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ABSTRACT

In this report, the author presents examples from the field of private labor relations that demonstrate the value of agency shops. He argues that agency shops contribute to union stability which stability leads to a more businesslike union-management relationship. The author examines State and Federal constitutions to determine the validity of agency shops and concludes that they are legally sound. (JF)

1971

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IS THE AGENCY SHOP APPROPRIATE FOR NEGOTIATED SETTLEMENTS IN PUBLIC EDUCATION?

Erwin B. Ellmann*

Although public sector labor relations is perhaps the country's most spectacular growth industry, we are still waiting for a philosopher who can tidy all the developments in more than fifty jurisdictions into a unified field theory. Meanwhile, people who have had experience in one state, or on one side of the bargaining table, or under a particular statutory system, too often go around the country hypostasizing their prejudices into principles of universal truth. Union security in public education has particularly invited extravagant attacks and justifications. These debates frequently call to mind the blind men considering the elephant. We can concentrate on the flank and find the agency shop like a wall or barrier to progress or human decency, or feel the trunk and pronounce it a ladder to heaven. I have been defending the agency shop for about four years in Michigan. We have generally had unexceptionable success before the Michigan Employment Relations Commission and in various circuit courts.[1]

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[1] See Oakland County Sheriff's Department, 1968 MERC L. Op. 1, 227 Gerr F-1; Southgate Community School District and Linda Morrison, 1970 MERC L. Op. 161; Swartz Creek Community Schools, 1971 MERC L. Op. 645, 414 GERR E-1 (1971); City of Warren v. Local No. 1383, International Association of Firefighters (Macomb Co. Cir. Ct., 1968), 68 LRRM 2977; Clampitt v. Board of Education of the Warren Consolidated Schools, (Macomb Co. Cir. Ct., 1968). 256 GERR E-1, 68 LRRM 2996; Smigel v. Southgate Community School District (Wayne Co. Cir. Ct., 1968), 70 LRRM 2042; Nagy v. City of Detroit, (Wayne Co. Cir. Ct., 1969), 71 LRRM 2362; Warczak v. Detroit Board of Education, (Wayne Co. Cir. Ct., 1970), 73 LRRM 2237.

We stumbled a bit before our Court of Appeals[2] and are currently awaiting reversal of that decision by our Supreme Court. What a court might do under a particular statute or in a particular factual situation, however, is of only incidental relevance to the question posed here--whether agency shop itself is an appropriate or desirable technique for use in the public field. Rather than try to score forensic points, I would like to consider the issue in perspective.

If you are an employer representative in either the private or public sector--and my office represents many managements in private industry--it is unlikely that you secretly yearn to have your workers organized. Most of us are sufficiently confident of our own wisdom that we are sure our dictatorship is benevolent and needs no outside restraints or limitations. If you have to deal with a union at all, you would prefer to have a minimum of dealings--for example, the polite and meaningless minuet that is contemplated by a "meet and confer" statute. But if you are lucky enough to be in the growing number of jurisdictions in which collective bargaining in the public sector is a reality, you have a different kind of a problem. You are legally obligated to negotiate in good faith terms and conditions of employment. You have to deal with the organization which has obtained one vote more than half and thus represents the majority of the electorate. That organization is the exclusive represen-

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If the designated and certified organization represents the overwhelming majority of the employees who freely support it,

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[2] Smigel v. Southgate Community School District, 24 Mich App 179 (1970).

as an employer representative you may be able to deal in reasonable confidence that it is responsible, faithful to its word, with a stable presence at the bargaining table and between contract talks. If, on the other hand, you are in a situation where there is strong competition between two or more organizations for the votes of the employees, you may find yourself constantly involved in election campaigns, with shifting organizational loyalties among your personnel. Undeniably, the chaos of internecine warfare is deflective if not disruptive to your operations. Understandings with one group are barely reached when their rivals, speaking a rhetoric bereft of responsibility, try to win the next election by promising to undo or outdo everything which has previously been done. In the short run, you may postpone meaningful bargaining by cultivating the rivalries between the AFT and the NEA, for example, but ultimately you may create more problems than you avoid.

As far back as 1902 the Anthracite Coal Commission, studying emerging unionism in the coal fields, concluded that:

> "Experience shows that the more full the recognition given to a trades union, the more business-like and responsible it becomes. Through dealing with businessmen in business matters, its more intelligent, conservative and responsible members come to the front and gain control and direction of its affairs."3/

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I think this has generally proved to be true in the ensuing years. Those of us who negotiate for private managements know that it is much easier to deal with organizations which are able to speak authoritatively for their memberships and who "know their business". The greatest source of frustration at the bargaining table is not militancy, but stupidity or ignorance or inexperience.

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[3] Senate Document No. 6, 58th Cong., Sp. Sess. 31, 63 (1902).

