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The Consequences of Discriminatory Union Membership Policy

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by a skilled merchant or by one upon whom reliance is placed, leads the writer to believe that the sale of a used house is properly governed by the doctrine of caveat emptor.[100]

An application of the existing law of implied warranties produces an anomalous result in the "model home" situation. The purchaser of a completed new home is without a remedy for defects in the absence of an express contractual provision, express warranty or fraud, yet his neighbor who buys a similar home before it is completed receives the benefit of implied warranties of proper workmanship and fitness for habitation.

Today's consumer of a new product, in general, buys with assurance that the law imposes some duty on the vendor in the form of an implied warranty as to quality,[101] and many builders voluntarily recognize such a duty in the sale of a new house in regard to the repair of defects. To protect the purchaser of a defective house from an irresponsible builder it is submitted that in the sale of every new house the law should recognize an implied warranty as to proper workmanship and materials and fitness for intended habitation.[102]

EUGENE I. SELKER

The Consequences of Discriminatory Union Membership Policy

THE CONTINUING push for union organization and union security has pointed up the need for reconciling such objectives with the rights of individuals. The rights and duties discussed here concern only one facet of this large problem. What rights has an individual, and what duties does a labor union owe toward an individual, who is arbitrarily refused full mem-

[100] Unless the skill of a real estate agent is to be attributed to the seller, thus making him a skilled merchant, the analogy to the sale of second-hand goods is inescapable and offers a further basis for restricting implied warranty to new houses. Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, PROCEEDINGS, AMERICAN BAR ASSOCIATION SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 16 (1952).

[101] UNIFORM SALES ACT § 15.

[102] See Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, PROCEEDINGS, AMERICAN BAR ASSOCIATION SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 4 (1952) as to current developments along this line. In England, the destruction of caveat emptor is indicated by a statute which changed the common law by imposing an implied warranty of fitness for habitation in the lease of every house rented below a designated price. Housing Act, 1936, 26 Geo. 5 and 1 Edw. 8, c. 51.

bership rights in a union? Although the most simple and thorough solution would be to admit such persons to membership, the courts have shown little desire to do so without legislative prodding.[1] Therefore, the problems discussed within the framework of this note will be concerned only with the duties of unions to such non-members short of granting them the right to join a union.

Duty to Represent Fairly

Both the National Labor Relations Act[2] and the Railway Labor Act[3] provide in effect that the bargaining representative chosen by a majority of workers in an appropriate unit shall be the exclusive representative of all within the unit or class. Nowhere in either act is it expressly stated that, because this bargaining unit is an exclusive one, the chosen representative must treat all whom it represents in an equal and non-discriminatory manner. This proposition, however, was established in the case of *Steele v. Louisville & Nashville R.R.*[4] The plaintiff in that case was a fireman for the defendant railroad and was barred because of his race from membership in the defendant Brotherhood of Railway Firemen. The Brotherhood, as the bargaining representative of the firemen, negotiated a contract with the railroad providing that not more than 50% of the firemen in each class of service in each seniority district should be Negroes and that all vacancies should be filled by white men. As a result, the plaintiff lost his seniority rights and was relegated to less remunerative work. The plaintiff brought suit but was held to have no right to complain of the union's action.[5]

The Supreme Court reversed this decision. The rule enunciated was based on a reading of the statute which implied that Congress, in providing that the majority representative should have the power to bargain for all

[1] For an excellent discussion of statutory aspects of the general problem see Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs,* 44 ILL. L. REV. 425, 631 (1949). Legislative innovations have largely consisted of Labor Commissions or Fair Employment Commissions empowered to enforce a right to membership in a union. Oregon is an example of the former and Connecticut of the latter. Fletcher v. Brotherhood of Railway Carmen, 4 CCH LAB. LAW REP. ¶ 49,176 (Ore. 1952); Connecticut Comm'n on Civil Rights *ex rel.* Tilley v. International Brotherhood of Elec. Workers, 4 CCH LAB. LAW REP. ¶ 49,170 (Conn. 1952).

[2] 49 STAT. 453 as amended (1935), 29 U.S.C. § 159(a).

