In the Matter of GIANT FOOD SHOPPING CENTER, INC., EMPLOYER *and* RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1501, A. F. L., PETITIONER

Case No. 5-UA-57.—Decided May 20, 1948

DECISION ON APPEAL

AND

ORDER

On December 17, 1947, the Petitioner filed a petition with the Regional Director for the Fifth Region seeking authority, by reason of an election under the provisions of Section 9 (e) (1) of the National Labor Relations Act, as amended,[1] for bargaining with the Employer relative to a union shop [2] for certain of its employees in a unit alleged to be appropriate for such purposes. Shortly thereafter the Employer and the Petitioner signed an agreement for a consent election to be held on January 2, 1948.

By letter dated December 26, 1947, the Regional Director informed the Employer and the Petitioner that the election would not be held as scheduled. On January 9, 1948, the Regional Director dismissed the petition herein on the ground that the unit requested by the Petitioner was inappropriate for the purposes of conducting an election pursuant to the provisions of Section 9 (e) (1) of the Act.

From this dismissal the Petitioner appealed to the Board in accordance with Section 203.63 of the Board's Rules and Regulations, Series 5.

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[1] 49 Stat 449, 29 U. S C 141 *et seq*, 1947 Supp Section 9 (e) (1) provides

"Upon the filing with the Board by a labor organization, which is the representative of employees as provided in Section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer."

[2] The term union shop, as used herein, refers to the type of compulsory union membership sanctioned by Section 8 (a) (3) of the Act. As described therein, an employer may make "an agreement with a labor organization . . to require as a condition of employment membership [of employees] therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later."

77 N L. R. B , No. 133.

Opinion

The Employer, a District of Columbia corporation, is engaged in the retail sale of groceries, meats, produce, and bakery products. It operates 10 stores in the District of Columbia, 3 stores in Virginia, and 1 in Maryland, the Virginia and Maryland stores being within a 25-mile radius of the District of Columbia. The Employer maintains bakery stands in 3 of these stores, 2 of which are in the District and the third in Virginia. This proceeding involves only the 2 bakery stand employees at each of these 3 stores, a total of 6 employees. Since 1941, the Petitioner has been the collective bargaining representative of the bakery stand employees and no other labor organization at this time disputes the Petitioner's current bargaining status. Moreover, the Employer recognizes the Petitioner's status and agrees with the Petitioner that the bakery stand employees constitute a unit appropriate for the purposes of collective bargaining with the meaning of Section 9 (a) of the Act.[3]

The Petitioner is requesting a union-shop election under Section 9 (e) (1) in a unit coextensive with the appropriate collective bargaining unit. The inclusion in this unit of employees employed in the Employer's store in the State of Virginia where an anti-union shop statute is in effect,[4] raises the question of the relationship of Section 14 (b) [5] of the Act to Section 9 (e) (1). The Regional Director interpreted Section 14 (b) as giving full effect in this matter to the Virginia statute which prohibits the making of a contract requiring membership in a labor organization as a condition of employment. The Regional Director thereupon concluded that the conduct of an election in a unit including the Employer's Virginia employees would be purposeless, and accordingly dismissed the petition upon the ground that the unit was inappropriate for the purposes of Section 9 (e) (1).

[3] Bargaining units comprised of District of Columbia and Virginia employees within a 25-mile radius of the District are common in the retail grocery business See, for example, *Matter of The Great Atlantic & Pacific Tea Company,* 69 N L R. B 463.

The absence of any controversy concerning the appropriateness of the collective bargaining unit and the Petitioner's representative status, indicates that as required by Section 9 (c) (1) no question concerning representation exists

[4] Acts of Assembly, 1947, Chapt. 2 The policy of the Act, as expressed in its title, is "to make unlawful and to prohibit combinations or agreements which require membership in labor organizations as a condition of employment." Section 2 provides

> 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, is hereby declared to be against public policy and an illegal combination or conspiracy.

