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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

CLOSED SHOP AGREEMENTS

The closed shop[1] and activities by unions designed to achieve it have probably received in the past more criticism from the courts than any other labor device or activity.[2] Long after unionization and other forms of collective agreements received the approval of the courts, the closed shop often continued under the

1. For the purposes of this article there is no significant difference between the closed and the union shop and so, for purposes of brevity, the term closed shop alone will be used.

2. Fumerton, *The Collective Bargaining Agreement and its Legal Effects* (1943) 18 WASH. L. REV. 1-5; LANDIS, CASES ON LABOR LAW (1934) 1-37.

judicial ban as a device to interfere with employment and in restraint of trade.[3] Only when the economic advantages to employers of industrial peace and stability in labor relations flowing from closed shop agreements became apparent did the courts begin to change their attitudes toward such agreements.[4]

The N.L.R.A.[5] gave a great impetus to the acceptance of the closed shop as a legitimate form of employer-employee relationship. The Act itself was not designed to encourage closed shop agreements as appears from the committee report:

> ". . . The bill does nothing to facilitate closed-shop agreements or to make them legal in any state where they may be illegal; it does not interfere with the *status quo* on this debatable subject, but leaves the way open to such agreements as might now legally be consummated, with two exceptions. . ."[6]

But the statute, aside from its effect of encouraging all collective bargaining, was a definite legislative declaration setting out in permanent form[7] the new attitude toward closed shop agreements and so guaranteed that this attitude of acceptance would continue.

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3. Despres, *The Collective Agreement for the Union Shop* (1939) 7 U. OF CHI. L. REV. 24, 33-41. The treatment of the courts, of course, was not uniform. Some courts, through hostility to labor organizations, developed rather extreme doctrines of "monopoly" as applied to closed shop agreements. The New Jersey courts did this in a long line of decisions exemplified by Brennan v. United Hatters of North America, 73 N. J. LAW 729, 65 Atl. 165 (1906); Upholsterers' Int'l. Union v. Essex Reed & Fibre Co., 12 N. J. MISC. 637, 174 ATL. 207 (1934). Other courts, having a more enlightened attitude toward labor organizations, held closed shop agreements valid, as by 1905 the N. Y. court had done in Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905). The courts have often considered such factors as whether the union was open or closed as in Shinsky v. O'Neil, 232 Mass. 99, 121 N. E. 790 (1919) and Wilson v. Newspaper & Mail Delivers' Union, 123 N. J. Eq. 347, 197 Atl. 720, 721 (1938); and the extent of closed shop agreements in the district by the union involved, Polk v. Cleveland Ry., 20 Ohio App. 317, 151 N. E. 808 (1925); McCord v. Thompson-Starrett Co. 129 App. Div. 130, 113 N. Y. Supp. 385 (1908), *aff'd*, 198 N. Y. 587, 92 N. E. 1090 (1910). A closed union and a large percentage of other closed shop agreements in the particular industry being factors that influence the courts toward a holding of restraint of trade. Note (1940) 49 YALE L. REV. 755, illustrates the operation of these rules and the dangers of their use by anti-labor judges.

4. Despres, *The Collective Agreement for the Union Shop* (1939) 7 U. OF CHI. L. REV. 24, 29-30.

5. 49 STAT. 449-457 (1935), 29 U. S. C. §§ 151-166 (1940).

6. Sen. Rep. 573, 74th Cong., 1st Sess. (1935) 11-12.

7. Sec. 8 (3) "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 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." 49 STAT. 449-457 (1935), 294 S. C. § 151-166 (1940).

Requirements of a Valid Closed Shop Agreement

In order that a valid closed shop agreement may be negotiated under the N.L.R.A., it is necessary that the provisions of Section 8(3) be strictly followed. That provision[8] requires: (1) that the union making the agreement must not be established, maintained or assisted by any unfair labor practice; (2) that the union be the representative of the majority of the employees as provided for by Section 9(a) of the N.L.R.A. and (3) that the preceding two conditions existed when the contract was made.

