, are encompassed within the phrase "agreements requiring membership in a labor organization as a condition of employment"? Second, is 14(b) limited to agreements that are valid under federal law, or does it extend to agreements, like the closed shop, that are invalid? Third, in either event, what are the respective roles of the state courts and the Labor Board in the case of an agreement whose status, under federal law is (a) clearly valid, (b) clearly invalid, (c) unclear?

¹⁸ 375 U.S. 96 (1963).

¹⁹ In the first argument before the Supreme Court, the union contended that the status of the agreement under 14(b) should, in any event, be determined by the Board in the first instance. This issue is discussed in text accompanying note 80 *infra*.

²⁰ 336 U.S. 301 (1949).

²¹ 375 U.S. at 105. (Emphasis in original.) In *Local 429, Int'l Bhd. of Elec. Workers, AFL v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957), the Court reversed per curiam a state court injunction based upon a right-to-work law against picketing for an all-union agreement. In doing so, the Court merely cited *Garner v. Teamsters Union*, 346 U.S. 485 (1953). In *Local 438, Constr. & Gen. Laborers Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963), the Court again reversed such an injunction, this time stating that 14(b) gave the court on jurisdiction in such a situation. In neither case, however, did the Court make clear the reasoning set forth in *Schermerhorn* that such picketing lies "exclusively in the federal domain." 375 U.S. at 105. Under established jurisdiction doctrines this would mean that states are precluded from granting damages as well as issuing an injunction. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

²² As the Court stated in *Schermerhorn*: "As a result of § 14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field." 375 U.S. at 105.

I

WHAT TYPE OF AGREEMENTS REQUIRE UNION "MEMBERSHIP"?

Section 14(b) by its terms is limited to "agreements requiring membership in a labor organization as a condition of employment." Some state right-to-work laws purport to regulate or prohibit activities that are clearly beyond that scope, and to that extent they are unenforceable in a situation subject to Labor Board jurisdiction. For example, a law that purports to protect the "inherent right of a person to . . . bargain freely with his employer, individually or collectively"²³ could not be applied to negate the federal principles that a majority union is the exclusive bargaining agent for all employees within the bargaining unit,²⁴ and that a collective contract takes precedence over any individual agreement.²⁵ At the other extreme are agreements that expressly require union membership to obtain or keep a job, and therefore under the literal language of 14(b) are clearly within state jurisdiction. With respect to them the only issue, so far as 14(b) coverage is concerned, is whether that test is the sole condition to the exercise of state jurisdiction.²⁶ In *Schermerhorn*, however, the Court held that an agency shop agreement which did not use the word "membership" in describing the conditions of employment was nevertheless within the scope of 14(b), because the conditions it imposed were the "equivalent" of membership requirements. Thus, the question is whether and to what extent that reasoning is applicable to other types of agreements.

The Court's reasoning in *Schermerhorn* was based in part on its decision in a companion case, *NLRB v. General Motors*,²⁷ which sustained the validity of an agency shop clause against an attack under federal law. In the latter case the Labor Board ordered General Motors to bargain with the Auto Workers concerning an agency shop clause in an agreement applicable to Indiana,²⁸ where such a clause had been held valid under that

²³ TEX. REV. CIV. STAT. art. 5207a § 1 (1962). To the same effect in ARK. STAT. ANN. § 81-201 (1960), declaring the "freedom of organized labor to bargain individually." In Louisiana, where the right-to-work law contained no express provision, the supreme court nevertheless held (in an intra-state situation) that a clause recognizing the union as exclusive bargaining agent for all employees within the bargaining unit constituted a violation of the law, because it "abridged" the right of nonmembers to work as they chose. *Piegtz v. Amalgamated Meat Cutters*, 228 La. 131, 81 So. 2d 835 (1955). Shortly after this decision the law was repealed except as to agricultural workers. LA. REV. STAT. §§ 23:881-89 (Supp. 1963).

²⁴ Labor Management Relations Act § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958). This provision, however, contains a proviso, that employers may adjust grievances with individual employees, in a manner not inconsistent with the terms of the collective bargaining agreement, provided the union is given an opportunity to be present.

²⁵ *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

²⁶ See text accompanying notes 54-77 *infra*.

²⁷ 373 U.S. 734 (1963).

²⁸ *General Motors Corp.*, 133 N.L.R.B. 451 (1961), reversing a prior decision in the same case, 130 N.L.R.B. 481 (1961).

state's right-to-work law.²⁹ The Court of Appeals for the Sixth Circuit refused to enforce the Board's order on the ground that the clause was invalid under federal law, reasoning that the proviso to 8(a)(3) protects only agreements requiring "membership" as a condition of employment, and the agency clause did not require "membership."³⁰ The Supreme Court reversed, holding (1) that Congress intended the proviso to protect not only the union shop but also lesser forms of union security;³¹ and (2) that in any event, since enforcement of a union shop clause under the proviso can be validly conditioned only upon payment of initiation fees and dues,³² the agency shop clause is "the practical equivalent of union 'membership' as Congress used that terms in the proviso to Section 8(a)(3)."³³

