VALIDITY OF OPEN-SHOP CONTRACT PROVISIONS FOR UNION PREFERENCES AND SUPERSENIORITY

On October 17, 1946 Cutler-Hammer, Inc., and Lodge No. 1061 of the International Association of Machinists entered into a contract which set up preferences for union members in hiring, in laying off men with less than five years' seniority, in laying off men with equal seniority of over five years, and in transfers from night to day shifts. The contract also provided that departmental committeemen, shop committeemen, members of the bargaining committee, and other union officers should head the seniority lists in their respective departments regardless of how long they had been employed. The contract did not, however, provide for a closed shop. The employer contended that clauses establishing preferences and super-seniority would operate to encourage union membership, and in the absence of a closed- or union-shop provision in the contract would constitute unfair labor practices. An action was brought in the Circuit Court of Milwaukee County for a declaratory judgment upon the legality of the disputed clauses. The court said that under the Wisconsin Employment Peace Act[1] an employer may lawfully encourage union membership only by means of a closed-shop agreement, but held that the clauses in question, although clearly encouragements of union membership, could nevertheless be validated by a referendum of Cutler-Hammer employees conducted according to the terms of the closed-shop proviso of the WEPA. In effect this was a holding that even though there was no closed-shop contract these clauses fell within the proviso. *Cutler-Hammer, Inc. v. International Association of Machinists.*[2]

This decision is perhaps symptomatic of a widespread contemporary change in attitude toward industrial relations policy. Under the Wagner Act[3] the emphasis was on unfair employer practices; the prohibition against encouraging or discouraging union membership was aimed at efforts by employers to influence their employees' choice of collective bargaining representatives rather than at contractual concessions made to unions in the course of genuine collective bargaining. The instant case suggests that we may expect a judicial tendency to reinterpret the language of the prohibition of Section 8(3) of the Wagner Act incorporated in Section 8(a)(3) of the Labor-Management Relations Act[4] in accordance with the spirit of the new law rather than with the practice under the old law.[5]

The significance of this particular case lies in the similarity of the anti-discrimination provision of the Wisconsin statute to Section 8(a)(3) of the LMRA.

[1] Wis. Stat. (Brossard, 1943) §§ 111.01–111.19.

[2] 20 L.R.R.M. 2522 (1947).

[3] National Labor Relations Act, 49 Stat. 449–57 (1935), 29 U.S.C.A. §§ 151–66 (1940).

[4] 61 Stat. 260 (1947), 2 U.S.C.A. § 251 (Supp., 1948); 29 U.S.C.A. §§ 141–44, 151–67, 171–82, 185–88, 191–97 (Supp., 1948); 50 U.S.C.A. § 1509 (Supp., 1948).

[5] See H. R. 245, 80th Cong. 1st Sess., at 18 (1947), which decries the tendency of the Board and the courts to give "far-fetched" meanings to words of the Act.

Both laws prohibit encouragement or discouragement of union membership by discrimination in regard to hiring, tenure, or in terms or conditions of employment; both contain provisos which except one type of discrimination—in the Wisconsin law the "all-union" shop, and in the LMRA the union shop; and both require validation by employee referendum of contracts excepted by the proviso.[6] If, then, this decision that union preferences and superseniority are "encouragements" of union activity can be taken as indicating the current trend, it may forecast similar holdings under the LMRA; and if this happens, it is possible that other courts going this far may refuse to find that such "encouragements" are saved by the union-shop proviso. A glance at past practice under the Wagner Act with respect to preference provisions and superseniority in collective agreements may help in determining whether such results are probable.

A conclusion that union preferences which do not amount to a union-shop

[6] "It shall be an unfair labor practice for an employer individually or in concert with others:

(c) To encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least three-quarters of the employes voting (provided such three-quarters of the employes also constitute at least a majority of the employes in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. Such authorization of an all-union agreement shall be deemed to continue thereafter, subject to the right of either party to the all-union agreement to request the board in writing to conduct a new referendum on the subject." Wis. Stat. (Brossard, 1943) § 111.06(c).

"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 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 section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) 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; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. . . ." Labor Management Relations Act, 1947, § 8(a)(3).

