LabourWatch Summary of

Young, James, and Webster v. The United Kingdom

(Application no. 7601/76; 7806/77)

Executive Summary

The applicant employees Young, James and Webster were employed by British Rail. During the time of their employment British legislation changed to allow for the termination of unionized employees who were not Members of the union in any British workplace where the union and employer negotiated a "Closed Shop" collective agreement.

Employment with British Rail required that employees be unionized by one of either, National Union of Railwaymen ("NUR"), the Transport Salaried Staffs' Association ("TSSA") or the Associated Society of Locomotive Engineers and Firemen ("ASLEF"). The applicants, for a variety of reasons did not wish to become Members of one of the unions. They subsequently failed to satisfy this condition, and the change in legislation gave the union the power to have them terminated from their jobs.

This 1981 decision by the European Court of Human Rights held that the United Kingdom had failed to protect the applicant's Article 11 - Freedom of Association rights when it allowed British Rail to terminate the employment of Messieurs Young, James and Webster.

> *Section 11(1): Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

This decision represents the first of three decisions over a 25 year period up to 2006 that together render all forms of forced union Membership and conditional employment illegal throughout the European Union (EU), which included 27 countries as of September 2007. Even though it appears that some members of the EU, such as Iceland may still have laws abrogating the human rights of workers, it appears they will no longer withstand any challenge.

Background

During the late 1960's and early 1970's legislation in Great Britain addressed the issue of the right (or lack thereof) for a union to force an employer to terminate employees who are not Members of the union where the union and employer had a closed shop provision in their collective agreement.

Considerable history is presented in this decision that explains how this right to terminate and transgress the free choice of unionized employees came and went a number of times in Britain.

The three unionized applicants had all been employed by British Rail for a period of time during which legislation in Great Britain marked both the exclusion and inclusion of the right to terminate where a closed shop provision was in place in a collective agreement. When legislation changed and granted the union the power to demand an employer terminate non-Members, the three applicants were required to join one of the unions that had agreements with British Rail. These facts clearly impact the Court's decision.

In the European Union (EU), member countries must follow EU Directives. However Conventions, such as the European Convention on Human Rights are not as binding as Directives. As such actions to test Convention rights must generally make their way through a country's own legal system before a case can be taken to the Court in Strasbourg. This is why such cases are brought against a country's government and not, for example, the union and/or employer. The issue is that a country has failed to ensure its citizens Convention rights are protected. Once a country brings the Convention into their own statute law, then applicants can proceed against a union or employer, unless their allegation is that the law is not aligned with the Convention.

The applicants for a variety of reasons did not wish to also become Members of one of the unions and so failed to satisfy this condition and were fired. They alleged that the treatment to which they had been subjected gave rise to violations of Articles 9, 10, 11 and 13 of the European Convention of Human Rights (the Convention).

- Article 9 The right to freedom of thought, conscience and religion.
- Article 10 The right to freedom of expression.
- Article 11 The right to freedom of association.
- Article 13 The rights to remedy.

The Judgment

In this decision the Court addresses, but does not reach a firm conclusion regarding the issue raised by the Applicants that the Article 11 - Freedom of Association implies a "negative right" to not associate. The Court discusses the point that the negative right of non-association had deliberately been excluded from the final Convention but the Court goes on to quote from documents that went into the development of the Convention (referring to the "travaux preparatoires" - preliminary works).

> *On account of the difficulties raised by the 'closed-shop system' in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which 'no one may be compelled to belong to an association'…*

In addressing the difficulty of adjudicating an Article 11 application the Court states that though not expressly addressed in the Convention *"…it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11."*

The decision states that the Court will limit its examination to the effects of the closed shop system on the applicants.

Nevertheless, the Court concludes that the situation facing the applicants clearly ran counter to the concept of freedom of association in its negative sense.

> *…a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union.*
>
> *In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11.*

The Government expressly stated that they had no wish to argue Section 11(2) – Freedom of Association:

> *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The conclusions drawn are also interesting considering the minority standing of the three applicants within the large, predominately union supporting group that was the workforce of British Rail at the time.