The usual types of cases in which the validity of closed shop agreements arise are (1) where the employer has enforced the agreement and fired non-union employees or done other acts that without a closed shop agreement would be unfair labor practices; or (2) where a union not a party to the agreement is attempting to secure certification as bargaining agent. Obviously, it is the party asserting the invalidity of the agreement who bears the burden of proving the fact.[9]

The first condition precedent for a valid closed shop agreement is violated when the agreement is made with a company-dominated union.[10] Such agreements have been considered by the courts and the Board[11] and have uniformly been held invalid.[12] When proceeding beyond the company-dominated union to cases where the maintenance and assistance is not quite so flagrant, the ground for invalidating a closed shop clause becomes less certain. For this purpose it would be well to look for factors which commonly lead to a union's being adjudged company-dominated.[13] For in a particular case sufficient of these factors might be present to make the union "maintained or assisted" for the purpose of invalidating a closed shop agreement, and yet not be sufficient to make it a dominated union subject to being disestablished under section 8(2).[14]

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8. See note 7 *supra.*

9. Sperry Gyroscope Co. Inc. v. N.L.R.B., 129 F. (2d) 922, 928 (C.C.A. 2nd, 1942); N.L.R.B. v. Mason Mfg. Co., 126 F. (2d) 810, 813 (C.C.A. 9th, 1942).

10. Section 8 (2) of the N.L.R.A. provided that it is an unfair labor practice "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 49 STAT. 449-457 (1935), 29 U. S. C. § 151-166 (1940).

11. National Labor Relations Board.

12. Virginia Electric & Power Co. v. N.L.R.B., 319 U. S. 533, 63 Sup. Ct. 1214 (1943); Sperry Gyroscope v. N.L.R.B. 129 F. (2d) 922 (C.C.A. 2nd, 1942); Corning Glass Works v. N.L.R.B., 118 F. (2d) 625 (C.C.A. 2nd, 1941); N.L.R.B. v. J. Greenebaum Tanning Co., 110 F. (2d) 984 (C.C.A. 7th, 1940); N.L.R.B. v. Pacific Greyhound Lines, 106 F. (2d) 867 (C.C.A. 9th, 1939); Hamilton-Brown Shoe Co. v. N.L.R.B., (United Shoe Workers of America, Local 125, Intervener) Boot & Shoe Workers Union v. N.L.R.B., 104 F. (2d) 49 (C.C.A. 8th, 1939); Ronrico Corp. and Puerto Rico Distilling Co., 53 N.L.R.B. 1137 (1943); Lancaster Iron Works, Inc., 20 N.L.R.B. 738 (1940); Auburn Foundry, Inc., 14 N.L.R.B. 1219 (1939).

13. Titan Metal Mfg. Co. (Titan Employees Protective Ass'n, Intervenors) v. N.L.R.B., 106 F. (2d) 254, 261-263 (C.C.A. 3rd, 1939); Crager, *Company Unions Under the N.L.R.A.* (1942) 40 MICH. L. REV. 831, 839-49; Notes (1941) 27 VIR. L. REV. 359, 367-375.

14. 49 STAT. 452 § 8 (2) (1935), 29 U. S. C. § 158 (2) (1940).

This seems to be the position of the Supreme Court in *International Ass'n v. N.L.R.B.*[15] This test is, perhaps broader than that provided for by the statute which condemns acts of assistance "defined in this Act as an unfair labor practice."[16] But the necessities of the situation require this extension of the literal language of the statute because, as has been frequently pointed out by the courts, slight indications of an employer's attitude or action of supervisory employees may lead to drastic changes in the attitude of the employees, who depend for their sole livelihood on their continued employment.[17]

This result is also caused by the fact that the Board will not order the disestablishment of an organization affiliated with a national body, even though under like circumstances such an order would be issued to a company union.[18] Therefore, when a nationally affiliated union is involved, as was true of the *International Ass'n case,* there can be no finding of company domination, but the factors that would lead to such a holding must be considered to determine the independence of the union from employer control or assistance for the purposes of section 8(3).

