trust is to be administered, which is beneficial to a party other than the trustee, and which is sufficiently definite to form the basis of a beneficiary's suit to compel specific performance by the trustee.

These criteria of an enforceable obligation, however, frequently work hardships, especially in those cases in which a testator has died with the belief, usually written into the will, that the devisee will provide for other designated individuals.[14] In such a case, the failure of a court to find a trust relationship results in the violation of the testator's intent if the devisee does not fulfill his moral obligation. This result seems especially harsh in view of the fact that the weight of authority indicates that the testator's insertion of a few words to the effect that the devisee was to use the property for the care and maintenance,[15] or for the education,[16] of the non-inheriting survivors, would operate to establish an enforceable trust.

Nevertheless, the general rule requiring an enforceable obligation in a trust relation seems desirable in that it spares the courts the burdensome problem of defining moral obligations in concrete, pecuniary terms which are enforceable. Furthermore, as applied in the *Ponzelino* case, the rule effectively bars the creation of mock legal entities and relationships which can be used to insure a property owner the full beneficial use of his property, while putting it beyond the grasp of creditors and tax collectors.

DISCHARGE FOR DUAL UNIONISM UNDER THE WAGNER ACT

On April 1 the CIO petitioned the National Labor Relations Board for investigation and certification of representation at the respondent's plant. A prior closed-shop contract between the AFL and the respondent automatically renewed itself for an additional year on May 3. On June 23 the Board held an election[1] among the respondent's employees at which the AFL was chosen over the CIO as majority representative. Thereafter, an employee who had served as an observer for the CIO at the election was expelled from the AFL for his activities in promoting the rival union. At the demand of the AFL, and pursuant to the existing closed-shop contract, the respondent, with full knowledge

[14] Annis v. Huggins, 35 S.D. 300, 152 N.W. 114 (1915); Axtell v. Coons, 82 Fla. 158, 89 So. 419 (1921); Floyd v. Smith, 59 Fla. 485, 51 So. 537 (1910). Cf. Braubaker v. Lauver, 322 Pa. 461, 185 Atl. 848 (1936); Bliss v. Bliss, 20 Idaho 467, 119 Pac. 451 (1911).

[15] Colton v. Colton, 127 U.S. 300 (1888); Burke v. Burke, 259 Ill. 262, 102 N.E. 293 (1913); Gibson v. Gibson, 25 Ky. 1332, 77 S.W. 928 (1904).

[16] Parks v. Lefeber, 162 Okla. 265, 20 P. 2d 179 (1933); Hill v. Clark, 74 Pa. Super. Ct. 181 (1920); Mackenzie v. Los Angeles Trust & Savings Bank, 39 Cal. App. 247, 178 Pac. 557 (1919); Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699 (1919).

[1] The CIO had given timely notice of its representation claim, and the Board did not consider the contract a bar to representation proceedings. Cf. Matter of American Woolen Mills, 57 N.L.R.B. 647 (1944).

of the basis for the expulsion, discharged the employee. The NLRB found the discharge to be discriminatory and ordered the employee reinstated with back pay. Refusing to comply with the order, the employer contended that the discharge was protected by the closed-shop proviso of Section 8(3) of the Act.[2] In enforcement proceedings initiated by the Board, the Ninth Circuit Court of Appeals affirmed the order. *NLRB v. Portland Lumber Mills.*[3]

The problem presented in the instant case—one on which three circuit courts have recently disagreed[4]—is the product of apparently conflicting provisions in the Wagner Act.[5] That Act guaranteed to employees the full freedom of self-organization,[6] while at the same time it permitted the execution of a closed-shop agreement with the majority representative. The conflict arose where the majority representative utilized the union security provision to secure the discharge of an employee who exercised his right to self-organization in promoting a rival union. While the NLRB had previously followed the rule applied in the instant case, its position having become known as the *Rutland Court Doctrine,*[7] the principal decision marks its first test before the courts.[8]

In *Wallace Corp. v. NLRB*[9] the Supreme Court was presented with a case involving discharges pursuant to a closed-shop contract where the employer had knowledge at the time the agreement was signed that it would be utilized

[2] 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (3) (1942): ". . . . Provided, That nothing in this Act . . . . 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."