> *Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Accordingly, the mere fact that the applicants' standpoint was adopted by very few of their colleagues is again not conclusive of the issue now before the Court.*

Ultimately, the Court finds the government guilty of breaching Article 11 of the Convention and restitution is ordered for the applicants.

LabourWatch Commentary

Of the countries that recognize unions and collective bargaining, it is obvious that the legal systems, industrial relations systems, and traditions and values differ to varying degrees from country to country. That makes comparing certain legal realities in one country to others more challenging. At the same time, there are certain principles which can be used as a basis for evaluating a given country's statutes and practices against others when asking whether a country should maintain its current policies or implement

changes. It is in this framework that LabourWatch seeks to question key aspects of Canadian labour relations such as forced Membership, conditional employment, forced union dues, and union supervision of ratification and strike votes, etc.

Canada's Supreme Court in interpreting the Charter of Rights and Freedoms has decided that there is a negative right of non-Association. More narrowly it has held the closed shop of forced Membership and conditional employment mandated by statute law to be a violation of Charter rights. However, in Advance Cutting and Coring, the Court found Quebec's Construction sector regime of forced Membership, was saved by Section 1 – See LabourWatch's Summary for this decision which detail our concerns about this ruling.

The Canadian Charter deals only with the laws, actions, governments and situations where government has a significant influence over the direction of collective bargaining. Collective agreements between unions and private sector employers are not subject to the Charter and as such employees seeking to end forced Membership would need to look to the legislatures to pass statute law banning forced Membership and union dues for non-Members. Whether or not some human rights statutes in Canada could be an avenue for employee legal action is a topic for further examination.

Young appears to be the beginning of the end of the closed shop in Europe. It takes 25 years, including some other decisions such as Sibson (1993), another UK case, Sig. . . (1993) from Iceland to end the closed shop in the EU. In 2006, it is Sørensen and Rasmussen that ends the Danish closed shops. While legislated attempts were made, they failed to pass Parliament.

This line of EU decisions reinforce how out of step Canada is with international trends on employee free choice because our Court has found a way to allow the violation of Canada's unionized employees and as such the closed shop is still very mush a part of most unionized workplaces in Canada.

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF YOUNG, JAMES AND WEBSTER v. THE UNITED KINGDOM

(Application no. 7601/76; 7806/77)

JUDGMENT

STRASBOURG

13 August 1981

In the case of Young, James and Webster,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. THÓR VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCIA DE ENTERRIA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Mr. M. SØRENSEN,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 5 and 6 March and 25 and 26 June 1981,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case of Young, James and Webster was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in two applications against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission in 1976 and 1977 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three United Kingdom citizens, Mr. Ian McLean Young, Mr. Noël Henry James and Mr. Ronald

Roger Webster. The Commission ordered the joinder of the applications on 11 May 1978.

2. The Commission’s request was lodged with the registry on 14 May 1980, within the period of three months laid down by Articles 32 par. 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration made by the United Kingdom recognising the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the Commission’s request is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 9, 10, 11 and 13 (art. 9, art. 10, art. 11, art. 13) of the Convention.

3. The Chamber of seven judges to be constituted included, as ex officio members, Sir Gerald Fitzmaurice, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Pallieri, the President of the Court (Rule 21 par. 3 (b) of the Rules of Court). On 4 June 1980, the President drew bij lot, in the presence of the Registrar, the names of the five other members, namely Mr. G. Wiarda, Mr. J. Cremona, Mr. Thór Vilhjálmsson, Mr. R. Ryssdal and Mrs. D. Bindschedler-Robert (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43). Sir Gerald Fitzmaurice was subsequently replaced by Sir Vincent Evans (Rule 2 par. 3).