[3] 44 STAT. 577 as amended, 45 U.S.C. § 152, fourth.

[4] 323 U.S. 192, 65 Sup. Ct. 226 (1944). Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 65 Sup. Ct. 235 (1944) was decided as a companion case.

[5] Steele v. Louisville & N.R.R., 245 Ala. 113, 16 So.2d 416 (1944). The Alabama court was relying on the general rule that in general seniority rights are a creature of the union and thus subject to destruction by the union. Shaup v. Grand Int'l Brotherhood of Locomotive Engineers, 223 Ala. 202, 135 So. 327 (1931); Long v. Baltimore & Ohio R.R., 155 Md. 265, 141 Atl. 504 (1928).

within the class, did not intend a union to have the unlimited power to destroy rights. The Court stated:

> The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and is to act for and not against those whom it represents.[6]

Although concurring in the result, one member of the Court placed his decision on the ground that the statute as applied to this plaintiff was unconstitutional,[7] a question which the majority expressly avoided deciding.[8] However, despite the Court's disagreement as to the correct ground upon which to base the decision, its effect is clear. Henceforth, a union as exclusive bargaining agent can be prevented from discriminating in its contract negotiations against non-members whom it represents.[9]

Subsequent to the decision in the *Steele* case, the lower federal courts were presented with contract provisions that were merely subterfuges to circumvent this duty of fair representation.[10] In *Tunstall v. Brotherhood of Locomotive Firemen and Engineers*,[11] an injunction was granted to restrain enforcement of a contract providing that only "promotable" men would be employed as firemen. There was an express clause in the contract to the effect that "non-promotable" should refer only to Negroes. The omission of such an express clause did not prevent another court from looking past the labels in a later case.[12] The latter court, in rejecting the

[6] Steele v. Louisville & N.R.R., 323 U.S. 192, 197, 65 Sup. Ct. 226, 230 (1944).

[7] *Id.* at 202, 65 Sup. Ct. at 232.

[8] Although the above quoted interpretation of the statute was adopted as the ground for its holding, the Court also stated: "If, as the state court has held, the Act confers this power on the bargaining representative . . . constitutional questions arise. If the Railway Labor Act purports to impose on petitioner . . . the legal duty to comply with the terms of a contract, whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members we must decide the constitutional questions which petitioner raises in his pleading. But we think that Congress . . . did not intend to confer plenary power upon the union . . . without imposing on it any duty to protect the minority which it represents." Steele v. Louisville & N.R.R., 323 U.S. 192, 198, 65 Sup. Ct. 226, 230 (1944).

[9] Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 70 Sup. Ct. 14 (1949) illustrates this fact. The Court in that case turned down the argument that such discrimination was valid because a majority of the union members had voted for it.

[10] "From the formation of its organization in 1873 down to the present time the Brotherhood has been committed to a program of eliminating Negro locomotive firemen from railroad service and replacing them with white firemen, members or potential members of the Brotherhood." Letter from the Brotherhood to the Louisville & N.R.R. reproduced in Hall v. Louisville & N.R.R., 18 CCH LAB. CAS. ¶ 65,916 (D.C. Ky. 1950).

[11] 163 F.2d 289 (4th Cir. 1947).

[12] Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951).

argument that the contract provision was based on efficiency as to which the Brotherhood had a large discretion, pointed out that a discrimination based on a legal classification, which in turn was based on race, would not be tolerated.[13]

NATURE OF UNFAIR REPRESENTATION

1. *The Problem of Auxiliary Unions*

The Supreme Court in the *Steele* case specifically held that the statute, as interpreted, did not deny labor unions the right to determine eligibility to membership.[14] This negatived any implication that merely excluding a person from membership in the union would of itself violate the duty to represent fairly.

The question then arises, what if under a proper union security clause[15] full membership is denied, but membership in an auxiliary union is offered or even insisted upon? The first case arising under the recently amended[16] Railway Labor Act, *Taylor v. Brotherhood of Railway & Steamship Clerks*,[17] decided that segregation per se is not unlawful. The same rule had been applied to cases arising under the National Labor Relations Act.[18] The reason for such a rule is found in the fact that an opposite holding would re-

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[13] The court relied on Richmond v. Dean, 37 F.2d 712 (4th Cir. 1930) in which it was held that a zoning ordinance which in effect discriminated on grounds of race would not be upheld merely because it was based on a legal prohibition of intermarriage, which itself was based on racial grounds.

