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# Compulsory Union Membership Under The National Labor Relations Act-Is Hershey Foods Corp. The End Of The Road?

# COMPULSORY UNION MEMBERSHIP UNDER THE NATIONAL LABOR RELATIONS ACT—IS *HERSHEY FOODS CORP.* THE END OF THE ROAD?

Although the National Labor Relations Act[1] sanctions some form of compulsory union membership,[2] discharge of employees for nonmembership is tempered by two provisos. One proviso[3] is § 8(b)(3)(B) which forbids discrimination against a nonmember employee if membership was denied or terminated for reasons other than nonpayment of the initiation fee and periodic dues.[4] However, reference in the Act to union membership as a condition of employment has led to increased controversy concerning the breadth of valid union security provisions.[5] The National Labor Relations Board and the courts have been confronted with the problem of whether Congress intended to sanction some form of compulsory active[6] union membership or

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[1] 29 U.S.C. § 141 *et seq.* (1970).

[2] Section 8(a)(3) of the Act contains the following provision:

> Provided, That nothing in this subchapter . . . 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 or the effective date of such agreement . . . .

29 U.S.C. § 158(a)(3) (1970).

[3] The other proviso requires that membership in the union be available to all employees on nondiscriminatory terms and conditions. 29 U.S.C. § 158(a)(3)(A) (1970).

[4] Section 8(a)(3)(B) provides:

> [t]hat no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(a)(3)(B) (1970). Discrimination in this context refers to situations in which an employer extends more favorable work conditions or wages to employees on the basis of union membership. Additionally, it would include the discharge of an employee for reasons related to union membership.

[5] *See* text accompanying notes 108-11 *infra*. *See, e.g.*, NLRB v. Technicolor Motion Picture Corp., 248 F.2d 348 (9th Cir. 1957); NLRB v. Pape Broadcasting Co., 217 F.2d 197 (5th Cir. 1954); NLRB v. Philadelphia Iron Works, 211 F.2d 937 (3d Cir. 1954).

[6] The Court dealt with the concept of active membership in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967). In that case, the Court stated that an active member was one who pledges allegiance to the union constitution, takes an oath of full union membership, attends union meetings, and generally enjoys full union membership. *Id.* at 196.

merely financial support of the union.[7] In *NLRB v. Hershey Foods Corp.*,[8] the United States Court of Appeals for the Ninth Circuit upheld an employee's right to refrain from joining a labor union. The court enforced the National Labor Relations Board decision[9] that if an employee is willing to tender payments equal to union fees and dues, then the employee cannot be compelled to become a member[10] of the union.[11]

In *Hershey* an employee resigned from union membership to return to work during a strike. The collective bargaining contract in effect before the strike contained a security agreement requiring employees to be members in good standing.[12] The union and company failed to reach a new agreement when the existing contract expired and the union went on strike. The employee returned to work after sending a letter of resignation to the union. After the strike ended with a new contract containing a union security agreement, the employee forwarded a check to the union for an amount equal to membership dues. The union, however, refused the tender and requested that the employee rescind his resignation and direct that the amount be credited to dues.[13] When he failed to comply with its request, the union demanded the employee's discharge. After submitting the matter to arbitration, the company complied with the union's demand.[14] The employee subsequently filed unfair labor practice charges against both the union and the company. The NLRB ordered his reinstatement,[15] holding that the Act allows agreements only to the

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[7] *See* text accompanying notes 108-11 *infra*.

[8] 513 F.2d 1083 (9th Cir. 1975).

[9] Hershey Foods Corp., 207 N.L.R.B. 897 (1973), *enforced*, NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975).

[10] When the Ninth Circuit stated that an employee could not be compelled to become a union member, it meant a member to the extent that he would be subject to more than the financial obligations of membership. 513 F.2d at 1085. *See* text accompanying notes 45-48 *infra*.

[11] 207 N.L.R.B. 897 (1973).

[12] *Id.* at 899. The union security agreement defined member in good standing as one who tendered the required fees and dues. In a letter to the union, the employee stated that he was resigning his membership but would tender an amount equal to dues if membership was required under the new labor agreement. The union admitted that there were no union rules that would affect the validity of the employees resignation. *Id.* at 899-900.

[13] The collective agreement allowed employees who could not join the union for legitimate religious reasons to pay merely a service charge equal to union fees and dues. This was the only situation, however, in which the agreement sanctioned nonmembership. *Id.* at 900.

[14] *Id.*

[15] *Id.* at 897.

extent that they require payment of initiation fees and periodic dues. An employee, the Board stated, who meets this financial obligation cannot be discharged.[16]

The *Hershey* decision is the first definitive holding since the passage of the Labor Management Relations Act (Taft-Hartley Act)[17] regarding the extent to which a valid security agreement can control an employee in the exercise of his employment rights.[18] The main issue which the Board and the Ninth Circuit confronted in *Hershey* was whether an employee may refrain from joining the union and fulfill his obligations under a valid agreement by merely tendering an amount equal to required dues.[19] Although the issue of the union's power to discipline bargaining unit employees was not directly addressed, it was an implicit concern.[20] The decision's impact, however, may transcend its effects on the rights of the individual workers involved.[21] Since the ramifications of the *Hershey* decision involve the growth of individual employees' rights and union stability,[22] the ultimate evaluation of the decision requires a balancing of the potential gains in the area of individual rights against the potential harm to union stability and bargaining strength.[23]

The adverse climate which nurtured the early labor movement and produced the union security agreement formed an important background to the *Hershey* decision. During the first part of the Twentieth Century, unions were not an accepted part of the American society.[24] As the labor movement grew it encountered determined

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[16] *Id.*

[17] Labor Management Relations Act, Act of June 23, 1947, ch. 120, 61 Stat. 136 (1947).