If the Supreme Court had stopped with the first observation, it might have concluded in *Schermerhorn* that an agency shop clause, though valid under federal law as a lesser form of union security, was nevertheless not an agreement requiring "membership" as a condition of employment subject to 14(b). But having held in *General Motors* that an agency shop clause was the "practical equivalent" of "membership" within the meaning of the 8(a)(3) proviso, a denial of 14(b) coverage over the agency shop would have required the Court to attach a different meaning to the word "membership" in the two sections, and this the Court was not prepared to do. "At the very least," the Court held, "the agreements requiring 'member-

²⁹ The UAW did not propose a specific clause, but asked to bargain over one "generally similar" to the one held valid in *Indiana. Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959). The clause, like the one in *Schermerhorn*, involved the equivalent of initiation fees and dues. The basis of the Indiana court's decision, ironically, was that such an agreement did not involve "membership" within the right-to-work law's scope. The court relied both upon the fact that Indiana's law did not expressly preclude a requirement of money payments, and upon the ground that the law contained criminal provisions. Compare cases cited at note 17 *supra*.

³⁰ *General Motors Corp. v. NLRB*, 303 F.2d 428 (6th Cir. 1962).

³¹ This has been the traditional Labor Board view. See *American Seating Co.*, 98 N.L.R.B. 800 (1952) ("support money" equivalent to dues from religious objectors); *Public Serv. Co. of Colorado*, 89 N.L.R.B. 418 (1950) (service fee equivalent to membership dues). This was also the view of the Supreme Court in *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949) (maintenance of membership provision).

³² As the Court stated, "'membership' as a condition of employment is whittled down to its financial core." 373 U.S. at 742. The court thus sanctioned a long-established construction of the Act that if an employee tenders his initiation fee and dues he may not be required as condition of employment to take an oath of membership, *Union Starch & Ref. Co. v. NLRB*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951), or to submit to an initiation or attend union meetings, *Union Bhd. of Carpenters*, 115 N.L.R.B. 518 (1956). In *General Motors*, the court conceded that under a lawful union security agreement "the employee may have to become a 'member' in the sense that the union may be able to place him on its rolls," but did not regard that difference between the union shop and agency shop as significant for purposes of 14(b). 373 U.S. at 744.

³³ *Id.* at 743. The court left open the question posed by an agency shop agreement coupled with a closed union policy. *Id.* at 744.

ship' in a labor union which are expressly permitted by the proviso are the same 'membership' agreements expressly placed within the reach of state law by Section 14(b)."³⁴

In *Schermerhorn*, on appeal, the union sought for the first time to distinguish the agency shop clause in that case from the one in *General Motors* by arguing that theirs was limited to a "service fee" to be used exclusively for collective bargaining purposes and not for other "institutional purposes unrelated to its exclusive agency functions," whereas the *General Motors* clause allowed nonmember contributions to be used "without restriction." The Court said it was "wholly unpersuaded" by the attempted distinction for two reasons: (1) the clause in *Schermerhorn* was ambiguous, and therefore susceptible to an interpretation that would allow nonmembers' money to be used for "institutional" purposes; and (2) since nonmember payments were equal to member payments, even if money from nonmembers were allocated exclusively to bargaining agency functions, the nonmember would be paying "more of these expenses than his pro rata share," thus indirectly subsidizing the union's institutional activities.³⁵

The decision thus leaves open, by implication, the possibility that an agreement requiring payment by nonmembers of a service fee as a condition of employment may be valid under federal law and yet outside the reach of state power under 14(b), if limited in amount to the nonmember's pro rata share of "exclusive agency" functions—that is, those services, such as bargaining and grievance handling, which a union is required to perform for members and nonmembers alike under its statutory duty of fair representation.³⁶ Obviously, to distinguish between such functions and

³⁴ 373 U.S. at 751.

³⁵ *Id.* at 752–54. The Court did not expressly consider the possibility that members might contribute toward institutional functions by way of special assessments. *Cf.* *H. John Homan Co.*, 137 N.L.R.B. 1043 (1962), in which two Board members express the view that a special service fee is not *prima facie* discriminatory, even though equivalent in amount to union dues, because members additionally contribute through initiation fees and assessments.

³⁶ A union acting as statutory bargaining representative has a duty, in negotiation and administration of the agreement, to represent all employees within the bargaining unit in a fair and impartial manner. *Syres v. Oil Workers Union*, 350 U.S. 892 (1955) (under the NLRA). *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (under Railway Labor Act). The duty extends to nonmembers as well as members. See *Wallace Corp. v. NLRB*, 323 U.S. 248, 249, 255–56 (1944), in which the Court stated: "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged within the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation." Moreover, discrimination against nonmembers in administration of the agreement constitutes an unfair labor practice within § 8(b)(2). *E.g.*, *Bricklayers Local 10*, 124 N.L.R.B. 691 (1959). This duty is apparently enforceable through the courts as well as through the Board. See *Humphrey v. Moore*, 375 U.S. 335 (1964) (rejecting by implication Board's exclusive jurisdiction).

