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Discriminatory Practices in Exclusive Hiring Halls

James R. Craig

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NOTES

Discriminatory Practices in Exclusive Hiring Halls

Union executed a collective bargaining contract with a trucking association, the contract containing an exclusive hiring-hall provision whereby the union was to dispatch casual employees to members of the association on a seniority basis, *irrespective of union membership*. Employers seeking casual employees were obligated to call upon the union dispatching service before looking elsewhere.¹ Slater, a union member who had previously used the hiring hall, in this instance secured casual employment with Motor Express, a party to the contract, without obtaining union referral. Subsequently Slater was discharged by his employer on complaint of the union that he had been employed in violation of the referral agreement. The National Labor Relations Board found² that the exclusive hiring-hall provision was illegal per se³ and that Slater's discharge thereunder constituted a violation of the statute⁴ by both the employer and the

¹ The contract provisions relating to hiring of casual employees were as follows:

Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, irrespective of whether such employee is or is not a member of the Union.

Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source.

² The Board's decision and order are reported in Los Angeles-Seattle Motor Express Inc., 121 N.L.R.B. 1629 (1958).

³ This finding was based on the absence in this case of the contract provisions required under the *Mountain Pac.* doctrine. See note 24 *infra* and accompanying text. See also note 30 *infra*.

⁴ The National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U.S.C. §§ 151-66 (1956), provides in relevant part:

Sec. 7. 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any

union.⁵ The Board then ordered, *inter alia*, that the employer and union jointly and severally reimburse *all* casual employees of Motor Express for fees and dues paid by them to the union beginning six months prior to the date of the filing of the charge.⁶ *Held*: (1) Illegal discrimination may not be *inferred* from the face of an exclusive hiring-hall agreement which prohibits discrimination based on union membership and is coupled with no other provisions calling for illegal conduct. (2) The dues reimbursement remedy is not applicable where there is no showing that union membership, fees, or dues have been coerced by reason of an unfair labor practice.⁷ *Teamsters Union v. NLRB*, 365 U.S. 667 (1961).⁸

Hiring halls were developed in industries such as the maritime and construction trades in order to alleviate some of the peculiar hardships to both employees and employers caused by the characteristically sporadic and temporary nature of employment in those industries. The funneling of employment opportunities through a central agency eliminated time-consuming and repetitious job-hunting by individual workmen and provided for those workmen a measure of employment security otherwise unattainable. These arrangements also provided a dependable source of manpower for employers in need of workmen for jobs of limited duration.⁹ Thus, there is little question that

term or condition of employment to encourage or discourage membership in any labor organization

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or 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

⁵ As the charges against the union and company were not filed within six months of the execution of the contract in question no finding was based on the execution of the contract. 121 N.L.R.B. 1629, 1630 n.2 (1958). See Section 10(b) of the NLRA, 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(b) (1956).

⁶ This finding was based on the application of the *Brown-Olds* remedy. See text accompanying note 31 *infra*.

⁷ The decision in *United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961), decided on the same day as the instant case, is said by the Court to be dispositive of the dues reimbursement issue in this case, and the Court's reasoning in the *Carpenters* case will be discussed in this Note in order that the two related problems may be presented together. Counsel for the union and for the Board agreed that the principal argument on the dues reimbursement issue would be made in *Carpenters*. Brief for the union, p. 15; Brief for the Board, p. 3 n.1.

⁸ On petition of the union for review of the Board's action, the court of appeals upheld the Board in ruling that the hiring-hall agreement was illegal per se, but set aside that portion of the order requiring a general reimbursement of dues and fees. 275 F.2d 646 (1960).