4. Mr Balladore Pallieri assumed the office of President of the Chamber (Rule 21 par. 5). He ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government") and the Delegates of the Commission regarding the procedure to be followed. On 25 June 1980, he decided that the Agent should have until 25 September 1980 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of the transmission of the Government’s memorial to them by the Registrar. On 20 August, 24 October and 13 November, the President agreed to extend the first of these time-limits to 25 October, 14 November and 5 December 1980, respectively.

5. On 25 November 1980, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

6. The Government’s memorial was received at the registry on 5 December 1980. On 4 February 1981, the Delegates transmitted to the Court a memorial which had been submitted to them on behalf of the applicants, and indicated that they reserved the right to present their own observations at the oral hearings.

On 29 January, the President instructed the Registrar to obtain certain documents from the Commission and from the Government. These documents were produced on 4 and 19 February, respectively.

7. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, Mr. Wiarda, who had been elected

President of the Court following the death of Mr. Balladore Pallieri, directed on 10 February 1981 that the oral hearings should open on 3 March 1981.

Some further documents were filed by the Government on 27 February.

8. On 3 March immediately before the opening of the hearings, the Court held a preparatory meeting. On that occasion it decided proprio motu, in pursuance of Rule 38 par. 1 of the Rules of Court, that during the oral proceedings it would hear, on certain questions of fact (including English law and practice) and for the purpose of information, a representative of the British Trades Union Congress.

9. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 3 and 4 March.

There appeared before the Court:

- for the Government:

Mr. D. EDWARDS, Legal Counsellor,
Foreign and Commonwealth Office, *Agent*,
Sir Ian PERCIVAL, Q. C., Solicitor-General,
Mr. S. BROWN, Barrister-at-Law,
Mr. N. BRATZA, Barrister-at-Law, *Counsel*,
Mr. H. STEEL, Law Officers' Department,
Mr. J. BILLAM, Department of Employment,
Mr. C. TUCKER, Department of Employment,
Mr. N. MELLISH, Department of Employment, *Advisers*;

- for the Commission:

Mr. J. FAWCETT,
Mr. G. SPERDUTI,
Mr. J. FROWEIN, *Delegates*,
Mr. D. CALLCUTT, Q. C., and Mr. C. KOLBERT and Mr. C. MITCHELL-HEGGS, Barristers-at-Law,
assisting the Delegates (Rule 29 par. 1, second sentence, of the Rules of Court).

The Court heard the Delegates and those assisting them, Sir Ian Percival for the Government and also, in accordance with its decision of 3 March, Lord Wedderburn of Charlton, Barrister-at-Law, Professor of Law in the University of London, for the Trades Union Congress.

10. The Delegates of the Commission filed various documents during the hearings, including one entitled "memorial (submissions on fact and law) of the Trades Union Congress". The Court decided that it would take the latter document into account as regards any factual information, but not any arguments of law, which it contained.

11. In accordance with decisions taken by the Court after the hearings, the following documents were filed with the registry:

- on 3 April 1981, replies by the Government to certain questions put by the Court at the hearings to those appearing before it;

- on 6 April 1981, replies by the applicants to the aforesaid questions, together with their observations on the submissions made by Sir Ian Percival in his address to the Court;
- on 22 April 1981, observations of the applicants on the submissions made by Lord Wedderburn in his address to the Court and on issues of fact contained in the "memorial" mentioned at paragraph 10 above;
- on 11 May 1981, comments by the Government on the aforesaid observations filed on 6 April.

The documents emanating from the applicants were transmitted to the Court by the Commission's Delegates.

AS TO THE FACTS

12. Mr. Young, Mr. James and Mr. Webster are former employees of the British Railways Board ("British Rail"). In 1975, a "closed shop" agreement was concluded between British Rail and three trade unions, providing that thenceforth membership of one of those unions was a condition of employment. The applicants failed to satisfy this condition and were dismissed in 1976. They alleged that the treatment to which they had been subjected gave rise to violations of Articles 9, 10, 11 and 13 (art. 9, art. 10, art. 11, art. 13) of the Convention.