unrelated "institutional" activities would be difficult, but the Court provides what may be a clue to its thinking on that matter by citing, with apparent approval, a portion of the union's brief to the effect that non-bargaining functions may include political, charitable and educational activities, promotion of labor institutions in other countries, financing of low-cost housing, and financing litigation.³⁷ Once bargaining functions are identified, to compute their costs and the nonmember's pro rata share poses a further and formidable accounting task, but perhaps no more difficult than the analogous duty which the Supreme Court says the Railway Labor Act imposes in union shop situations. There a union is required to compute the total and pro rata costs of political and non-political activities so that a member who declines to contribute toward political expenses may be given a discount from total dues.³⁸

An alternative to the general service fee impliedly valid under the reasoning of *Schermerhorn*, and one more likely to appeal to unions, is a special fee charged nonmembers for particular services which the union must provide under its duty of representation.³⁹ Some agreements, for example, impose a charge upon nonmembers for use of the union-maintained hiring hall, and the Board has sustained these agreements under federal law in the absence of evidence (1) that the hiring hall is operated in a discriminatory manner, or (2) that the amount of the fee is not reasonably related to hiring hall operating costs.⁴⁰ Presumably similar considerations apply if a union charges on a separate basis for services rendered or costs incurred in handling a grievance or arbitration matter for a nonmember.⁴¹

³⁷ 373 U.S. at 753 n.6. Other matters institutional in nature would probably include the maintenance of internal union benefit programs and similar functions. On the other hand, the financing of certain litigation, for example a suit to compel contract compliance, would appear to lie within the bargaining function.

³⁸ *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113 (1963). The Court suggests that the separation be effected by establishment of a separate political fund, as in Britain. *Id.* at 122-23. Perhaps the Court is more interested in the principle of separation than in precise calculation of amounts. Summers, *Labor Law Decisions of the Supreme Court, 1962 Term*, A.B.A. SECTION OF LABOR RELATIONS LAW REPORT 1 (1963).

³⁹ Unions, however, may be reluctant to stress the difference between over-all cost of bargaining functions and institutional functions. *But see* Spielmans, *Bargaining Fee versus Union Shop*, 10 IND. & LAB. REL. REV. 609 (1957).

⁴⁰ *H. John Homan Co.*, 137 N.L.R.B. 1043 (1962). It is not clear what the general counsel must prove to show the fee is unreasonable in amount. In *Homan*, nonmembers paid \$9.00 per month, as opposed to members' dues of \$10.00, of which \$1.10 was sent to the International in the form of a per capita assessment. Two Board members would have held these facts to constitute sufficient, or at least prima facie, evidence of discrimination, but the majority held it insufficient. *Cf.* Local 1351, S.S. Clerks & Checkers, 55 LRRM 2390 (Feb. 13, 1964); *J. J. Haggerty, Inc.*, 139 N.L.R.B. 633 (1962), modified, Local 138 Int'l Union of Op. Eng'rs, AFL-CIO v. NLRB, 321 F.2d 130 (2d Cir. 1963); *Houston Maritime Ass'n*, 136 N.L.R.B. 1222 (1962); *Galveston Maritime Ass'n*, 139 N.L.R.B. 352 (1962).

⁴¹ *Cf.* *Peerless Tool & Eng'r Co.*, 111 N.L.R.B. 853 (1955), holding it was an unfair labor practice for a union to refuse to process grievances for employees willing to pay their dues but unwilling to pay an assessment to the union strike fund.

If a general or special service fee agreement lies outside the reach of state power under 14(b), it is because the fee is used to support only those union functions that are available to members and nonmembers alike, and therefore does not constitute a requirement of "membership" within the meaning of that section. This conclusion is consistent with the relationship between 14(b) and the proviso to 8(a)(3) on either of two theories. First, as the Court reaffirmed in *General Motors*, the proviso protects forms of union security less stringent than the union shop, and a service fee agreement may fall within that category.⁴² In the first *Schermerhorn* decision, the Court expressly left open whether state power under 14(b) reaches all agreements that depend upon the proviso for their validity under federal law, deciding only that it at least reaches the union shop and its equivalent the agency shop.⁴³ It is consistent with the decision, therefore, that a service fee may be outside 14(b) even though within the 8(a)(3) proviso.⁴⁴

Second, and a better analytical approach is that the kind of service fee we are discussing does not involve the proviso at all, because the fee has nothing to do with membership. It is not a union security measure and it is valid under federal law independently of the proviso. In the absence of the kind of discrimination found to exist in *Schermerhorn*, where nonmembers were required to pay more than their pro rata share for bargaining services, the prohibition of 8(a)(3) does not come into play.⁴⁵ The proviso would then be relevant only if it were necessary to protect a service fee arrangement from being held to constitute a prohibited interference with employee rights under section 7.⁴⁶ While section 7 protects the right of an employee not to "assist" a labor organization, a service fee limited to payments for services received would not appear to violate its principles.⁴⁷ If a service fee is valid independently of the proviso, then it is quite clearly beyond the reach of state power under 14(b), for the function of that sec-

⁴² If it does, presumably it must conform to the 30-day requirement. To date, the only fee arrangements held to be within the "less stringent" category are those requiring the equivalent of union dues, or dues plus initiation fee. See *Retail Clerks Ass'n v. Schermerhorn*, 375 U.S. 96 (1963); 373 U.S. 746 (1963).