[18] Employment rights include the right to continued employment, to contract with the employer, and to the benefits of the collective contract. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[19] Haggard, *A Clarification of the Types of Union Security Agreements Affirmatively Permitted by Federal Statutes*, 5 RUTGERS CAMDEN L. REV. 418, 434-35 (1974) [hereinafter cited as Haggard].

[20] *See* text accompanying notes 45-55, 119 & 120 *infra*.

[21] *See* text accompanying notes 113-17 *infra*.

[22] *See* text accompanying notes 115-17 *infra*.

[23] *See* text accompanying notes 119-21 *infra*.

[24] The idea of organized labor and collective bargaining was contrary to the American idea of individualism. The Puritan work ethic, which was firmly imbued in our society, stressed the benefits of hard work in order to get ahead in the labor market. Social Darwinism, a predominant social theory of the early Twentieth Century, was based on the belief that a person's success or failure in employment was a result of individual motivation and ability. *See generally* C. BUFFORD, THE WAGNER ACT: EMPLOYEE AND EMPLOYER RELATIONS, (1st ed. 1941); NEW YORK STATE JOINT LEGISLATIVE

opposition from hostile employers.[25] To facilitate growth, unions sought means of increasing their bargaining power by building larger and more cohesive memberships. The security agreement met the needs of the union by compelling membership.[26]

Four types of security agreements developed. Under the first, an open shop agreement, unions were recognized but employees had the unrestrained option to join, or refuse to join, the union.[27] In contraposition was the closed shop. In order to be considered for employment a worker had to be a union member and, generally, employers requested workers through union hiring halls.[28] The union shop, the type of agreement involved in *Hershey*, was less restrictive. Under a union shop agreement, workers were not required to be union members in order to be hired, but they were compelled to become members within a specified period of time after being hired and to remain members as long as employed.[29] Finally, the agency shop permitted the union to require the financial support of all employees but actual union membership was optional. An employee who chose not to become a member was still required to pay a service charge to the union. This charge was usually equal to initiation fees and periodic dues required of members.[30]

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COMMITTEE ON INDUSTRIAL AND LABOR CONDITIONS, THE AMERICAN STORY OF INDUSTRIAL AND LABOR RELATIONS 36-58 (1943) [hereinafter cited as N.Y. STATE LEG. COMM.].

[25] The two popular methods used by employers to hinder labor organization were the blacklisting of known or suspected union sympathizers and the "yellow dog" contract. Employers circulated lists of union sympathizers who they felt were undesirable employees and appearance on this "blacklist" made it virtually impossible for union sympathizers to find employment. The "yellow dog" contract was often forced on employees as the result of the superior bargaining strength of the employer. These contracts forbade union membership. Early legislation outlawing "yellow dog" contracts was declared unconstitutional. *E.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (state legislation); Adair v. United States, 208 U.S. 161 (1908) (federal legislation pertaining to the railroads). However, by 1930 new laws were surviving constitutional challenges. N.Y. STATE LEG. COMM. at 101-5.

[26] *See generally* C. GREGORY, LABOR AND THE LAW 115-20 (2d rev. ed. with supp. 1961).

[27] *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 269 n.2, 270 (1917) (Brandeis, J., dissenting).

[28] *Id.* The closed shop and hiring hall are allowed, in modified form, in the building and construction industries. 29 U.S.C. § 158(f) (1970). When a hiring hall is used, prospective employees seek employment through a union rather than through direct contact with the employer. *See generally* L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 510 (6th ed. 1974).

[29] Haggard, *supra* note 19, at 419. Section 8(a)(3) of the NLRA purportedly adopts the idea of the union shop, 29 U.S.C. § 158(a)(3), however, *Hershey* holds that less than a true union shop is actually allowed. *See* text accompanying notes 105-10 *infra*.

[30] Haggard, *supra* note 19, at 419.

Congress, in passing the National Labor Relations Act (Wagner Act), recognized the need for legislative sanction of security agreements.[31] Congress provided for the workers' right to organize in § 7 which permits concerted activities, free from employer interference, to obtain better contract terms.[32] To further strengthen the development of unionism, the Wagner Act also gave legislative approval to the closed shop[33] and other forms of union security.[34] Free from employer harassment and through the use of security agreements, unions vastly increased membership and expanded their power.[35]

Abuse accompanied the growth of union power. Union leaders called an excessive number of strikes and work slowdowns, many leading to violence and property damage.[36] The closed and union shops were also misused. Many workers could not obtain employment

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[31] H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY, 27-29 (5th ed. 1965) [hereinafter cited as MILLIS & BROWN]. Although large segments of American society acknowledged the validity of labor unions, employer opposition continued to hamper union efforts to organize workers. The Depression aggravated the industrial injustices, which in turn disturbed industry. The stock market collapse and Depression destroyed the worker's faith in welfare capitalism and increased middle class sympathies toward organized labor. Keynesian economics, the foundation of New Deal policies, emphasized the importance of increasing mass purchasing power. Increased labor bargaining power, achieved by aiding labor to organize, was one way to stop shrinking payrolls and increase mass purchasing power necessary to sustain a mass producing economy. By enabling workers, through unions, to bargain with employers on an equal basis unions were able to raise wage levels and lower working hours. This not only gave workers more money to spend which aided the faltering economy, but also created jobs for the unemployed. The NLRA was one by-product of the massive legislative effort to end the Depression. Protection of unionism provided by the Act was a desirable counterbalance to previously unrestrained power of large industries. *Id.* at 19-29.