I. GENERAL BACKGROUND AND DOMESTIC LAW

A. Closed shops and dismissal from employment

In general

13. In essence, a closed shop is an undertaking or workplace in which, as a result of an agreement or arrangement between one or more trade unions and one or more employers or employers' associations, employees of a certain class are in practice required to be or become members of a specified union. The employer is not under any legal obligation to consult or obtain the consent of individual employees directly before such an agreement or arrangement is put into effect. Closed shop agreements and arrangements vary considerably in both their form and their content; one distinction that is often drawn is that between the "pre-entry" shop (the employee must join the union before engaged) and the "post-entry" shop (he must join within a reasonable time after being engaged), the latter being more common.

In the United Kingdom, the institution of the closed shop is of very long standing. In recent years, closed shop arrangements have become more formalised and the number of employees covered thereby has increased

(3.75 million in the 1960's and 5 million in 1980, approximately). Recent surveys suggest that in many cases the obligation to join a specified union does not extend to existing non-union employees.

The law in force until 1971

14. There was no legislation explicitly directed to the practice of the closed shop until 1971. Nevertheless, the courts had since the 1920's recognised the legitimacy of the trade union object of advancing the union's interests even to the point of enforcing the dismissal, or a ban on the hiring, of non-union employees. However, it was an unlawful conspiracy at common law to pursue a closed shop against individuals beyond the point which the courts regarded as the defence of genuine trade union interests (Huntley v. Thornton [1957] 1 All England Law Reports 234; Morgan v. Fry [1967] 2 All England Law Reports 386).

The Royal Commission on Trade Unions and Employers' Associations, which reported in 1968, whilst rejecting the possibility of prohibiting the closed shop, considered the question of safeguards for individuals in a closed shop situation. In particular, a majority of that Commission took the view that an existing employee who was dismissed for refusal to join a union following the introduction of a closed shop should be able to succeed against his employer in a complaint of unfair dismissal so long as he could show that he had reasonable grounds for that refusal.

15. Prior to 1971, the rights and liabilities of the parties to a contract of employment were for the most part governed by common law. Leaving aside cases of justified summary dismissal, it was lawful to dismiss an employee, even without cause, provided that he was given due notice. The remedy open to an employee dismissed without due notice was merely to sue for the balance of wages he would have earned during the appropriate notice period; the courts would not order his employer to re-engage him. These principles applied, for example, to dismissals motivated by an employee's joining, or refusing to join, a trade union.

The Industrial Relations Act 1971

16. Since 1971, there has been increased Parliamentary intervention in the areas under consideration, and changes of Government have led to changes in the scope and content of the legislation in force. The first major enactment was the Industrial Relations Act 1971 which radically altered the common law position in two respects.

17. In the first place, the 1971 Act conferred on employees (with certain exceptions) the right not to be unfairly dismissed. Dismissal of an employee without cause became unlawful, even if he had been given due notice. An individual who considered that he had been unfairly dismissed could present a complaint to an industrial tribunal; unless the dismissal had been motivated by one or more reasons specified in the Act (for example, qualifications, conduct, redundancy) or some other substantial reason and unless the employer was found to have acted reasonably in treating that or

those reasons as a sufficient reason for dismissal, the tribunal could award compensation to the employee or recommend that he be re-engaged. The employee's common law rights were unaffected by the Act, although after 1971 little reliance was placed on them in practice by those entitled to the new right.

18. In the second place, the 1971 Act introduced specific provisions which were designed to make the operation of the majority of closed shops unlawful. In addition to stipulating that pre-entry closed shop agreements were void, the Act, subject to certain exceptions, gave every worker the right to be a member of no trade union or to refuse to be a member of any particular union. In the context of the rules on unfair dismissal and in contrast to the position at common law (see paragraph 15 in fine above), the Act laid down that dismissal motivated by the employee's exercise of, or intention to exercise, that right was be to regarded as unfair.

19. A Green Paper on Trade Union Immunities, published by the British Government in January 1981, states that the 1971 Act "met considerable resistance from trade unions and in practice its closed shop provisions were circumvented by many employers and unions. The closed shop continued much as before".