⁴³ The Court stated that "The connection between the § 8(a)(3) proviso and § 14(b) is clear. Whether they are perfectly coincident, we need not now decide. . . . Whatever the status of less stringent union-security arrangements, the agency shop is within § 14(b)." 373 U.S. at 751.

⁴⁴ Section 14(b) by its terms, however, would appear to reach "less stringent" union security measures such as the modified union shop or maintenance of membership provision, which expressly requires membership as a condition of employment.

⁴⁵ See the hiring hall fee cases cited at note 41 *supra*.

⁴⁶ The proviso constitutes a limitation on the application of § 7. See note 3 *supra*.

⁴⁷ *Cf. Local 357, Teamsters Union v. NLRB*, 365 U.S. 667 (1961), in which the Supreme Court made no comment on the Labor Board's argument that an exclusive hiring hall arrangement by its nature constituted an interference with § 7 rights, even in the absence of discrimination.

tion, as the Supreme Court stated in *Schermerhorn*, is to limit the preemptive effect of the proviso.⁴⁸

Somewhat similar reasoning is applicable to the status under 14(b) of a non-discriminatory hiring hall agreement, whereby the union acts as a referral agency without regard to union membership. Such an agreement is valid under federal law independently of the 8(a)(3) proviso, the Supreme Court having held that, while a hiring hall may encourage union membership, the only encouragement or discouragement banned by the Act is that which is "accomplished by discrimination."⁴⁹ Accordingly, such an agreement is not one requiring "membership" within the meaning of 14(b) and is beyond the reach of state authority.⁵⁰ This is the view of the Board, which held that a non-discriminatory hiring hall agreement is a mandatory subject of bargaining under federal law, and that its asserted illegality under a state right-to-work law is no defense to a refusal to bargain charge:

It is abundantly clear that a union-operated non-discriminatory hiring hall does not, by definition, require membership in that union as a condition of referral and thus of employment. Rather, the non-discriminatory hiring hall operates to serve both members and non-members of the Union and also services employers. An employee seeking a job referral to an employer having an appropriate contract need not become a member of the union which is running the hiring hall, nor must he even tender "agency shop" payments to the union in lieu of membership. In sum, there are no union-oriented conditions of employment which he is required to satisfy, which might arguably be considered forms of union security. Furthermore, a review of both Board and Court cases which have dealt with the issue warrants no inference that a non-discriminatory hiring hall bears any of the characteristics of a union security agreement.⁵¹

May a state acquire jurisdiction over a hiring hall agreement on the ground that in fact it discriminates against nonmembers? Certainly evi-

⁴⁸ 373 U.S. at 756-57.

⁴⁹ *Local 357, Teamsters Union v. NLRB*, 365 U.S. 667 (1961).

⁵⁰ Wyoming's right-to-work law, however, expressly prohibits such an arrangement. WYO. STAT. ANN. § 27-245.5 (Supp. 1963). The Arkansas Supreme Court has held an exclusive hiring arrangement invalid under that state's right-to-work law on the ground that it amounts to a requirement of "affiliation" with the union. *Kaiser v. Price-Fewell, Inc.*, 359 S.W.2d 449 (Ark.), cert. denied, 371 U.S. 1955 (1963). To the same effect is *Branham v. Miller Elec. Co.*, 118 S.E.2d 167 (S.C. Sup. Ct. 1961), in which the court assumes "it would be certain, as a practical matter, that only union members in good standing would be employed"; Cf. *Building Trades Council of Reno v. Bonito*, 71 Nev. 84, 280 P.2d 295 (1955) (interpreting a hiring provision as meaning that the union will furnish only "union labor"); *Sheet Metal Workers v. Walker*, 236 S.W.2d 683 (Tex. Civ. App. 1951) (contract construed as prohibiting employment of non-union workers). It does not appear, however, that any of these cases involved employers within Labor Board jurisdiction.

⁵¹ *Houston Chapter, Ass'n Gen. Contractors of Am.* 143 N.L.R.B. 43 (1963). To the same effect is a Trial Examiner's decision in *Tom Joyce Floors, Inc.*, Case No. 20-CA-2477, pending before the Board for decision.

dence of actual operation would be required, since as a matter of federal law discrimination may not be inferred from an agreement which is non-discriminatory on its face.⁵² But if a hiring hall is operated in a discriminatory manner, its operation constitutes an unfair labor practice under federal law, subject to Labor Board jurisdiction;⁵³ and whether 14(b) gives states concurrent jurisdiction in such a situation is a question considered in the next section.