Assistance may be of two major types: (1) that which leads to the establishment of the union as majority representative,[19] or (2) that which helps to maintain membership in a union which formerly had obtained an unassisted majority. In *International Ass'n v. N.L.R.B.*[20] the Union, affiliated with the A.F. of L. was established and a majority membership in the unit secured by the employer acting through supervisory employees. A closed shop agreement made after this activity was held void. In *N.L.R.B. v. Electric Vacuum Cleaner Co.*,[21] the Unions, A.F. of L. affiliates, formerly had an uncoerced majority and when a C.I.O. union began to make gains in the plant, the employer assisted the affiliates by personally encouraging membership in them and also by a shutdown at the affiliates' request. A closed shop agreement subsequently negotiated was held invalid. In *N.L.R.B. v. John Engelhorn & Sons,*[22] the A.F. of L. affiliate was a *bona fide* union, but was later assisted in acquiring members by a drive carried on by supervisory employees and by threats of a shutdown if the C.I.O. was successful in its drive. The closed shop agreement then negotiated with the A.F. of L. union was held invalid. In

15. International Ass'n v. N.L.R.B., 311 U. S. 72, 61 Sup. Ct. 83 (1940).

16. BUFFORD, WAGNER ACT EMPLOYEE AND EMPLOYER RELATIONS, § 194, p. 549.

17. Sperry Gyroscope Co., Inc. v. N.L.R.B., 129 F. (2d) 922, 927 (C.C.A. 2nd, 1942); N.L.R.B. v. Link-Belt Co., 311 U. S. 584, 588, 61 Sup. Ct. 358, (1941); H. J. Heinz Co. v. N.L.R.B., 311 U. S. 514, 520, 61 Sup. Ct. 320, (1941); N.L.R.B. v. Moench Tanning Co., 121 F. (2d) 951, 953 (C.C.A. 2nd, 1941).

18. Notes (1941) 27 VA. L. REV. 359, 366.

19. This type of assistance includes actions ranging from inducing the establishment of a union, to aiding a minority union to obtain a majority representation.

20. International Ass'n v. N.L.R.B., 311 U. S. 72, 61 Sup. Ct. 83 (1940).

21. N.L.R.B. v. Electric Vacuum Cleaner Co., 315 U. S. 685, 62 Sup. Ct. 846 (1942).

22. N.L.R.B. v. John Engelhorn & Sons, 134 F. (2d) 553 (C.C.A. 3rd, 1943).

this last case[23] the C.I.O. Union was claiming a majority representation at the same time, but the employer ignored this and immediately negotiated the closed shop agreement with the A.F. of L. affiliate. The court held that the speed with which the company negotiated the contract was evidence of assistance to the contracting union.[24] It is to be noted that this is one of the factors which often lead a court—in conjunction with other matters—to uphold a Board determination of company domination, but it is not strictly an unfair labor practice.

If the labor organization is found free from employer assistance, only the first hurdle to establishing a valid contract has been surmounted. Compliance with the second requirement must be shown by proving that the organization represented a majority of the employees for purposes of making the agreement. Section 9(a)[25] which governs this matter refers to "Representatives designated or selected for the purposes of collective bargaining." Some courts have intimated that mere membership in a union is not sufficient to satisfy this requirement; but that it must appear either: (1) that membership in the union by its constitution or by-laws automatically designated the union as bargaining agent,[26] or (2) that a specific authorization for bargaining was given by the employer to the union.[27] Some courts have intimated that they would require a specific authorization to the representatives to negotiate a closed shop agreement.[28] But this requirement seems too extreme. Closed shop agreements have become sufficiently common that it might be reasonably expected that the bargaining representatives might attempt to secure such a clause in an agreement if it seemed possible to do so. And it would place a great burden on the union representatives in bargaining to have to stop in the middle of negotiations to secure the proper authorization before proceeding.

If the bargaining representatives have been properly authorized, it is necessary for this authorization to have been given by a majority of the employees in the appropriate unit.[29] It is not necessary that the Board should have certified the

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23. See note 21 *supra.*

24. N.L.R.B. v. John Engelhorn & Sons, 134 F. (2d) 553, 556 (C.C.A. 3rd, 1943). This factor was also noted and given the same effect in Hamilton-Brown Shoe Co. v. N.L.R.B. (United Shoe Workers of America, Local 125, Intervener), 104 F. (2d) 49 (C.C.A. 8th, 1939), where there was negotiation of a closed shop agreement with a company-dominated union.

25. 49 STAT. 453, 29 U. S. C. § 159 (a).

26. N.L.R.B. v. Hollywood-Maxwell Co., 126 F. (2d) 815, 819-820 (C.C.A. 9th, 1942). In this case members of the Union executed signed revocations of the power of the Union to bargain for them, but they continued to be members of the Union. The court held that the Union then had no power to negotiate for members who had revoked.