The law in force at the time of the events giving rise to the applicants' complaints

20. The industrial Relations Act 1971 was repealed by the Trade Union and Labour Relations Act 1974 ("TULRA"). The provisions of TULRA relevant to the present case came into force on 16 September 1974.

21. The repeal of the Industrial Relations Act 1971 removed from the statute book both the prohibition on closed shops and the employee's right not to belong to a union. However, the law did not fully return to its pre-1971 condition. This was because TULRA maintained the protection against unfair dismissal; since one result of a closed shop is that an individual who declines to join a specified union may have his employment terminated, it was necessary to spell out the precise conditions in which dismissal for this reason was to be regarded as fair. Accordingly, TULRA:

(a) set out - by reference to the concept of "union membership agreement", which it defined - the circumstances in which a closed shop situation was to be regarded as existing;

(b) laid down the basic rule that, if such a situation existed, the dismissal of an employee for refusal to join a specified union was to be regarded as fair for the purposes of the law on unfair dismissal;

(c) provided that, by way of exceptions, such a dismissal was to be regarded as unfair if the employee genuinely objected

(i) on grounds of religious belief to being a member of any union whatsoever; or

(ii) on any reasonable grounds to being a member of a particular union.

22. The powers of an industrial tribunal under the 1971 Act to award compensation to an unfairly dismissed employee were also re-enacted by TULRA. However, the power to recommend his re-engagement was later replaced, by the Employment Protection Act 1975, by a discretionary power to order reinstatement or re-engagement in certain circumstances (notably, where this was considered "practicable"). It was provided that, if the order were not complied with, the employee should be awarded the normal compensation for unfair dismissal and, in specified cases, an additional sum.

23. TULRA was modified in various respects by the Trade Union and Labour Relations (Amendment) Act 1976 ("the Amendment Act") which came into force on 25 March 1976. In particular, the second of the exceptions mentioned in paragraph 21 (c) above was abolished, so that the action for unfair dismissal remained available only to genuine religious objectors. With the object of achieving greater flexibility, the Amendment Act also modified the concept of "union membership agreement".

Subsequent legislative developments

24. The Employment Protection (Consolidation) Act 1978 repealed and re-enacted the then existing provisions concerning unfair dismissal.

The 1978 Act was in turn amended, without retroactive effect, by the Employment Act 1980. It remains the basic rule that the dismissal of an employee for refusal to join a specified union in a closed shop situation is to be regarded as fair for the purposes of the law on unfair dismissal. However, with effect from 15 August 1980, this rule became subject to three exceptions whereby such dismissal is to be regarded as unfair if:

(a) the employee objects on grounds of conscience or other deeply-held personal conviction to being a member of any or a particular union; or

(b) the employee belonged, before the closed shop agreement or arrangement came into effect, to the class of employees covered thereby and has not been a member of a union in accordance therewith; or

(c) in the case of a closed shop agreement or arrangement taking effect after 15 August 1980, either it has not been approved by the vote in a ballot of not less than 80% of the employees affected or, although it is so approved, the employee has not since the balloting been a member of a union in accordance therewith.

A Code of Practice, issued with the authority of Parliament and coming into effect on 17 December 1980, recommended, inter alia, that closed shop agreements should protect basic individual rights and be applied flexibly and tolerantly and with due regard to the interests of individuals as well as unions and employers. The Code is admissible in evidence, but imposes no legal obligations.

25. The green Paper on Trade Union Immunities (see paragraph 19 above) rehearsed arguments for and against various proposals and indicated that the Government would welcome views on whether further changes in

legislation affecting the closed shop were desirable and would be likely to prove effective.

B. Other relevant matters concerning trade union membership

26. Since 1971, there has been statutory protection of the right to belong to a trade union. The exact content of the provisions has varied over the years, but their essence is that an employee is entitled to compensation if he is dismissed or penalised for, or deterred or prevented from, being or seeking to become a member or taking part in the activities of a trade union (Industrial Relations Act 1971, section 5; TULRA, Schedule 1, paragraph 6 (4); Employment Protection Act 1975, section 53; Employment Protection (Consolidation) Act 1978, sections 23 and 58).