⁹ See, e.g., Fenton, *The Taft-Hartley Act and Union Control of Hiring—A Critical*

hiring halls served a real economic need in those industries. With the advent of the National Labor Relations Act,¹⁰ and the attendant increase in union strength and bargaining power, hiring halls came to be operated almost exclusively by unions,¹¹ often in conjunction with closed shops¹² which were then entirely legal.¹³ This meant that the individual workman's employment opportunities depended entirely upon union sponsorship, and the situation was compounded by the union's then legitimate power to refuse vital union membership to an individual on arbitrary bases.¹⁴ These evils aroused public opinion and led to the passage of the Labor Management Relations Act¹⁵ in 1947, under which closed shops were outlawed.¹⁶ However, the Act, both as enacted in 1947 and as amended in 1959,¹⁷ contains no language which expressly abolishes the union hiring hall or establishes specific conditions under which such halls may be operated. Moreover, Senator Taft expressed his opinion that union-controlled hiring halls were not illegal per se and that they should be allowed

Examination, 4 Vill. L. Rev. 339 (1959); Rains, *Construction Trades Hiring Halls*, 10 Lab. L.J. 363, 366-69 (1959). See generally Larrowe, *Shape-Up and Hiring Hall* (1955).

¹⁰ 49 Stat. 449 (1935), 29 U.S.C. §§ 141-68 (1946).

¹¹ See, e.g., Haber & Levinson, *Labor Relations and Productivity in the Building Trades* 62-64, 71 (1956); U.S. Dept. of Labor, *Extent of Collective Bargaining and Union Status, January 1945*, 60 Monthly Labor Rev. 816-822 (1945).

¹² That is, a contract requiring union membership at the outset of employment as distinguished from one requiring membership some time after employment commences. The latter is called a union shop and is presently valid if certain conditions are met. See note 16 *infra*.

¹³ Prior to the amendment in 1947, § 8(a)(3) of the NLRA included the proviso that "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein." 49 Stat. 449 (1935).

¹⁴ Senator Taft stated on the floor of the Senate the closed shop

is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them Such an arrangement gives the union tremendous power over the employees; furthermore, it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field.

93 Cong. Rec. 3836 (1947).

¹⁵ 61 Stat. 136 (1947), 29 U.S.C. §§ 141-68 (1956).

¹⁶ The proviso to § 8(a)(3) was amended to read "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . ." In order to limit the effect of the unions' discretion in refusing membership, Congress added an additional proviso:

no employer shall justify any discrimination against an employee for non-membership in a labor organization . . . 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.

61 Stat. 136 (1947), 29 U.S.C. § 158(a)(3) (1956).

¹⁷ Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959) (codified in scattered sections of 29 U.S.C.).

so long as they were not *operated* in such a way as to create a closed shop.¹⁸

Within this framework of policy considerations, the National Labor Relations Board was forced to perform a balancing act. On the one hand it was apparent that the hiring hall served an extremely useful function and should be allowed to exist, and yet on the other hand there was the obligation of the Board to carry out the broad policy goals of the Act.¹⁹ The factor which made this balancing so difficult was that the very structure of the union-operated hiring hall tended to camouflage forbidden discrimination, and there was evidence of widespread circumvention of the ban against preferential treatment of union members through the operation of hiring halls, at least in some industries.²⁰

Initially, the Board's approach was to correct specific discriminatory abuses as they arose in individual cases.²¹ Of course, in cases where the contract provided specifically for discriminatory measures, the Board found the provisions to be illegal.²² But in cases in which the collective bargaining contract provided only for a union-operated hiring hall, absent specific discriminatory measures, the predominant view expressed by the Board and obtaining greater acceptance by the courts was in favor of the validity of the hiring-hall provision.²³ In

¹⁸ S. Rep. No. 1827, 81st Cong., 2d Sess. 13-14 (1950):

The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. The Board and the court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions as long as they are not so operated as to create a closed shop with all of the abuses possible under such arrangements, including discrimination against employees, prospective employees, . . . and operation of a closed union.

¹⁹ In *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954), the Court said that "the policy of the Act is to insulate employees' jobs from their organizational rights . . . to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."

