UNION SECURITY IN WARTIME

LESTER B. ORFIELD*

ONE of the newest phrases in labor law and relations is "union security." The concept is a rather sweeping one. It includes the closed shop under which none but union members may be hired. It also includes the less familiar union shop under which a non-union man may be hired, but upon his being hired, he must join the union. It includes preferential hiring under which the employer agrees to give preference to members of the union in the hiring of new employees and ordinarily expects the union to supply new employees when the company needs them. Last of all, it includes maintenance of membership under which as a condition of employment all persons must remain members who are members when the collective agreement is signed, or who voluntarily join at some later time.

The War Labor Board of the first World War formulated principles with respect to union security. A conference of representatives of employers and workers had agreed upon a body of principles prior to the appointment of the board. Strikes or lockouts were not to be availed of to turn an open shop into a closed shop, or the reverse. The union shop, if established, was to continue. The refusal by an employer to grant a closed shop was not to be deemed a grievance. This commitment was given in return for the previously unaccepted principle that employers should not interfere in any way with the right of employees to organize and to bargain collectively through chosen representatives.

With the outbreak of the present war, President Roosevelt called together a conference of industrial and labor leaders with William H. Davis serving as chairman. The participants could not arrive at any agreement as to the issue of union security. It was asserted by the employer members that it should not be within the jurisdiction of the War Labor Board. Finally the President announced that there was agreement on a board which could settle all labor disputes; and the employer members stated that they would accept the "direction" of the President.

If the number of disputes involving union security is any criterion, the issue is a basic one. Dean Morse has stated:

* Professor of Law, University of Nebraska. Formerly Vice-Chairman, Kansas City Regional War Labor Board.

† Gregg, The National War Labor Board, 33 Harv. L. Rev. 39 (1919); Report, National War Labor Board 32 (1921).
The question most often in dispute in cases coming before the National War Labor Board has been that of wages. Approximately two-thirds of the cases so far decided by this Board have involved some sort of a demand for an increase in wages. The next most prevalent demand has been that for union security. Approximately one-half of our cases have involved some form of union security.²

Between January 12, 1942, and April 30, 1943, there were 188 cases involving 1,300,000 employees in which the National War Labor Board made decisions involving maintenance of membership. Maintenance was granted in 165 cases, submitted to employees for referendum in 1 case, and denied in 22 cases. The check-off was an issue in 99 of these cases. With respect to these 99 cases, the check-off was granted in 75 of them, continued in 2 of them, and denied in 22 of them. With respect to the 75 cases where a check-off was granted, 33 of them involved a voluntary binding check-off, 31 of them a voluntary irrevocable, 8 a voluntary revocable, and 3 another type.

The importance of the issue of union security may readily be grasped when it is remembered that the difficulty of settling the issue brought about the ending of the National Defense Mediation Board.³ That board recommended that the Bethlehem Steel Corporation adopt the closed shop in its West Coast shipbuilding plants.⁴ Previously the government had prevailed upon the employees not to press for wage increases, or to strike. With the exception of the Bethlehem Steel Corporation, all the shipbuilders responded by accepting the closed shop. The employer members of the board contended that if the board forced the closed shops upon Bethlehem, it would thereby be establishing a legal precedent beyond the power of the board as a mediator. The public and labor members replied in return that mediation involves only the particular case and sets no precedent. It was known that the company would accept the closed shop if recommended. For a time this solution was satisfactory. The next step was the development by the public members of the compromise which we today designate as maintenance of membership. The board persuaded a number of employers and unions to accept it. In several cases it "recommended" maintenance, and its recommendation was followed.

Industry, however, was not ready to accept the concept. A subsidiary


³ See Daykin, The Treatment of Unionism by the National War Labor Board, 28 Iowa L. Rev. 451, 452-458 (1943).

of the steel corporation, the Federal Shipbuilding Corporation, was a party to the Atlantic Coast Zone Standards Agreement. Its employees had not pressed for wages and had given up their right to strike. New employees without experience as members of a labor union were entering the shipbuilding industry in large numbers. There was danger that the union would be weakened, if not destroyed. The board felt that the union was entitled to protection. The company replied that it preferred the loss of its plant to compliance.

It was now up to the board to decide whether its decisions were to be supported by force. The board asked the President to take over the plant. At this climactic point John L. Lewis came forward with a demand for the union shop for the captive mines, which are the mines owned by the steel companies. Thus both the employer and the union were making extreme demands without offer to compromise. The parties ultimately agreed to submit the case to the board for its recommendations, but there was no agreement to accept them. The labor members contended that the Bethlehem case constituted a precedent entitling the union to a union shop as of right. The board denied the demand for a union shop after John L. Lewis announced that the United Mine Workers needed no protection. The CIO members of the board thereupon resigned.

MAINTENANCE OF MEMBERSHIP

The present maintenance of membership formula briefly described runs as follows. Anyone who is a member of the union fifteen days from the date of the directive order must continue his membership for the duration of the contract as must anyone else joining thereafter. All employees have the right to withdraw from the operation of the union maintenance provision during the fifteen-day period or to refrain from joining the union without risking the loss of their jobs. Both the company and the union are ordered to refrain from any form of coercion. Disputes arising as to whether or not a worker is a union member are settled through the use of ordinary grievance machinery or final arbitration by the board.

Maintenance of membership has sometimes been vehemently criticized as amounting to the closed shop. But such criticism is based on careless analysis. Maintenance of membership does not preclude the hiring of non-union men; the closed shop does. Maintenance of membership does not preclude the continuance in employment of non-union men; the closed

5 For the current standard maintenance of membership provision, explanatory statement to be posted in plants, and procedure for administering the maintenance clause, see December 1, 1943, 12 War Lab. Rep. VIII, and appendices at the end of this article.
shop does. Maintenance of membership in the standard form developed by the National War Labor Board permits members of the union fifteen days in which to resign before the maintenance of membership clause goes into effect.

