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Labor Law - "Agency Shop" Clause Not Violative of Right-To-Work Laws unless Expressly Prohibited - Meade Electric Co. v. Hagbert, 159 N.E.2d 408 (Ind. App. 1959)

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dictum to set up a procedural question of timeliness of joinder similar to the situation in the *Wholesale Grocers* opinion. It then said that joinder after the determination of liability would not have been allowed in such a case.

Consideration of the cases ruling on intervention by a member of a class, keeping in mind the legislative purposes for which Rule 23 was adopted, leads to the conclusion that the intervention in the *Wholesale Grocers* opinion was a proper exercise of the court's discretion. The presence of all the members of the class at the determination of the issue of liability, while hampering the court's process, would not have had any effect upon their decision. Therefore, the defendant's position was not prejudiced. The intervention of all the members of the class would not now prejudice the defendants because the factual situation upon which the determination of liability is based was adequately represented by the original plaintiffs.

A court in exercising its discretion should carefully consider the factual situation in each case. It is conceivable that intervention during or after trial might prejudice a party. This is most apparent where a trial by jury has been demanded. However, as noted in the *Hurd* case, intervention at the appellate level might be a proper exercise of the court's discretion. Let each ruling stand or fall on the facts.

LABOR LAW—"AGENCY SHOP" CLAUSE NOT VIOLATIVE OF RIGHT-TO-WORK LAWS UNLESS EXPRESSLY PROHIBITED

The business manager of Local 697, International Brotherhood of Electrical Workers, and Meade Electric Company negotiated a contract in which they agreed on all terms except a provision commonly known as the "agency shop" clause. The proposed "agency shop" clause provided that union membership was not mandatory but, as a condition of continued employment, all employees must pay the union an amount equal to that paid in fees by the union members.

The company contended this clause was in violation of the Indiana Right-To-Work Act. They filed a complaint in the Superior Court of Lake County to enjoin the union from insisting that this clause be included in the collective bargaining agreement. The Superior Court of Lake County entered judgment for defendant and the plaintiff appealed. The Indiana Appellate Court affirmed holding that the "agency clause" did not violate the Indiana Right-To-Work law. *Meade Electric Company v. Hagbert,* 159 N.E.2d 408 (Ind. App., 1959).

The issue raised in this case is one of first impression. Although nineteen states have such Right-To-Work laws there appears to be no case law on

the validity of the "agency shop" clause. The Indiana Appellate Court held this clause not in violation of the Indiana statute and, in so doing, has provided the only judicial decision squarely upon the issue of the validity of the "agency shop" clause. The question of federal pre-emption was argued by both counsels. The trial court and appellate court resolved this issue by reference to the Labor-Management Relations Act, Section 14 (b) which specifically authorizes and recognizes the state's right to enact Right-To-Work laws.[1] States are thereby authorized to make provisions outlawing agreements which condition employment upon membership in unions. The United States Supreme Court has upheld the basic constitutionality of such Right-To-Work statutes.[2]

Section three of the Indiana statute does not specifically prohibit the payment of fees or charges to a labor union by nonunion members. It prohibits agreements which make union membership a condition to employment. Thus, it forbids denial of employment on the basis of membership or nonmembership in a labor organization.[3]

Section five of the Indiana Act provides that if an individual corporation or labor organization enters into an agreement in violation of Section three, said person is guilty of a misdemeanor and upon conviction shall be fined and/or imprisoned.[4]

The appellate court interpreted the Indiana statute to be of a penal nature because of the penalty provisions of Section 5 and thereby strictly con-

[1] 61 Stat. 136 (1947), 29 U.S.C.A. § 164 (Supp., 1958).

[2] Lincoln Federal Union v. Northwestern Iron & Metal Company, 335 U.S. 525 (1949) in which the Right-to-Work statutes of Nebraska and North Carolina were challenged as unconstitutional.

