Vanderbilt Law Review

Volume 15
Issue 4 *Issue 4 - October 1962*

Article 10

10-1962

Constitutional Questions Involved in the Expenditure of Compulsorily Paid Union Dues Under the Railway Labor Act

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NOTES

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I. Introduction

Prior to the enactment of federal labor legislation the negotiation and execution of union and closed shop contracts raised many legal questions of which compulsory payment of union dues and assessments was but one. Where an employer agreed to a closed[1] or union shop,[2] few legal problems arose. Frequently, the employer only agreed to a closed or union shop after considerable pressure had been exerted, thus presenting the problem of the legality of economic pressure for such an objective. In the absence of statute, some state courts held that the closed or union shop was illegal, while others took the view that a strike by a union to obtain a closed or union shop clause in a contract was a strike for an illegal purpose, even though the closed shop would have been valid had it been freely negotiated. Still other courts held that a closed shop was only illegal if such an agreement restrained trade in the particular locality.[3]

During the depression years, Congress, concerned with the problem of labor-management relations in the railroad industry, amended the Railway Labor Act. The 1934 Act did not provide for union security,[4] but rather stated that no carrier "shall require any person seeking employment to sign any contract or agreement to join or not to join a labor organization."[5] In sharp contrast was the 1935 version of the National Labor Relations Act, which provided that under certain conditions a company and a union could enter a closed shop contract.[6] Two of the basic reasons given for the later commencement of the union security movement in the railroad industry were a fear of company dominated unions and a strong tradition of

1. A closed-shop provision requires that all employees be members of the union when hired and remain members in good standing during their period of employment.

2. Workers employed under a union shop agreement need not be union members when hired, but they must join the union within a specified time and must remain members during the period of employment.

3. See 5 Williston, Contracts § 1656 (rev. ed. 1937) and the cases cited.

4. The House of Representatives did, however, pass a bill providing for union security in the railroad industry. H.R. Rep. No. 1944, 73d Cong., 2d Sess. § 2 (1934); 78 Cong. Rec. 11710-20 (1934).

5. Act of June 21, 1934, c. 691, § 2, 48 Stat. 1188.

6. National Labor Relations Act, c. 372, § 8(3), 49 Stat. 452 (1935).

voluntary unionism in that industry.[7] In 1947, the National Labor Relations Act was amended so as to render the closed shop illegal and to allow the union shop, subject to specified conditions and apparently only in the absence of prohibitory state laws.[8]

The subject of union security in the railroad industry was thoroughly considered in 1950, and the unions succeeded in securing the passage of a statute allowing a company and a union to enter a union shop agreement. The basic reason advanced by the unions for the passage of such a bill was that if the union thought it could perform its functions as exclusive bargaining agent more effectively under a union shop contract, it should be allowed to bargain for union security. The unions argued that since the law required them to represent fairly all the workers in the unit, the cost of representation should be spread over the entire unit.[9] This reasoning convinced the House of Representatives.

With these purposes in mind Congress adopted section 2-11 which provides:

> Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment . . . or the effective date of such agreements . . . all employees shall become members of the labor organization representing their craft or class. . . .[10]

The provisions of this amendment are different from the Taft-Hartley amendment in that the former pre-empts conflicting state law, whereas the latter does not purport to authorize the union shop where forbidden by a contrary state law.[11] This difference is justified on the basis of a more direct need for uniformity in the railroad industry than in business generally.

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7. TONER, THE CLOSED SHOP 93-114.

8. Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158 (a) (3) (1958).

9. The statement of George M. Harrison is fairly typical of the arguments raised in favor of the union shop: "Activities of labor organizations resulting in the procurement of employee benefits are costly, and the only source of funds with which to carry on these activities is the dues received from the members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits of those activities without contributing anything to the cost." *Hearings on H.R. 7789 Before the House Committee on Interstate and Foreign Commerce*, 81st Cong., 2d Sess. 10 (1950).

10. Act of Jan. 10, 1951, 64 Stat. 1238, 45 U.S.C. § 152 (11) (1958).

11. "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 61 Stat. 151 (1947).

This note will examine the constitutional issues involved when a union operating under a union shop contract made pursuant to the Railway Labor Act collects dues from a member and spends a portion of this money in support of political causes which the member opposes. The constitutionality of such an expenditure can become an issue in a lawsuit when an employee sues for restitution of dues paid under such a contract. The constitutional issue can be presented as a defense when the union seeks to expel the member for non-payment of dues. A company could raise this question in an action for a declaratory judgment on the validity of the contract between it and the union, or it could arise by way of defense in a suit for breach of a union shop contract. The constitutionality of such expenditures will be treated with respect to: the nature of the constitutional rights involved; the theory upon which the constitutional rights are violated; and the appropriate remedies in the event of a violation.