What is the board's basic theory in ordering maintenance of membership? The answer is supplied by Dean Morse:

Protection of the union for the union's sake has not been the basic reason for this board's decision affording that protection. Behind every decision it makes is the one question: What will best aid the war effort? 6

One of the best statements of the theory of maintenance of membership is that by Dr. Frank P. Graham in the Little Steel Cases 7 decided August 26, 1942:

By and large, the maintenance of a stable union membership makes for the maintenance of responsible union leadership and responsible union discipline, makes for keeping faithfully the terms of the contract, and provides a stable basis for union-management cooperation for more efficient production. If union leadership is responsible and cooperative, then irresponsible and uncooperative members cannot escape discipline by getting out of the union and thus disrupt relations and hamper production. If the union leadership should prove unworthy, demagogic, and irresponsible, then worthy and responsible members of the union still remain inside the union to correct abuses, select better leaders, and improve protection. This establishment of a more stable basis for union-management relations can, with wise and cooperative leadership on both sides, contribute to a united concentration in the supreme task of winning the war.

What, then, is the fundamental justification for the grant of maintenance? Possibly it may be put this way: The union is that preeminent organization resorted to by most employees when they wish to make their strength felt. 8 Better than anything else, it expresses their composite personality as it is developed in their daily work. It is the mode by which they seek to function significantly in the government of industry. In the words of Thorstein Veblen, "Those who move in trade-unions are, however crudely and blindly, endeavoring, under the compulsion of the machine process, to construct an institutional scheme on the lines imposed by the new exigencies given by the machine process."

Maintenance of membership represents a compromise between the two

extremes of closed shop and open shop. To grant the closed shop where it had not previously existed would amount to establishing a national closed shop policy in contradiction to President Roosevelt's statement of November 14, 1941 that "the government of the United States will not order nor will Congress pass legislation ordering a so-called closed shop." On the other hand, to establish an open shop policy would result in general industrial unrest, wildcat strikes, and a vast expenditure of energy by the union in membership campaigning.

The formula guide clearly operates as a restriction on the liberties of the individual worker. The restriction, however, operates only after he has voluntarily submitted to it. As the National Board stated in the Little Steel case, the formula provides

..., for the larger liberty of the members in a secure and stable union. Membership in any organization necessarily imposes restrictions. A free union, like our free society, derives its freedom from the consent of the government and from the subordination of personal rights to the general welfare of all the members of the union. Limitations on individual rights are, by the very nature of organized society, the basis of civilization itself. Some limitations on the individual liberty of workers are self-imposed for the larger liberty of the independence, dignity, self-expression, and creative cooperation of workers in labor unions through which they have won and are winning a larger share in the economic, social, and spiritual things by which men work and live, and for which they hope and dream for themselves and their children.

Maintenance does not constitute such a severe limitation of the worker's freedom as might at first be supposed. The worker has previously made his choice to join the union. In making such choice, it is perhaps not too much to say that he has thereby undertaken the obligations of solidarity which inheres in the relationship. Arguably, the contract of union association does not constitute a pledge of fidelity as a condition of being permitted to continue employment. It is, however, a well known purpose of unions to obtain the union shop. Hence it may be contended that membership constitutes consent to the objectives of the union.

It has been argued that maintenance results in coercion of the individual employee. In reply, it has been pointed out that the sincerity of the employer's concern is open to question; that the contention would be more convincing if it came from the employee himself. It has also been pointed out that when an employer of his own free will makes an agreement for union security, he himself is limiting the freedom of the employee. In reply to this last contention, it may be observed that an agreement may be the result of the superior power of the union and that merely because the employer limited his employee's freedom of action, this does not justify the government in forcing him to do so.
Maintenance obviously does restrict the employer in some important respects. It restricts his power to retain a worker. He must discharge a union member who fails to maintain his membership. In the absence of maintenance, he might have retained the worker because of his efficiency, a then valid reason; or he might have retained him because he broke with the union, a discreditable reason.

It is true that maintenance of membership does, to some extent, impose restrictions on the power of the employer to hire and fire. But the new relationship is limited to those workers who voluntarily accept it. The employer cannot complain that he is barred from hiring good workers who are unwilling to join the union. The only limit is on workers who, being union members at the time of the collective agreement and at the expiration of the escape clause, now wish to resign. The union must still rely on its own devices to persuade the worker to join. But when the worker has been persuaded, he must be loyal to his choice.

One argument made by employers against maintenance is that one of the purposes of maintenance is to foster peaceful and stable relations and that such relations cannot be created or maintained by compulsion. Admittedly there is much truth in Plato's observation "that the creation of a cosmos out of chaos is a series of victories of persuasion over force." The significance of persuasion should not be underrated. But as the solutions have been worked out, it seems clear that they are, and inevitably must be, composites of persuasion and force.

One criticism voiced against maintenance is that it operates only against the employer. It should be noted, however, that the board may under proper circumstances deny the request of the union for maintenance. Such a denial is self-enforcing just as is the refusal of relief to a plaintiff in a civil action. Furthermore, the union may be commanded to incorporate certain terms in an agreement and impliedly to work under those terms. Employees who struck were even in the last war threatened with cancellation of their deferred draft status and of their employability in any war production. The present War Labor Board has hinted at its use. A strike may result in a refusal of maintenance.

Today the maintenance clause is granted to any union which represents a majority and is responsible. The Boston regional board has formulated
the following standards\textsuperscript{12} to be applied in all cases where maintenance is requested by the union and objected to by the company: The union must prove that management is hostile to the union or that maintenance will improve relations between the parties. Management must prove that the union is irresponsible, that maintenance will worsen existing relations between the parties, or that the union constitution, by-laws, and practices are such as to work hardship on the company and that union leaders might be expected to invoke such unjust provisions.

The chief prerequisite to the granting of maintenance of membership is responsibility. As Chairman William H. Davis stated in the \textit{S. A. Woods Machine Company} case:\textsuperscript{13}

The employer members expressed their view that the maintenance-of-membership clause should not be granted to a union in a particular case, unless the Board was satisfied that the union was responsible and was operated according to certain well-established democratic principles under its constitution and by-laws. The public members of the Board agree with the employer members in this respect completely.