[3] Ind. Rev. Stat. (1957) c. 19, § 3 provides:
"Prohibited Agreements. No corporation or individual or association or labor organization shall solicit, enter into or extend any contract, agreement or understanding, written or oral, to exclude from employment any person by reason of membership or non-membership in a labor organization, or to discharge or suspend from employment or lay off any person by reason of his refusal to join a labor organization or by reason of his failure to maintain his membership in a labor organization or by reason of his resignation or expulsion or suspension from a labor organization. Any such contract, agreement or understanding, written or oral, entered into or extended after the effective date of this Act, shall be null and void and of no force or effect."

[4] Ind. Rev. Stat. (1957) c. 19, § 5 provides:
"Penalties. It is hereby declared to be a misdemeanor: (a) to solicit, enter into or extend any agreement or understanding, written or oral, which contract, agreement or understanding violates Section 3 of this Act; (c) to exclude, discharge, suspend, or lay off from employment any person pursuant to any contract, agreement or understanding, written or oral, which contract, agreement or understanding, violates Section 3 of this Act; and any corporation or individual or association or labor organization which commits any of said acts may, upon conviction be fined in any sum not to exceed one hundred dollars ($100) to which may be added imprisonment not to exceed ten (10) days."

strued it.[5] The language of the Act prohibits the making of union membership a condition of employment.[6] However, it remained silent and did not specifically prohibit an "agency shop" agreement requiring payment of fees to the union as a condition to employment. The court appears to have viewed this legislative omission as determinative and held the proposed "agency shop" clause legal and not in violation of Section 3 of the Act.

This judicial interpretation of the legislature's intent is very logical when viewed in light of the existing Right-To-Work laws of the other jurisdictions. In interpreting the legislative intent it seems reasonable to engage in the presumption that the legislators drew upon all material available to them at the time of drafting the legislation.

At the time of the Indiana enactment there were 18 states with Right-To-Work laws.[7] The appellate court pointed out that of these states, fifteen had specifically prohibited the payment of any fees by non-union members to labor unions. They further pointed out that the other three states did not have these provisions in their enactments. In comparing these statutes to the Indiana Act, the court pointed out that Arizona, Nevada and North Dakota similarly do not prohibit payment of fees to a labor union as a condition to continued employment. By way of direct contrast Utah, North Carolina and many other states by their statutes specifically prohibit the payment of such fees to unions. The Attorney General of North Carolina issued an opinion indicating that under their law the payment of dues, fees or any other charges of any kind to a union as a condition to employment is prohibited.[8] The North Carolina Act, however, has specifically prohibited this type of payment as in contrast to the Indiana Right-To-Work Act.[9] The Arizona Act had given rise to the only previously reported court decision concerning the "agency shop" clause.[10] This case involved picketing by a union in an effort to achieve certain provisions in a proposed contract, one of which was an "agency shop" clause. The trial court issued a temporary injunction restraining the picketing. During the trial the union irrevocably

[5] Ibid.

[6] Ibid., at § 5.

[7] Ala. Code (1940) c. 26, §§ 375(1) to 375(7); Ariz. Rev. Stat. (1946) §§ 23-1301 to 23-1307; Ark. Stat. (1947) c. 81, § 202; Fla. Const. Decl. of Rights (1944) § 12; Ga. Acts (1947) c. 54, § 905; Iowa Code (1950) c. 736A, § 1; Kan. Gen. Stat. (1949) c. 44, § 803; Miss. Code (1942) § 69845; Neb. Rev. Stat. (1943) c. 48, §§ 217 to 219; Nev. Rev. Stat. (1952) § 613.250; N.C. Gen. Stat. (1943) c. 95, §§ 78 to 84; S.C. Code (1952) c. 40, §§ 46 to 46.11; N.D. Rev. Code Supp. (1949) § 34-0114; S.D. Laws (1947) c. 17, § 1101; Tenn. Code Ann. (1955) c. 50, §§ 208, 212; Tex. Ann. Stat. (Vernon, 1955) § 15154(g)(1); Utah Code (1953) c. 34, §§ 16-8, 16-10; Va. Code (1950) c. 40, §§ 68 to 70.

[8] 31 N.C. Atty. Gen. Opin. 244 (1952).

[9] Ind. Rev. Stat. (1952) c. 19, § 3.