II

STATE AUTHORITY TO REMEDY UNION SECURITY ARRANGEMENTS THAT VIOLATE FEDERAL LAW

The language of the *Schermerhorn* opinion, which describes state power to proscribe union security arrangements under 14(b), is broadly phrased. The Court states that "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 Section 14(b) and decided to suffer a medley of attitudes and philosophies on the subject."⁵⁴ There are difficulties, however, with an assumption that the Court meant to sweep within this generalization an agreement that on its face or in its application violates federal as well as state law. It is one thing to conclude, as the Court has, that Congress intended to authorize states to pursue their own policies in the prohibition of agreements that are tolerated by federal law, and quite another to conclude that the states may also pursue their policies with respect to agreements or conduct already forbidden by federal law. Some of the consequences of a broad interpretation of *Schermerhorn* should be considered in appraising the scope of the Court's language.

If both the Board and states may assume jurisdiction over precisely the same agreement, there will be duplication and possible conflict in federal and state remedies, even when the agreement expressly conditions employment on union membership. For example, complaints against a closed shop agreement in a right-to-work state could be lodged with either a state court or the Board, or both, thereby setting in motion differing procedures and inviting separate remedial action.⁵⁵ The Board's jurisdiction would presumably not be affected by the pendency of the state suit, or even by

⁵² Local 357 Teamsters v. NLRB, 365 U.S. 667 (1961).

⁵³ *Ibid.*

⁵⁴ 375 U.S. 96, 104-05 (1963).

⁵⁵ As the Court noted in *Schermerhorn*, state right-to-work laws contain "a wide variety of sanctions, including injunctions, damage suits, and criminal penalties." 375 U.S. at 104-05. Under 10(c) of the Act, the Board is authorized to issue a cease and desist order against enforcement of the agreement, and to require the reinstatement with back pay of any employees discriminated against under the agreement. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1958).

a decision of the state court, since section 10(a) of the act provides that the Board's decisional "power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."⁵⁶ The effect on state jurisdiction of the pendency of a concurrent Board proceeding, or a Board determination, is not clear. If 14(b) does authorize concurrent jurisdiction in this class of unfair labor practice cases, it would appear that an argument for deference to federal authority would have to be based on principles of comity, and not preemption.⁵⁷ In short, the Board and the state courts could find themselves in competition when effectuating their respective remedial powers, a situation which has long been considered inimical to the purposes of the Act.⁵⁸

Conflict in remedies is not the only potential difference in treatment to which union security cases may be subject if the Board's unfair labor practice jurisdiction in this field is to be shared with the states. The determination of whether an employer and a union have by agreement conditioned employment on union membership may call for fact finding and the application of legal principles that could well produce different factual and legal conclusions. An arrangement that one tribunal finds to be a discriminatory agreement might be found a legitimate practice by another. This kind of situation is most likely to arise in cases involving alleged discriminatory application of otherwise lawful agreements, or in practices which are not reflected in written agreements. State right-to-work laws have frequently been invoked in such cases, including the discriminatory operation of a hiring hall,⁵⁹ the discharge of an employee because of his union membership

⁵⁶ 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958).

⁵⁷ Compare *Carey v. Westinghouse*, 375 U.S. 261 (1964), where the Board's superseding authority under 10(a) was recognized in the situation where the Act has expressly provided for duplicating remedial authority of the Board and the courts. This case, however, is probably not controlling with respect to the problem under discussion, since the duplication of remedy involved jurisdiction to enforce contracts. Principles of federal labor law govern the interpretation of collective bargaining contracts, *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962); thus, it is quite possible to argue consistently that courts are required to apply Board decisional law in such cases, but not in cases where 14(b) has vested states with authority to enforce their own policies.

⁵⁸ Perhaps the best statement is in *Garner v. Teamsters Union* 346 U.S. 485 (1953), a landmark preemption case. The case involved picketing to compel the unionization of a place of business, conduct which "fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices." *Id.* at 487. The Court observed that "when two separate remedies are brought to bear on the same activity, a conflict is imminent." *Id.* at 498. It then rejected the argument that a state remedy against unfair labor practice activity is consistent with federal policy. "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Id.* at 490-91. Compare the observation of Mr. Justice Holmes in *Charleston & W. Car. Ry. v. Varnville Furn. Co.*, 237 U.S. 597, 604 (1915): "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition."

⁵⁹ *Taylor v. Hoisting Eng'rs*, 189 Kan. 137, 368 P.2d 8 (1962).

or nonmembership when no agreement is involved,⁶⁰ picketing to force the discharge of non-union employees and the hiring of union members,⁶¹ and other actions which the Board would find to violate the Act.⁶² Discrimination of this kind, indeed, is more prevalent than the enforcement of a closed shop contract, for few employers and unions enter into such obviously illegal agreements.

