The State of South Carolina

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The Honorable T.W. Edwards, Jr.
Member of the House of Representatives
104 Blatt Building
Columbia, South Carolina 29211

Dear Representative Edwards:

You have asked the opinion of this Office regarding whether the South Carolina Right to Work Law [§ 41-7-10, et seq.] would prohibit Mack Trucks from terminating nonunion employees at its Winnsboro, South Carolina plant in order to provide employment opportunities for U.A.W. members who claim a preference for the Winnsboro jobs in accordance with a transfer provision contained in a collective bargaining agreement entered in Pennsylvania. For the reasons hereinafter stated, this Office concludes that the South Carolina Right to Work Law would preclude the termination of the nonunion employees at the Mack Trucks plant in Winnsboro, South Carolina in favor of U.A.W. members who transfer from other Mack plants.

We understand the pertinent facts to be as follows.[1] Mack Trucks entered into a master collective bargaining agreement with the U.A.W. that took effect on or about October 30, 1984 and covered Mack plants in Pennsylvania, Maryland and New Jersey. The master contract, as construed by arbitration, included what is known as a "union shop" security agreement that required (with rare exception) the covered employees to join the U.A.W. within thirty days of being hired by Mack Trucks.[2] The labor agreement

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[1] The facts recited herein have been derived from public documents and this Office does not have access to employment or personnel records in the hands of Mack Trucks or the U.A.W.

[2] A "union shop" agreement is a type of what are commonly known as "union security" agreements. It generally provides that no one will be employed who does not join the union within a short time after being hired. Oil, Chemical and Atomic Workers, International Union, AFL-CIO v. Mobil Oil Corporation, 426 U.S. 407, 409, fn. 1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976). A "closed shop" is another type of union security agreement that generally provides that the employer will hire no one who is not a member of the union. Id., 426 U.S., at 407, fn. 1.

also contains what is known as a transfer clause that has been construed to require Mack to offer employment in its Winnsboro plant to the employees that were protected by the master collective bargaining agreement and prefers those employees over the employees not protected by the agreement. Mack has locally hired several hundred nonunion employees for production work at its Winnsboro, South Carolina plant and your inquiry focuses upon a hypothetical situation wherein Mack terminates these nonunion employees and replaces them with transferred employees protected by the contract. We note here that Mack has made general assurances that the nonunion employees will not be terminated in favor of transferred employees. As earlier noted, the employees who were entitled to the transfer preference were required to join the U.A.W. within thirty days of their employment with Mack. Thus, the practical import is that the employees who are eligible for the transfer preference were required to have joined the U.A.W. as a precondition to obtaining eligibility for transfer.

We note at the outset that South Carolina's Right to Work Law guarantees working men and women in South Carolina the right to work regardless of whether or not they are members of a labor union. The statute sets forth the public policy of the State "of protecting the worker in his right to work free of any interference and control by either employers or labor organizations.

> He has a right to join his fellows in organization for the betterment of his condition and to choose his own representatives for that purpose. He also has the right to decline to join any organization and to retain employment wherever he chooses. (emphasis added)."

Minor v. Bldg. and Construction Trades Council, 75 N.W.2d 139, 149 (N.D. 1956). South Carolina's Right To Work law like others, insures that "all other persons who will not or can not, participate in union assemblies" are not driven "from remunerative employment." Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 531 (1949).

We first conclude that the South Carolina Right to Work Act governs employment at the Mack plant in Winnsboro, South Carolina. The U.S. Supreme Court has held that the location of the "predominant job situs" is the critical factor in determining whether a state's right to work law is applicable. Oil, Chemical and Atomic Workers, International Union, AFL-CIO v. Mobil Oil Corporation, supra. Since the production operations will be located in Winnsboro, South Carolina, and concomitantly the critical employment functions, South Carolina's Right to Work Law governs.

Our second conclusion is that South Carolina's Right to Work Act is extremely broad in proscribing any hiring or termination practices that discriminate in favor of union membership. The

South Carolina Right to Work Act "announces emphatically the public policy of South Carolina that union membership should have no relevance upon a person's 'right to work'...." Gregory Electric Company v. Custodis Constr. Co., Inc., 312 F.Supp. 300 (D.S.C. 1970). The South Carolina Act itself is most clear as to its intention:

> It is hereby declared to be the public policy of this State that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.

Section 41-7-10, South Carolina Code. The Act's purpose has been succinctly characterized as "preserving the right of laboring men to employment notwithstanding closed-shop agreements entered into between employers and labor unions...." Friendly Society of Engineers and Sketchmaker v. Calico Engraving Company, 238 F.2d 521, 524 (4th Cir. 1956), cert. denied 353 U.S. 935.