[32] 29 U.S.C. § 157 (1970). Section 8(a)(5) of the Act requires employers to bargain collectively with representative unions concerning wages, hours, and similar conditions of employment. *Id.* § 158(a)(5). These provisions were made effective by § 8(1) which made interference with employees' § 7 rights an unfair labor practice.

[33] Section 8(3) of the Wagner Act gave approval to closed shop provisions in collective contracts as long as the union was not established or assisted by unfair labor practices and was the authorized representative as provided by § 9(a). *See, e.g.*, International Ass'n of Machinists, Lodge No. 35 v. NLRB, 311 U.S. 72 (1940); Peninsular & Occidental S. S. Co. v. NLRB, 98 F.2d 411 (5th Cir.), *cert. denied*, 305 U.S. 563 (1938). *See also* S. REP. No. 573, 74th Cong., 1st Sess. (1935).

[34] *See* text accompanying notes 27-30 *supra*.

[35] Unions were able to add twelve million members to their rolls between the passage of the Wagner Act and the Taft-Hartley Act. MILLIS & BROWN, *supra* note 31, at 271.

[36] As large unions such as the Teamsters, Steelworkers, and Mine Workers developed they were able to use their large memberships and financial resources to conduct widespread strikes which paralyzed large sections of the economy. *Id.* at 272.

because unions refused to accept them as members and in instances where union membership was open, new members were charged exorbitant fees and dues. Also, a worker who joined a union was not guaranteed future employment since his membership could be capriciously terminated, thus resulting in the loss of employment.[37] Such increases in union strength were feared as a threat to the social system.[38]

The Taft-Hartley Act[39] was adopted to curb the excesses of union power. Restrictions abolishing the closed shop[40] were placed on union security agreements,[41] but § 8(a)(3) was added to permit agreements that require employees to become "union members" within thirty days after initial employment.[42] That section further provides, however, that an employer cannot discharge an employee for nonmembership if membership was denied or terminated for reasons other than nonpayment of initiation fees and periodic dues.[43] This statutory combination represents a congressional desire to shield an employee's employment rights from his organization duties while preventing him from enjoying the benefit of union representation without bearing some burden to support the union.[44]

The ambiguous language in § 8(a)(3) has necessitated judicial interpretation of the degree of union control over bargaining unit employees that Congress intended to sanction. The *Hershey* decision resolves several of the questions raised by previous decisions which confronted the problem of union discipline of employees. Among those decisions was *NLRB v. Allis-Chalmers Manufacturing Co.* which upheld court-enforceable union discipline.[45] The Supreme

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[37] *Id.* at 277-78.

[38] *Id.* at 22-30.

[39] Labor Management Relations Act, Act of June 23, 1947, ch. 120, 61 Stat. 136 (1947).

[40] *See* note 28 *supra.*

[41] *See* notes 2-4 *supra.*

[42] Only the union which is the authorized representative of the employees may bargain with an employer concerning union security agreements. 29 U.S.C. § 158(a)(3)(i) (1970).

[43] *See* note 4 *supra.*

[44] *See* text accompanying notes 98-101 *infra.*

[45] 388 U.S. 175 (1967). The union member crossed union picket lines to return to work in violation of the union's resolution calling for a fine against strikebreakers. The employee was fined after completion of a union disciplinary hearing. When he refused to pay the fine the union sought enforcement in the courts. *See generally* Archer, *Allis-Chalmers Recycled: A Current View of a Union's Right to Fine Employees for Crossing a Picket Line*, 7 IND. L. REV. 498 (1974); Note, *Union Power to Discipline Members Who Resign*, 86 HARV. L. REV. 1536 (1973); 42 U. CINN. L. REV. 146 (1973).

Court stated that the legislative history of the Taft-Hartley amendments indicated congressional reluctance to interfere in union internal affairs.[46] The Court held that a union could fine full union members[47] for violations of union rules and could enforce the fines either judicially or through expulsion from the union.[48]

Although a union could justifiably discipline a full member for violations of union rules, it was uncertain whether this power extended to members after resignation from the union. The Court examined this question in *NLRB v. Textile Workers Local 1229*.[49] In *Textile Workers*, several union members attempted to avoid fines for strikebreaking by resigning before returning to work, but the union fined the strikebreakers despite their resignations.[50] The employees filed unfair labor practice charges with the NLRB which ruled[51] that the union's action violated § 8(b)(1) of the Act which forbids union interference with employees' § 7 rights to refrain from engaging in concerted activities.[52] On appeal from the Court of Appeals' denial of enforcement,[53] the Supreme Court held that a union's power over its members ceased upon termination of membership and, therefore, the union could not fine strikebreakers who had resigned.[54] The holding in *Textile Workers*, however, is limited in scope since no union rule restricted the ability of a member to resign, and the collective bargaining agreement requiring union membership had lapsed. Although the employees were able to resign and avoid union discipline, the Court did not consider the extent to which the ability to resign can be circumscribed by a contract between the member and the union or by a valid security agreement.[55]

Congressional intent to insulate an employee's employment rights from his organizational duties[56] provokes serious questions concerning union restrictions on a member's ability to resign. *Textile Workers* left open the possibility that a union security agreement requiring

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[46] 388 U.S. at 185.

[47] *See* note 6 *supra*.

[48] 388 U.S. at 192.

[49] 409 U.S. 213 (1972).