The first case to reach the Supreme Court under section 2-11 was *Railway Employees Department v. Hanson.*[12] This case involved a Kansas railroad employee who sued to enjoin the enforcement of a contract made pursuant to section 2-11. It was alleged that the enforcement of the contract requiring the plaintiff to pay union dues constituted a violation of the first, fifth, and ninth amendments of the United States Constitution.[13] Although no specific finding of fact was made by the state courts as to whether the union dues were being spent for political purposes, the opinion of the Nebraska Supreme Court indicates that they were being so spent, and accordingly it held the act unconstitutional.[14]

The Supreme Court, in reversing the Nebraska courts, held that legislation designed to promote industrial peace in industries affecting interstate commerce was a legitimate subject for congressional action, and that the function of the judiciary was at an end when it appeared that the measure adopted by Congress was "relevant or appropriate to the constitutional power which congress exercises." The court then made a statement that seemed to be an attempt to limit the case to its facts, but which came to be a source of confusion in subsequent cases:

> [I]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirements for financial support of the collective-bargaining agency

12. 351 U.S. 225 (1956).

13. The allegations of the plaintiffs are fully stated in the state court report of the case. 160 Neb. 669, 71 N.W.2d 526 (1955).

14. The Nebraska court objected to employees being required to "make contributions to any and all of the varied objects and undertakings in which labor organizations are or may become engaged . . . ." 71 N.W.2d at 547. Mr. Justice Frankfurter's dissenting opinion in International Ass'n of Machinists v. Street, 367 U.S. 742, 804 (1961) states that the *Hanson* case involved political expenditures.

> by all who receive the benefits of its works is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.[15]

The Supreme Court's opinion recognizes the constitutionally protected rights of free speech and association and the necessity that governmental action meet the reasonableness test of the fifth amendment. The Supreme Court disagreed with the Nebraska courts on the question of the reasonableness of requiring a worker to give financial support to a union which acts as his collective bargaining agent.[16] Inasmuch as the Supreme Court found a valid exercise of power under the commerce clause, and that the regulation was not unreasonable, the Court had no cause to deal with problems of remedy.

Lower courts experienced considerable difficulty in applying the *Hanson* case. The difficulty stemmed from the scope of the *Hanson* reservation. If the facts of the *Hanson* case were that the union was spending money for political purposes, and that question was before the court, the reservation in *Hanson* would seem to be limited to cases where the compulsorily collected dues were used to impose ideological conformity. On the other hand, if the facts of the case were that the dues were being spent only in negotiating and administering contracts, then the reservation of the Court is substantially broader.[17]

The North Carolina Supreme Court thought that *Hanson* had held that an employee had no constitutionally protected right to challenge the political expenditures of a union.[18] Another state supreme court held that

15. 351 U.S. at 238.

16. "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work . . . . To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more than that is attempted here." 351 U.S. at 235.

17. McClair, *The Union Shop Amendment: Compulsory Freedom to Join a Union*, 42 A.B.A.J. 723 (1956), discusses the *Hanson* case as though political expenditures were before the Court. McClair criticized the Supreme Court because it "brushed aside the finding below that initiation fees, dues, and assessments are used for political activities and other purposes foreign to collective bargaining. . . ." *Id.* at 724. Other writers have treated the *Hanson* case as though the question of political expenditures were not before the Court. See 13 VAND. L. REV. 384 (1959).

18. Allen v. Southern Ry., 249 N.C. 491, 107 S.E.2d 125 (1959). This was a suit by a minority group of railroad employees to restrain the enforcement of a union shop contract made pursuant to section 2-11 on the ground that a portion of the dues collected would be used in support of political causes which the plaintiff opposed. The jury found as a fact that some of the dues would be used for political purposes. The majority of the court held that this question had been litigated and decided in the *Hanson* case. Of the reservation in *Hanson* the North Carolina court said: "We do not think that this langnage conveys the idea that the financial support required is limited to such expenditures as the collective bargaining agency incurs while engaged in the negotiation and servicing of collective bargaining agreements. Rather it indicates

the *Hanson* case reserved the question of the constitutionality of political expenditures.[19] Still another court, relying on *Hanson*, held collections to be used for political purposes were not contemplated by Congress when it used the terms "dues" and "assessments" in the Act.[20]