27. See N.L.R.B. v. Mason Mfg. Co. 126 F. (2d) 810, 813 (C.C.A. 9th, 1942).

28. See note 27 *supra.*

29. Eastwood-Nealley Corp. v. International Ass'n of Machinists, Dist. No. 47, 124 N. J. Eq. 274, 1 Atl. (2d) 477 (1938); N.L.R.B. v. National Motor Bearing Co., 105 F. (2d) 652, 659-660 (C.C.A. 9th, 1938).

union for the negotiation of a valid closed shop agreement,[30] but the majority representation must exist in fact. The employer in making an agreement with a union not certified by the N.L.R.B. at the time does so at his peril. For if the majority of the union is doubtful, if Board investigation of the union is pending,[31] or if a majority claims of a rival union have been presented,[32] then the employer is on notice of a dispute as to majority representation and no agreement negotiated while this dispute continues is valid.

Compliance with the two conditions above discussed must have existed at the time the agreement was made.[33] The fact that the labor organization at some future date becomes an unassisted organization and/or acquires a majority representation would not relate back to validate the closed shop agreement made without existence of these two conditions. It is obvious that a labor organization having a closed shop agreement will soon acquire a majority of the employees.

If any of the three requirements of validity of the agreement are not present, the agreement is void. An employer firing for failure to join or maintain membership in the union will be guilty of discrimination under sections 8(1) and 8(3) of the Act. The agreement would be no bar to having another election to determine the proper bargaining agent.

If a valid closed shop agreement has been negotiated, an agreement with representatives of an uncoerced majority of employees at the time made, then a relationship has been established which allows the employer to take certain actions otherwise condemned by the Act as unfair labor practices and the employees are henceforth restricted in their freedom to join, to refrain from joining or to change unions.

Consequences of a Valid Closed Shop Agreement

Assuming the negotiation of a valid closed shop agreement, the employer has the right to demand membership in the union as a condition of employment.[34] It should be noted that the exercise of this right by the employer is conditioned on his giving notice of the existence of the closed shop agreement to his employees before any actions are taken to enforce it.[35] For otherwise the employee might refuse to join and think that he was exercising his rights under the Act.

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30. M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, 23 F. Supp. 11 (D. C. Ore., 1938), *aff'd*, 101 F. (2d) 938 (C.C.A. 9th, 1939).

31. Malden Electric Co., 33 N.L.R.B. 78 (1941); Imperial Lighting Products Co., 41 N.L.R.B. 1408 (1942); Boston Store of Chicago, Inc., 37 N.L.R.B. 1140 (1941); General Motors Corp., Frigidaire Division, 37 N.L.R.B. 616 (1941).

32. N.L.R.B. v. John Engelhorn & Sons, 132 F. (2d) 553 (C.C.A. 3rd, 1943); Fine Art Novelty Corp., 54 N.L.R.B. 480 (1944); Philip J. Byer d/b/a Ideal Chair Mfg. Co., 36 N.L.R.B. 844 (1941); Columbus & Southern Ohio Electric Co., 36 N.L.R.B. 386 (1941).

33. N.L.R.B. v. John Engelhorn & Sons, 134 F. (2d) 553, 557 (C.C.A. 3rd, 1943); N.L.R.B. v. Mason Mfg. Co., 126 F. (2d) 810, 813 (C.C.A. 9th, 1942); Warehousemen's Union v. N.L.R.B., 121 F. (2d) 84, 87 (App. D. C. 1941).

34. M & M Wood Working Co. v. N.L.R.B., 101 F. (2d) 938, 940 (C.C.A. 9th, 1939); N.L.R.B. v. Lion Shoe Co., 97 F. (2d) 448, 457 (C.C.A. 1st, 1938).

35. Electric Vacuum Cleaner Co., 8 N.L.R.B. 112, 122 (1939).

The employer may discharge for simple failure to join the union,[36] or for individual shift of union membership.[37] The employer may not fire merely because employees advocate changing union membership[38] nor because they urge new workers not to join the union.[39] As long as the individual workers maintain membership in good standing in the union, the employer has no grounds for taking action against them.[40]

After the agreement is made, the employer may give more aid and assistance to the union than before; though the extent of this has not been defined by the courts or the Board. He probably may refuse to allow rival union representatives to have access to the place of business or to employees and allow such privileges to the bargaining union. In the *Waterman Steamship Corp.* case[41] the Board and court held this an unfair labor practice under an agreement for preferential hiring, but based this only on the fact that it would prevent a fair election. This would not be involved where a legitimate closed shop agreement had been negotiated.