[10] Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957).

renounced their demands for the "agency shop" clause, thereby making the issue of their legality a moot question. The Arizona Supreme Court, in reviewing the case, found it unnecessary to rule on the legality of the "agency shop" clause and decided the case on other grounds.

The Attorney General of North Dakota issued an opinion dated January 13, 1956 stating:

> We do not think that an agency shop agreement is in violation of the above law. In the first place, the right to work under this agreement is not dependent upon membership or non-membership in a union, but is rather a payment of a fee as compensation for representation by the union. Secondly, the employee enters into the arrangement of his own free will and the payment of the fee entitles him to union representation without actual membership in the union. His right to work is not abridged on account of membership or non-membership in the union, but he is placed on an equal footing with the union members in consideration of the payment of the fee.[11]

The court also refers to the Nevada Right-To-Work law as being similar to that of Indiana. Although there has been no state decision in North Dakota or Nebraska, the Attorney General of the latter state also issued an opinion in 1952 (year of enactment) that the "agency shop" was lawful.[12] However, in 1958 the Attorney General reversed the 1952 opinion and now states that it would violate Nebraska law.[13] In this latter opinion, the Nebraska Attorney General discussed the requirement of paying fees to the union under the "agency shop" clause. He concluded that this was the equivalent of assessing nonunion members in the same manner and to the same extent and purpose as union employees. He then stated: "This is the very thing that the act was designed to prevent. It is an elementary rule of law, needing no citation of authorities, that what the law *prohibits directly* cannot be accomplished indirectly."[14] There is no argument with the rule as stated. Examination of the statute, however, fails to reveal any provision of the act which *prohibits directly* the payment of fees pursuant to an "agency shop" agreement.

In reviewing the Right-To-Work statutes existing at the time of the Indiana enactment, it becomes evident that these laws were of two distinct types. One type being where the payment of fees pursuant to an "agency shop" clause was specifically prohibited, contrasted by the other type of statute which contained no such specific prohibition. When viewing the unambiguous terms of the Indiana Act in the light of these similar and nonsimilar statutes, the appellate court's decision that the "agency shop" clause does not violate this Act is eminently logical.

[11] N.D. Atty. Gen. Opin. (July 1, 1954 to June 30, 1956) p. 73.

[12] Neb. Atty. Gen. Opin. No. 184 (July 11, 1952).

[13] Neb. Atty. Gen. Opin. No. – (September 23, 1958).

[14] Ibid. (emphasis supplied).

The decision of this court has provided the first adjudication of the legality of an "agency shop" clause under the Indiana Right-To-Work Act. However, the importance of this decision will extend far beyond the State of Indiana. Other states which are now considering the adoption of Right-To-Work laws will have to consider this decision when framing their proposed enactments. As pointed out by this Indiana court, if legislators seek to prohibit the "agency shop," then they must manifest this intent by clearly stating such prohibitions in the statute.

What effect this decision will have on the decisions of other states with similar statutes is difficult to foresee. In these states, unions will definitely seek to negotiate similar provisions so as to test their respective statutes. Just two months after the *Meade* decision, the Attorney General of North Dakota issued an opinion on "agency shop" clauses and referred to this Indiana decision.[15] He concurred with the *Meade* opinion as to their validity, however, he suggested the charge to nonunion employees for union representation should only be on the basis of *actual cost* of such representation. The fundamental reasoning used by the Indiana court in deciding the legality of the "agency shop" clause has provided a sound basis for other courts to deal with this same problem in the future.

[15] N.D. Atty. Gen. Opin. (August 24, 1959).

LABOR LAW—UNION SHOP CLAUSE VIOLATES FREEDOM OF SPEECH WHERE FUNDS USED FOR IDEOLOGICAL PURPOSES

S. B. Street was employed for many years by one of the defendant railroads. Subsequent to employing Street, defendant railroad entered into a labor contract with the defendant union, the authorized collective bargaining representative for employees of the railroad within the provisions of the Railway Labor Act.[1] The contract provided for a union shop, which made union membership a condition of continued employment and would have required Street to join the union. A substantial part of the dues, fees, and assessments which the plaintiffs were to be required to

[1] 45 U.S.C.A. § 152(11) (Supp., 1958) provides: "Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class:"