The board has not in any case denied union security because of the presence or absence of any provisions in the union's constitution or by-laws.\textsuperscript{14}

The granting of a maintenance of membership clause is not automatic.\textsuperscript{15} Indeed one will find decisions pointing in quite the opposite direction. In a case\textsuperscript{16} decided as recently as June, 1943, the national board unanimously denied a request for maintenance, adopting the following finding of fact of a special examiner:

At the hearing, it was mutually agreed that there had never been any discrimination by the employer against the union or its members. Indeed Mr. Wright stated: "They are

\textsuperscript{13}August 1, 1942, 2 War Lab. Rep. 159, 162. See also Rice, \textit{The Law of the National War Labor Board}, 9 Law and Contemp. Prob. 470, 479-481 (1942).
\textsuperscript{15}For the situation prior to March, 1943, see Daykin, \textit{The Treatment of Unionism by the National War Labor Board}, 28 Iowa L. Rev. 451, 463 (1943).
\textsuperscript{16}H. D. Hudson Mfg. Co., 9 War Lab. Rep. 367, 368-369 (June 18, 1943). This case was followed by the panel of the Fourth regional board in Jorgensen Bennett Mfg. Co., 11 War Lab. Rep. 613, 619-620 (Sept. 29, 1943). The latter case also cited the Norma-Hoffman Bearings Corporation case, 2 War Lab. Rep. 433 (Aug. 24, 1942), in which it is stated that "the granting of union maintenance is not an automatic reaction to a demand for some sort of union security; it is granted only after a thorough examination of the merits of the case and careful deliberation." See also a decision of the Dallas regional board, Universal Atlas Cement Co., 13 War Lab. Rep. 278 (Dec. 8, 1943), and of the Philadelphia regional board in Thomas Somerville and Sons, 12 War Lab. Rep. 286 (Nov. 6, 1943).
fair." For this reason, the undersigned finds that he cannot agree with the contention of the union that a maintenance-of-union-membership clause is necessary in order to preserve the union during the life of this contract. He feels that to adopt any other policy would rather help to incur enmity where friendship and understanding now exists (sic).

Where a strike occurs without authorization by union officials, who immediately take steps to bring about termination of the stoppages, the clause has been granted. 7 This is particularly true when the stoppages were in part provoked by management. 8 In other words, the board has granted union security unconditionally in spite of strikes when it has been shown that the union leadership was opposed to the strike and took vigorous steps to end it, particularly where there have been provocative tactics by the employer. Weak action by the union may prevent the unconditional or immediate grant of maintenance. 9

There are several courses which the board may adopt when it decides that previous participation by a union in a stoppage is so culpable as to warrant adverse action. It may grant union security subject to withdrawal if further stoppages occur, as it did in the Semet Solvay case. 20 It may grant union security subject to review in a stated period, as it did in the Sanford Day Iron Works case, 21 where the grant was subject to review within ninety days from the date of the board's order. It may grant union security provided the international union assigns one of its representatives to supervise the locals, but the grant is made subject to review if further stoppages occur. This was done in the Yellow Truck and Coach Manufac-

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21 7 War Lab. Rep. 392 (March 30, 1943). Commercial Solvents Co., 12 War Lab. Rep. 323 (Nov. 11, 1943). For a decision of the Kansas City regional board see General Steel Castings Corp., 12 War Lab. Rep. 520 (Nov. 4, 1943). No criteria have been developed as to the length of the probationary period. It has been fixed in some cases at sixty days, in others at ninety, and in still others at six months. Seemingly, it should depend on the degree of irresponsibility.
Union Security in Wartime

It may grant a lesser form of union security, as it did in the Allis-Chalmers case, where the so-called Marshall Field formula was applied calling for an individual and voluntary written consent from each employee. It may deny union security but permit the union to reapply at the end of a stated period, as it did in the General Chemical Company case, in which the board postponed the decision for six months because the union had called a strike during negotiations. Finally it may deny union security outright.

If a union is granted union security on condition that future strikes will not occur, the occurrence of such strikes will not constitute a basis for revoking the security, if the union adopts satisfactory measures of discipline. The imposition of fines on the culpable members, enforced if necessary by the sanctions of the union security clause, is likely to be considered a satisfactory disciplinary measure. In one case, the union fined 179 of its members five dollars each, the fine to go to a war relief agency.

Up to August, 1943, the board has granted union security in about twenty cases where the record contained evidence of strikes and the employers alleged irresponsibility; granted it conditionally in about seven such cases, and denied it unconditionally in about eleven cases. It seems fairly clear that union security will not be denied or will not even be made conditional simply because there is evidence of a strike. It may be necessary for the employer to produce evidence of weak union leadership.

One of the important modifications of the concept of maintenance is the "escape clause." The effect of this clause is to give members of the union fifteen days in which to resign before maintenance of membership goes into effect. This period should normally run from the date of the receipt of the directive order or of acquaintance with its contents. What is the rationale of the clause? The employer members of the board argued that if the employee really wishes to remain in the union, there is no sound reason for not giving him a choice. Prior to the development of the escape

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22 5 War Lab. Rep. 244 (Dec. 14, 1942). But the occurrence of such stoppages will not be a basis for revocation of the clause if the union applies satisfactory disciplinary measures.


27 The escape clause was first ordered in Ryan Aeronautical Co., Case No. 46, June 18, 1942.
clause, the somewhat equivocal answer made was that the employee had already made his choice by joining the union. The democratic concept that the worker should have a real choice played an important role. Probably of equal if not greater importance was the hope that employer members of the board would then subscribe to the maintenance principle. An employer member, Roger D. Lapham, had argued in his dissenting opinion in the *Federal Shipbuilding* case, “If the contention is correct that members of a union intend to be so bound by virtue of joining a union, what then can be the possible objection to giving each of them an opportunity to express his wishes?”