[5] Section 14 (b) provides:

> (b) 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

The issue before us on appeal, therefore, is the effect of Section 14 (b) upon the substantive union-shop provisions of the Act, that is, Sections 9 (e) (1) and 8 (a) (3).[6] More specifically we are called upon to determine whether by reason of Section 14 (b) a unit is inappropriate for purposes of a union-shop election under Section 9 (e) (1) where such unit includes employees whose work is performed in a State which forbids union-shop agreements of the type sanctioned by Section 8 (a) (3).

The language of Section 14 (b) is amply clear, free from ambiguity, and emphatically proscriptive. Appearing as it does under that part of the Act entitled "Limitations," we believe that Section 14 (b) must be viewed as placing a limitation on all provisions of the Act, including Sections 8 (a) (3) and 9 (e) (1), which in their unrestricted application might be construed as superseding or invalidating any State or Territorial law which prohibits membership in a labor organization as a condition of employment. Section 14 (b), therefore, in effect removes all Federal restrictions upon existing and future State legislation prohibiting compulsory unionism insofar as the National Labor Relations Act is concerned, even where such legislation may affect employees engaged in interstate commerce.[7]

The intent of Congress, consistent with this construction, is set forth with clarity in the legislative history preceding the enactment of Section 14 (b). Thus, the House Conference Report[8] on the bill which became law states in part:

> Under the House bill [H. R. 3020] there was included a new section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of

[6] The relevant parts of Section 8 (a) (3) are:

> It shall be 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: *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, . . if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement . . .

[7] The power of the several States in certain circumstances to regulate the terms and conditions of employment is well recognized. (*Bethlehem Steel Co, et al,* v. *New York State Labor Relations Board,* 330 U. S. 767, 772.) The plenary power of Congress over interstate commerce provides such a circumstance in the instant case; through this plenary power Congress has "clearly put the full weight of its power behind existing and future state legislation . . ." (*Prudential Insurance Co* v. *Benjamin,* 328 U. S. 408, 431.) This Congressional action is not an unwarranted delegation of legislative power to the States for "the will which causes the [State] prohibitions to be applicable is that of Congress." (*Clark Distilling Co* v. *Western Maryland Railway Company,* 242 U. S. 311, 326.)

[8] H Rep No. 510, 80th Cong., 1st Sess., p. 60.

> compulsory union agreement in any State where the execution of such agreement would be contrary to State law. * * * The conference agreement, in Section 14 (b), contains a provision having the same effect.

The purpose of Section 13 of the House bill, adverted to above, was stated in the House Report accompanying H. R. 3020 as establishing the policy that "the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the State laws limit compulsory unionism more drastically than does the Federal law." [9] Thus, the legislative history preceding the enactment of Section 14 (b) fully supports the otherwise clear language of this provision as establishing the intent of Congress to leave to the exclusive jurisdiction of the States the prohibition of union-shop agreements to the extent that prohibition in this respect now exists or may hereafter exist in such States.[10]

It is urged, however, that even if Section 14 (b) accords supremacy to State laws prohibiting the union shop, it should not be construed as precluding the conduct of a union-shop election in the proscribing States. The purpose of conducting an election under Section 9 (e) (1) is to determine whether the employees in a particular unit desire to authorize their statutory bargaining representative to make a union-shop contract as sanctioned by Section 8 (a) (3). The argument that, notwithstanding the existence of State prohibitions against union-shop agreements, the union-shop election machinery as provided by the Act should be utilized in such States, can lead only to results which are neither logical nor in keeping with the deference which Congress expressly accorded enactments of the States in this field. Thus, in the event that the employer and the union intend, as they should, to abide by the prohibition of the State law and refrain from executing a union-shop agreement, an election under the processes of the Act would be futile. On the other hand, if the employer and the union, acting pursuant to the authority conferred by a Board-conducted

[9] H Rep. No 245 on H R 3020, 80th Cong , 1st Sess , p 34 See also the excerpts from the Congressional Record contained in footnote 10, below.