[50] A resolution calling for a fine of $2000 for strikebreaking had been adopted by the members before the employees involved had resigned. *Id.* at 214.

[51] Textile Workers Local 1029, 187 N.L.R.B. 636 (1970).

[52] 29 U.S.C. § 158(b)(1) (1970).

[53] NLRB v. Textile Workers Local 1029, 446 F.2d 369 (1st Cir. 1971).

[54] 409 U.S. at 217.

[55] *Id. See generally* Note, *Union Power to Discipline Members Who Resign*, 86 HARV. L. REV. 1536 (1973); 42 U. CINN. L. REV. 146 (1973).

[56] *See* text accompanying notes 96-99 *infra*.

membership might subject an employee who resigns to a risk of discharge from employment. In order to avoid contravention of the congressional intent to protect employee employment rights, however, it has also been stated that union membership must be voluntary to permit a union to discipline its members.[57] The NLRB, in *Hershey*, utilized the same rationale in deciding that a valid agreement cannot, in fact, require actual membership in a union as a condition of employment. The Board eliminated existing ambiguity by defining membership, under the Act, as requiring only the payment of a sum equal to union dues.[58]

On the basis of the facts[59] in *Hershey*, the Board found, with one member dissenting,[60] that the union and company had been guilty of unfair labor practices in discharging the employee. According to the Board, a valid security agreement could only require payment of an initiation fee and periodic dues.[61] The employee, therefore, was under no obligation to become, or remain, a union member.[62]

In reaching its decision, the Board emphasized its reasoning in *Union Starch and Refining Co.*[63] In *Union Starch* the Board held that if obtaining union membership required more than payment of dues an employee could not be discharged from employment for nonmembership.[64] The union in *Hershey* attempted to distinguish the *Union Starch* decision in that the union had imposed no condition on membership beyond the payment of dues, while in *Union Starch* the union required new members to take a union oath and attend a meeting at which their application for membership would be approved. However, the Board stated that this had no bearing on the case.[65] The union argued that if it were willing to extend membership to an

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[57] *See* Haggard, *supra* note 19, at 442-43.

[58] Hershey Foods Corp., 207 N.L.R.B. 897 (1973).

[59] *See* text accompanying notes 12-14 *supra*.

[60] *See* note 65 *infra*.

[61] 207 N.L.R.B. 897.

[62] *Id.*

[63] 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951). *See also* cases cited in 513 F.2d at 1086.

[64] 87 N.L.R.B. 779, 784.

[65] 207 N.L.R.B. at 901. *But see* Board Chairman Miller's dissenting opinion. *Id.* at 897. Chairman Miller urged that the § 8(a)(3) proviso forbids an employer to discharge an employee for nonmembership in the union if he has reason to believe that "membership was denied or terminated for reasons other than failure of the employee to tender . . . periodic dues and . . . initiation fees . . . ." The employee, Chairman Miller reasoned, did not fall within the protection of the proviso because membership was not denied him. The employee, admittedly, did not seek or desire to become a member. *Id.* at 898.

employee solely on the condition that he pay dues, the employee could be carried on the union membership rolls.[66] The Board noted, however, that despite language to the contrary, the Supreme Court had concluded that Congress intended to prevent the use of security agreements for any purpose other than compelling the payment of dues.[67]

According to the Board in *Hershey*, although the union may list an employee on its membership rolls if he pays dues, the union cannot require any affirmative action[68] by the employee. Moreover, a unilaterally enrolled employee[69] is not subject to all obligations of membership.[70] The Board indicated that a true union membership relationship is a voluntary contractual relationship which the employee can terminate at will.[71] Membership under the Act, the Board reasoned, means no more than a duty to pay fees and dues uniformly required of members when membership is not voluntarily sought by an employee.[72]

The United States Court of Appeals for the Ninth Circuit reviewed the Board's order.[73] In enforcing the order, the court indicated that the form of union security agreement allowed by § 8(a)(3)[74] was a compromise between disallowing all compulsory unionism and maintaining the legality of the closed shop.[75] Judge Wallace, for the

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[66] 207 N.L.R.B. at 901. The union relied on Supreme Court dictum:

> [I]f the union chooses to extend membership even though the employee will meet only the minimum financial burden, and refuses to support or "join" the union in any other affirmative way, the employee may have to become a "member" under a union shop contract, in the sense that the union may be able to place him on its rolls.

NLRB v. General Motors Corp., 373 U.S. 734, 743-44 (1963) (footnote omitted). The union felt that this language indicated that an employee could be compelled to join the union if the only prerequisite to membership was payment of dues. The effect on the employee of being carried on the union rolls, if he takes no active part in union activities, is uncertain. The Court did not foreclose the possibility of extending union discipline power to cover members who merely pay dues. *See* text accompanying notes 83-85 *infra*.

[67] 207 N.L.R.B. at 902. The Board relied upon NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963), *citing* Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954).

[68] By affirmative action the Board meant attending union meetings, taking oaths, or, as was the case in *Hershey*, rescinding a previous resignation.

[69] A unilaterally enrolled employee is one who was involuntarily placed on union rolls as a result of his paying dues.

[70] 207 N.L.R.B. at 902.

[71] *Id.*

[72] *Id.* at 903.

[73] NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975).

[74] 29 U.S.C. § 158(a)(3) (1970).