The escape clause harks back to a conception of the collective bargaining agreement scarcely in line with the majority rule concept of the National Labor Relations Act. It is not consistent with the trend toward standard employment terms and toward equality instead of individual choice. As Dean Morse stated in the *International Harvester* case:

> The record is clear that the union maintenance plan proposed by the public members in this decision would be vigorously opposed in peacetimes because in the eyes of labor it would involve unjustifiable governmental encroachment upon internal union affairs.

Thus the labor members yielded up something in principle. This type of union security has been called the democratic method of combining union security and voluntary union membership.\(^8\)

The escape clause has not meant any substantial loss of members by the unions. Part of the directive order in maintenance of membership cases is to the effect that the union agrees that neither it nor any of its officers or members will intimidate or coerce employees into membership in the union.

The maintenance clause is effective only for the duration of a union contract.\(^9\) Hence if it is ordered to be renewed by the board, it must contain the fifteen-day escape clause. This was the holding in a case coming before the shipbuilding commission in the first case to raise the issue.\(^30\) The national board affirmed the ruling.\(^31\) The Detroit regional board has ordered the incorporation of the escape clause even though the prior

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\(^9\) The termination of part of the contract by union's notice of desire to "modify or amend" does not limit the union security provision. Weber Showcase & Fixture Co., 12 War Lab. Rep. 138 (Nov. 9, 1943).


maintenance provision had no such clause. The Cleveland regional board has ruled that where a maintenance clause is renewed, the right of workers to withdraw from the union during the new escape period is limited to the members who have paid their dues to the expiration date of the old contract.

The jurisdiction of the War Labor Board with respect to union security has been more frequently challenged than it has with respect to any other subject. Nevertheless, the board has repeatedly and constantly adhered to the view that whenever union security was an issue in good faith, the board would pass on it. As Dean Morse has pointed out, "As a matter in dispute, it has as seriously threatened production as any other issue and thus is within the board's power and duty of final determination."

One fundamental objection raised to maintenance of membership is that only Congress can bring about so basic a change in labor relations. It is pointed out that the War Labor Board and its predecessor, the National Defense Mediation Board, were created by executive order only, and that the Constitution and statutes confer no such authority. Against the legality of the maintenance clause, it has been argued that it contravenes Section 7 of the executive order which provides that "nothing herein shall be construed as superseding or conflicting with the provisions of . . . . the National Labor Relations Act." The provision of the National Labor Relations Act alleged to have been violated is Section 8 providing:

It shall be an unfair labor practice for an employer . . . . (3) 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 the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

The answer to this contention may be found in the board's decision in the Little Steel case. The board pointed out that the matter has not been passed upon by the courts. But the interpretation by the National Labor

Relations Board may be resorted to. On September 11, 1941, President Roosevelt suggested to the chairman of the National Defense Mediation Board that the board discuss the question with the National Labor Relations Board. Following such discussion, the general counsel of the former board confirmed the opinion of the National Defense Mediation Board and concluded (1) that the proviso to Section 8(3) makes it lawful to make an agreement with an unassisted union, which is the exclusive representative of the employees in an appropriate unit requiring as a condition of employment that such employees be members of the contracting union; (2) that the proviso is not confined to the closed-shop variety of contract; and (3) that an employer does not engage in unfair labor practices within Section 8 of the National Labor Relations Act by including in a contract with a proper labor organization a maintenance of membership clause. Since a closed shop agreement would not be in conflict with the act, a maintenance of membership clause a fortiori should not be since it provides for a degree of unionism less than the closed shop. Moreover the maintenance clause is not adopted voluntarily by the parties, but is imposed upon them by the order of the War Labor Board.

On June 25, 1943, Congress passed the War Labor Disputes Act. This act does not preclude the War Labor Board from ordering maintenance of membership clauses. The contrary argument rests on the language of the act stating that "the Board shall conform to the provisions of . . . the National Labor Relations Act." In reply it would seem that the act intends to strengthen, not limit, the powers previously exercised by the board, including the power to order maintenance clauses. What are the indications of such intention? In the first place, the executive order under which the board had operated for eighteen months prior to the act also required conformity with the National Labor Relations Act. During these eighteen months the board had ordered maintenance clauses in 185 cases. In the second place, Section 7(a) of the War Labor Disputes Act gives the board authority to "provide by order wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties." Maintenance clauses date back to 1925. At the end of 1942 about 13 million workers were covered by collective bargaining agreements and about two million of these workers were under maintenance of membership agreements. In the third place, the legislative history of the act shows the intention of both the House and the Senate to continue intact the existing powers and

practices of the board and to add to its authority. In the fourth place, the House specifically, by a vote of three to one, rejected a provision which would prohibit the board from ordering maintenance of membership. This action was taken on the unanimous recommendation of the membership of the House Military Affairs Committee. In the fifth place, the legislative history of the act shows that it was the intention of Congress to maintain the national no-strike agreement. An essential condition of this agreement is that there must be a tribunal for the peaceful settlement of all disputes, including disputes over union security.

The standard maintenance of membership clause and voluntary check-off may be imposed in spite of state statutes containing provisions which conflict therewith. The national board so ruled with respect to a Wisconsin statute providing that an agreement for union security is invalid unless "three-fourths or more of the employees in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of the union security clause," and with respect to a Wisconsin statute prohibiting assignment of future wages without written permission of the employee's wife. The power of the board stems from the war powers of the National Government and the War Labor Disputes Act of June 25, 1943.

**The Check-off**

Before Pearl Harbor, the check-off of union dues had not become general in this country. To be sure, it had existed for over forty years in the coal-mining industry. After 1929, it also came to be the prevalent practice in that part of the hosiery industry which was unionized. To some extent, it had been adopted in men's and women's clothing, trucking, shoes, and a few other industries. It constituted a means of collecting dues which certain unions found convenient. The outbreak of the war created a need for uninterrupted production and a tightening of the labor market. This meant that the check-off necessarily became a basic method of eliminating strife over the collection of union dues and of preventing the discharge of workers for failure to pay their union dues. The relationship of the check-off to maintenance of membership has become of the greatest significance.