[10] That Section 14 (b) is applicable to future as well as existing State legislation is beyond the peradventure of a doubt. See H Rep No. 245 on H R 3020, 80th Cong , 1st Sess , p 34. Further evidence of the prospective nature of Section 14 (b) is found in the following remarks made in Senate Debate on the Conference Bill which was subsequently enacted into law :

> (1) Senator Morse . ". . this amendment [Section 14 (b)] proposes that we except from the national policy, as it relates to interstate commerce, national jurisdiction over these matters as they involve the closed shops and union shops, in the case of any State which passes an anti-closed shop or anti-union shop bill." (93 Cong. Rec 6456) (2) Senator Barkley : "So in the States whose legislature desire to exempt their own interstate companies from the operation of this law, all they need to do is to pass a law outlawing the closed [sic] shop. . . ." (93 Cong Rec. 6520.)

union-shop election, should enter into a union-shop agreement notwithstanding the prohibitions of the State law, the Board might well be placed in the position of having to accept the union-shop agreement as a defense to an unfair labor practice complaint alleging discriminatory discharges in violation of the Act. In the latter instance, the employer and the union [11] would be seeking immunization from the Board by virtue of a contract executed in violation of State law, the enactment of which is specifically protected under Section 14 (b). Such an anomalous position on the part of the Board is not conceivable; nor logically, as a matter of legislative consistency, is such a result tenable. We are convinced, therefore, that the conduct of union-shop elections pursuant to Section 9 (e) (1) in States which prohibit union-shop agreements would serve no useful purpose. To the contrary, it would lead only to the circumvention and frustration of State law, a result that Congress clearly did not intend as evidenced by its enactment of Section 14 (b).[12] We conclude, therefore, that Section 14 (b) prohibits the utilization of Section 9 (e) (1) and the consequent application of the proviso of Section 8 (a) (3) by employers and unions who seek to evade the obligations imposed by State law prohibiting the execution or application of union-shop agreements.

The Petitioner contends, however, that the refusal to conduct an election in the proposed unit because of the inclusion of Virginia employees would deprive the District of Columbia employees also included in the unit of their statutory right to seek and obtain through collective bargaining a union-shop contract. The fallacy of this position is that it assumes that the unit appropriate for the purposes of Section 9 (e) (1) must be the same unit which is appropriate for purposes of collective bargaining under Section 9 (a). The first condition imposed upon a labor organization filing a petition under Section 9 (e) (1) is that it be "the representative of employees as provided in Section 9 (a)," that is, the representative of employees in a unit appropriate "for the purposes of collective bargaining."

[11] Section 8 (b) (2) of the Act, as amended, makes it an unfair labor practice for unions, as it had been under the Wagner Act for employers, to discriminate against employees in violation of Section 8 (a) (3). The authority of the Board to issue remedial orders against both employers and unions, as the case may be, for violations of Section 8 (a) (3) is found in Section 10 (c) of the Act, as amended.

[12] Representative Hoffman sought by amendment to have all union-shop sanctions eliminated from H. R. 3020 so that the States would have complete authority over such matters However, he withdrew his amendment when affirmatively assured by members of the House Committee on Education and Labor which had favorably reported with amendments H R 3020, that his interpretation of Section 13 of H. R. 3020, which was the predecessor section of Section 14 (b) was correct, to wit, that it gave "permission to the States to legislate on interstate commerce insofar as it affected" union-shop agreements. (93 Cong. Rec 3562)

This labor organization as the representative of the employees in an appropriate collective bargaining *unit* can then petition for a union-shop election in "*a unit* claimed to be appropriate *for such purposes.*" [Italics supplied.] It is well recognized, as a matter of statutory construction, that all words in a statute must, if possible, be given effective meaning.[13] Accordingly, it is clear that a "unit . . . appropriate for such purposes" may reasonably be construed to be a unit different from that appropriate for the purposes of collective bargaining so long as such unit is a part of and included within the collective bargaining unit; otherwise, the phrase would be superfluous.