[14] Steele v. Louisville & N.R.R., 323 U.S. 192, 206, 65 Sup. Ct. 226, 232 (1944).

[15] The two most common forms of union security are the closed shop and the union shop. The former requires a worker to be a member of the union before he can start working. The latter requires the worker to become a member of the union at some stated period after the employment relationship has begun, usually thirty days. A variation that was popular during the war was to give workers already in the union a chance to drop their membership only at stated intervals. This form of security i s referred to as "maintenance of membership." ROTHENBERG, LABOR RELATIONS 48 (1949).

[16] The Railway Labor Act, which previously did not allow any form of union security clause, has been amended to provide for a union shop. 64 STAT. 1238 (1951), 45 U.S.C. § 152, eleventh (a).

[17] 106 F. Supp. 438 (D.C. 1952).

[18] "Segregation of white employees and Negro employees into separate locals is not per se a form of racial discrimination. Where the union represents that it does not, never has and never will discriminate against any race or creed and will provide equal representation to the colored as well as to the white locals, such representation is construed to mean that the local composed of Negroes is now and will continue to be, accorded the same rights of affiliation and representation as is accorded to other affiliated locals." Atlanta Oak Flooring Co., 62 N.L.R.B. 973, 975 (1945). That the present rule is as unsatisfactory in the labor field as it is in education or transportation is indicated by the number of suits brought asking for full membership rights.

sult in enforcement of a right to membership in the bargaining union. To avoid such a result, the court in the *Taylor* case takes pains to point out that the legislative history of the amendment shows no Congressional intent to alter membership rights.[19]

2. *Extension of the Rule in the* Steele *case*

As was seen, definite limits have been placed on the ability of unions to discriminate against minority groups whom they represent. But even after the decision in the *Steele* case, the railway brotherhoods never considered that they owed a legal duty toward persons not within the class for which the union acted as bargaining representative.[20] Thus a familiar tactic of the brotherhoods is to demand that work assignable to Negroes not in the craft represented by the brotherhood be given to those whom the brotherhood represents and who are capable of doing the same work. This device was struck down in the recent case of *Brotherhood of Railway Trainmen v. Howard.*[21]

In the *Howard* case the Brotherhood of Railway Trainmen was the bargaining representative for white "brakemen." Negroes, ineligible for membership in the Brotherhood, had for years held the position known as "train porter" and were represented by a bargaining agent of their own choosing. Although the crafts were separate in name, the "train porters" performed all the duties of brakemen and were recognized as brakemen for a brief

[19] Taylor v. Brotherhood of Railway & S.S. Clerks, 106 F. Supp. 438, 440 (D.C. 1952). It should be noted that the amendment to the Railway Labor Act has no proviso to the effect that nothing contained in the Act shall impair the right of unions to determine eligibility to membership, although such a proviso appears in the Labor-Management Act of 1947. 61 STAT. 140 (1947), 29 U.S.C. § 158 (b)(1)(A). In the face of this difference between the Acts the court in the *Taylor* case relied on the statement in the *Steele* case that the Railway Labor Act did not impair the right of a union to determine eligibility to its membership. Steele v. Louisville & N.R.R., 323 U.S. 192, 204 65 Sup. Ct. 226, 233. Since the Railway Labor Act omits such an express proviso it would seem that the power of a union is less under that Act.