[75] 513 F.2d at 1085.

court, indicated that this compromise was designed to eliminate "free riders"[76] while proscribing the union's power to determine an employee's future on the job.[77] He reasoned that the union security agreements might be described as "in the nature of union shops."[78] Although a union may prescribe rules for acquisition and retention of membership, Judge Wallace stated that as long as an employee is willing to pay dues and initiation fees he is protected from employment discharge by § 8(a)(3)(B) of the Act.[79]

The membership requirements under the Act have a significant impact on the union's power to discipline employees in the bargaining unit.[80] The Supreme Court has held that a union can impose court-enforceable fines on active members,[81] but that a union cannot discipline employees for action taken after they have resigned from the union.[82] The Court had not, however, dealt with the question of whether a valid union security agreement can restrict a member's right to resign.

As stated previously, prior case law concerning the union's disciplinary power over its members was an important factor leading to the *Hershey* decision. In *NLRB v. Allis-Chalmers Manufacturing Co.* and subsequent cases dealing with union discipline of members, the Supreme Court placed great emphasis on the voluntary nature of the union-member relationship, but failed to examine the effect of a security agreement on an employee's decision to become an active union member.[83] The Court also did not explain the degree to which a union

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[76] A "free rider" is an employee who benefits from the efforts of the union without bearing his share of the burdens. Generally, the financial burdens of unionism are emphasized, leading to efforts to force all employees to at least pay dues. When an employee supports the union financially, but ignores the organizational duties of union membership he can be considered an "organizational free rider." *See* text accompanying notes 90-95 *infra*.

[77] 513 F.2d at 1085.

[78] *Id.*; LEGISLATIVE HISTORY OF THE LMRA 321 (1948) [hereinafter cited as LEG. HIST. OF LMRA]. *See* text accompanying notes 59-72 *supra*.

[79] 513 F.2d at 1087.

[80] *See* text accompanying notes 45-55 *supra*.

[81] Scofield v. NLRB, 394 U.S. 423 (1969); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

[82] Booster Lodge No. 405, Machinists & Aerospace Workers v. NLRB, 412 U.S. 84 (1973); NLRB v. Textile Workers Local 1029, 409 U.S. 213 (1972). Both of these cases involved attempts by the unions to enforce judicially fines on employees who had resigned from the union. The employees involved had resigned from the unions because they desired to return to work during union strikes. The Court held that a union could not fine members for actions taken after they had resigned. 412 U.S. at 85; 409 U.S. at 217-18.

[83] 388 U.S. 175, 196 (1967).

can discipline a member who does no more than pay required fees and dues.[84] If an agreement can compel an employee to submit to union discipline, an employee's § 7 rights to engage or refrain from engaging in concerted activities free from either management or union coercion would appear to be violated.[85] In two cases subsequent to *Allis-Chalmers* the Court held that a union's power over a member terminates when that member resigns from the union.[86] However, the Court expressly avoided determining whether the contractual relationship between members and the union or a valid security agreement could limit a member's right to resign.[87] Therefore, the possibility that an employee could be compelled to expose himself to union discipline under a valid agreement was not foreclosed.

The *Hershey* decision settles several questions concerning union discipline and control of its membership. With union membership under the Act defined as simply the payment of dues and fees, the assumption now is that those employees who actually join[88] the union do so voluntarily. Thus, under *Hershey*, an employee who joins a union can be assumed to be a full and active member thereby subject to union discipline.[89] The *Hershey* decision is also partially dispositive of the effect of a member's resignation on the union's power over him. If, as the court in *Hershey* held, a valid security agreement can require no more than payment of union dues, an employee cannot lose his job upon resignation so long as he meets the financial obligations

[84] 388 U.S. 175 (1967). *See* Local 749, Boilermakers v. NLRB, 466 F.2d 343, 345 n.3 (D.C. Cir.), *cert. denied*, 410 U.S. 926 (1973).

[85] 29 U.S.C.. § 157 (1970).

[86] Booster Lodge No. 405, Machinists & Aerospace Workers v. NLRB, 412 U.S. 84 (1973); NLRB v. Textile Workers Local 1029, 409 U.S. 213 (1972).

[87] Booster Lodge No. 405, Machinists & Aerospace Workers v. NLRB, 412 U.S. 84, 88 (1973); NLRB v. Textile Workers Local 1029, 409 U.S. 213, 217 (1972). The NLRB considered one such restriction in UAW, Local 647, 197 N.L.R.B. 608 (1972). In that decision the union claimed that the resignation was invalid due to a union constitutional provision which allowed resignations ten days before the end of the fiscal year only. The Board held that this provision so drastically limited the members right to resign that it had to be ignored, because there was no connection between the restriction and any legitimate union interests. *Id.* at 609. In an earlier case, NLRB v. UAW, 320 F.2d 12 (1st Cir. 1963), the court upheld a similar provision. The court found a legitimate union interest in insuring " 'uniform practices to preserve its financial standing by establishing reasonable times for resignations.' " *Id.* at 16. This case was decided before *Scofield* and *Allis-Chalmers* which emphasized the voluntary nature of the union-member relationship. *See* text accompanying notes 45-57 *supra.*

[88] An employee who actually joins the union is one who chooses active membership rather than the *Hershey* option to pay merely an amount equal to dues.

[89] *See* text accompanying notes 45-48 *supra.*

of union membership. Therefore, a security agreement cannot operate in such a way as to prevent an employee from resigning to avoid union discipline. The court in *Hershey* did not define the degree to which a member's resignation can be restricted by a union by-law or constitutional provision. The decision could, however, aid the courts in deciding the extent to which a union rule can restrict member resignation. Actual union membership under *Hershey* is purely voluntary, and members of a voluntary association can be expected to abide by all of the rules of that association, including reasonable restrictions on the right to resign from the association.