In the case of *International Ass'n of Machinists v. Street*,[21] the Supreme Court was presented a record that was adequate to answer the constitutional issues involved when a union operating under a contract made pursuant to section 2-11 spends money for political purposes. In this case a group of employees brought suit to enjoin the enforcement of a union shop contract made pursuant to section 2-11. They alleged that a portion of their dues was being spent for political causes they opposed. The proof that the union was making political expenditures was abundant.[22] The trial court entered a decree enjoining the enforcement of the contract on the ground that section 2-11 violates the federal constitution in that it permits political expenditure of these employees' union dues. The Supreme Court of Georgia affirmed.[23] The majority of the Supreme Court avoided the constitutional issues and interpreted the statute as giving the unions the power to collect dues from all of the workers in the class only for the purpose of negotiating and administering contracts and in the settlement of disputes. The statute was held not to authorize the collection of that part of the dues which would be used for political expenditures because such expenditures were not germane to the purpose for which the union shop was created.[24]

II. Nature of the Rights

In order for a plaintiff to state a cause of action based on the Constitution, he must show that he has some right which is protected by that document. A plaintiff may claim the right to be secure in his person, rights in

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that the required financial support embrace all activities of the collective bargaining agency reasonably related to its maintenance as an effective bargaining representative." 107 S.E.2d at 133.

19. In Looper v. Georgia, So. & Fla. Ry., 213 Ga. 279, 99 S.E.2d 101 (1957), the complaining employees alleged that a portion of their union dues would be spent for objectionable political purposes. The court held that the constitutionality of sueh expenditures had not been answered in *Hanson*, and accordingly held the expenditures invalid.

20. Sandsbury v. International Ass'n of Machinists, 156 Tex. 340, 295 S.W.2d 412 (1956), held that a "political assessment was not contemplated by the Congress in using the term 'assessments' in the union shop statute. . . ." 295 S.W.2d at 416.

21. 367 U.S. 740 (1961).

22. *Id.* at 744-45 n.2.

23. 215 Ga. 27, 108 S.E.2d 796 (1959).

24. "[W]e construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money . . . . Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." 367 U.S. at 768.

property, or freedom of expression.[25] In the type of action under discussion the usual allegation is that the collection and expenditure of dues for political purposes violates the first and fifth amendments—free speech and association, and due process.

Several lower courts have held that contributions made under a union shop contract which are used in support of political causes that the employee opposes violate free speech and association.[26] It has been held that in order for a member to be deprived of free speech the plaintiff must show that the exaction is tantamount to a personal affirmation of the cause.[27] The Georgia court in the *Street* case found such an affirmation, relying on cases involving compulsory flag salute statutes.[28] The state court in the *Hanson* case, likewise, thought that freedom of speech was violated,[29] but the Supreme Court in that case held that no issue of free speech was presented.[30] The majority of the Supreme Court in *Street*, though approving the denial of a free speech issue in *Hanson*, declined to rule that free speech had been violated.[31] However, four members of the Court thought that an issue of free speech was presented by the *Street* record. Mr. Justice Douglas seems to have balanced the interests of individual freedom against the interests of the group and concluded that the individual's freedom outweighed the interests of the group in this case.[32] Mr. Justice Black flatly stated that the expenditures involved in *Street* violated the first amendment.[33] Justices Frankfurter and Harlan thought that the first

25. See Wellington, *The Constitution, The Labor Union, and Governmental Action*, 70 YALE L.J. 345 (1961).

26. The Nebraska court in *Hanson* and the Georgia court in *Looper* and *Street* so held.

27. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

28. 108 S.E.2d 796, 807-08.

29. 71 N.W.2d 526, 545.

30. The Supreme Court said: "We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and it does not violate either the First or Fifth Amendments." 351 U.S. at 238.

31. "The record in this case is adequate squarely to present the constitutional question reserved in *Hanson*. These are questions of the utmost gravity. However, the restraints against unnecessary constitutional decisions counsel against their determination unless we must conclude that Congress, in authorizing a union shop under § 2, Eleventh, meant that the labor organization receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes he opposes." 367 U.S. at 749.

32. "Some forced assoeiations are inevitable in an industrial society. One who of necessity rides busses and street cars does not have the freedom that John Muir and Walt Whitman extolled. The very existence of a factory brings into being human colonies. Public housing in some areas may of necessity take from apartment buildings which to some may be as repulsive as ant hills. Yet people in teeming communities often have no other choice. Legislatures have some leeway in dealing with problems created by these modern phenomena." 367 U.S. at 775-76.