The Act further expressly proscribes "[a]ny agreement between any employer and any labor organization whereby persons not members of such labor organizations shall be denied the right to work for such employer or whereby such membership is made a condition of employment, or of continuance of employment by such employer, or whereby such union or organization acquires an employment monopoly in any enterprise...." Section 41-7-20 of the South Carolina Code. The decisional law that has considered this provision has given it broad application whenever a union, by an agreement with an employer, has maintained control over hiring practices. For example, in Brabham v. Miller Electric Company, 237 S.C. 540, 118 S.E.2d 167 (1961), the Court condemned as violative of the Right to Work Act any agreement that provided (1) union control of employment, or (2) employer boycott or insistence upon union labor. Brabham also made clear that the "practical effect" of the agreement will be examined as well as the agreement's actual terms to determine whether a union maintains control of employment. 237 S.C., at 547. Thus, it is convincing that South Carolina's Right to Work Law was intended to be broadly applied to prohibit any agreement between an employer and a labor organization that as a practical effect would discriminate against nonunion workers in the hiring and firing of workers in this State.

We thirdly conclude that a bargaining agreement that includes a union shop clause and provides a hiring preference in favor of the workers protected by the agreement if applied in South Carolina as a basis for discontinuing the employment of nonunion workers would contravene South Carolina's Right to Work Law. As earlier noted, the Mack employees who are given a preference for the employment opportunities in Winnsboro could not have obtained that priority status without having joined the U.A.W. since Mack entered into a union shop security agreement

with U.A.W. Thus, union membership is undisputedly a factor in this preference. This analysis is amply supported by decisional law. For example, in Courier-Citizen v. Boston Electrotypers, Union No. 11, 702 F.2d 273 (1st Cir. 1983), the Court held that the presence of a union security clause in a labor agreement, together with a recall provision that provided a hiring preference in favor of laid off employees protected by the union security agreement, insured "as a practical matter" that the recalled employees would all be members of the union. 702 F.2d, at 277.[3]

The reasoning of the Seventh Circuit in Miller Brewing v. Brewery Workers, 739 F.2d 1159 (7th Cir. 1984) is similar. In Miller Brewing the employers and the union were parties to a collective bargaining agreement that contained a union shop clause requiring every new employee to join the union within thirty days after beginning work. This clause was practically identical to that included in the bargaining agreement entered between Mack and the U.A.W. In addition, the bargaining agreement contained a recall preference for laid off employees and this preference for employment generated the dispute before the Court. Although the Court was not concerned with the application of a state's right to work law, the Court reasoned that the hiring or recall provision operated as a preference in favor of the union members even though not every favored worker was in actuality a union member. The Court's conclusion in this regard emphasized that the presence of the union shop clause ensured that practically every worker favored by the preference had been required to join the union at some point.[4] Accordingly,

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[3] The Court's opinion did not address the right to work laws.

[4] Additionally, several courts have recognized (generally in the context of whether a particular labor arrangement constituted "an unfair labor practice") that a union cannot extend the terms of a collective bargaining agreement to cover a nonunion place of employment or interfere with the employment rights of workers not covered by the bargaining agreement. See, U.A.W. v. Kellogg, 329 F.Supp. 1044 (S.D.N.Y. 1975); International Association of Machinists v. Howmet Corp., 466 F.2d 1249 (9th Cir. 1972). The right to work issue we address is similar in many aspects to the federal right of employees to make an independent choice regarding union representation; however, the right to work issue is controlled by state law. We recognize that the National Labor Board's General Counsel may disagree with this line of cases, see Advice Memorandum issued by N.L.R.B. on U.A.W. - G.M. Saturn Agreement (June 2, 1986). However, the memorandum does not fully address the cited cases nor does it dispute that a hiring or transfer preference constitutes a preference in favor of union members in those circumstances where the benefited workers gained the favored position as a result of being covered by a union shop agreement.

we believe that the operation of the transfer preference coupled with the union shop clause creates for all practical purposes an employment preference or monopoly in favor of the U.A.W. members over nonunion workers for the job opportunities in Winnsboro, South Carolina. South Carolina's Right to Work Act precludes this favored treatment.