Discrimination cases that call for an evaluation of factual evidence are of course commonplace in Board decisional law, with a well defined set of rules and remedies applicable to them. If the states have concurrent jurisdiction to make their own factual determinations and to apply their own law under 14(b), much of the Act that heretofore has been considered amenable to the preemption doctrine can no longer be said to be within the Board's exclusive jurisdiction. It is not inconceivable that the encroachment upon Board authority in this area could be extended to states without right-to-work statutes, for 14(b) does not expressly exclude state decisional law as a source of policy for acting against union security arrangements or their applications.⁶³

The area of potential conflict which has been described would be materially narrowed if the state jurisdiction that 14(b) authorizes is limited to written union security agreements. Obviously, there is far less opportunity for differences in adjudications with respect to a written union security provision than with respect to factual practices and oral arrangements. The language of 14(b) speaks of "the execution or application of agreements," which is ambiguous.⁶⁴ The Supreme Court, however, has empha-

⁶⁰ *Self v. Taylor*, 217 Ark. 953, 235 S.W.2d 45 (1950); *Lunsford v. City of Byran*, 156 Tex. 520, 297 S.W.2d 115 (1957); In *Self*, the court determined that an unwritten practice of discrimination was subject to the Arkansas right-to-work law, no less than a written agreement. 217 Ark. at 957, 235 S.W.2d at 49.

⁶¹ *Baldwin v. Arizona Flame Restaurant*, 40 L.R.R.M. 2375 (Ariz. Super. Ct. 1955); *Gallespie Constr. Co. v. International Hod Carriers Union*, 32 LRRM 2383, May 18, 1953 (Fla. Cir. Ct.).

⁶² See note 6 *supra* for a description of some of the right-to-work laws that expressly overlap into areas which have ordinarily been regarded as subject to exclusive regulation by the Labor Board.

⁶³ Section 14(b) refers generally to "State or Territorial law." See text accompanying note 11 *supra*. In *Hughes v. Superior Court*, 339 U.S. 460 (1950), the Court observed that for purposes of the fourteenth amendment, at least, "the fact that state policy is expressed by the judicial organ of the state rather than by the legislature we have repeatedly ruled to be immaterial." Compare the dictum of the Ohio Supreme Court in *Grimes & Hauer v. Pollack*, 163 Ohio 372, 380, 127 N.E.2d 203, 207 (1955) that 14(b) refers only to constitutional or statutory enactment.

⁶⁴ Compare 8(e) of the Act, which imposes a different kind of contractual regulation, but expressly includes "any contract or agreement, express or implied." 73 State. 542 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1959).

It is at least arguable that the wording of 8(e) shows that Congress knew how to include an implied agreement in its regulation, and that the reference in 14(b) to "the execution or application of agreements" is thus limited to express contracts.

sized that "state power, recognized by 14(b), begins *only with actual negotiation and execution of the type of agreement described by Section 14(b)*."⁶⁵ If this language is to be read to preclude that jurisdiction over implied agreements, *i.e.*, practices and oral arrangements which are alleged to discriminate on the basis of union membership, a considerable amount of case law under the right-to-work statutes must be regarded, on that ground alone, as wrongly decided.⁶⁶ It would appear that if 14(b) is to be restricted to written agreements, the Supreme Court will have to inform the states that this is the correct delineation of their authority. Continuation of the existing decisional law under right-to-work statutes will encourage conflict with the Board's unfair labor practice jurisdiction, as long as concurrent jurisdiction is exercised in this area.

The potential for conflict, of course, does not alone require an interpretation of the Act which denies concurrent jurisdiction. Under the preemption doctrine "the purpose of Congress is the ultimate touchstone,"⁶⁷ and there are plainly areas in which Congress has provided for a duplication of remedies. Perhaps the most obvious is the grant of judicial power in section 303 to award damages for certain kinds of union unfair labor practices. There is no escape here from the possibility of conflicting and competing litigation. All that can be said is that Congress expressly departed in section 303 from the concept of national uniformity in the administration of federal labor policy.⁶⁸ The same observation must now be made with respect to section 301 of the Act, which provides for Court awards of damages in actions brought on collective bargaining contracts. To the extent that the alleged breach of contract may constitute an unfair labor practice, the Supreme Court has acknowledged the existence of concurrent

⁶⁵ *Local 1625, Retail Clerks Ass'n v. Schermerhorn*, 375 U.S. 96, 105 (1963). (Emphasis in original.) The statement was made in explanation of earlier rulings that economic action undertaken to obtain union security agreements "lies exclusively in the federal domain." *Ibid.* Accordingly, its implications as to the somewhat different problem regarding the kinds of agreements included within 14(b) should not be pressed too far.

⁶⁶ Right-to-work laws frequently cover matters other than discrimination resulting from written agreements. See note 6 *supra*.

⁶⁷ *Retail Clerks Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963).