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38 Public Law 89, 78th Congress (June 25, 1943).
There have been three stages in the evolution of such relationships: in the first, the check-off was frequently granted in lieu of maintenance of membership; in the second, it was granted as a supplement to maintenance; and in the third and current stage, it was granted as an integral part of union security.

In the initial period, which lasted from January to July, 1942, the check-off was regarded as a substitute for maintenance of membership. The first case in which the check-off was in issue was the Marshall Field case decided March 5, 1942. In this case the board granted both maintenance of membership and the check-off but wrote no opinion. The provision required an individual signed authorization card from each employee who wished to be regarded as a union member and to have his dues deducted. In six subsequent cases, the board denied requests for maintenance of membership or the union shop and granted the check-off only. In five of these six cases, the authorization for check-off was revocable by the worker at any time. In four of these six cases, the board granted the check-off instead of union security because the company and the union were negotiating their first contract and had had little previous bargaining experience. The board in two cases pointed out that the union was strong and stood in no need of security. In the American Brass Company case, the board saw no reason for granting maintenance of membership because the check-off would give the union the protection it needed.

As a reason for granting the check-off in the White Sewing Machine Corporation case, the panel pointed out that not only did the company make payroll deductions for a number of items, but it cost the union about $2,500 a year to collect dues on company property during working hours, inasmuch as the union reimbursed the shop stewards for the time spent in following the paymaster around. The panel thought that the expense to the company through interference with production while dues were being collected was also considerable.

In two cases, the check-off was made applicable to delinquent members only. In the Ranger Aircraft Engines case where maintenance of membership was granted, the check-off was denied outright in a ten to two decision. The majority of the board declared that the check-off would require the equivalent of an organizing campaign and that the panel had erroneously assumed that both the company and the union wanted it. The two dissenting industry members favored the check-off in lieu of maintenance because the company was new and needed greater flexibility in its management program.

The Little Steel case, decided on July 16, 1942, initiated the second
UNION SECURITY IN WARTIME

stage in the board's theory with respect to the check-off. The check-off was now viewed as a supplement to, rather than as a substitute for, union security, if the union could establish facts indicating a special need therefore. The opinion by Frank P. Graham listed several factors which affected the board's decision: (1) the employers forbade the collection of union dues on company property and provided no facilities anywhere for this purpose; (2) the collection of dues by the union was a heavy burden because of the existence of many nationalities and races among the employees, because of the widely separated and far-flung locations of mills and homes, and because of limitations on transportation; (3) several of the companies made deductions for a number of authorized items to agencies in which the companies believed or had an interest, and the employees often felt that the companies were opposed to the union because there was no check-off of union dues; (4) the check-off eliminates picket lines for collecting dues and attendant abuses; (5) when linked with maintenance of membership, the check-off avoids the necessity for the discharge of a would-be delinquent; (6) it saves the time of the union leaders for the settlement of grievances and the improvement of production; and (7) the maintenance of a stable membership and the prompt collection of union dues make for a more responsible and more cooperative union.

Between July 16, 1942, and April 1, 1943, the board granted some form of check-off in sixty-five cases and denied it in twenty-one cases. The figure understates, however, the number of denials. In an unknown number of cases, the board did not grant the check-off, but no mention of such was made in the directive order. In some cases, the union withdrew the issue during the panel hearing; in other cases, the panel denied the check-off and the board simply overlooked it because the union comments on the panel report did not press the issue. In every case except one in which the check-off was granted, some form of union security was approved or continued. While not every board action was consistent with the doctrine that the check-off would be granted only upon proof that the union needed it for a special reason to protect its position, the general pattern was reasonably clear. The denials of the check-off during this period usually rested on the "needs" test. In most of the twenty-one cases, union security was granted but the check-off denied because the panel found it was not essential "to the security of the union" or "to stabilize bargaining relations." Mere convenience to the union was not enough, nor was the

39 For cases in the first and second stages, see Daykin, The Treatment of Unionism by the National War Labor Board, 28 Iowa L. Rev. 451, 473-477 (1943).
existence of an anti-union attitude on the part of management. As late as March 30, 1943, the board denied the check-off on the recommendation of a mediation officer who noted that the union had made no showing of special conditions which required the check-off, and its other contracts with the same company did not include a check-off.40

Since April, 1943, there has appeared the third stage in the board's attitude toward the check-off, namely, a tendency to regard the check-off as an integral administrative part of union security, and to grant it with maintenance of membership except where there is substantial ground for denying it or where it is clearly unnecessary.41 This view has developed because of the desire to end disputes, to prevent discharges in war plants as a result of dues delinquency under maintenance of membership provisions, and to enable the union officials to spend their full time settling grievances and promoting production. The difference between the third phase and the earlier ones is mainly a matter of emphasis.

In April and May, 1943, the board granted the check-off in eighteen cases and denied it in one. The denial was based on recommendation of the panel as a result of a strike which the union authorized during the panel deliberations.42 In a June case of denial, the union had a verbal union shop agreement and gave as its only reason for requesting the check-off the shortage of gasoline due to rationing.43 In an August case of denial, the board upheld the referee's finding that there were no special facts warranting a check-off.44 From April, 1943, through September, 1943, the board granted the check-off in forty-seven cases and denied it in only the three cases just mentioned. The board seems to be taking increasing notice of the fact that a number of unions have been calling upon employers to discharge employees, as required under the maintenance clause, and the reluctance of employers to discharge them. It has also noted that some unions were hesitant even to ask for the discharge of members not maintaining their membership, with a resultant weakening of the union. The check-off is not automatically granted, however. On December 11, 1943, the national board affirmed the Chicago regional board in denying a check-


41 For a late case, see Westinghouse Air Brake Co., 13 War Lab. Rep. 221 (Dec. 17, 1943). For a decision of the Kansas City regional board treating maintenance and check-off as closely intertwined, see Zimmerman Steel Casting Co., 8 War Lab. Rep. 804 (April 8, 1943).


off where no evidence was presented indicating that the union stewards were having difficulty in collecting dues.\(^4\)

The check-off involves a deduction of union dues or other fees by an employer from the wages of employees. The board has in practice confined the check-off to initiation fees and dues, and has not applied it to fines or assessments. It may assume various forms, the board having thus far ordered four types: (1) the individually signed authorization form of check-off under which workers agree to the check-off at the same time that they affirm their union membership—the “Marshall Field” formula; (2) the individually signed authorization form of check-off under which union members may elect to authorize the company to deduct dues from their wages or may continue to pay dues directly to the union; (3) the voluntary binding check-off under which the check-off applies automatically if the member does not withdraw from the union during the escape period allowed under the maintenance of membership clause—the Little Steel check-off; and (4) the compulsory check-off under which all union members are bound by the check-off and are given no alternative except to quit their jobs if they object to it.