A much more complicated problem which arises is that which occurs when there is a shift of majority representation from the bargaining union to another during the term of the closed shop agreement. Should the agreement be held a bar to certification of representatives? Should an election be held to determine the present desires of the employees as to bargaining representatives? Or should the employer be allowed to fire the employees leaving the bargaining union even though they represent a majority of the employees?

To determine the answers to these questions, it is necessary to notice two important and in this case seemingly opposed policies behind the N.L.R.A.: (1) The desire to establish stability in industrial relationships and (2) the desire to enforce the democratic right of allowing the majority to be represented by a union of their own choosing.

Collective bargaining should bring stability into industrial relations and decrease industrial strife. This would seem to be accomplished by enforcing collective bargaining agreements when they are validly made. A closed shop agreement would be a particularly effective device to bring about stable employer-employee relationships.[42] But if a rival union enters the field and a majority of the employees change their affiliation to that union, serious doubt arises as to whether enforcing the closed shop agreement with the first union leads to stability of relationship. In New York, the Court of Appeals in the *Triboro* case[43] refused to allow

36. Aeolian-American Corp., 8 N.L.R.B. 1043 (1938); United Fruit Co., 12 N.L.R.B. 404 (1939); Sbicca, Inc., 30 N.L.R.B. 60 (1941).
37. United Fruit Co., 12 N.L.R.B. 404 (1939).
38. Ansley Radio Corp., 18 N.L.R.B. 1028, 1042-43 (1939).
39. Electric Vacuum Cleaner Co., 18 N.L.R.B. 591 (1939).
40. Ansley Radio Corp., 18 N.L.R.B. 1028 (1939).
41. N.L.R.B. v. Waterman Steamship Corp., 309 U. S. 206, 226, 60 Sup. Ct. 493, 503 (1940).
42. ROSENFARB, THE NATIONAL LABOR POLICY AND HOW IT WORKS (1940) 270.
43. Triboro Coach Corp., v. N. Y. State Labor Relations Board, 286 N. Y. 314, 36 N. E. (2d) 315 (1941).

the state board to certify the second union as the bargaining agent where there was a subsisting closed shop agreement and this decision was immediately followed by a strike of the members of the second union.[44] The result of this case certainly did not lead to stable industrial relations.

The closed shop agreement also adds to the stability of the union because such an agreement gives it a stable membership and income, makes more easy relationship with the employer, because there is then no worry of his discouraging unionization, and because friction between union and non-union workers is eliminated. Yet this same stability may lead to lack of participation by the general membership of the union and to a corrupt, autocratic leadership.

Collective bargaining under the N.L.R.A. is intended to be not only a stabilizing, but also a democratic process whereby only representatives of the majority can make binding agreements as to terms and conditions of employment. Too often before this Act was enacted conditions of employment were determined only by the employer, or with the small group of employees with which he was willing to deal, with no participation by the mass of the employees. The Act has changed this to require that the bargaining union must be the representative of the majority of the workers in the unit in order to negotiate a valid agreement.[45] But if this is the only time that a majority representation of the union is required, turnover of workers in the plant or change in economic conditions may lead the majority of the workers in the unit at some later date to desire another union to represent them. If the agreement that was negotiated had a closed shop clause, the problem becomes much more acute. And if coupled with a closed shop provision, there is a clause for automatic renewal of the agreement except on notice, if the agreement remains in effect, the workers will be bound to the union without hope of escape. But what of the employer who had made an agreement with the union and made his calculations of costs and production time on the basis of it. Must he be forced to negotiate a new agreement whenever a majority of the workers desire a change of unions?

In order to solve these problems, one must resort to the basic theory of the collective bargaining agreement. In the past three main theories have been used to justify enforcement of such agreements: (1) custom and usage,[46] (2) agency,[47] and (3) third party beneficiary.[48] Under any of these theories the individual worker could repudiate the collective agreement and make his individual terms with the employer;[49] for a custom may be varied by an express agreement, the third party may waive the terms of the contract made for his benefit; and a principal

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44. New York Times, August 9, 1941.
45. 49 STAT. 45.3 (1935); 29 U. S. C. § 159 (a) (1940).
46. Illinois Cent. Ry. v. Moore, 112 F. (2d) 959 (C.C.A. 5th, 1940).
47. Mueller v. Chicago & N. W. Ry., 194 Minn. 83, 259 N. W. 798 (1935).
48. Yazoo & M. V. R. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931).
49. Note (1942) 56 HARV. L REV. 294, 295; Hamilton, *Individual Rights Arising from Collective Labor Contracts* (1938) 3 Mo. LAW REV. 252.

certainly may repudiate his agent and negotiate for himself.[50] This result is clearly opposed to the policy of the N.L.R.A.