[3] 158 F. 2d 365 (C.C.A. 9th, 1946), cert. granted, 67 S. Ct. 1305 (1947).

[4] A fact situation similar to that in the instant case was presented in NLRB v. American White Cross Laboratories, Inc., 160 F. 2d 75 (C.C.A. 2d, 1947), where the Second Circuit Court of Appeals enforced the Board's order of reinstatement, while in Aluminum Co. v. NLRB, 159 F. 2d 523 (1946), the Seventh Circuit Court of Appeals set aside the Board's order and held the discharge to be protected under the closed-shop proviso.

[5] 49 Stat. 449 (1935), 29 U.S.C.A. § 151 et. seq. (1942).

[6] 49 Stat. 452 (1935), 29 U.S.C.A. § 157 (1942). "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

[7] Matter of Rutland Court Owners, Inc., 44 N.L.R.B. 587 (1942), supplemental opinion rendered 46 N.L.R.B. 1040 (1943). The Board isolated two factors essential to establish employer liability for discharges resulting from dual union activity: first, that the employer had prior knowledge of the reasons for the requested discharge, and, second, that these activities occurred at a time when a question concerning representation might be appropriately raised.

[8] It should be noted that under the Wagner Act the Board could direct its order only at the employer; it could not take any direct action against the union. An unfair labor practice, under the terms of the statute, could be committed only by an employer. 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (1942). Under Section 10(c) and 2(1) of Title I of the Labor-Management Relations Act of 1947 the Board can make its order run against a labor organization. 29 U.S.C.A. §§ 160(b), 152(i).

[9] 323 U.S. 248 (1944). The Court split five to four, with Justices Roberts, Frankfurter, and Jackson, and Chief Justice Stone, dissenting.

to secure the discharge of employees who had supported a rival union. In enforcing the Board's order of reinstatement, the Court, through Mr. Justice Black, said, "We do not construe the provision authorizing a closed-shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone."[10] The court in the instant case considered this language broad enough to support the Board's position, even though the facts are different in that the employer in the principal case did not know—as the employer did in the Wallace case—the use to be made of the closed shop at the time the agreement was executed.[11] Others have contended, however, that the *Wallace* case turned on collusion and company domination,[12] pointing to the next sentence in the opinion as a necessary qualification of the portion quoted above: "To permit it [the employer] to do so by indirection, through the medium of a 'union' of its own creation, would be to sanction a readily contrived mechanism for evasion of the Act."

To resolve the situation left in doubt by the *Wallace* decision, various statutory interpretations have been suggested. The Board, in support of its contention that the closed-shop proviso of the Wagner Act should not be construed as protecting discharges made for activity in behalf of a labor organization, cited the rule of statutory construction that provisos limiting the scope of remedial legislation are to be strictly construed.[13] It pointed to the report of the Senate Committee stating that the proviso was inserted merely to avoid an interpretation of Section 8(3),[14] which had previously been given to Section

[10] Ibid., at 256.

[11] A law review writer has suggested that this distinction is not material. Note, 56 Yale L.J. 1048, 1051 (1947). Other distinctions have been suggested. It is important to note that a complicating factor in the Wallace case was the settlement agreement that had been made prior to the election proceedings. "The settlement agreement plainly implied that the old employees could retain their jobs with the company simply by becoming members of whichever union would win the election." Ibid., at 252. The Board in a later case distinguished the case in these words: "In his partial reliance on the Wallace case, counsel for the Board cited a decision, which bears even less closely upon the central issues here. That decision, which was upheld by the Supreme Court of the United States, dealt with the issue of non-admission to a union, rather than expulsion." Matter of Southwestern Portland Cement Company, 65 N.L.R.B. 1, 8 (1945).

[12] Aluminum Co. of America v. NLRB, 159 F. 2d 523 (C.C.A. 7th, 1946); Gregory, Labor and the Law 332 (1946); Dodd, Discrimination by Labor Unions in the Exercise of Statutory Bargaining Powers, 58 Harv. L. Rev. 448 (1945). Contra: NLRB v. American White Cross Laboratories, Inc., 160 F. 2d 75 (C.C.A. 2d, 1947).