Certain factors, however, militate in favor of increased union control over employees. One such factor arises from the benefits shared by all employees, regardless of membership status, from a union negotiated contract.[90] Another benefit to the employee is that employers may not negotiate less advantageous individual contracts with employees who choose not to become union members.[91] If all employees benefit from the bargaining efforts of the union, all employees should be required to accept certain responsibilities of union membership.[92]

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[90] J. I. Case Co. v. NLRB, 321 U.S. 332 (1944). In *J. I. Case* the company refused to bargain collectively with the certified union claiming that the employment relationship was controlled by individual contracts that had been negotiated with employees. The NLRB held that the refusal to bargain with the union violated § 8(5) of the Wagner Act, which makes it an unfair labor practice to refuse to bargain over any matter for which bargaining was authorized, and indicated that the individual contracts were being used to impede the employees' § 7 rights. *Id.* at 334. The Court indicated that although individual employment contracts must be made with each employee, all employees were entitled to all of the benefits of the collective agreement even if willing to settle for less beneficial terms. Contracts made between employers and individual employees concerning matters that are subject to collective bargaining are superseded by the collective agreement. *Id.* at 338. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); NLRB v. U.S. Sonics Corp., 312 F.2d 610 (1st Cir. 1963); Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 210 F.2d 623 (3d Cir. 1954), *aff'd*, 348 U.S. 437 (1955); NLRB v. Port Gibson Veneer & Box Co., 167 F.2d 144 (5th Cir.), *cert. denied*, 335 U.S. 819 (1948); Gatliff Coal Co. v. Cox, 152 F.2d 52 (6th Cir. 1945).

[91] J. I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

[92] Not only do all employees benefit from the terms of the union negotiated collective agreement, but also the union has a duty to represent fairly all members of the bargaining unit, regardless of their membership status. *E.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Wallace Corp. v. NLRB, 323 U.S. 248 (1944). *Cf.* Conley v. Gibson, 355 U.S. 41 (1957). *See generally* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957). This duty of fair representation extends to representation during grievance proceedings as well as during collective bargaining. Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945). Unions argue that this duty to represent all employees in a bargaining unit should carry with it a corresponding duty on the part of those employ-

Although the *Hershey* decision emphasized the financial obligations of union membership, the court neglected to examine an expanded form of the "free rider" theory.[93] The *Hershey* decision requires all employees who benefit from the collective bargaining agreement to carry the financial burden of the collective bargaining process. However, employees are allowed to avoid the organizational responsibilities of union membership.[94] The effect on union bargaining power of freeing employees from all but the most basic financial obligations toward the union is indeterminable. The possibility of seriously hampering the unions in the execution of their bargaining function is, however, a potentially serious ramification of the decision.[95]

The dual purpose[96] served by the language of the relevant Taft-Hartley provisions obfuscates the nature of allowable union security agreements.[97] Section 8(a)(3) of the Act[98] permits an agreement which

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ees to support the union. CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE CASE AGAINST "RIGHT TO WORK" LAWS 81-82 (1957).

[93] *See* text accompanying note 76 *supra*.

[94] Most important is the fact that nonmembers may continue working and earning a living while union members are out on strike in order to persuade the employer to grant benefits to all employees, union members and nonmembers alike.

[95] If the Ninth Circuit had decided that an employee could be compelled to join the union if the only prerequisite to membership was payment of dues and fees, courts in the future could have operated within the interstices of the *Allis-Chalmers* decision. That case left unanswered the question of whether a union could discipline members who paid dues but took no active role in union activities. 388 U.S. 175, 197 (1967). If it became necessary to avoid hampering the unions in their role as bargaining agents, courts could allow unions to levy fines against these inactive members in circumstances where it might prove vital to the preservation of the union. An example of such a situation would be during a union strike. By levying fines against strikebreakers, the union would be able to force compliance by all bargaining unit members with the strike vote without coming within the purview of the § 8(a)(3) provisions dealing with discrimination against nonmember employees. Because these fines would be court-enforceable the union would not have to resort to the threat of expulsion in order to enforce them. *See* text accompanying notes 45-48 *supra* & 119-21 *infra*.

[96] *See* text accompanying note 99 *infra*.

[97] The legislators consistently indicated that union shops and compulsory membership were allowable thirty days after commencement of employment. On the other hand, the debates also seemed to center around eliminating the "free rider," one who seeks to benefit from the efforts of the union without offering his support. It is possible that the rhetoric, and ultimately the language drafted, was vague because of the politically volatile nature of the amendments. The Senate Committee Report stated that, under the Act:

> An employee is permitted to make arrangements requiring membership in a union as a condition of employment applicable to employees in a given bargaining unit thirty days after an employee is hired . . . Under another proviso of this subsection, it becomes an unfair labor

requires union membership as a condition of employment, but the *Hershey* decision defines this "membership" as nothing more than payment of a sum equal to fees and dues. The two major aims throughout the debates over the Taft-Hartley amendments were to separate an employee's employment rights from his organizational duties and to prevent nonmembers from benefiting at the expense of dues-paying members.[99] Congress attempted to accomplish these twin goals in § 8(a)(3) by authorizing security agreements requiring membership, but permitting discharge from employment only for failure to pay dues. Whether Congress intended § 8(a)(3) to be applicable only after an employee becomes a member[100] or to allow an employee to refrain from joining the union is uncertain.[101]

Prior to *Hershey* the NLRB and courts had interpreted the legislative history of the Act in favor of the former position. These cases appear consistent with an interpretation of the Act sanctioning secu-

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> practice for an employer to discharge an employee under a compulsory-membership clause if he has reasonable grounds for believing . . . (B) that membership in the union was terminated for reasons other than nonpayment of regular dues and initiation fees . . . The committee did not desire to limit the labor organization to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership.