We finally conclude that there is a probability that the federal law has not preempted South Carolina's enforcement of its Right to Work Law in the situation described. We express some caution in this conclusion, however, since the federal decisional law has not definitively resolved this exact issue. Nonetheless, the history of the National Labor Relations Act has been read by the United States Supreme Court as supporting a state's authority to enact and enforce laws that proscribe and regulate the application of union security agreements where the state has sufficient contact with the job site. State laws may be more restrictive than the federal law and in addition they may conflict with federal law. In Algoma Plywood and Veneer Company v. Wisconsin Employment Relations Board, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed 691 (1941), the Court in tracing the history of the National Labor Relations Act stated:

> Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements.
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> But if there could be any doubt that the language of the section [29 U.S.C. § 164(b)] means that the Act shall be construed to authorize any "application" of a union-security contract, such as discharging an employee, which under the circumstances is prohibited by the State the legislative history of the Section [29 U.S.C. § 164(b)] would dispel it.

336 U.S. at 313, 314 [emphasis added]. The Court reasoned that the states were permitted to enact state laws regulating or restricting union-security agreements even if the state law is in conflict with the federal law since a conflict in this area is sanctioned. Moreover, the Court in Retail Clerks v. Schermerhorn, 375 U.S. 96, 102, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963) further concluded that:

> In light of the wording of § 14(b) [29 U.S.C. § 164(b)] and its legislative history, we conclude that Congress in 1947 did not deprive the States

> of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. Since it is plain that Congress left the states free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws.

Other jurisdictions have also concluded that states are free to prohibit application of all types of union security agreements including closed shop arrangements. Burgess v. Daniel Plumbing and Gas Company, 285 S.W.2d 517 (Ark. 1956); Baldwin v. Arizona Flame Restaurant, 313 P.2d 759 (Ariz. 1957); Sheet Metal Workers Local No. 175 v. Walker, 236 S.W.2d 683 (App.Tex. 1951). 375 U.S., at 102. Additional reference is made to Sheet Metal Workers International Association v. Nichols, 89 Ariz. 187, 300 P.2d 204 (1961) wherein the Arizona Supreme Court reads the history of 29 U.S.C. § 164(b) as preserving to the states the broad powers they had to regulate and prohibit union security arrangements that had existed under the Wagner Act. 360 P. 2d, at 208, quoting Meltzer, The Supreme Court, Congress, and State Jurisdiction over Labor Relations: I, 59 Cola.L.Rew. 6, 41-42. Thus it appears that the State of South Carolina may enforce its Right to Work Law to proscribe application of a union-security agreement in South Carolina. The termination of nonunion workers in Fairfield County as a result of an agreement between the employer and the U.A.W., that as a practical effect requires the employer to displace nonunion workers with workers whose eligibility for employment depends upon prior union membership, constitutes, in effect, application of a union-security agreement in South Carolina. Accordingly, South Carolina's Right to Work Law may likely be enforced to preclude such an arrangement.

CONCLUSION

In conclusion, it is our opinion that the State's right to work policy has long been the cornerstone and bulwark of labor relations in South Carolina. That policy has withstood the test of time and is deeply embedded in our history. It is supportive of our First Amendment guarantees - to join or refrain from joining a labor union as we wish. No matter whether a person is a member of a union or not, he or she has the right to work in South Carolina. Such policy has the sanction not only of the federal Congress and our General Assembly, but the people of South Carolina as well. Right to work is clearly a wise policy, but it also represents the statutory law of this State.

The purpose of our Right to Work Statute is not only to preserve the individual freedom of working men and women in South Carolina, but also to encourage industrial development in this State. So long as the Right to Work Law remains on the books and is effective, such sends a strong signal to industries who may contemplate locating in South Carolina that this State offers a favorable climate for industrial location and development. As

the United States Supreme Court has stated in the right to work context, a state is not bound in a constitutional strait jacket when it comes to creating favorable business and industrial conditions. See, Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co., 335 U.S., 525, 537 (1949). Thus, it is crucial to our industrial growth in South Carolina that the Right to Work Law be interpreted in light of its original intent and purpose.

Accordingly, the situation which you have presented to us is prohibited by state law. Use of the transfer clause to give transferees job preference over South Carolina workers who are already working at Mack is in conflict with our Right to Work Statute. The effect of the situation you have presented could be to reserve some or even all of the jobs at Mack to those persons who previously have been legally required to join the union in Pennsylvania at the expense of trained South Carolina workers already working at Mack; these South Carolina workers may neither be members of U.A.W. nor have any interest whatever in membership. This creates in whole or in part a closed shop in Winnsboro. We have little doubt that our Right to Work Statute did not intend such discrimination against those who do not wish to join a union, but who are trained for and desire to continue working at Mack.

Very truly yours,

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