²⁰ See, e.g., *Haber & Levinson, op. cit. supra* note 11, at 71; *Craig, Hiring Hall Arrangements and Practices*, 9 Lab. L.J. 939, 942 (1958).

²¹ *American President Lines*, 101 N.L.R.B. 1417 (1952); *National Maritime Union*, 78 N.L.R.B. 971 (1948) (did not pass on the legality of the hiring hall provision), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950). Compare *Del E. Webb Constr. Co. v. NLRB*, 196 F.2d 841 (8th Cir. 1952) with *Hunkin-Conkey Constr. Co.*, 95 N.L.R.B. 433 (1951). *Fenton, supra* note 9, at 356, says "the bulk of the cases have not dealt with the legality of the hiring-hall agreement but have, rather, taken the view that only where the evidence demonstrates actual discrimination in operation does an exclusive hiring hall violate the act. . . ."

²² *NLRB v. Waterfront Employers*, 211 F.2d 946 (9th Cir. 1954); *NLRB v. Alaska S.S. Co.*, 211 F.2d 357 (9th Cir. 1954); *Lumms Co.*, 101 N.L.R.B. 1628 (1952), *enforced as modified*, 210 F.2d 377 (5th Cir. 1954); *American President Lines*, 101 N.L.R.B. 1417 (1952) (recognizing rule); *Pacific Am. Shipowners Ass'n*, 98 N.L.R.B. 582 (1952); *Pacific Maritime Ass'n*, 89 N.L.R.B. 894 (1950); *National Maritime Union*, 82 N.L.R.B. 1365 (1949); see *NLRB v. F. H. McGraw & Co.*, 206 F.2d 635 (6th Cir. 1953).

²³ *Eichleay Corp. v. NLRB*, 206 F.2d 799 (3d Cir. 1953); *Hunkin-Conkey Constr. Co.*, 95 N.L.R.B. 433 (1951), approved in *NLRB v. Swinerton*, 202 F.2d 511 (9th Cir. 1953),

1958, however, the Board departed from its earlier course and in *Mountain Pac. Chapter of the Associated Gen. Contractors*²⁴ laid down tests to be applied in subsequent exclusive hiring-hall arrangements.²⁵ Under the *Mountain Pac.* rules an exclusive hiring-hall provision would be found illegal per se, regardless of the presence or absence of specific discriminatory *practices* thereunder, unless it provided that (1) selection of applicants for referral would be on a nondiscriminatory basis, unaffected by the applicant's union status or by union regulations, (2) the employer had the right to reject any job applicant referred by the union, and (3) the provisions relating to the functioning of the hiring hall would be posted for the inspection of applicants.²⁶

Necessary to the establishment of the Board's position (which was accepted and well-presented by Mr. Justice Clark in his dissent in the instant case) was that Section 8(a)(3) discrimination included *any* difference in treatment in hiring.²⁷ The Board reasoned

cert. denied, 346 U.S. 814 (1953); see *NLRB v. Philadelphia Iron Works*, 211 F.2d 937 (3d Cir. 1954) (stating that a referral system is not per se invalid). See also *Missouri Boiler & Sheet Iron Works*, 93 N.L.R.B. 319 (1951) (stating that the mere fact that an employer uses union employment facilities is not, per se, indicative of hiring practices condemned by the statute). *But see NLRB v. Int'l Union of Operating Eng'rs*, 255 F.2d 703 (3d Cir. 1958) (the court stated that a union may not insist that an employer subordinate his own hiring preference to the union's referral arrangement).

²⁴ 119 N.L.R.B. 883 (1957), *enforcement denied*, 270 F.2d 425 (9th Cir. 1959).

²⁵ The Board's decision in *Mountain Pac.* was subsequently denied enforcement. Note 24 *supra*. The case was remanded to the Board for a determination as to whether the hiring hall was in fact operated so as to prefer union members. The Board accepted the remand, and, finding evidence of such illegal preference, issued a supplemental decision on that basis. *Mountain Pac. Chapter of the Associated Gen. Contractors*, 127 N.L.R.B. 1393 (1960).