LEG. HIST. OF LMRA, *supra* note 78, at 426. *See id.* at 300. Senator Taft, one of the bill's sponsors, said:

> [M]any persons believe that the union shop, which is the usual form of closed shop, should be absolutely prohibited. The committee did not feel that it should go that far, but the committee felt that if it permitted a union shop agreement which provided that every man must be a member of the union, then the union must be reasonable, must accept as members all who apply for membership, and must accept them on the same terms as it applies to other members, and must permit them to remain in the union if they are willing to pay their dues.

93 CONG. REC. 4193 (1947). *See also id.* at 5088. *See generally* Taft, *The Taft-Hartley Act, What It Does Do, What It Doesn't Do*, 15 I.C.C. PRAC. J. 466 (1948).

[98] *See* note 2 *supra*.

[99] LEG. HIST. OF LMRA, *supra* note 78, at 413. *See also* Haggard, *supra* note 19, at 439-40.

[100] Prior cases have definitively held that membership in the union cannot be a condition of employment if more than payment of dues is required of employees as a prerequisite to membership. Consequently, § 8(a)(3) is clearly applicable if membership is denied or terminated for reasons other than nonpayment of dues. The question of when § 8(a)(3) applies is uncertain only in situations in which the union is willing to accept an employee into its ranks if he does no more than pay dues.

[101] *See* note 65 *supra*.

rity agreements which require an employee to join the union, provided that the only prerequisite to union membership is payment of dues and initiation fees. In *NLRB v. General Motors Corp.*,[102] the Court found a company's refusal to bargain over an agency shop agreement a violation of the Act. In dictum the Court indicated that the agency shop provision dealt with in that case was a less coercive contract requiring less adherence to the union than the arrangement sanctioned by the Act.[103] The Court discussed "membership" under the Act, concluding that it was limited to its "financial core."[104] Although expulsion could result in discharge from employment only for failure to pay dues, the Court indicated that, if the only prerequisite to membership was the payment of dues, the union may carry all employees on the membership rolls.[105] Arguably, the only allowable security agreements fall between a union shop and an agency shop.[106] Although the discussion in *General Motors* on allowable agreements under the Act was dictum, it is important to analysis of the *Hershey* decision which defined allowable union security as no more than an agency shop in contravention of the dictum in the *General Motors* decision.[107]

Prior cases concerning union membership involved denial of membership because the prospective member refused to comply with requirements beyond the payment of dues.[108] In *Hershey*, however, the employee could have become a member by merely paying union dues and initiation fees. The Ninth Circuit stated that an employee's desire to become a member is irrelevant to the application of §

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[102] 373 U.S. 734 (1963). *See generally* Toner, *The Union Shop Under Taft-Hartley*, 5 LAB. L.J. 552 (1954); Cogen, *Is Joining the Union Required in the Taft-Hartley Union Shop?*, 5 LAB. L.J. 659 (1954).

[103] *General Motors* concerned only an unfair labor practice charge that is not relevant to the present discussion. Nevertheless, in dictum, the Court stated, "[I]f Congress desired . . . in the Taft-Hartley Act [to permit] the union shop, then it also intended to preserve the status of less vigorous, less compulsory contracts which demanded less adherence to the union." 373 U.S. at 741.

[104] *Id.* at 742.

[105] *See* note 67 *supra*.

[106] Haggard, *supra* note 19, at 425-26; *see* text accompanying notes 27-30 *supra*.

[107] The dictum in *General Motors* dealing with the relative nature of union and agency shop agreements is of debatable importance. The Court's reasoning was not dispositive of the question in the case and, arguably, emphasis should not be placed on isolated and unnecessary language in the opinion. The Court did not need to interpret the language of § 8(a)(3) as it relates to its maximum allowances. Nevertheless, the language is some indication of how the question was viewed by the Supreme Court.

[108] *See, e.g.*, NLRB v. Hershey Foods Corp., 513 F.2d 1083, 1086 (9th Cir. 1975); Union Starch & Refining Co. v. NLRB, 186 F.2d 1008 (7th Cir. 1951).

8(a)(3)(B) protecting him from discharge from employment.[109] The Ninth Circuit went significantly beyond prior decisions concerning compulsory union membership. Although prior cases held that a non-voluntary member could not be forced to comply with membership requirements such as signing of union applications, taking of union oaths, or attending union meetings, there was some indication that the employee could be compelled to join the union if only payment of dues and fees were required.[110] *Hershey* is the first case deciding that a union cannot compel an employee to join the union even if it requires mere payment of dues. A valid security agreement can only require payment of an amount equal to initiation fees and periodic dues, the equivalent of an agency shop.[111]

Prior to *Hershey* the effect of a union security agreement on an employee's employment rights and organizational duties was uncertain. Although an employee could not be required to comply with any conditions of membership beyond dues payment, he could be subjected to reasonable union discipline if he were an active union member. The Court had not decided whether an employee could be subjected to union discipline if his membership consisted solely of dues payments. Moreover, the ability of an employee to resign from the union to avoid union rules without jeopardizing his job security was questionable.[112]

*Hershey* resolves these uncertainties to some extent. Apparently a valid agreement cannot compel an employee to join a union, even if the only requirement is the payment of dues. The employee is without any obligation to the union beyond providing financial support and, by declining union membership, is able to flaunt union rules without risking discipline. If an employee joins the union, but later decides not to abide by the rules, he may resign without fear of losing his job. The decision that a union security agreement can require no more of the employee than financial support of the union,

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[109] 513 F.2d at 1087. *See* Local 749, Boilermakers v. NLRB, 466 F.2d 343, 344-45 n.1 (D.C. Cir. 1972). *See also* note 64 *supra*.