33. "I would therefore hold that § 2, Eleventh of the Railway Labor Act, in authorizing application of the union-shop contract to the named protesting employees who are

amendment questions had been settled in the *Hanson* case. Even if these questions were not settled there, they did not think that the true political beliefs of these plaintiffs were suppressed.[34]

A second basis for relief can be found in the due process clause of the fifth amendment. This point of view was fully developed by the Nebraska court in the *Hanson* case. Several due process arguments were developed by that court. One test of due process is the reasonableness of the relationship between the regulation in question and the ends it seeks to accomplish. The ends sought by section 2-11 of the Railway Labor Act were to promote the peaceful settlement of disputes in that industry and to end the free rider problem. The court found that no condition existed in 1951 which could justify the curtailment of the plaintiff's basic rights.[35] Other courts have adopted views similar to those of the Nebraska court.[36] The Supreme Court, however, held that legislation allowing a company and a union to enter a union shop agreement was a reasonable exercise of legislative power.[37] Whether the *Hanson* case allows political expenditures of money so collected depends on the facts which were before that Court.

Mr. Justice Brennan for the majority in the *Street* case thought that the *Hanson* case did not involve political expenditures.

> [T]here was nothing concrete in the record to show the extent to which unions were actually spending money for political purposes . . . and nothing to show that the employees there involved opposed the use of their money for any particular political objective. (Footnote omitted.) In contrast, the present record contains detailed information on all these points, and specific findings were made in the courts below as to all of them.[38]

Justices Frankfurter and Harlan thought that the *Hanson* case decided this question.[39]

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appellees here, violates the freedom of speech guarantee of the First Amendment." 367 U.S. at 791.

34. "Plaintiffs here are in no way subjected to such suppression of their true political beliefs or sponsorship of views they do not hold. Nor are they forced to join a sham organization which does not participate in collective bargaining functions, but only serves as a conduit of funds for ideological propaganda." 367 U.S. at 805.

35. The Nebraska court said: "It is apparent that the purpose of the amendment was to get rid of free-riders . . . . Assuming it would be reasonable to require free-riders to pay their proportionate share of the cost of collective bargaining carried on in their behalf by labor organizations, we do not think the means selected has any real and substantial relation to the object sought to be obtained." 71 N.W.2d at 547.

36. See Looper v. Georgia, So. & Fla. Ry., *supra* note 17; Sandsberry v. International Ass'n of Machinists, *supra* note 18.

37. "We only hold that the requirements for financial support of the collective-bargaining unit by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and it does not violate either the First or the Fifth Amendments." 351 U.S. at 238.

38. 367 U.S. at 747.

39. Of the *Hanson* record Mr. Justice Frankfurter said: "The record before the Court in *Hanson* clearly indicated that dues would be used to further what are nor-

Another approach to the due process problem is to determine whether political expenditures are germane to the purposes of collective bargaining. If they are germane, then they meet the due process requirement; if they are not germane to the purposes of collective bargaining, then they fall before the due process clause. The courts in *Hanson*[40] and *Street*[41] were positive that political expenditures were not germane to the collective bargaining process. Others have taken the position that such expenditures are sufficiently closely related to the maintenance of an effective bargaining agent that they should not fall before the due process clause.[42]

III. THEORY OF CONSTITUTIONAL VIOLATION

The first and fifth amendments are restraints on the federal government.[43] If one private person deprives another of a constitutionally secured right, the first or fifth amendment is not violated because the federal government is not the actor.[44]

In cases involving political expenditures, the courts which have disallowed such expenditures have usually recognized the issue of government action and found it present. The Georgia court in the *Street*[45] case and the Nebraska court in the *Hanson*[46] case so found. Both of these states had right-to-work laws; therefore, it was thought that inasmuch as an employee could not be forced to join a union under local law, the federal government was the party making the situation possible. The Supreme Court has not yet taken this step in a case involving political expenditures of a union operating under federal law. In one case it was urged that a union by

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mally described as political and legislative ends. And it surely can be said that the Court was not ignorant of a fact that everyone else knew. Union constitutions were in evidence which authorized the use of union funds for political magazines, for support of lobbying groups, and for urging union members to vote for union-approved candidates." 367 U.S. at 804.

40. "To require all employees receiving benefits from collective bargaining agreements to pay the labor organizations obtaining them initiation fees, dues, and assessments is to require them to make contributions to any and all of the varied objects and undertakings in which labor organizations are or may become engaged and which have no substantial relation to the object here sought to be obtained." 71 N.W.2d at 547.