²⁶ Board Member Murdock, in his dissent in *Mountain Pac.*, had the following interesting comments concerning the Board's action:

For more than 7 years it has been well-established Board law, judicially approved in every circuit court of appeals in which the issue was raised, that an exclusive nondiscriminatory hiring hall is not *per se* unlawful. Now for the first time, in a sweeping decision ignoring all Board and court precedents, the majority holds that such a contract is unlawful. . . . The majority now says that a nondiscriminatory hiring hall, which the Board, the courts, and Senator Taft regarded as perfectly legal, runs counter to the express proscription of the statute unless objective standards are included in the hiring-hall contract. . . . My understanding of the law is that the General Counsel must prove by a preponderance of the testimony that the discharge was intended to encourage or discourage union membership. . . . To my knowledge this is the first time that the Board or any court has found an unfair labor practice solely on the ground that the respondent failed to express a lawful motivation at the time the alleged unfair labor practice occurred. . . . Senator Taft was in agreement with previous Board and court decisions to the effect that where the General Counsel had *proved* that an ostensible nondiscriminatory hiring hall was, *in fact*, operated as a closed shop or in an otherwise discriminatory manner, the *practice* was unlawful.

119 N.L.R.B. 883, 887-91 (1957) (footnotes omitted).

²⁷ The Board, in its brief in the principal case, p. 9, states:

The divided structure of Section 8(a)(3), which deals separately with "discrimination" and "encouragement," shows that the former term refers to a

that discrimination existed where only workers referred by the union were able to obtain employment.²⁸ The Board then found that, in the absence of a meeting of the *Mountain Pac.* requirements, this discrimination tended to encourage union membership because it was widely known among workers that these arrangements had led to favoritism toward union members in the past.²⁹ Hence, the Board hypothesized that in cases in which the three *Mountain Pac.* requirements had not been met, there was a violation *because* of the contract,³⁰ regardless of the manner in which it was actually enforced.

In order to put teeth into the mandate of *Mountain Pac.* the Board announced that in subsequent cases involving illegal hiring-hall provisions it would use the dues reimbursement remedy,³¹ under which employers and unions could be liable to refund to *all* employees covered by the illegal agreement all dues, fees, and assessments paid into the union from a date six months prior to the filing of the unfair labor practice charge.³² The dues reimbursement remedy, commonly called the *Brown-Olds* remedy,³³ was claimed to be within the Board's grant of power under Section 10(c) of the National Labor Relations Act,³⁴ which authorized the Board, after finding an unfair labor practice, not only to issue a cease and desist order

disparity of treatment between employees in their hire or employment, and that the latter term describes the kind of disparity which is forbidden. The division of the job applicants by the contract in the present case into those who are cleared for employment through the hiring hall and are thereby eligible for work, and those who are not so cleared and are thereby precluded from working, thus constitutes discrimination within the statutory meaning.

²⁸ It was not thought by the Board that such discrimination was itself illegal; however, "such disparity does not constitute a violation . . . until it is further shown that the difference in treatment encourages or discourages union membership. . . if it can be shown that this discrimination encourages union membership, the violation is complete." Brief for the union, p. 19.

²⁹ In its opinion in *Mountain Pac.* the Board said:

Here the very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over the employment status. Here all that appears is unilateral union determination and subservient employer action with no aboveboard explanation as to the reason for it, and it is reasonable to infer that the Union will be guided in its concessions with an eye towards winning compliance with a membership obligation or union fealty in some other respect. Employers have surrendered all hiring authority to the Union and have given notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so.

119 N.L.R.B. 883, 896 (1957).

³⁰ In the Board's opinion in the principal case it was flatly stated without giving reasons therefor that "none of these safeguards essential to the legality of an exclusive hiring arrangement is contained in the contract to which Respondents are parties." 121 N.L.R.B. 1629, 1630 (1958).