Evidence that it was within the contemplation of Congress that the unit appropriate for a union-shop election might be smaller than that appropriate for collective bargaining purposes is to be found in the language of Section 9 (e) (3) limiting the frequency of union-shop elections. It is there provided that no election may be held "in any bargaining unit *or any subdivision* within which, in the preceding twelve-month period, a valid election shall have been held." [Italics supplied.] The legislative history of Section 9 (e) (1) does not show a contrary Congressional intent. Moreover, an intelligent statutory construction precludes our subscribing to a course of action which would narrowly restrict the meaning of Section 9 (e) (1) for the sole purpose of defeating the plain purport of Section 14 (b). A further and more practical consideration also militates against the unnecessarily restrictive interpretation urged by the Petitioner, since it is foreseeable that the Board will be confronted with other situations where those seeking to utilize Section 9 (e) (1) may not have a legitimate interest in the establishment of compulsory unionism.

We are of the opinion, therefore, that although the unit appropriate for the purposes of Section 9 (e) (1) in most instances will be coextensive with the unit appropriate for the purposes of collective bargaining under Section 9 (a), contrary to the Petitioner's contention, it need not be identical in all cases with such unit. Our conclusion in this matter by no means forecloses the right of those employees in the appropriate collective bargaining unit who are employed in the District of Columbia to express their desires relative to a union-shop agreement. A petition seeking a union-shop election among those employees would be processed in conformity with our determination herein. Upon the basis of the foregoing considerations, we concur in the determination by the Regional Director for the Fifth Region that the unit proposed by the Petitioner, by virtue of its inclusion of

[13] 2 Sutherland, *Statutes and Statutory Construction,* p 339 (3rd ed. 1943).

Virginia employees, is inappropriate for the purpose of conducting an election pursuant to the provisions of Section 9 (e) (1) of the Act.

ORDER

IT IS HEREBY ORDERED that the appeal of the Petitioner herein be, and it hereby is, dismissed. Accordingly, the dismissal by the Director of the Fifth Region of the petition in this proceeding is affirmed.

CHAIRMAN HERZOG, dissenting:

If my colleagues' conclusion were based primarily upon administrative considerations, rather than upon a construction of the law which I think mistaken, I would be reluctant to voice a dissent. For I agree that the conduct of union-shop authorization elections within the borders of prohibiting States may prove a *relatively* futile enterprise, and believe that the Board has so much else to do that it should not dissipate its energies on controversies that do not require its attention. [14]

However, the only legislative history upon which we are entitled to rely [15] does not, in my opinion, lend adequate support to the majority's conclusion that the Board lacks authority to conduct a union-shop authorization election among persons employed in the Commonwealth of Virginia. At best, that history is ambiguous. I should have thought that more than ambiguity would be required before this Board would conclude that the Congress of the United States intended, as a matter of law, to delegate its powers to the legislatures of forty-eight separate States. [16]

That, in effect, is what the majority opinion does. By declining to conduct even a consent election in a prohibiting State, the Board is declaring that a State offense becomes, *ipso facto*, a Federal offense. [17] Any employer who discharges an employee within a prohibiting State

[14] See the dissenting opinion in *Matter of Liddon White Motors*, 76 N. L. R. B. 165.

[15] I recognize that the constructions of Section 14 (b) contained in the President's veto message (93 Cong. Rec. 7488) and also in the recent Report of the Joint Committee on Labor Management Relation (March 1948, p. 31; 80th Cong., 2nd Sess.) coincide with my colleagues' conclusion. But they do not, quite correctly, rely upon either as part of the legislative history for this purpose.

[16] This is especially true in the light of the intent disclosed by Section 10 (a) of the amended Act, which exalts the Federal power by authorizing the Board to cede jurisdiction only to those State agencies that enforce provisions consistent with those contained in the National Act.

My own preference for respecting the powers and desires of the separate States has often been recorded. See, for example, the dissenting opinion in *Matter of Jacob Schneider Pattern Works*, 64 N. L. R. B. 787, 790 (1945). The majority position, although at first glance a recognition of State authority, itself opens the door to Federal intrusion into State affairs by assuming that this Board is qualified to interpret local legislation.

[17] The Board is, in effect, also placing itself in the position of declaring conduct to be a Federal offense under the Act even when it occurs in those prohibiting States, several in number, which do not implement their own laws by making such conduct punishable.

pursuant to a union-shop agreement, and any labor organization that contributes to that result, not only violates the State enactment but also violates Sections 8 (a) (3) and 8 (b) (2) of the Labor Management Relations Act, simply because this Board, by declining to conduct a referendum pursuant to Section 9 (e) of that Act, makes it impossible for them to put themselves in compliance with Federal law.[18] In the absence of compelling proof to the contrary, I find it difficult to believe that Congress could have deliberately intended so anomalous a result.