41. The Georgia court did not in explicit language say that spending money for political purposes was not germane to collective bargaining. However, an allegation in the complaint was addressed directly to this point and the court's remarks which were addressed to the first and fifth amendment issues seem to be based on the assumption that participation in politics is foreign to the purposes of a labor union. 108 S.E.2d at 798, 807-08.

42. See DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947).

43. Shelley v. Kraemer, 334 U.S. 1 (1948); Rice v. Sioux City Cemetery, 349 U.S. 79 (1954).

44. Wellington, *supra* note 25.

45. 108 S.E.2d at 807.

46. 71 N.W.2d at 546.

utilizing the services of the National Mediation Board thereby became an arm of the federal government, but the Supreme Court declined to so hold.[47]

Another theory of constitutional violation would be to construe the Constitution so that it will apply to arbitrary actions of power against individuals by all centers of private government.[48] This suggestion has not been followed by the Supreme Court, but it has been hinted at by state courts.[49] Traditionally, labor unions have had the outward appearance of private organizations and have been so treated by the courts. Those who would apply the United States Constitution to the internal affairs of labor unions contend that labor unions can no longer be regarded as private fraternal organizations.

> The corporate organizations of business and labor have long ceased to be private phenomena. That they have a direct and decisive impact on the social, economic, and political life of the nation is no longer a matter of argument. It is an undeniable fact of daily experience.[50]

A third method of protecting dissenting union members is suggested in the cases involving the breach of a duty to fairly represent all the employees.[51] Some of these cases are disposed of by reference to some policy of Congress, while others seem to base the duty to represent fairly on the Constitution.[52] This doctrine has not been directly applied by the Supreme Court, although it was argued before the Court in the *Street* case.[53]

IV. Adequate Remedies

If a court for any reason decides that a union cannot spend compulsorily collected dues for objectionable purposes, it must devise an appropriate remedy. If an employee has been discharged for refusal to pay union dues under such circumstances, he should be re-hired. Many of the state court cases in this area have been suits to enjoin the enforcement of the entire

47. Federation of Ry. Workers v. National Mediation Bd., 110 F.2d 529 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 628 (1940).

48. See Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933 (1952); Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 Colum. L. Rev. 155 (1957).

49. See Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).

50. Friedmann, *supra* note 48, at 176.

51. This could be accomplished by an extension of the doctrine of Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). If this approach were adopted, a union which spent, for objectionable political purposes, dues collected under a union-shop contract would be held to have violated its duty to fairly represent the entire bargaining unit.

52. For a general discussion of this approach in varying factual contexts, see Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957); Note, *Duty of Unions to Minority Groups in the Bargaining Unit*, 65 Harv. L. Rev. 490 (1952).

53. 367 U.S. at 771-75.

union shop contract.[54] State courts have sometimes given this relief.

The Supreme Court, in the *Street* case, held that an injunction was improper relief. The Georgia court was directed to devise a remedy that would protect the interests of the dissenting employees to the maximum extent without undue impingement of those of the majority.[55] One suggested remedy would be to deduct from the employee's dues an amount equal to the relation of the total union political expenditures to the total dues collected. A second method would be:

> restitution to an individual employee of that portion of his money which the union expended, despite his notification, for political causes to which he had advised the union he was opposed.[56]

The Georgia Supreme Court, in turn, instructed the trial court to hold a hearing for the purpose of determining the amount of these plaintiffs' money that was spent for political purposes. The only directions given to the trial court were that if it could determine:

> whose money is spent for what . . . and how the plaintiffs can be saved from harm by any withdrawal from the general fund for political purposes, and [is] able to formulate a practical method which would afford the relief which the majority say is due the plaintiffs, then that court is directed to enter a decree accordingly.[57]

If the trial court could not make such a determination, then it was told to "make use of its equity powers to give the protection by enjoining the unions from spending any monies for political purposes."[58]

V. CONCLUSION

The Supreme Court, in the *Street* case, committed itself to the position of giving some form of protection to dissenting union members. It is highly unlikely that the Court will declare section 2-11 of the Railway Labor Act to be an invalid exercise of legislative power even though political expenditures are involved.[59]

The Court will receive some criticism for not reaching the constitutional issues in the *Street* case. The interpretation given to section 2-11 is indeed strained; but to hold otherwise, that is, to hold that the internal affairs of labor unions are to be controlled by the first and fifth amendments, would create formidable problems.

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54. See notes 13, 18, & 23 *supra.*
55. 367 U.S. at 771-75.
56. *Id.* at 775.
57. International Ass'n of Machinists v. Street, 217 Ga. 351, 122 S.E.2d 220, 222 (1961).
58. *Ibid.*
59. See Wellington, *supra* note 25.