The more adept union negotiators become, the better for workers and managements alike. Indeed, employers are constantly recruiting for their own supervisory staffs those who have proved most knowledgeable, articulate and effective union representatives.

In 1916, speaking before he went on the Supreme Court, Mr. Justice Brandeis admonished employers campaigning for the open shop that "they ought to recognize it is for their interests as well as that of the community that unions be strong and powerful".[4] Employers have found by bitter experience that denial of a dues checkoff, for example, only substitutes regular rounds of collections by stewards or other union representatives, with resultant regular invitations to every member to register a complaint or generate a grievance whenever he pays his dues. Automatic payroll deductions permit, if they do not actually encourage, a contrary spirit of indolent repose. The occasional dramatic excesses of union power should not blind us to the fact that industrial democracy has proved a constructive force in the adjustment of private capitalism to the contemporary world. In the views of many, the greatest danger faced by organized labor at the present time is complacency born of fatness. The larger union treasuries grow, the greater the institutional stake in maintaining them. Private managements are certainly not deploring

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[4] 8 Commission on Industrial Relations, Final Report, Senate Document No. 415, 64th Cong., 1st Sess. 7681 (1916). See, generally, Magruder, "A Half Century of Legal Influence Upon the Development of Collective Bargaining", 50 Harv. L. Rev. 1071, 1075 (1937).

I see no reason why the techniques developed in industry are not equally adaptable to the public sector. As organizations of government workers have been trying to recapitulate about 35 years of collective bargaining history in the last five years, they have undoubtedly been victims of their own inexperience, naivete, rivalries and insecurity. They have for one reason or another felt that they have to "prove themselves", often by taking extravagant positions or even reckless actions. But this condition is not likely to be cured by exacerbating the sense of insecurity or making the organization struggle for economic survival. Sometimes institutional poverty may weaken and dishearten to the point that the organization disappears. But much more probably, the organization with its back to the wall is goaded into greater effort and more militant action. Nothing inspires like necessity, said Rossini, and the lesson is not limited to composing operas.

In short--from a purely managerial standpoint--I think it is desirable that unions be stable and secure. Doctrinal opposition to union security provisions is either a disguise for fundamental anti-unionism or the product of misguided anxiety about the unfamiliar. The administrator who is himself insecure in this new area of labor-management relations may feel threatened by the thought that the union he is facing across the table may be strengthened by a closed shop, a union shop, a maintenance of

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skies have not fallen. The public's business is being attended to. Labor-management unrest in the form of strikes has been on a substantial decline. Weekly, new agency shop clauses are being negotiated, despite some legal uncertainties which have arisen.

In my state these uncertainties have not been generated by employers, even though some have been willing to take advantage of them. It is rival organizations who are on the outside looking in, or dissident employees fronting for such organization, or the National Right to Work Committee which likes to spend its tax-exempt dollars supporting litigation, that have generated or maintained the court actions which have clouded the issue. Usually these cases represent no more than a technique of organizational politics; the first challenge to the agency shop in education was brought by an affiliate of the Michigan Federation of Teachers in Warren, Michigan, where an MEA group had been chosen as bargaining representative; however, in Detroit, where the Federation is the exclusive representative, it is one of the stalwart defenders of agency shop provisions written in identical language, which is now under attack by the National Right to Work Committee.

Discounting the motivation behind such attacks, however, it is worth considering the constitutional and statutory problems which they raise. When the government acts with respect to the

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Discounting the motivation behind such attacks, however, it is worth considering the constitutional and statutory problems which they raise. When the government acts with respect to the citizen, or a group of citizens, it cannot escape the limitations imposed by the Constitution and, particularly, the Bill of Rights. The State may not invidiously discriminate in the treatment accorded one group as against another, nor act arbitrarily or capriciously with respect to either. Thus, though a school board is not required to permit public lectures in a school auditorium, once it opens its doors, it may not pick and choose among those lecturers whose ideologies are congenial to it.[5] If a

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[5] Danskin v. San Diego Unified School District, 28 Cal. 2d 536, 171 P 2d 885, 891-893 (1946); ACLU of Virginia, Inc. v. Radford College, 315 F Supp 893, 896-897 (WD Va, 1970).

municipal transit company permits posters on its buses, it cannot accept advertising from the Red Cross and refuse space to an anti-war group like the SDS.[6] Even though the views being expressed represent those of a small minority, as Mr. Justice Jackson emphasized in the flag-salute case, the very purpose of a Bill of Rights was to withdraw fundamental rights from the "vicissitudes of political controversy" and to place them "beyond the reach of majorities". Freedom of expression, association, conscience and the like "depend on the outcome of no elections".[7]

But the collective bargaining system we have developed in this country since the Wagner Act--which is being emulated in the public sector--leaves scant room for dissident opinion. "The majority-rule concept is today unquestionably at the center of our federal labor policy."[8] The duty of the employer to deal with the certified bargaining representative imposes a correlative negative duty to deal with no other.[9] The private employer--under pain of committing an unfair labor practice--has thus for years been required to discriminate, if you will, between the so-called majority and minority organizations. Congress and many of the states have exerted governmental power to require radical differences in treatment between the organization which has won the election and the organizations which have not--and no one has successfully argued that this deliberate legislative policy offends the equal protection clause. The difference in function and relationship

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6 Kissinger v. New York City Transit Authority, 274 F Supp 438, 442 (SD NY, 1967).