³¹ See Address by Jerome D. Fenton, General Counsel, NLRB, Ill. State Bar Ass'n, Dec. 7, 1958, in 1 Lab. Rel. Rep. 46 (1958).

³² See Note, 45 Va. L. Rev. 1192 (1959).

³³ See note 42 *infra* and accompanying text.

³⁴ 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(c) (1956).

but also "to take such affirmative action . . . as will effectuate the policies of this Act."³⁵ The Board's power had been interpreted not to include the issuance of penal sanctions,³⁶ and prior to 1943 the Board's power to require reimbursement of checked-off dues³⁷ had been repeatedly denied.³⁸ However, in 1943, the Supreme Court recognized the power of the Board to require dues reimbursement,³⁹ at least in situations where company-dominated unions operating under closed shop provisions could be considered to have coerced membership, dues, and fees. Subsequently, the remedy gained greater acceptance in the appeals courts,⁴⁰ and it was expanded and applied in situations in which the unions were not company-dominated.⁴¹ Thus, in 1956 the Board ordered dues reimbursement in *Brown-Olds Plumbing & Heating Corp.*⁴² on an inference that dues were being coerced under an illegal closed shop agreement. The instant case is the first of several cases in which the Board applied the dues reimbursement remedy to hiring arrangements which, though not *operated* as closed shops, were considered to have a similar effect of illegal encouragement of union membership due to the lack of safeguards, as required under *Mountain Pac.*, over the union's exclusive control of worker referral.⁴³

In refusing to grant validity to the *Mountain Pac.* requirements, the Court appears to have reached the correct result under the present statute. It is highly doubtful that Congress intended under Section 8 (a) (3) to ban anything more than discrimination in hiring or firing based on union status and accomplished with a purpose

³⁵ The application of this broad remedial power is subject to judicial control, since the courts of appeals may deny enforcement to any order which they feel exceeds the limits of the Board's discretion. See, e.g., *Corning Glass Works v. NLRB*, 118 F.2d 625 (2d Cir. 1941); *Western Union Tel. Co. v. NLRB*, 113 F.2d 992 (2d Cir. 1940); cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

³⁶ *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-13 (1940); see *UAW v. Russell*, 356 U.S. 634, 646 (1958) (dictum).

³⁷ The phrase "checked-off" refers to the procedure by which a company deducts union dues and assessments from the employee's pay check.

³⁸ Prior to 1943, five circuits in eleven cases refused to enforce Board orders requiring reimbursement of checked-off union dues. It seems that the punitive character of the order was the controlling factor in each case. See cases cited in *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 534 n.1 (1943).

³⁹ *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533 (1943).

⁴⁰ It is difficult to say to just what extent the remedy was to be used, as the Board was constantly reexamining the remedy's application. See *Galveston Maritime Ass'n*, 122 N.L.R.B. 692 (1958).

⁴¹ *NLRB v. Parker Bros.*, 209 F.2d 278 (5th Cir. 1954); cf. *NLRB v. McGough Bakeries Corp.*, 153 F.2d 420 (5th Cir. 1946); *Alaska Salmon Indus.*, 122 N.L.R.B. 1552 (1959).

⁴² 115 N.L.R.B. 594 (1956).

⁴³ This case also represents the first approval of the *Brown-Olds* remedy by the full Board. See *United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 653 (1961). See also *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961) (where the remedy was applied to a similar situation).

of encouraging or discouraging union membership.⁴⁴ With such an interpretation of congressional intent in mind the Court in *Radio Officers' Union v. NLRB*⁴⁵ stated that it was the "true purpose" or "real motive" of the union or employer that constituted the test of illegal discrimination,⁴⁶ and the Court reiterated that position in the principal case.⁴⁷ Under that test "some conduct may by its very nature contain the implications of the required intent,"⁴⁸ but the Court reasonably refused to allow an inference of discriminatory intent on the part of the union and employer when the contract specifically provides that there shall be no difference in treatment based on union status.⁴⁹ Moreover, a mere showing of encouragement of union membership should not invalidate the hiring-hall provision under Section 8(a)(3) as "this section does not outlaw *all* encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited."⁵⁰