[20] The complex administrative scheme set up by the Railway Labor Act would seem to justify the brotherhoods' conclusion, at least in part. Under that Act disputes as to who are the proper representatives of a carrier's employees are referred to the National Mediation Board. 44 STAT. 577 as amended (1926), 45 U.S.C. § 152, ninth (1946). Jurisdictional disputes between unions are referred to the National Railroad Adjustment Board. 44 STAT. 578 as amended (1943), 45 U.S.C. § 153 *et seq.* (1946). The Supreme Court has held that one aggrieved by the action of a union must first exhaust the administrative remedies available under the Act. Slocum v. Delaware L. & W.R.R., 339 U.S. 239, 70 Sup. Ct. 577 (1950); Order of Railway Conductors v. Pitney, 326 U.S. 561, 66 Sup. Ct. 322 (1946); General Comm. v. Brotherhood of Locomotive Engineers, 320 U.S. 323, 64 Sup. Ct. 146 (1943). As regards Negroes the Court has evidently carved out an exception to this rule. Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 Sup. Ct. 1022, (1952).

[21] 343 U.S. 768, 72 Sup. Ct. 1022 (1952).

period during World War I when the government took over the railroads.

In an attempt to provide more work for its members, the Brotherhood under threat of a strike forced the railroad to agree to discharge the Negro "porters" and fill their jobs with white men. The plaintiff, Howard, on behalf of himself and others similarly situated, brought an action against the Brotherhood and the railroad for a decree that the contract provision be declared void and unenforceable. The district court held the issue nonjusticiable because the plaintiff's administrative remedies had not been exhausted.[22] The court of appeals held that the "train porters" were actually brakemen and, therefore, protected under the rule laid down in the *Steele* case.[23]

The Supreme Court affirmed the court of appeals. In answering the argument that the Brotherhood owed no duty whatsoever to refrain from using its statutory bargaining power to abolish the jobs of the Negro "train porters," the Court held that:

> The Federal Act prohibits agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers.[24]

The holding, according to the opinion, is based on a similar interpretation of the statute to that invoked in the *Steele* case.[25] However, the broad language quoted above would seem to indicate that the Court will allow an injunction against any discrimination by a union bargaining under the Railway Labor Act. The only correct theory on which to base such a holding is that the union, at least for purposes of preventing racial discrimination, is an organ of the government since, in the absence of a Fair Employment Practices Act, a private unincorporated association is not prohibited from discriminating against anyone.[26] The reasoning of the majority, as a consequence, is unsatisfactory and obscure, for the Supreme Court does not make

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[22] Howard v. Thompson, 72 F. Supp. 695 (E.D. Mo. 1947).

[23] Howard v. St. Louis & San Francisco Ry., 191 F.2d 442 (8th Cir. 1951).

[24] Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 774, 72 Sup. Ct. 1022, 1025 (1952).

[25] *Id.* at 773, 72 Sup. Ct. at 1025.

[26] The dissent clearly points up this difficulty: "I do ont understand that private parties such as the carrier and the Brotherhood may not discriminate on the ground of race. Neither a state government nor the Federal Government may do so, but I know of no applicable federal law which says that private parties may not." Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 778, 72 Sup. Ct. 1022, 1027 (1952). It should be noted that one state court has held that union action was government action, and, therefore, under the Fifth Amendment the union must allow the plaintiffs full participation rights. In that case, however, there had been a prior promise to allow full membership. Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946). The decision has been mentioned but not followed in any other state.

its real holding clear. Are all unions henceforth required to regard the rights of workers whom they do not represent as a governmental body must regard the rights of its citizens? Or was the Court merely affirming the court of appeals by holding that, in effect, the train porters were brakemen and therefore must be protected under the rule of the *Steele* case.[27]

That the probable effect of the *Howard* case will be to widen the duty of non-discrimination to include employees who are without the bargaining unit is admirably brought out in *Dillard v. Chesapeake & Ohio Ry.*[28] The plaintiffs in that case were Negro laborers. The defendant Brotherhood sought to prevent the promotion of the laborers into the craft which the Brotherhood represented. Relying specifically on the *Howard* case, the court held that the union had abused its statutory power by attempting to deny the plaintiff's promotion into the higher class. Because it is clear that the plaintiffs in the *Dillard* case were not within the class protected under the Railway Labor Act as construed by the Supreme Court in the *Steele* case, it would seem the court regarded the *Howard* case as deciding that a union is constitutionally prohibited from discriminating on the basis of race.