That compelling proof is lacking. The debates and Committee Reports antedating the enactment of Section 14 (b) suggest to me that Congress, aware of the Supreme Court's conclusion in *Hill* v. *Florida* and the *Bethlehem Steel*[19] cases that the Federal power is paramount over industries in which labor disputes might impair interstate commerce, intended to make certain that the new Congressional enactment did not operate to prevent the States from continuing to enforce *their own* laws concerning union-security agreements. Absent Section 14 (b), successful argument might well have been made that the States were ousted of all jurisdiction over these matters where industries affecting commerce were involved. The inclusion of Section 14 (b) makes such argument almost impossible. But that is a far cry from saying that it was also intended to make the State law paramount, not only within its own sphere, but also to the extent of creating violations of Federal law. Indeed, the very House Report[20] relied upon by the majority as leaving this subject "exclusively" to prohibiting States, refers to compulsory unionism as a subject "that the States may regulate *concurrently* with the United States"; moreover, the quotation from the Congressional Record[21] offered to support the same conclusion refers to Section 14 (b)'s predecessor as giving "*permission* to the States to legislate." (Italics supplied.) Concurrent jurisdiction is not exclusive jurisdiction; permission to legislate within one's own sphere is not authority to set another's standards.

Because of the administrative factors involved, I should have been readier to join my colleagues had this bellwether case arisen wholly in a jurisdiction that prohibits union security agreements. Here, however, some of the employees sought to be covered are employed

[18] Yet the Board has only recently, with my concurrence, departed from ancient practice for the very purpose of making it possible for employers and labor organizations to comply with the law, by directing a union-shop authorization election in a one-man unit. *Matter of West End Iron & Metal Company,* ruling on appeal dated May 5, 1948, Case 18–UA–231.

[19] *Hill* v. *Florida,* 325 U. S. 538; *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767.

[20] House Report No. 245 on H. R. 3020, p. 34.

[21] Footnote 12 of the majority opinion. 93 Cong. Rec., 3562.

in such a State, whereas others work in the District of Columbia—which has no similar legislation. I question the practicability of my colleagues' suggestion that the employees who work in the District of Columbia might, for union-shop purposes, be split off from the other employees in the unit that has been represented by the Petitioner in collective bargaining since 1941, and which the Petitioner and the Employer still agree is the unit appropriate for the purposes of collective bargaining. The suggestion rests on the majority's conclusion that a unit appropriate for the purposes of a union-shop election under Section 9 (e) can be different from that appropriate for the purposes of collective bargaining under Section 9 (a) and (b). This, I fear, may create more problems than it will solve. In shunning Scylla, we may fall into Charybdis.

The majority opinion refers, in footnote 2, to the language in Section 8 (a) (3) that describes the kind of union security agreement that an employer may make with a labor organization. It fails to quote the Congressional requirement that such an agreement be made only with a labor organization that is "the representative of the employees as provided in Section 9 (a), *in the appropriate collective-bargaining unit covered by such agreement when made.*" [22] This provision was carried over without change from the Wagner Act, in which the phrase "appropriate collective-bargaining unit" could have meant only the unit provided for in Section 9 (a) and (b) for collective bargaining on *all* subjects. The only apparent purpose of inserting the new Section 9 (e) in the amended Act was to implement the provision in Section 8 (a) (3) that permits the discharge of employees under properly made union-shop agreements. I believe that Congress intended the employees covered by a union-shop agreement to be the same as those who previously designated or selected the bargaining representative that makes the agreement. Indeed, if my colleagues had not held otherwise today, I should have doubted whether an agreement in a different unit could provide an adequate defense for a discharge made pursuant to its terms. But they have held otherwise, and I shall gladly abide hereafter with their construction of the law.

MEMBER HOUSTON concurs in the foregoing opinion.

[22] Italics supplied