Collective agreements cannot be dealt with adequately using the tools of individualistic contract doctrine.[51] The far-reaching social and economic effects of these agreements prevent their being treated as the private property of the bargaining parties. The collective agreement is, in character, quasi-legislative[52] and sets up normative terms of employment[53] which result from the statutory requirement that the majority bargaining agent shall be the representative of all employees—union and non-union—for the purpose of bargaining as to wages, hours and conditions of employment. The terms and conditions of employment are established by this statutory representative without regard for the desires of non-union workers and can be changed only by expiration or the efforts of a representative who fulfills the requirements of the statute as to majority representation. The normative terms remain in force either: (1) for the period of the agreement or until varied by a new agreement if the parties maintain their ability to negotiate such a new agreement; that is, if the union continues to be majority representative; or (2) for a reasonable time after the negotiation of the agreement if the parties lose their ability to negotiate a new agreement; that is, if the union no longer is majority representative and its representative capacity is properly challenged.

This quasi-legislative or normative effect of the collective agreement has been recognized by the Supreme Court in the *J. I. Case Co.* case[54] and only on such a theory can the actions of the Board be justified when it allows a certification of representatives while a valid agreement is in existence.[55]

Using this approach to the problem of the change of majority representation during the existence of a valid agreement, the two basic policies of the Act, stability and democracy, can both be satisfied. The stability is achieved because the normative terms remain in force for a reasonable period of time, say the one year which the Board now usually requires between the negotiation of the agreement and a new certification.[56] The democracy is achieved by allowing certifica-

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50. Witmer, *Collective Labor Agreements in the Courts* (1938) 48 YALE L. REV. 195, 227, 235.

51. Comment (1944) 9 Mo. L. REV. 260; Notes (1942) 51 YALE L. J. 465, 471.

52. 1 TELLER, LABOR DISPUTES & COLLECTIVE BARGAINING (1940) §§ 154-68; Lenhoff, *The Present Status of Collective Contracts in the American Legal System* (1941) 39 MICH. L. REV. 1109, 1137; Rice, *The Legal Significance of Labor Contracts under the N.L.R. Act* (1939) 37 MICH. L. REV. 693, 695; Witmer, *Collective Labor Agreements in the Courts* (1938) 48 YALE L. J. 195-99.

53. Hoeniger, *The Individual Employment Contract Under the Wagner Act* (1941) 10 FORDHAM L. REV. 14, 35; Comment (1944) 9 Mo. L. REV. 263; Notes (1942) 56 HARV. L. REV. 294, 297; (1941) 50 YALE L. J. 695, 700.

54. J. I. Case Co. v. N.L.R.B., 321 U. S. 332, 64 Sup. Ct. 576, (1944).

55. Comment (1942) 51 YALE L. J. 465, 467.

56. Comment (1942) 37 ILL. L. REV. 43, 47; Pacific Greyhound Lines, 22 N.L.R.B. 111, 131 (1940); Pressed Steel Car Co. Inc., 36 N.L.R.B. 560 (1941); 7 N.L.R.B. Annual Report (1942) 55.

tion after a reasonable period whenever sufficient proof of a change of majority representation is presented.[57]

By looking at several typical situations we can determine the result of applying this quasi-legislative or normative theory. If a petition for representation is made to the Board, or notice of a new majority is given to the employer when an existing agreement is about to terminate or within time for termination, then certification will be allowed and any agreement negotiated by the employer after such notice is not a bar to certification.[58] Normative terms of employment can be made only after a determination of the question of majority representation. In such a case as this where there was a closed shop clause in the old agreement, the Board will usually allow a much less conclusive showing of majority representation as a ground for holding an election.[59]

Where a valid closed shop agreement is in existence and will not terminate or be terminable in the near future, the Board has usually based its decision of refusing or allowing a new election on the length of time that the agreement has been in force. If the agreement is to run for only a year or has not been in force for a year, the Board will usually deny or postpone an election, indulging in a rebuttable presumption of continued majority representation for a year.[60]

But where the agreement has been in force for more than a year and will not terminate within another year, the Board has generally allowed certification or held the contract no defense to charges of unfair labor practices for attempting to enforce the closed shop provision.[61] The Board at first held that the second union certified was "substituted"[62] in the agreement for the first union, thus carrying out the quasi-legislative or normative effect of the collective agreement. But in recent cases the Board has not referred to this theory.