27. At the end of 1979, there were 477 trade unions in the United Kingdom, with 13.5 million members; in 1980, 108 unions with 12.1 million members, were affiliated to the Trades Union Congress.

The Congress adopted in 1939 a series of morally binding recommendations ("the Bridlington Principles") designed to minimise, and laying down procedures for dealing with, disputes between affiliated unions over membership questions. The current version of the Principles states, inter alia, that dual membership is valid only if the two unions concerned have jointly agreed to it.

28. The Trade Union Act 1913, as amended, attaches certain conditions to the application by a union of its funds for a number of political objects specified in section 3 (3), without prejudice to the furtherance of any other political objects. In particular, payments for the specified object must be made out of a separate "political fund" and any member of the union has the right to exemption from contributing thereto. A person so exempted may not be placed at any disadvantage as compared with other members, and contribution to the said fund may not be made a condition for admission to the union.

II. BRITISH RAIL AND ITS CLOSED SHOP AGREEMENT

29. In 1970, British Rail had concluded a closed shop agreement with the National Union of Railwaymen ("NUR"), the Transport Salaried Staffs' Association ("TSSA") and the Associated Society of Locomotive Engineers and Firemen ("ASLEF"), but, with the enactment of the Industrial Relations Act 1971 (see paragraph 18 above), it was not put into effect.

The matter was, however, revived in July 1975 when British Rail concluded a further agreement with the same unions. It was provided that as from 1 August 1975 membership of one of those unions was to be a condition of employment for certain categories of staff - including the applicants - and that the terms of the agreement were "incorporated in and

form[ed] part of" each contract of employment. Like other staff of British Rail, Mr. Young, Mr James and Mr. Webster had, it appears, been supplied when engaged with a written statement containing a provision to the effect that they were subject to such terms and conditions of employment as might from time to time be settled for employees of their category under the machinery of negotiation established between their employer and any trade union or other organisation.

The membership requirement did not apply to "an existing employee who genuinely objects on grounds of religious belief to being a member of any Trade Union whatsoever or on any reasonable grounds to being a member of a particular Trade Union". The agreement also set out the procedure for applying for exemption on these grounds and provided for applications to be heard by representatives of the employer and the unions.

30. In July/August 1975, notices were posted at the premises of British Rail, including those where the applicants were then working, drawing the attention of staff to the agreement with the unions and the change in conditions of employment.

A further notice of September 1975 stated that it had been agreed that the exemption on religious grounds would be available only where a denomination specifically proscribed its members from joining unions. The notice added that "confining exemption only to religious grounds depends upon the passing through Parliament of the Trade Union and Labour Relations (Amendment) Bill" and that staff would be advised further on this point. As recorded in paragraph 23 above, the Amendment Act came into force on 25 March 1976.

On the same date, a further agreement between British Rail and the railway unions came into effect. It was in identical terms to the July 1975 agreement, except that the words "or on any reasonable grounds to being a member of a particular Trade Union" (see paragraph 29 above) were omitted.

31. The applicants and the representative of the Trades Union Congress informed the Court that NUR, TSSA and ASLEF were the only unions actually operating in 1975 in those sectors of the railway industry in which Mr. Young, Mr. James and Mr. Webster worked. According to the Government, other unions did have members in, although they were not recruiting amongst, the relevant grades.

It appears that, prior to the conclusion of the 1975 closed shop agreement, between 6,000 and 8,000 British Rail employees, out of a total staff of 250,000, were not already members of one of the specified unions. In the final event, 54 individuals were dismissed for refusal to comply with the membership requirement.

32. The applicants were not eligible for membership of ASLEF. As regards NUR and TSSA, intending members were required to sign an application form which, at the relevant time, embodied an undertaking to

abide by the Rules of the union and "loyally to promote" its objects (NUR), or to use their "best endeavours to promote its objects and interests" (TSSA).