[13] Cf. Thompson v. United States, 258 Fed. 196 (1919), cert. den. 251 U.S. 553 (1919).

[14] "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment . . . . to encourage or discourage membership in any labor organization. . . . ."

7(a) of the National Industrial Recovery Act,[15] that closed-shop contracts were outlawed under all circumstances. The Board contended that the proviso must be read in light of the fundamental policy of the Act which was to promote industrial peace through the protection of self-organization and the encouragement of collective bargaining by representatives of the employees' own choosing. The employees' right to select representatives impliedly includes the right at some appropriate time to change representatives. Otherwise employees desiring another bargaining agent could secure it only by a strike for recognition which the Act was designed to prevent.[16]

Another interpretation of the Act supporting the decision in the instant case grows out of the purpose of the proviso. In permitting employers to give effect to closed-shop provisions, it is probable that Congress was concerned with the situation where an employee refuses to join the union or to maintain his membership. The proviso was recognized as a device for allowing the contracting union to compel all employees in the unit to join the union. But there is no reason to believe that Congress intended to require an employer blindly to recognize and enforce any policy which the contracting union might wish to impose under a closed-shop provision. If the contracting union denies membership to an employee in the unit because he is a Negro, because he will not pay an outrageous initiation fee, or because of his political or economic beliefs, there is reason to conclude from recent court decisions that such a union position might be considered illegal as against public policy.[17] Similarly, the union's action in the instant case is clearly contrary to the general public policy contained in the Wagner Act. Where the union acts arbitrarily in denying membership, as here, it is submitted that a closed-shop contract in this circumstance would be unenforceable; and where the employer, with knowledge of the motivation, gives effect to such action by a union, the employer himself, in his refusal to assert his defense, becomes culpable in the illegal expulsion and might

[15] 48 stat. 195 (1933).

[16] The court in the instant case justified its conclusion on three grounds. First, it indicated that closed-shop contracts are drawn in the anticipation that during their currency there will be elections at which the employees will be given an opportunity to choose their bargaining agent. Hence, there would be a condition, implied in fact or implied in law, that employees will not be discharged pursuant to the closed-shop provision for such activity. The court's second argument was that the right conferred upon employees by Section 7 "to bargain collectively through representatives of their own choosing" does not permit a discharge for activities at an election authorized by Section 9(a). As a third reason for enforcing the Board's order, the court considered the employer's assistance to be in violation of Section 8(1), which proscribes employer interference, restraint, or coercion of employees in connection with the rights guaranteed in Section 7. For this reason the proviso was not considered a protection by the court since the employer has assisted the union by his own unfair labor practice in discharging an employee for activity in behalf of a rival union, and the employer could not enter a valid closed-shop contract with such a labor organization, under the express terms of the proviso.

[17] Cf. James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329 (1944); Betts v. Easley, 161 Kan. 459, 169 P. 2d 831 (1946), noted in 14 Univ. Chi. L. Rev. 292 (1947); Summers, The Right To Join a Union, 47 Col. L. Rev. 33, notes 150–55 (1947). But see Shein v. Rose, 12 N.Y.S. 2d 87 (N.Y., 1939).

justifiably be held to have violated the Act. In such a situation the employer has exceeded the intended protection of the Act.

Other statutory arguments, however, can be mustered in opposition to the *Rutland Court Doctrine* and the court's conclusion in the instant case. The history of the Wagner Act, the climate in which it was passed, and the express words of the statute itself indicate that its purpose was to protect employees from the unfair practices of employers resulting from their superior bargaining position. A prima facie case is made against any action which attempts to protect the employee from his labor organization. Passed prior to the split in the American labor movement, the Wagner Act did not give "to the Board any power to supervise union membership or deal with union practices. . . . ."[18] In support of this contention the court in *Aluminum Co. v. NLRB*[19] said, "It strains the imagination to see where in the Act Congress has intended that discharges made pursuant to a valid union security contract should in themselves constitute an unfair labor practice." Furthermore, the employer, to protect himself, might refuse to honor requests for discharges by the union without first insisting on at least a cursory investigation into the facts of the case. In light of the already stated purpose of the legislation, the Act could not have been intended to permit employer interference with internal union activities. Finally, Congress was advised of past restrictive union practices, and failed to provide definite measures in the Act for the prevention of such practices or the solution of problems resulting from them. This might be said to indicate a deliberate intent not to deal with these problems in the Wagner Act.