Each of these types may be either revocable at any time or irrevocable for the duration of the agreement. The first and fourth types of check-off have been seldom used. The first or “Marshall Field” formula has been directed only in three textile cases and in the \textit{Allis-Chalmers} case.\(^4\) The fourth or compulsory form was involved in the \textit{Bethlehem Steel Company, Shipbuilding Division} case.\(^7\) In this case, the board granted a maintenance of membership clause and a binding check-off without an escape period. The union had requested a union shop and a union hiring hall on the ground that they had been embodied in oral understandings with the company. The company denied any such understandings and the board was in doubt as to the facts.

The great bulk of the check-off cases have directed either the individual signed authorization\(^8\) or the voluntary binding check-off. The latter type

\(^4\) Minneapolis Hospital Council, 13 War Lab. Rep. 211 (Dec. 11, 1943). The panel of the regional board was unanimous in finding against the check-off. In Columbus Iron Works Co., 12 War Lab. Rep. 638 (Nov. 18, 1943), a regional board order was suspended where the panel had found that harm might be done to the relations of the parties by forcing the check-off on the company.

\(^5\) 7 War Lab. Rep. 297 (March 30, 1943), Public Members Graham and Morse dissenting.

\(^6\) 8 War Lab. Rep. 67 (April 21, 1943).

\(^7\) 7 War Lab. Rep. 297 (March 30, 1943), Public Members Graham and Morse dissenting.

\(^8\) McQuay-Norris Mfg. Co., 13 War Lab. Rep. 50 (Nov. 16, 1943) (Kansas City regional board affirmed).
was inaugurated in the *Little Steel* case.\textsuperscript{49} It left a union member no choice except to resign his membership during the escape period, if he objected to the check-off. His objection to check-off carried with it an objection to maintenance of membership. Because of this feature it was considered more strict than the authorization type and was therefore ordered with more caution. It was confined for many months to the steel and mining industries, in which the physical problem of securing individual authorization is most difficult. Finally in February, 1943, following a panel recommendation, it was extended to the major meat-packing companies.\textsuperscript{50} The panel pointed out that at least one of the plants had indicated that if maintenance of membership was ordered, it would grant a check-off of its own accord to avoid disputes over dues delinquency. It also pointed out that some of the most serious disputes and stoppages had arisen out of difficulties in collecting dues. It also noted that the employees came to work in small groups at odd times, that lunch periods and quitting times were varied, and that due to the character of the work most workers changed into special working clothes and did not carry their money with them. On May 21, 1943, this type of check-off was extended to the rubber industry.\textsuperscript{51} On July 15, 1943, it was extended to a number of other large rubber companies, and it has since become the pattern for the rubber industry. It has since been applied to the employees of a university,\textsuperscript{52} to a petroleum company,\textsuperscript{53} and to a manufacturer of cartridge cases.\textsuperscript{54}

In industries other than steel, mining, meat packing, and rubber, the national board has usually awarded the individual signed authorization type of check-off.\textsuperscript{55} The significant feature of this type is that it permits some union members to pay dues directly to the union, while others have


\textsuperscript{50} Four Meat Packing Companies, 6 War Lab. Rep. 395 (Feb. 8, 1943). But the board modified an order of the Chicago regional board ordering the Little Steel check-off, to order instead the individual check-off where there were no existing obstacles to dues collection. Armour and Co., 12 War Lab. Rep. 200 (Oct. 11, 1943).

\textsuperscript{51} Big Four Rubber Companies, 8 War Lab. Rep. 537 (May 21, 1943).

\textsuperscript{52} Columbia University, 9 War Lab. Rep. 687 (July 17, 1943). The individual check-off was ordered in Yale University, 12 War Lab. Rep. 315 (Sept. 30, 1943).

\textsuperscript{53} Texas Company, 10 War Lab. Rep. 90 (July 17, 1943).


their dues checked off by the company. It permits the union to conceal its strength, if it so desires. No clear reason has appeared in the decisions why the board selects this type of check-off. With a very few exceptions these check-offs have been made irrevocable for the duration of the agreement. It seems clear that the board prefers a check-off which must remain in effect for the contract year. The Detroit regional board has refused the Little Steel check-off and ordered the individual authorization type where a state statute forbade the former. But the national board affirmed a decision of the New York City regional board ordering a compulsory check-off despite a contrary New York statute.

One may ask why is not the check-off as universal as a maintenance of membership clause? The answer is that most unions do not raise it as an issue. In the first place, many unions are satisfied with the various methods of collecting dues which they have already developed. In the second place, many union members believe that the check-off weakens the tie between the union organization and the rank and file membership. In the third place, the check-off reveals to the employer the strength of the union organization. This last factor is important where there is a substantial turn-over in employment, where the union finds it difficult to organize the new employees, and where an unfriendly employer is ready to refuse to recognize the union once it has lost its majority.

It may well be that the check-off is not invariably the most effective method for stabilizing industrial relations or developing union responsibility. Alternative techniques may include: (a) permitting union delegates to collect dues during working hours at scheduled times; (b) permitting union business agents to accompany the paymaster on his rounds; (c) providing the union with a collection office or booth on company property; and (d) establishing the union office near the entrance of the plant. These methods bring together union members and officials, keep the members aware of their union obligations, and largely reduce the number of disputes concerning dues collection.