⁶⁸ The Supreme Court has held in *ILWU v. Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952), that sections 303 and 8(b) are "independent of each other." The potential conflict inherent in such independence is best illustrated in two decisions handed down the same day by the United States Court of Appeals for the Sixth Circuit. *United Brick Workers v. Deena Artware*, 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952); *NLRB v. Deena Artware*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953). In the latter decision the court upheld the Board's conclusion that the union involved did not violate the secondary boycott provisions of the Act, but in *United Brick Workers* the Court upheld the federal district court's conclusion in a section 303 action that the union had engaged in a secondary boycott. The two cases arose out of the same labor dispute and involved the same conduct, but inconsistent factual findings were made by the respective tribunals, and the court of appeals found support for both in the respective records.

jurisdiction between the Board and the courts.⁶⁹ These exceptions to the preemption doctrine, however, are premised on express statutory provisions that necessarily contemplate the possibility of non-uniformity. The Court has made clear that "different principles are applicable" to section 301 or 303 cases involving preemption problems, and decisions arising under these sections do not necessarily apply in other areas.⁷⁰

The history of the preemption doctrine in labor law shows that the most cogent evidence of congressional intent, either expressed in specific statutory wording or in reliable explanations of legislative purpose, is required to warrant departure from that doctrine.⁷¹ There is no cogent evidence of congressional intent to allow concurrent jurisdiction under 14(b). To the contrary, the legislative history of that section, as summarized in *Schermerhorn*, discloses apprehension that the proviso to 8(a)(3), in the absence of a clarifying amendment, might "authorize [union security] arrangements . . . in states where such arrangements were contrary to the state policy,"⁷² rather than a desire to add the "wide variety of sanctions" afforded in state law to the remedies available in federal law against agreements outlawed by the act.⁷³

In *Algoma Plywood v. NLRB*,⁷⁴ the Court described 14(b) as designed to leave the states "free to pursue their own *more restrictive* policies in the matter of union-security agreements."⁷⁵ There now is little doubt that this description accurately encompasses Congress's main concern in the adoption of 14(b), namely the preservation of local authority to reject union security arrangements that federal law accepts. Both *Algoma* and *Schermerhorn* are consistent with the proposition that this was all 14(b)

⁶⁹ *Carey v. Westinghouse*, 375 U.S. 261 (1964); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

⁷⁰ *Local 100, Plumbers Union v. Borden*, 373 U.S. 690, 693 n.1 (1964).

⁷¹ See, e.g., *Weber v. Anheuser-Busch*, 348 U.S. 468 (1955); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Local 207, Iron Workers v. Perko*, 373 U.S. 701 (1963). An exception exists in cases involving union violence or public disorder, that may constitute unfair labor practices under section 8(b)(1)(A) of the Act. See, e.g., *UAW v. Russell*, 356 U.S. 634 (1958); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956); *United Construction Workers v. Laburnum*, 347 U.S. 656 (1954). As explained in the *Garmon* case, "State jurisdiction has prevailed in these situations because the compelling state interest in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." 359 U.S. at 247. As shown in the opinions in the foregoing cases, the legislative history of the 1947 amendments to the act strongly supports the conclusion that in this area, at least, existing local remedies were not to be disturbed by the act's proscription against restraint and coercion of employees.

⁷² H.R. REP. NO. 510, 80th Cong. 1st Sess. 60 (1947).

⁷³ 375 U.S. at 100.

⁷⁴ 336 U.S. 301 (1949). The *Schermerhorn* and *Algoma* cases are the only occasions in which the Supreme Court has dealt with the scope of 14(b).

⁷⁵ 336 U.S. at 314. (Emphasis added.)

was intended to accomplish, for the agreements in both cases were valid under federal law.⁷⁶ Moreover, the insistence in *Schermerhorn* that union conduct in attempting to obtain a union security clause is subject to exclusive federal jurisdiction⁷⁷ suggests that the Court did not wish to press the exception to federal preemption beyond the requirements of the case. On balance, due regard for the legislative purpose in enacting section 14(b), together with a proper concern for avoiding the problems inherent in duplicating the Board's authority to remedy unfair labor practices, argue strongly in favor of limiting the language of *Schermerhorn* to the particular facts involved.

III

THE RESPECTIVE ROLES OF THE BOARD AND STATE COURTS IN UNION SECURITY CASES

If, as has been suggested, the Board alone has adjudicatory authority with respect to union security agreements that violate federal law, it would follow that state courts must decline jurisdiction in all union security cases except those in which the validity of the agreement under federal law is established beyond question. Thus, cases involving contract language that plainly falls within federal proscription are automatically removed from state control, and become subject to well established Board decisional law. Similarly, in situations in which the alleged violation turns not upon contract language, but upon factual findings of discrimination, the Board alone would be competent to make the determination. Thus, a finding that an employee was denied employment because of nonmembership in a union would establish a federal unfair labor practice, which can be remedied only by the Board, and a contrary finding would establish an absence of discrimination, and thereby the inapplicability of 14(b). In either alternative, the state court may not act.⁷⁸ Absent a written union

⁷⁶ The Supreme Court has not hesitated to confine its decisions in the labor field to a narrower area than its language might justify in order to maintain coherency in the rules of federal preemption. See the treatment of *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) in *Weber v. Anheuser-Busch*, 348 U.S. 468, 481 n.9 (1955), and the treatment of *United Const. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954), in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 248 n.6 (1959).

⁷⁷ 375 U.S. at 105.