These sections are very similar to the National Labor Relations Act § 158, on which they are modeled. "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 sections 151–166 of this title 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 sections 151–166 of this title 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 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made." 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (1940); Christoffel v. Wisconsin Employment Relations Bd., 243 Wis. 332, 10 N.W. 2d 197 (1943); Appleton Chair Corp. v. United Brotherhood of Carpenters & Joiners, 239 Wis. 337, 1 N.W. 2d 188 (1941); Lampert, The Wisconsin Employment Peace Act, 1946 Wis. L. Rev. 193 (1946).

agreement constitute unlawful discrimination ignores the background of the prohibition against encouragement of union membership. In the Wagner Act this prohibition was not intended to invalidate union-security provisions in collective-bargaining contracts. It was rather designed to prevent an employer from aiding the union which he favored to win bargaining rights in the unit. Accordingly, preferences such as those in the Cutler-Hammer contract were never attacked under the old section. Under the usual rule of statutory interpretation, then, the language of Section 8(a)(3) which was re-enacted unchanged from Section 8(3) should not be construed now to cover matters not previously thought to fall within it.[7]

Nevertheless the preferences, although unobjectionable under the Wagner Act, do not appear so innocent in the light of the present policy of "protecting" employees against their unions as well as against employers. Such clauses do smack of discrimination; for instance, nobody would deny that if preferences in hiring and lay-offs were given to non-union workers the practice would fall squarely within the prohibitions of both Section 8(3) and Section 8(a)(3). By parity of reasoning, it therefore might be argued that the allowing of such preferences to union members would also be discrimination—although the parallelism between the two situations is not close because the realities underlying them are quite different. And in fact some analogical support for the instant decision may be found in cases under the Wagner Act. For example, even under a closed-shop contract employers could not exert influence upon employees for or against unionism or a particular union.[8] In the absence of a closed-shop provision discharges for refusal to join the union or to pay dues were held to be unfair labor practices.[9] And an employer could take no steps to favor one union over its competitor. He could not grant passes to organizers of one union or make his property available for its organizational activities while denying such privileges to another.[10] In the absence of a valid closed or union shop, therefore, it is arguable that on precedent an employer may do nothing to favor union employees

[7] See 93 Cong. Rec. 6460 (June 3, 1947).

[8] A valid closed-shop agreement did not justify discharges for working for a change in the collective-bargaining representative. Local 2880, Lumber & Sawmill Workers Union v. NLRB, 158 F. 2d 365 (C.C.A. 9th, 1946); In the Matter of Ansley Radio Corp. and Local 1221 United Electrical & Radio Workers of America, CIO, 18 N.L.R.B. 1028 (1939). Nor did a closed-shop contract protect an employer who discharged an employee for testifying against the contracting union before the NLRB. NLRB v. American White Cross Laboratories, 160 F. 2d 75 (C.C.A. 2d, 1947). And closed-shop contracts with inappropriate or company-aided bargaining agents were held invalid. NLRB v. Graham, 159 F. 2d 787 (C.C.A. 9th, 1947); In the Matter of Dow Chemical Company and United Mine Workers of America, District No. 50, 13 N.L.R.B. 993 (1939).

[9] In the Matter of American Car and Foundry Co. and Preston Walter Roper, 66 N.L.R.B. 1031 (1946); Sperry Gyroscope Co. v. NLRB, 129 F. 2d 922 (C.C.A. 2d, 1942).

[10] In the Matter of American-West African Lines, Inc. and Marine Engineers' Beneficial Ass'n, 21 N.L.R.B. 691 (1940); In the Matter of Waterman S.S. Corp. and National Maritime Union of America, 7 N.L.R.B. 237 (1938), aff'd sub nom. NLRB v. Waterman S.S. Corp., 309 U.S. 206 (1940).

over non-union employees; and if this argument is valid, it might reasonably be concluded that granting of the preferences in the instant case was an unfair labor practice.

Even if the courts should follow the *Cutler-Hammer* decision in holding preferences to be unlawful encouragements, they may not necessarily regard such preferences as subject to employee validation under the union-shop proviso of Section 8(a)(3). Validation of preferences found not to amount to a union shop might be denied upon the theory that the proviso excepts from the general condemnation of Section 8(a)(3) only the specific discrimination named therein. Wagner Act cases should not be regarded as precedents upon this point, since they were decided in a wholly different context—that of a statute aimed entirely at employer practices.[11] In practice preference clauses may operate to produce something like a preferential shop, a form of union security not far removed from the union shop, in which case the validation proviso might be applied. While this may be an unlikely eventuality under the type of clause involved in the Cutler-Hammer agreement—particularly if, as in that situation, many non-union employees have many years' seniority—it is a possibility not to be ignored. It is also possible that a court holding systematic encouragements approaching a union shop validable under the proviso might reason that, despite the express wording of the proviso, similar validation of lesser preferences should be permitted.