UNION SECURITY CLAUSES AND CLOSED MEMBERSHIP

Both the closed and union shop[29] were permissible for unions bargaining under the National Labor Relations Act; however, the Labor-Management Act of 1947 abolished the closed shop.[30] In contrast, no union security clauses were permitted under the Railway Labor Act until 1951.[31] When a union security clause is granted and the union arbitrarily refuses membership to an individual, a serious question of discrimination arises. In this situation the union, by its refusal of membership alone, is threatening the employment of the individual discriminated against.[32]

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[27] Again the dissent points out the logical inconsistency of the majority opinion: "The majority does not say that the train porters are brakemen and therefore the Brotherhood must represent them fairly as was held in the *Steele* case. Whether they belong to the Brotherhood is not determinative of the latter's duties of representation if it represents the craft of brakemen and if the train porters are brakemen. Steele was not a member of the Brotherhood of Locomotive Firemen & Enginemen and could not be because of race — the same reason that the train porters cannot belong to the Brotherhood of Trainmen. But Steele was a fireman, while the train porters are not brakemen." 343 U.S. 768, 776, 72 Sup. Ct. 1022, 1027 (1952).

[28] 199 F.2d 948 (4th Cir. 1952).

[29] See note 15 *supra.*

[30] 61 STAT. 140 (1947), 29 U.S.C. § 158 (a) (3).

[31] See note 16 *supra.*

[32] This power is to be contrasted with that of a union unable to gain a security clause. In such a case the union may only attempt to discriminate (which attempt would under present law be unsuccessful), but under no circumstances would it have the right to effect the discharge of a non-member. This was the situation of the railway brotherhoods before 1951.

1. *Right to Retain Employment*

A union protected by a security clause generally has the right to effect the discharge of employees who refuse to become members of the union. In logic, perhaps, the result should be the same when the union refuses membership. However, the courts have protected employees who are refused membership in a union having a closed shop or union shop agreement by enjoining the union from interfering with the employment of a non-member, so long as the membership is refused on racial or other arbitrary grounds.[33] Despite a tendency to cling to the historical rule that a union will not be required to take in an individual as a member,[34] courts of equity will usually protect the employee by recognizing his right to continue in a present employment.[35]

The case of *Seligman v. Toledo Moving Pictures Operators Union*[36] illustrates the rule clearly. The plaintiff was a motion picture operator who had worked in and around Toledo with permission from the union which had a closed shop agreement with the motion picture theaters in the area.

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[33] James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329 (1944); Lucke v. Clothing & Trimmers' Assembly, 77 Md. 376, 26 Atl. 505 (1893); Wilson v. Newspaper & Mail Deliverer's Union, 123 N.J. Eq. 347, 197 Atl. 720 (1938); Dorrington v. Manning, 135 Pa. Super. 194, 4 A.2d 886 (1938); *accord*, Wills v. Hotel & Restaurant Employees, 26 Ohio N.P. (N.S.) 435 (1927); Schwab v. Moving Picture Operators Union, 165 Ore. 602, 109 P.2d 600 (1941). *Contra:* Walter v. McCarvel, 309 Mass. 260, 34 N.E.2d 677 (1941). The Restatement of Torts has adopted the rule. "Workers who in concert procure the dismissal of an employee because he is not a member of a labor union satisfactory to the workers are . . . liable to the employee if, but only if, he desires to be a member of the labor union but membership is not open to him on reasonable terms." RESTATEMENT, TORTS § 801 (1939).

[34] Mayer v. Journeyman's Stone-Cutters Ass'n, 47 N.J. Eq. 519, 20 Atl. 493 (1890) is the leading case. For discussion of the right to join a union, see Hewitt, *The Right to Membership in a Labor Union,* 99 U. OF PA. L. REV. 919 (1951); Summers, *The Right to Join a Union,* 47 COL. L. REV. 33 (1947); Summers, *Admission Policies of Labor Unions,* 61 Q.J. ECON. 66 (1946).