⁷⁸ This treatment of the jurisdictional question is in accord with the conventional preemption rule that the Board, and not the state courts, has primary authority to adjudicate cases which may fall within its regulatory power. As stated in *Garner v. Teamsters Local 776*, 346 U.S. 485, 489 (1953): "It is not necessary or appropriate for [the Court] to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board"

security agreement, this principle would govern most hiring hall cases and other situations involving job discrimination.

Service fee cases present a different analytical problem. If the fee charged is not equivalent to "membership" obligations, perhaps because it is limited to payments for bargaining services, then a state court would lack jurisdiction because 14(b) is inapplicable.⁷⁹ If, on the other hand, the fee is equivalent to "membership," as in *Schermerhorn*, then a state court would have jurisdiction under 14(b) if the service fee clause is valid under federal law. Given a fee that imposes a requirement of union membership, its validity under a federal law turns on whether it meets the tests of the 8(a)(3) proviso. It is conceivable that such a clause may so obviously meet those tests that deference to Board jurisdiction would be superfluous. In many cases, however, such questions as whether the clause allows the proper waiting period, or whether one union involved is the statutory bargaining agent for the employees concerned, present at least arguable grounds for federal invalidity, and thus require initial determination by the Board.

There is nothing in the *Schermerhorn* decisions to discourage an application of the preemption rule which gives the Board sole adjudicatory authority with respect to cases that may involve unfair labor practices, if the Board also may be said to enjoy exclusive jurisdiction over violations of the Act in the union security area. In the first opinion, the Court pays due respect to the principle that the "assessment of any union-security arrangement for the purposes of §§ 7, 8 and 14(b), when there is significant doubt about the matter, is initially a task for the Board, so that it may finally come to this Court with the benefit of the affected agency's views. . . ."⁸⁰ The case was not disposed of on this ground only because the Board had fully expressed its views on the matter, and there was no "reason to hold our hand at this juncture in order that the Board may arrive again at what is now a foregone conclusion."⁸¹ This exception to the preemption rule is in accord with the *Garmon* decision.⁸²

It should be observed that, as a practical matter, there is little occasion for the Board to make a substantive ruling on the scope of 14(b), except when an alleged unfair labor practice is involved. Service fee and hiring clauses make unpromising cases for unfair labor practice charges in the absence of a showing of discrimination, except perhaps when an

⁷⁹ See text accompanying notes 44-48 *supra*.

⁸⁰ 373 U.S. 746, 755 (1963).

⁸¹ *Id.* at 756.

⁸² The Court made allowance in *Garmon* for the operation of state authority where the Board has made a "clear determination that an activity is neither protected nor prohibited" or where there is "compelling precedent applied to essentially undisputed facts." 359 U.S. at 246.

employer refuses to bargain about them.⁸³ Referral of non-discriminatory clauses to the Board might well result in the dismissal of a charge by the General Counsel's office without indicating whether the agreement is subject to section 14(b). To the extent that these clauses may be found not to deal with union membership, however, it would seem sensible for state courts to dismiss the proceeding on that ground. This entails an initial decision by the state court as to the scope of 14(b), but may be warranted when there is no basis for concluding that an unfair labor practice is involved. Examination by the state court of the section 14(b) problem is inherent in any union security case, since it is always possible that state jurisdiction may be proper under that provision as in the *Schermerhorn* and *Algoma* cases. A determination of an absence of state jurisdiction on the ground that union membership is not involved is scarcely different, from the standpoint of protecting the integrity of the Board's unfair labor practice jurisdiction, from a determination that 14(b) authorizes a state remedy.

However that may be, the *Schermerhorn* decisions reflect no backtracking from the rules that allocate responsibility to the Board for making initial decisions in cases which are within its exclusive province. If the Board has retained an area of exclusive competence to deal with union security matters, unaffected by section 14(b), the usual consequences should follow with respect to the division of authority between the Board and the states in handling cases.

IV

CONCLUSION

In summary, our analysis yields the following conclusions:

1. Section 14(b) grants states authority to proscribe by law the union shop and its equivalent, the agency shop.
2. Pursuant to such a state law, state courts may declare these agreements to be unlawful, may enjoin their enforcement, and may reinstate with back pay an employee denied employment as a result of the invalid agreement.
3. Since state jurisdiction arises only with the negotiation and execution of the invalid agreement, state courts may not enjoin or grant damages for union activity aimed at obtaining the agreement.

⁸³ The same may be said for service fee agreements which contain 30-day grace periods, and thus satisfy the conditions of the proviso to 8(a)(3), assuming that they are subject to the proviso in the first place.

4. A non-discriminatory service fee charged to nonmembers and limited to either a pro rata share of the actual cost of bargaining services (a general service fee) or particular services such as grievance handling or hiring hall administration (a special service fee) is probably beyond the reach of state power under 14(b).

5. A non-discriminatory hiring hall agreement is not subject to state control under 14(b) since it does not involve membership as a condition of employment.

6. State authority under 14(b) arguably applies only to express written agreements.

7. In any event, state authority under 14(b) does not extend to agreements or practices which are invalid under federal law.

8. State courts should defer to the jurisdiction of the Board in the case of any agreement or practice that is arguably an unfair labor practice under federal law.

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