There is little authority as to whether establishment of superseniority for union officers in an open shop falls within the same category as union preferences. "Straight" seniority, which does not discriminate between union and non-union employees, has been much discussed by courts and writers,[12] but superseniority, though frequently contracted for in mass-production industries, has seldom been mentioned.[13]

[11] There were, however, cases under the Wagner Act which held that employers could show no favoritism other than that called for in their collective-bargaining agreement. In the Matter of American Car and Foundry Co. and Preston Walter Roper, 66 N.L.R.B. 1031 (1946); In re American-West African Lines, Inc. and Marine Engineers' Beneficial Ass'n, 21 N.L.R.B. 691 (1940); In re Ansley Radio Corp. and Local 1221, United Electrical & Radio Workers of America, CIO, 18 N.L.R.B. 1028 (1939). "Because of the precise wording of the proviso [to Section 8(3)] the Board has held that it does not permit an employer to impose discriminatory conditions of employment other than membership in a labor organization." 5 Ann. Rep. N.L.R.B. 40 (1940).

[12] See Elder v. New York Central R.R., 152 F. 2d 361 (C.C.A. 6th, 1945); Primakow v. Railway Express Agency, 56 F. Supp. 413 (Wis., 1943); Hartley v. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 283 Mich. 201, 277 N.W. 885 (1938); Seniority Rights in Labor Relations, 47 Yale L.J. 73 (1937); Christenson, Seniority Rights under Labor Union Working Agreements, 11 Temp. L.Q. 355 (1937).

[13] Superseniority has been involved in litigation under the veterans' seniority provisions in Selective Service Act, 54 Stat. 885, 50 U.S.C.A. App. § 301 et seq. (1940), amended 60 Stat. 341, 50 U.S.C.A. § 301 et seq. (Supp., 1947). A veteran of World War II is entitled to step back on the ladder of seniority at the same point he would have occupied had he never left the employ of the company to enter the service. He is entitled to neither more nor less. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946); Trailmobile Co. v. Whirls, 67 S. Ct. 982 (1947); Kirkman v. MacMorland, 71 F. Supp. 15 (Pa., 1947); Feore v. North Shore Bus

However, the same argument adduced above with respect to preferences may be made against the position that superseniority under the circumstances of the *Cutler-Hammer* case is unlawful discrimination. The prohibition of Section 8(3) re-enacted in Section 8(a)(3) was not aimed at, and has never been interpreted as aimed at, union-security devices. It is nevertheless conceivable that courts may find that non-union employees are in fact discriminated against where there is superseniority, since this device sets a premium on joining the union to secure special advantages. Only union officials may enjoy them, and one cannot be a union official without joining the union. But this argument seems far-fetched, and is not compelling in light of the practical need for superseniority in successful administration of a collective-bargaining agreement. Indeed it seems clear that, as a matter of policy, superseniority should not be prohibited as an unfair labor practice. While the privileges of superseniority cannot guarantee responsible union leadership—a matter with which the membership must be concerned—such advantages make the duties of leadership more attractive to capable men who might otherwise forego the holding of union offices. Moreover, superseniority by encouraging continuity of experienced union leadership contributes substantially to the smooth operation of grievance machinery, the lack of which has in the past been a fertile source of industrial unrest; and it assures the constant contacts necessary for the successful negotiation of future contracts. Therefore continued recognition of superseniority for union officers as lawful might well operate to further the objectives of the LMRA by promoting stability in the collective-bargaining relationship.

THE CHENERY CASE AGAIN

Law in the courts, as the realists insist and most students admit, is not the unchanging, self-consistent body of rules which some might wish it to be. Nevertheless, one of the reigning conventions in the drafting of majority opinions requires that it be given that appearance whenever possible. But occasionally a court finds itself in a position where this convention cannot be served if the court's true opinion is to be voiced, as, for example, when more or less controlling decisions and the court's inclination in the instant case cannot be harmonized.

No court, regardless of its own opinion, will hear the merits of a dispute which it considers already finally adjudicated between the parties.[1] Courts will,

Co., 68 F. Supp. 1014 (N.Y., 1946), rev'd 161 F. 2d 552 (C.C.A. 2d, 1947); Droste v. Nash-Kelvinator Corp., 64 F. Supp. 716 (Mich., 1946). In all these cases the propriety of superseniority for union officials was assumed and often served as an argument for similar provision for veterans. One case held directly that a veteran is bound by the superseniority provisions of a contract negotiated in his absence. Gauweiler v. Elastic Stop Nut Corp., 162 F. 2d 448, 451 (C.C.A. 3d, 1947). This case is distinguishable from the instant case in that a closed-shop contract was involved.

[1] For a close case turning on this seemingly elementary principle, see Deposit Bank v. Frankfort, 191 U.S. 499 (1903).