[110] The Board stated:

> [T]he employees *were* willing to comply with the only term or condition for membership which we think can, under the provisos, legally be enforced by discharge—the tender of the periodic dues and the initiation fees uniformly required.

Union Starch & Refining Co., 87 N.L.R.B. 779, 785 (1949) (emphasis in original).

[111] *See* text accompanying note 30 *supra*.

[112] An employee's freedom to resign from the union to avoid discipline would be of particular importance if he were not in sympathy with a strike and desired to return to work.

therefore, raises questions concerning the effects it will have on labor.

Although the *Hershey* decision promotes the rights of individual workers, all workers in the bargaining unit are still, absent a provision to the contrary,[113] bound by the collective bargaining agreement.[114] Neither the Board nor the courts have confronted the issue of whether a nonmember may individually negotiate a more beneficial contract.[115] However, the union is under a duty to represent members and nonmembers alike; the employer is under a concomitant duty to bargain only with the bargaining representative.[116]

There are compelling reasons, in the labor field, for sacrificing the right of individuals to contract.[117] *Hershey* allows an individual worker who contributes merely financially, to reap the benefits of the union negotiated agreement, while bargaining higher individual advantages. This creates injustices in the collective bargaining process. The employee who benefits from the union negotiations, while contributing none of the organizational effort nor incurring the detrimental aspects of the strike,[118] is a "free rider" to the extent that he contributes no organizational assistance to the union cause.

The potential undermining of unions as the bargaining agent for the employees as a result of the *Hershey* decision appears to outweigh its promotion of individual rights. The ultimate effectiveness of the union depends upon its cohesiveness and ability to maintain a strike.[119] The power to present a "united front" through discipline of union members who ignore the union mandate is essential to the union's ability to strike and to bargain effectively. The *Hershey* decision subverts the union's power to compel unified employee demands and action by allowing employees to evade union discipline and elude their duties by refraining from participation in union membership. As the number of employees electing to refrain from membership in-

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[113] Many agreements provide individual workers with the right to negotiate benefits beyond those provided for generally. 2 BNA COL. BARG. NEG. & CONT. 93-201. For the purposes of this discussion it is assumed that no such provision is applicable.

[114] *See* text accompanying notes 90-92 *supra*.

[115] The Court in *J. I. Case Co. v. NLRB* stated: "We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than [the] collective agreement [provided] . . . " 321 U.S. 332, 338 (1944).

[116] *See* note 92 *supra*.

[117] *See generally* Dakom, *Individual vs. Collective Agreements: A Study in Conflict and Union Leverage*, 42 FORD. L. REV. 495 (1974).

[118] An employee who cannot be forced to honor picket lines during a strike will be able to benefit from the more advantageous contract provisions gained through the use of the strike without losing any pay as a result of not working during the strike.

[119] Summers, *Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 483, 488 (1950). *See* note 95 *supra*.

creases,[120] the strike threat, and consequently the union's effectiveness as bargaining representative, diminishes.

Although the Ninth Circuit's resolution of the *Hershey* case is consistent with the Taft-Hartley Act's design to insulate employment rights from organizational duties while prohibiting the "free rider,"[121] the court failed to confront problems involving the "organizational free rider"—the individual who satisifies the financial obligations of the union but fails to meet the further organizational responsibilities necessary to successful unionism. The decision does enable each employee to base his decision concerning union membership on individual desires rather than on contractual compulsion. Eventually, however, workers generally could suffer as a result of a weakened union solidarity. As unity deteriorates and management loses respect for the union as a bargaining agent the collective agreement will provide less satisfactory benefits for employees. Just as the "organizational free rider" reaps the benefits provided by the efforts of the active membership, union members will bear the detriment of decreased union efficiency created by the "organizational free rider." Consequently, the repercussions of *Hershey* extend beyond the individual to the institution.

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[120] The number of employees who will seek to avoid the responsibilities of union membership by declining actual membership in the union and merely tendering an amount equal to dues is purely speculative. States which have adopted right-to-work laws, outlawing compulsory union membership, offer a means of assessing the possible ramifications of the *Hershey* decision on union growth and power. Evidence available from one such state, Texas, indicates that overall union growth in manufacturing industries has shown no significant decline since passage of the right-to-work law. Industries that had traditionally depended on compulsory membership agreements, *i.e.*, construction and maritime industries, did experience difficulties in recruitment. Meyers, *Effects of "Right-to-Work" Laws: A Study of the Texas Act*, 9 IND. & LAB. REL. REV. 77, 78 (1955). *See generally* Warshal, *"Right-to-Work," Pro and Con*, 17 LAB. L.J. 131 (1966); McDermott, *Union Security and Right-to-Work Laws*, 16 LAB. L.J. 667 (1965).

[121] The union must be selected by a majority of the employees in a given bargaining unit. Upon the petition of 30% of the members of the bargaining unit the NLRB can order an election to redetermine the existence of majority support for the union. The Act only requires that a majority of the bargaining unit accept the union as exclusive bargaining agent, not that a majority be members of the union. Therefore, a union could still be exclusive bargaining representative and be able to compel less than a majority of the employees to take part in an economic strike. 29 U.S.C. 1 § 159(E) (1970). *See* text accompanying note 76 *supra*.