[35] Before 1947 the relief granted in such a case came largely from the state rather than the federal courts because prior to 1947 the National Labor Relations Act did not contain provisions for union unfair labor practices, but only for employer unfair labor practices. Since many cases involved only the union's action without any culpability on the part of the employer, a federal court would not have had jurisdiction to entertain such a case. The cases that were litigated in Federal courts arose under the duty of fair representation established in the *Steele* case. *E.g.,* Wallace Corp. v. N.L.R.B., 323 U.S. 248, 65 Sup. Ct. 682 (1944). Although without specific jurisdiction to curb discriminatory practices by unions, the NLRB, before 1947, stated: ". . . if it is shown by appropriate motion that the union has denied equal representation to any employee because of his race, creed or national origin we will consider rescinding any certification which may be issued herein." Carter Mfg. Co., 59 N.L.R.B. 804, 806 (1944). The decertification rule also applies where the union seeks a non-member's discharge. Bethlehem-Alameda Shipyard, Inc., 53 N.L.R.B. 999 (1943).

[36] 88 Ohio App. 137, 98 N.E.2d 54 (1947).

Eventually this permission was withdrawn, and the union demanded that the plaintiff's employer discharge him in accordance with the closed shop agreement because he was not a member of the union. The court of appeals affirmed an order for injunctive relief, saying that as a matter of public policy the union could not simultaneously demand a closed shop and refuse membership to a man already employed and fully qualified to do the job.[37] The holding is in accord with the decisions of most courts that have considered the question.[38] Although the cases are limited for the most part, some courts have taken the position that the union must either stop interfering with the plaintiff's employment or admit him to membership.[39] On the other hand, at least one state is committed to the proposition that such relief will be granted only where it is shown that the union has a monopoly of the labor supply in the community.[40]

2. *Statutory Limitation of Union Security to a Union Shop*

Recognizing the wisdom of curbing a union's power to effect the discharge of an employee by an arbitrary refusal of membership, Congress codified the rule established by the courts. The Labor-Management Relations Act of 1947 provides:

> That no employer shall justify any discrimination (A) if he has reasonable grounds for believing that . . . 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 . . . dues . . . and . ... initiation fees. . . .[41]

and:

> It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against and employee . . . with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender . . . dues . . . and . . . initiation fees. . . .[42]

Since the union shop is the only permitted form of union security under the 1947 Act, the above statutory provisions act as an effective guarantee that a worker will be protected in his right to acquire a job and keep it.[43]

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[37] *Id.* at 146, 98 N.E.2d at 59.

[38] See note 33 *supra.*

[39] James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329 (1944).

[40] Carroll v. International Brotherhood of Elec. Workers, 133 N.J. Eq. 144, 31 A.2d 223 (1943). California is the only state that has expressly declared that monopoly of the labor supply in a community is not necessary. William v. International Brotherhood of Boilermakers, 27 Cal.2d 586, 165 P.2d 903 (1946) (a closed shop in one plant is a sufficient monopoly).

[41] 49 STAT. 452 (1935) as amended, 29 U.S.C. § 158 (a) (3).

[42] 49 STAT. 452 (1935) as amended, 29 U.S.C. § 158 (b) (2).

[43] Because only the union shop is permitted to unions bargaining under the National

3. *The Right to Obtain Work*

Does a worker seeking employment, as distinguished from one already employed, have a right against a union which arbitrarily refuses him membership and thus blocks his entry to a job where membership is a condition precedent to employment?

Although the closed shop is prohibited to unions bargaining under the aegis of the National Labor Relations Act, at least twenty-two states still regard the closed shop as a legitimate union objective.[44] It has been held recently that a union which is able to bargain without the benefit of the National Labor Relations Board machinery is not subject to the sanctions of the Act even though the union is in interstate commerce.[45] Moreover, it is well to keep in mind that the closed shop has historically been the most coveted goal of organized labor. It has been fought for in the face of the threat of the doctrine of criminal conspiracy[46] and even in the face of the present national legislation.[47] Thus the problem of what duty is owed a worker who is refused membership in a union and who, therefore, cannot obtain employment because of the requirement that he be a member of that union is still one of crucial importance.[48]

Obviously the need for such protection is as imperative as the rule which protects a worker already employed. In certain industries, such as construction and shipbuilding, any one period of employment is likely to be extremely short-lived. If a man has a reasonable chance to get a job, no union should be able to prevent him from doing so by arbitrarily closing its books to him and still demand that the employer live up to the closed shop agreement.