It seems impossible to reach a conclusive result solely on the basis of objective statutory construction. Furthermore, the conflicting policy arguments cannot be resolved within the framework of the Wagner Act. The plight of the employer has been exaggerated,[20] but no one can deny the essential unfairness in making him suffer for the union's wrong and in forcing him at his peril to judge between licit and illicit union-demanded discharges. Moreover, the *Rutland Court Doctrine* entails certain results clearly objectionable to organized labor: 1) employer interference in internal union activities, and 2) a valid basis for objection to the closed-shop. On the other hand, if employees could lawfully be discharged for dual union activity, then once a union obtained a closed-shop contract, it could maintain itself in perpetuity by securing the discharge of each employee who evinced the desire to have a different representative.

Prior to the passage of the Labor-Management Relation Act of 1947, certain stop-gap solutions to the problem had been proposed. In his dissent in the *Wallace* case, Mr. Justice Jackson suggested that the Board, as a procedural measure, before certifying the winning union in an election as bargaining repre-

[18] Mr. Justice Jackson dissenting in Wallace Corp. v. NLRB, 323 U.S. 248, 268 (1944).

[19] 159 F. 2d 523 (C.C.A. 7th, 1946).

[20] See, for example, Dodd, op. cit. supra note 12. At its worst, the decision in the instant case would have forced employers to provide in their contracts with unions that they would not honor requests for discharges of certain employees under a closed-shop contract if they had reason to believe that dual unionism motivated the union's expulsion.

sentative, should require the union to agree to a policy of no reprisals against the opposing union. A violation of such an agreement would result in decertification. This suggestion was open to the criticism that after the victorious union had obtained the discharge of employees favoring the rival union, their position was secure, and they were no longer concerned with certification since they could achieve recognition through their economic power. A compromise solution would have been for the Board to confine its order to reinstatement, dispensing with the requirement of back pay to prevent employer financial liability in a situation for which he was not responsible. Of course, the effect of this remedy would have been to transfer the burden of inter-union strife to an individual less able to bear it—the employee, whose only error lay in assuming that he could exercise the rights given to employees by Congress in the Wagner Act without retaliation. The individual employee could sue the union in a private action[21] but in most cases he would not be successful since dual unionism is a customary ground for expulsion in union constitutions and by-laws.[22]

In essence it is an employee-union and not an employer-employee problem, and liability should be placed where it rightly belongs—on the labor organization which is directly responsible for the conduct deemed contrary to the intent of Congress.[23] Certainly the field was one which invited progressive legislative reform.

Whether Section 8(a)(3) of Title I of the Labor-Management Relations Act of 1947,[24] which abolishes the closed-shop and severely limits the union shop, has created more serious problems in mooting this one, should soon become evident. In the meantime, the Supreme Court has granted certiorari in the instant case,[25] and its analysis should aid in evaluating the new labor law.

[21] Leo v. Local Union No. 612, 174 P. 2d 523 (Wash. Sup. Ct., 1946).

[22] Chamberlain, The Judicial Process in Labor Unions, 10 Brooklyn L. Rev. 145 (1940). The American Law Institute suggests that dual unionism is a reasonable cause for expulsion from a union. Rest., Torts § 810(b) (1939).

[23] Section 8(b)(2) of Title I of the Labor-Management Relations Act, 1947, enacted over presidential veto on June 23, 1947, makes it an unfair labor practice for a labor organization or its agents ". . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C.A. § 158(b)(2) (1947).

[24] 29 U.S.C.A. § 158(a)(3) (1947). This section contains a proviso "That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . ." H.R. 3020, 80th Cong. 1st Sess. (Pub. L. No. 101, June 23, 1947). It is interesting to note that in the conference report accompanying the Labor-Management Relations Act of 1947 the Senate-House conferees indicated that the new statute does not outlaw union restrictive membership practices, but merely deprives a union pursuing such practices from securing the discharge of an employee for such reasons. Conference Report, H.R. 510, 80th Cong. 1st Sess. at 41 (1947).

[25] 67 S. Ct. 1305 (1947).