OTHER FORMS OF UNION SECURITY

Instead of ordering the standard maintenance clause, the board may order other and stronger types of union security provisions, such as the union shop, preferential hiring, maintenance of membership without an "escape period," and maintenance of a proportion of members.


First to be considered is the union or closed shop. The board has not
directed a union or closed shop in any case where such a provision had not
previously been in effect.58 On the other hand, the board will not permit a
company to abandon a union shop previously existing by voluntary agree-
ment.59 The board has, therefore, ordered the continuance of such agree-
ments and will generally do so except where there is proof of union irre-
responsibility. In one case the board made its order to renew a union shop
contract conditional on a report by the international president of the
union regarding the steps taken by the union to fix the responsibility for a
seven weeks’ strike and to prevent its recurrence.60

The treatment of “interim” employees has caused some confusion. In
the Harvill case61 the board served notice upon industry and labor generally
that if a union or closed shop contract terminated after February 12,
1943, the board would direct the renewal of the provision for all employ-
ees, including those hired between the expiration date of the old contract
and the board order.62 In the case of contracts expiring prior to February
12, 1943, “interim” employees would generally be subject only to a main-
tenance of membership provision.
Under a preferential hiring agreement, the employer agrees to give
preference to members of the union in the hiring of new employees and
ordinarily expects the union to supply new employees when the company
needs them. If the union is unable to furnish the needed workers within
a day or two days, the employer is free to hire them in the open market.
Since the preferential hiring clause does not require that the new employ-
ees shall remain union members in good standing, the issue of preferential
hiring has arisen principally in relation to maintenance of membership or
the union shop. In only one case has the board directed a preferential hir-
ing clause de novo and in that case the clause was customary practice in
the industry and the employer had stated that he was willing to accept it.

For decisions of the Kansas City regional board, see Donald Wholesale Co., 9 War Lab. Rep.

59 Everbest Engineering Corp., 8 War Lab. Rep. 607, 611 (May 26, 1943). For a case of en-
forcement of a union shop clause by ordering the company to discharge workers for dues delin-
quency, see F. S. Royster Guano Co., 12 War Lab. Rep. 510 (Oct. 27, 1943) (Cleveland regional
board).

62 For such a case decided by the Kansas City regional board, see Hutchinson Transportation
The most important problem has been whether preferential hiring amounts to a closed shop when combined with maintenance of membership. The board has been hesitant about combining the two provisions. In only two cases has it added maintenance of membership to a preferential hiring clause. In the latter of these the board pointed out that the decision was made on "most special grounds" and was not to be taken as a precedent. It listed four special circumstances: (1) testimony of the parties revealed that the preferential hiring clause had not resulted in all new employees joining or remaining in the union; (2) the company had a number of grounds on which to reject prospective employees referred by the union and had hired nonunion employees; (3) the union's objective settlement of grievances had cost it some of its members; and (4) the recommendations of the panel and review committees were unanimous.

If the preferential hiring clause requires all new employees to become union members, regardless of whether or not they are furnished by the union, and if labor turnover in the plant is extremely rapid and few old employees remain, the addition of maintenance of membership will clearly result in what amounts to a closed shop condition. Suppose, on the other hand, that the preferential hiring clause permits the employer to hire, without any conditions, non-union workers in the open market if the union cannot supply the needed workers. In that event, the addition of a maintenance clause will not compel these employees to become union members and consequently a closed shop will not result. Or, suppose the preferential hiring clause allows an employer to reject, for various specified reasons, employees referred to him by the union and the employer has hired a substantial proportion of non-union workers. Here again the addition of a maintenance clause will not result in a closed shop. Thus the effect of adding a maintenance clause depends upon the precise nature of the hiring clause, the conditions of the labor market, and the extent of labor turnover in the plant.

Occasionally the board has directed a maintenance of membership clause without an "escape period," thereby removing a potent threat to the strength of the union. In such cases, the effective date of the mainte-

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63 For a refusal by the Chicago regional board, see Western Felt Works, 13 War Lab. Rep. 177 (Nov. 16, 1943); see also a decision of the West Coast Lumber Commission, West Side Lumber Co., 12 War Lab. Rep. 162 (Sept. 23, 1943). In Weyerhauser Timber Co., 13 War Lab. Rep. 464 (Dec. 22, 1943), the national board reversed an order of the lumber commission awarding both preferential hiring and maintenance of membership provisions. The labor members and public member Wayne L. Morse dissented.

nance clause has usually been the date of the directive order, although in one case a retroactive date was used. The omission of the escape period must be justified by "extraordinary circumstances." What constitutes "extraordinary circumstances" is a matter of judgment. Such circumstances are company hostility to the union and failure to comply with a previous board order, unduly long delay in the final settlement of a case, and conflicting evidence as to an alleged oral agreement on the union shop. Possibly another circumstance should be the denial of a wage increase by the board at the same time that it grants maintenance of membership, since workers who are new and uneducated in their role as union members may resign en masse during the escape period.

The maritime industry on the Great Lakes presented a situation in which the standard maintenance clause was an ineffective device for providing union security. Usually seamen are under contract only for the duration of a single voyage. Hence in one case the board directed that the proportion of union members employed at the close of the last season, or the proportion of members established for each company thirty days after the opening of the coming season, whichever is larger, shall be the number of union personnel to be maintained as a minimum by that company for the duration of the contract. Possibly the maintenance of proportion formula may also be valid in manufacturing or other establishments where the turnover of labor is heavy and the union is faced with a continuous organizing campaign in order to maintain its strength. Heavy labor turnover has deprived several unions of their strength and has caused others to devote an undue amount of time and energy merely to maintain the organization. There are precedents for the use of such a formula in land establishments such as the so-called percentage agreements of the Brotherhood of Railway Trainmen which were made illegal by the amendment of the Railway Labor Act in 1934.