One writer is of the opinion that:

> In spite of the limited holdings on the facts of the cases there is some reason to believe that most courts would grant equal protection to the right to get a job.[49]

Labor Relations Act, a worker can get a job, but may have to join the union later on. Once employed the union cannot effect his discharge by refusing him membership so long as he tenders initiation fees and dues.

[44] Some of the more industrial states are included. California, Delaware, Illinois, Indiana, Maryland, Missouri, New Jersey, Ohio, Oklahoma and Oregon are among them. *E.g.*, Iacomini's Restaurant v. Hotel & Restaurant Employees & Bartenders Local, 107 N.E.2d 413 (Ohio App. 1949). For a comprehensive listing see the chart in 4 CCH LAB. LAW REP. ¶ 40,355 (1952).

[45] Williams v. Yellow Cab Co. of Pittsburgh, 103 F. Supp. 847 (W.D. Pa. 1952).

[46] Commonwealth v. Hunt, 45 Mass. 111 (1842).

[47] American Newspaper Publishers Ass'n v. NLRB, 193 F. 2d 782 (7th Cir. 1951).

[48] See Jansen, *The Closed Shop is Not a Closed Issue*, 2 IND. & LABOR REL. REV. 546 (1949).

[49] Summers, *The Right to Join a Union*, 47 COL. L. REV. 33, 47 (1947).

It appears, however, that the modern cases which have considered this question, of which there are few, have concluded that the union owes no duty to a non-member who seeks employment.[50] A lower federal court in discussing the problem said:

> There is . . . no authority for the idea that the union has any . . . duty toward persons not employed but who are employable. . . . The duty found . . . in *Steele v. Louisville & N.R. Co.* was one of fair representation. . . . The *Wallace* case does not hold that the union has any duty to consider the plight of a person who is deprived of securing employment because of the union shop [closed shop?] closed membership combination.[51]

It is interesting to speculate as to what effect the *Howard* case will have on the right to obtain employment. Before that case it seemed apparent that the right to obtain work would have to be based on some principle other than the right to fair representation because that principle was thought to apply only to those already within the bargaining unit.[52] As noted above, the only decision in point since *Brotherhood of Railway Trainmen v. Howard* interpreted the *Howard* case as deciding that unions can be prevented from using their power to discriminate in employment relations regardless of whether the persons sought to be discriminated against are within the class represented by the bargaining agent.[53] If the interpretation of the rule laid down in the *Howard* case is correct, whether the basis of the rule be constitutional or statutory, a union is charged with the same obligation to one seeking employment as to one already employed.[54]

CONCLUSION

Summing up the law as it stands today, two propositions are clear: first, an employee represented by a union which denies him membership has the right to equal and fair representation by that union along with those who are members; second, such an employee has a well-established right to remain undisturbed in his employment. A logical corollary to this last proposition would be that an employee will be protected in his right to obtain employment. This right has never been granted in any case, but that it

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[50] Underwood v. Texas & P. Ry., 178 S.W. 38 (Tex. Civ. App. 1915); *cf.* Hester v. Brotherhood of Railway Trainmen, 99 F. Supp. 968 (Mo. 1951); See Comment, 49 YALE L.J. 754, 759.

[51] Courant v. International Photographers of Motion Picture Industry, 176 F.2d 1000, 1003 (9th Cir. 1949).

[52] *Ibid.* Steele v. Louisville & N.R.R., 323 U.S. 192, 65 Sup. Ct. 235 (1944).

[53] Dillard v. Chesapeake & Ohio Ry., 199 F.2d 948 (4th Cir. 1952).

[54] Note, by way of analogy, that the Supreme Court and the NLRB both agree that refusal to hire a worker because of union affiliation is as much an unfair labor practice as discharging an employee for the same reason. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 Sup. Ct. 845 (1941); T.H. Burns & R.H. Gillespie, 101 N.L.R.B. No. 187 (1952).