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57. Metro-Goldwyn-Mayer Studios, 7 N.L.R.B. 662, 697 (1938); Volupte, Inc., 22 N.L.R.B. 1029 (1940); Kahn & Feldman, Inc., 30 N.L.R.B. 294 (1941); Willys Overland Motors, Inc., 52 N.L.R.B. 109, 110 (1943); Cramp Shipbuilding Co., 52 N.L.R.B. 309, 311 (1943).

58. Comment (1942) 51 YALE L. J. 465, 467; Comment (1942) 37 ILL. L. REV. 43, 45; 7 N.L.R.B. Annual Report (1942) 55; U. S. Bedding Co., 52 N.L.R.B. 382 (1943); H. D. Oberdorfer, 34 N.L.R.B. 683 (1941); Adolph Weinfeld and Henry Weinfeld, 35 N.L.R.B. 257 (1941); Max Hoffman, 25 N.L.R.B. 311 (1940).

59. Oregon Plywood Co., 33 N.L.R.B. 1234 (1941); Belmont Radio Corp., 27 N.L.R.B. 341 (1940); George W. Borg Corp., 25 N.L.R.B. 481 (1940).

60. See note 56 *supra*. But in Food Machinery Corp., 36 N.L.R.B. 491 (1941) the Board ordered an election after a closed shop agreement had run only 6 months where the original union had become inactive.

61. In these cases elections were ordered by the Board where closed shop agreements were in existence: Presto Recording Corp., 34 N.L.R.B. 28 (1941); National Battery Co., 28 N.L.R.B. 826 (1940); Borg-Warner Corp., 19 N.L.R.B. 538 (1940); M. & J. Tracy, Inc., 12 N.L.R.B. 936 (1939); Pacific Greyhound Lines, 22 N.L.R.B. 111, 131 n. 57 (1940). In Transformer Corp. of America, 26 N.L.R.B. 476 (1940), there was an injunction ordering the employer to hire only members of the bargaining union, but the Board nevertheless ordered an election.

62. M & M Wood Working Co., 6 N.L.R.B. 372 (1938); 1 N.L.R.B. Annual Report (1936) 108; 2 N.L.R.B. Annual Report (1937) 118.

Since the appropriation bill of July 12, 1943[63] for the Board which provided that funds appropriated should not be used in connection with a complaint case arising over an agreement or renewal which had been in existence for three months without complaint being filed, there could be no complaint issued for actions taken under an invalid closed shop agreement unless, under the change made in the statute of 1944,[64] it was made with a company dominated union. But this has no effect on certification cases, for the statute states only that a *complaint* shall not issue. The Board has so held in a number of recent cases.[65]

Conclusion

A closed shop agreement to be valid under the N.L.R.B. must be made only with the representative of an uncoerced and unassisted majority at the time it is made. A valid collective bargaining agreement is quasi-legislative in effect and establishes normative terms of employment which cannot be changed except by the original parties for a reasonable time (usually one year) after they are made. But if the agreement establishing the normative terms has been in existence for more than a year and will not terminate within another year, an election may be held to select a new statutory representative who may negotiate new normative terms.

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63. Title IV, Act of July 12, 1943, Public Law 135, 78th Cong., 1st Sess. 515, "No Part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. . . ."

64. Title IV, Act of June 28, 1944, Public Law 373, 78th Cong., 2nd Sess. A proviso was added "That these limitations shall not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code."

65. Letellier-Phillips Paper Co. Inc., 54 N.L.R.B. 1111, 1113 (1944); California Door Co., 52 N.L.R.B. 68 (1943); U. S. Bedding Co., 52 N.L.R.B. 382 (1943); Max Mordka & Flora Mordka, Co-partners d/b/a Memo Leather Goods Co., 52 N.L.R.B. 625 (1943).