Celanese Corporation of America, 7 War Lab. Rep. 95 (March 16, 1943).


APPENDIX A

MAINTENANCE OF MEMBERSHIP PROVISION

(Adopted by National War Labor Board, November 27, 1943)

(a) All employees who, on (insert date—fifteen days after date of Directive Order), are members of the Union in good standing in accordance with its constitution and by-laws, and all employees who become members after that date, shall, as a condition of employment, maintain their membership in the Union in good standing for the duration of the collective agreement in which this provision is incorporated, or until further order of the Board.

The Union shall, immediately after the aforesaid date, furnish the National (Regional) War Labor Board with a notarized list of its members in good standing as of that date.

The Union, its officers and members shall not intimidate or coerce employees into joining the Union or continuing their membership therein.

(b) If a dispute arises as to whether an employee (1) was a member of the Union on the date specified above or (2) was intimidated or coerced during the fifteen-day “escape period” into joining the Union or continuing his membership therein, such dispute may be submitted for determination by an arbitrator to be appointed by the National (Regional) War Labor Board. The decision of the arbitrator shall be final and binding upon the parties.

(c) If a dispute arises as to whether an employee (1) has failed to maintain his membership in the Union in good standing after the aforesaid date, or (2) was intimidated or coerced into joining the Union after the aforesaid date, such dispute may be submitted for determination by an arbitrator to be selected in the manner provided by the contract of the parties, or if no such provision exists, to be selected by special agreement. In the absence of such a contract provision or special agreement, the arbitrator will be selected by the National (Regional) War Labor Board, on due application. The decision of the arbitrator shall be final and binding upon the parties.

Any party desiring to post or otherwise publish an official explanation by the National War Labor Board of the foregoing maintenance of membership provision may use the attached form of notice. A statement of the procedure to be followed in administering the maintenance of membership provision, in the absence of some other procedure agreed to by the parties, is also attached.

APPENDIX B

PROCEDURE FOR ADMINISTERING THE MAINTENANCE OF MEMBERSHIP CLAUSE

(Approved by National War Labor Board, November 26, 1943)

The following procedure is intended to serve as a basis for determining disputes arising under paragraphs (b) and (c) of the maintenance of membership provision of the Board’s Directive Order.

1. The Union shall prepare a list of members who have failed to maintain their membership in the Union in good standing, as defined in its constitution and by-laws.
2. The Union shall then have its committeemen and stewards make a preliminary check of the list to ascertain whether the employees named thereon are still in the employ of the Company.

3. After such preliminary check, representatives of the Union and of the Company shall check the Union's list against the Company's employment records to further assure the accuracy of the list.

4. Thereafter, the Union shall address a letter to all persons on such list, advising them that unless, within seven days after the mailing of the letter, they take the necessary steps to place themselves in good standing in the Union, they will be reported officially to the Company.

5. After the expiration of the 7-day period, the Union shall submit to the Company a revised list of those persons who have failed to maintain their membership in the Union in good standing, showing the last month for which dues were paid by those persons, and the date of their last dues payment. In any case where loss of good standing resulted from conduct other than non-payment of dues, the Union should so indicate.

6. Within seven days after the presentation of the revised list, the employees on the list shall be summoned before a joint committee of representatives of management and of the Union.

7. If an employee, when summoned before the joint committee, makes no claim which would constitute a basis for an arbitrable dispute under paragraph (b) or (c) of the maintenance of membership provision, and if it is found as a fact that he has failed to maintain his membership in good standing, the Union may, after twenty-four hours following such finding, officially request the management in writing that the employee be suspended from employment for a period, not to exceed thirty days. If, at the expiration of the period of suspension from employment, the employee has failed to place himself in good standing, then the Union may officially request in writing that the employee be discharged by the Company, in accordance with its obligation under the Directive Order of the Board.

If, on the other hand, the employee asserts that he was not a member of the Union in good standing on the last day of the "escape period," or that he was coerced or intimidated during the "escape period" into joining the Union or continuing his membership therein, and if the Union continues to press the case of that particular employee, then the aforesaid issue or issues may be submitted for settlement by an arbitrator appointed by the National War Labor Board; or

If the employee asserts that he has continued his membership in good standing in the Union since the "escape period," or that he was coerced or intimidated after the "escape period" into joining the Union, and if the Union continues to press the case of that particular employee, then the aforesaid issue or issues may be submitted for settlement by an arbitrator to be selected as provided in the contract, or if no such provision exists, to be selected by special agreement of the parties. In the absence of a contract provision or special agreement of the parties, the arbitrator will be appointed by the National War Labor Board, on due application.

The arbitrator shall not consider any claim of coercion or intimidation unless it appears that the claim was raised at the first reasonable opportunity after the alleged acts of coercion or intimidation.
EXPLANATORY STATEMENT OF MAINTENANCE OF MEMBERSHIP PROVISION

(Approved by National War Labor Board, November 26, 1943)

The National War Labor Board (Region..........) has directed that a maintenance of membership clause be included in the terms and conditions governing the relationship between.......................................................... and ..........................................................

Briefly, the maintenance of membership clause provides as follows:

1. If you are a member of the Union in good standing, you will be required as a condition of employment to maintain your good standing in the Union for the duration of the contract, unless, before......................... 9......, you notify the Union in writing that you desire to withdraw from membership. (Your Union dues will also be deducted from your pay each month, unless you withdraw from membership before......................................................).*

2. If you join or reaffiliate with the Union after............................, 19......, you will be required as a condition of employment to maintain your good standing in the Union for the duration of the contract, (and your union dues will be deducted from your pay each month).*

3. If you are not now a member in good standing, this order does not require that you join the Union, but you are free to make application to join.

4. If you have any question as to whether you are now a member of the Union, or wish to be informed as to whether the Union regards you as a member, inquire at the Union office or of the departmental steward or other appropriate union official.

(This notice or copies thereof may be posted or otherwise published by the Company or the Union or both jointly).

*Matter in parenthesis to appear only in those cases where the Board or its agents has directed a check-off of union dues.