7 West Virginia Board of Education v. Barnette, 319 US 624, 638 (1943).

8 NLRB v. Allis-Chalmers Mfg Co, 388 US 175, 181 (1967), quoting Professor Wellington.

9 Medo Photo Supply Corp v. NLRB, 321 US 678, 684 (1944); NLRB v. Jones & Laughlin Steel Corp, 301 US 1, 44 (1937).

has been recognized as adequate basis for classification and disparate treatment.

What government may validly classify for private employment purposes it may validly classify, I believe, in the public employment sector. Even in the absence of statutory authority, the New York Court of Appeals held in Matter of Bauch v. City of New York, 21 NY 2d 599, 606, 237 NE 2d 211 (1968), that the Mayor of New York could grant exclusive recognition and dues checkoff to an organization selected by a majority of the employees, since such a method of "implementing union security may not be said to lack a reasonable basis". Efforts to obtain review on constitutional grounds were rejected by the United States Supreme Court. cert. den., 393 US 834 (1968). A California court has more recently emphasized that where an ordinance permits a county to treat one organization as the exclusive representative of all the employees, it may confine the dues check-off to that organization for other organizations do not serve "substantially the same function on behalf of their members in relation to the employing agency" which is served by the recognized union. This difference in function, the court concluded, warranted the difference in treatment.[10]

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It is familiar law in the private sector that the grievance procedure established by the union contract, though executed for the benefit of the members, remains subject to the control of the union. The union can reasonably regulate the use of the grievance machinery. While the employer may entertain grievances or complaints of individual employees, it is not obligated to do so and may contract with the union not to do so.[11] The same rule has

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[10] Sacramento County Employees Organization, Local 22 v. County of Sacramento, 78 LRRM 2855 (Sacramento Co. Calif, Super. Ct., 1971). See also Kraemer v. Helsby, 35 App Div 2d 297, 316 NYS 2d 88 (1970).

[11] Broniman v. Great Atlantic & Pacific Tea Company, 353 F2d 559 (6th Cir, 1965), cert den, 384 US 907 (1966); Black-Clawson Company, Inc v. IAM Lodge, 335, 313 F2d 179 (2nd Cir, 1962).

been recognized and applied in Michigan to labor relations in the public sector. While the labor organization has a duty fairly to represent all members of the bargaining unit, it is not obligated to process every grievance to arbitration and when the organization refuses to act, the employer is not bound to entertain the grievance from the individual.[12]

Undoubtedly these principles restrict the freedom of the individual and subordinate his claims to what are considered to be the superior claims of the majority of his fellow employees. There undoubtedly is something to be said against control of the individual by the group, as the saints of individualism and anarchism through the ages have pointed out. But in our times, in economic affairs, we have seen the individual dominated by the collectivism of the modern corporation and the modern bureaucracy, and we have been driven to realize that the only way such mass power can be checked is by countervailing power of individuals associating together. The right of association, of collective self-help, has itself been elevated in recent years to the First Amendment's pantheon.[13]

For unionism to be effective in discharging its function, the will of the majority, honestly determined, cannot be heedlessly thwarted by the wishes of the minority. That, at least, is the fundamental premise on which our national labor policy has been

[illegible] applied in Michigan to labor relations in the public sector. While the labor organization has a duty fairly to represent all members of the bargaining unit, it is not obligated to process every grievance to arbitration and when the organization refuses to act, the employer is not bound to entertain the grievance from the individual.[12]

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I can understand the plight of the individual who believes the organization at his place of work is wrongheaded,

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12 Avondale School District Board of Education and Harold Strayer, 1967 MERC L. Ops. 680; Mellon v. Board of Education of Fitzgerald Public Schools, 22 Mich App 218, 177 NW2d 189 (1970).