In *United Bhd. of Carpenters v. NLRB*,⁵¹ the companion case referred to by the Court in the instant case as dispositive of the dues reimbursement issue,⁵² the Court adhered to its earlier view that the Board is limited under Section 10(c) to *corrective* remedies and

⁴⁴ The legislative history of the statute indicates that its proponents were concerned with prohibiting actual discrimination in the operation of hiring halls. See, e.g., S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947).

⁴⁵ 347 U.S. 17 (1954).

⁴⁶ *Id.* at 43.

⁴⁷ 365 U.S. at 675.

⁴⁸ *Ibid.*; see *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

⁴⁹ In *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699-700 (1961), decided on the same day as the principal case and dealing with the application of the *Mountain Pac.* requirements to a hiring arrangement calling for foremen who are to be union members to do the hiring, the Court said "in the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives." It would appear from this statement that even if there had been no nondiscrimination clause in the principal case the holding would have been the same.

⁵⁰ *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-43 (1953). (Emphasis added.) This concept is explained in some detail by Mr. Justice Harlan, with whom Mr. Justice Stewart joined, in his concurring opinion in the principal case. 365 U.S. at 679-682:

A mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. . . . In general, this Court has assumed that a finding of a violation . . . requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity. . . . For present purposes, it is sufficient to note that what is involved in the general requirement of finding of forbidden motivation . . . is a realization that the Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit *all* the represented employees.

⁵¹ 365 U.S. 651 (1961).

⁵² See note 7 *supra*.

may not make use of punitive sanctions.⁵³ In *Carpenters* the Board had found an illegal closed shop agreement, and that finding was not questioned before the Court. But in neither *Carpenters* nor the principal case was there any evidence that membership, fees, or dues were actually coerced. The Court's theory, which seems to be sound, was that the dues reimbursement remedy applied under such circumstances would exceed the bound of corrective action, for where the union itself is legally created, it must be assumed in the light of the history of trade unionism that some, if not all, of its members are voluntary members. In such a case the burden logically should be upon the Board to prove the actual existence of coercion, and such coercion should not be inferred. *Virginia Elec. & Power Co. v. NLRB*,⁵⁴ the case from which the Board's theory had developed and in which coercion *was* inferred, was distinguished on the basis that a worker could never be considered a willing member of an illegal company-dominated union controlled by the very employer against whom it should be prepared to protect its members' interests.⁵⁵

Both issues presented to the Court in the principal case have been decided in conformity with prior Supreme Court interpretations of the statutes involved. Yet social desirability is seldom completely reflected in a given statutory scheme, and it may well be that hiring halls need more regulation than the statutes presently afford. The Board's contention in *Mountain Pac.* is certainly a thought-provoking argument in favor of additional insulation of job rights from union status, especially at a time when considerations of individual freedom seem to be of paramount importance. Moreover, even those regulations now existing cry for more effective enforcement methods,⁵⁶ and though the dues reimbursement remedy which the Board attempted to use may well have been unduly harsh in application, a series of less harsh statutory penalties could go far toward guaranteeing the desired objectives.

James R. Craig

⁵³ See note 36 *supra*.

⁵⁴ See note 39 *supra*.

⁵⁵ "That case involved a company union whose very existence was unlawful. . . . Return of dues was one of the means for disestablishing an unlawful union." 365 U.S. 651, 654 (1961).

⁵⁶ Brief for the Board, pp. 10-11, *United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961), points out that

in 1956, finding that, despite the ban which the Taft-Hartley amendments had imposed nine years earlier, closed-shop practices were still rampant, the Board concluded that a remedy more effective than a cease and desist order was required if such practices were to be curtailed and the statutory policy which they impaired vindicated.