13 NAACP v. Alabama, 357 US 449, 460 (1958); McLaughlin v. Tilendis, 398 F2d 287, 289 (7th Cir, 1968); AFSCME v. Woodward, 406 F2d 137, 139 (8th Cir, 1969).

seeking inappropriate objectives, or using methods he disdains. Though everyone seems out of step but he, as John Stuart Mill reminds us, he, in truth, may ultimately be right. We cannot help but view sympathetically Henry David Thoreau going to jail for refusing to pay taxes levied by his neighbors. But while this incident may have inspired a great tradition of civil disobedience among draft card burners of our day, it could not be allowed to have any significance at all in the administration of our taxation policies. Our political system cannot operate if the costs of government are permitted to rest upon personal preference rather than the collective will. In Abraham J. Muste, 35 T. C. 913, 918-919 (1961), a well-known pacifist refused to pay federal income taxes which were in part used for preparation for war. The Tax Court held:

> "We think it clear that, within the intendment of the first amendment, the Internal Revenue Code, in imposing the income tax and requiring the filing of returns and the payment of the tax, is not to be considered as restricting an individual's free exercise of his religion . . . There is no doubt as to the sincerity of petitioner's beliefs, but in our opinion he does not have the right to refuse to comply with the law, even though the policies of the Federal Government and the manner of expenditure of its revenues may not accord with the dictates of his conscience or religion."

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To similar effect are Eighth Street Baptist Church, Inc v. United States, 291 F Supp 603 (D Kans, 1968); Ray L Owens, 27 T. C. Mem. 15 (1968). Within a democratic government, taxes voted by a representative majority must be paid by all citizens who share in the services provided by such government, even those who believe that rascality is enthroned in the seat of power. In relations between management and labor the union is no less a political agency for governance. If all members of the bargaining unit are accorded representation by such organism--as they must--taxation of all is not only just but a practical necessity. To allow some

members to avoid paying their share of the costs of representation threatens the fabric of the organization no less than does tax evasion in the state.

In Michigan, as in at least twenty-five other states, no one may practice law without being a member in good standing of the State Bar. Whether I like the stand of the bar on revision of the penal code or no-fault insurance, I have to pay my dues to practice my profession. Neither the Supreme Court of Michigan,[14] nor the Supreme Court of the United States[15] has found any constitutional infirmity in that system. I see no reason why school teachers should be subject to less occupational burdens that I!

Let us not forget--no agency shop provisions ever gets into a collective agreement unless it has been accepted by representatives of both the employer and of all the employees in the bargaining unit. It then becomes one more in the series of terms and conditions of employment by which the parties have agreed all employees shall be bound. Paying a service fee, in such a situation, is no more compulsory than having to punch a time clock because the management thinks that is a good idea. If the employee finds that humiliating--as well he might--I doubt that he will get much help from the National Right to Work Committee. That organization has a very selective notion of freedom from

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[14] Ayres v. Hadaway, 303 Mich 589, 595-598 (1942).

[15] Lathrop v. Donohue, 367 US 820, 828 (1961). The situation of the lawyer was assimilated to an agency shop provisions compelling Indiscriminate financial support by all employees, Railway Employees Dept v. Hanson, 351 US 225 (1956); cf. International Association of Machinists v. Street, 367 US 740 (1961), decided the same day as the Lathrop case.

to place agency shop provisions in their contracts. It is thus ironic for self-proclaimed protectors of voluntarism to be asking the state to intervene at the bargaining table to prohibit employers and employee representatives from fixing what conditions of employment shall prevail. This is contrary to our whole tradition of "freedom of contract" in collective negotiations. See Porter v. NLRB, 397 US 99, 101 (1970).

In Wisconsin the legislature has explicitly made negotiable a so-called "fair share agreement" under which "all or any of the employees in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members". GERR RF-38. In Hawaii a modified agency shop provision is required to be placed in every agreement, the amount of such dues payment being determined by the Hawaiian Employment Relations Board. After some uncertainties as to the proper construction and application of the statute, the special hearings officer found that while the reasonably predictable costs allocable to non-members for representation amounted to $82.54 per person, this was more than the prevailing association dues of $77.00, and accordingly with the Association's consent, the service fee was fixed, at that lower amount. Hawaii State Teachers Association, 440 GERR E-1 (1972).

ironic for self-proclaimed protectors of voluntarism to be asking the state to intervene at the bargaining table to prohibit employers and employee representatives from fixing what conditions of employment shall prevail. This is contrary to our whole tradition of "freedom of contract" in collective negotiations. See Porter v. NLRB, 397 US 99, 101 (1970).

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area is much to be preferred. The Supreme Court of New Hampshire, even without enabling legislation, had no difficulty allowing policemen to negotiate a union shop clause which contemplated equality of payments by all members of the bargaining unit. Tremblay v. Berlin Police Union, 108 N. H. 416, 237 A2d 668 (1968). That, I am confident, is the way other courts will eventually go.

I do not offer the agency shop as a universal solvent for all the world's ills. It will not cure cancer. It is not a panacea, even, for bad labor-management relationships. But where there is maturity and goodwill on both sides, I submit to you that the agency shop is appropriate for negotiated settlements in public education.