The stated objects of NUR included the following:

> "... to secure the complete organisation of all workers employed by any Board, Company or Authority in connection with railways and other transport and ancillary undertakings thereto in the United Kingdom; to improve the conditions and protect the interests of its members; ... To further, if and when and so far as the same shall be or become a lawful object of a Trade Union, the interests of members by representation in Parliament and on local governing bodies, and to employ the Political Fund of the Union procuring such representation. To work for the suppression of the capitalist system by a Socialistic order of society. ... To make grants to and share in the management and control of any college or institution having for its object to educate and train Trade Unionists in social science in, and to take part in, the political and industrial life of the Labour Movement. ..."

The stated objects of TSSA included the following:

> "(a) To organise the whole of the Clerical, Supervisory, Administrative, Professional and Technical employees in all Departments of any British or Irish Railway undertaking, or of any Railway Carting Agency, associated or other undertaking as defined in Rule 2.
>
> (b) To improve the conditions and protect the interests of its members.
>
> ...
>
> (g) To establish a Fund, or Funds, including the Political Fund referred to in Rules 45 and 46.
>
> ...
>
> (i) To secure or assist in securing legislation and the more effective administration of the existing laws which may affect the general and material welfare of its members and of any other workmen.
>
> (j) To provide financial assistance and to lend money, with or without interest or other equivalent, to any such organisation (incorporated or not incorporated) as the Executive Committee may deem advisable in the interests of or for carrying out the objects of the Association, and so far as the law for the time being in force may permit.
>
> ..."

The objects of both unions also included the furtherance of the political objects specified in section 3 of the Trade Union Act 1913 and their Rules contained provisions reflecting that Act’s requirements in the matter of a political fund (see paragraph 28 above). In the case of TSSA, payments from its political fund could not be made unless the beneficiary was an individual member of the Labour Party or the purpose of the payment was in support of Labour Party policy; its general funds could be used for

providing financial assistance for political purposes other than the "political objects" listed in the 1913 Act.

III. FACTS PARTICULAR TO THE INDIVIDUAL APPLICANTS

A. Mr. Young

33. Mr. Young, who was born in 1953, commenced employment with British Rail in 1972.

34. In September 1975, he had a meeting with his supervisor and a representative of TSSA who informed him about the closed shop agreement - the effect of which in his case was that, as a clerical officer, he was required to join either TSSA or NUR - and of the grounds of exemption applicable at that time (see paragraph 29 above).

The applicant objected, though not on grounds of religious belief, to being a member of any trade union and in particular of TSSA or NUR. He believed that union membership should be a matter of personal choice based on conscience and political conviction. His reasons for not wanting to join TSSA, which he said also applied to NUR, may be summarised as follows:

(a) he did not subscribe to the political views of TSSA;

(b) money from the main union fund was used to produce a monthly newspaper biased in favour of the Labour Party and he had not received sufficient assurances that that fund was not utilised for other political purposes;

(c) he disapproved of TSSA’s support for nationalisation of industry and its forcing of inflationary pay awards; he also objected to being obliged to participate in strikes, this being action which in the case of a key service industry he saw as collective blackmail of the country as a whole;

(d) TSSA showed itself intolerant of the expression of individual freedom by seeking to enforce a closed shop and it acquired by that means an unacceptably extensive control over the hiring and firing of employees.

35. On 17 October 1975, Mr. Young submitted a written claim for exemption. On 30 April 1976, that is after the entry into force on 25 March 1976 of the Amendment Act (see paragraph 23 above), he was informed by letter that his claim would be heard on 5 May. On that day, he appeared before an appeal body composed of three persons representing, respectively, British Rail, TSSA and NUR.

By letter of 27 May, British Rail advised the applicant that the claim had been disallowed and gave him notice of dismissal - of one month, in accordance with his contract - expiring on 26 June 1976.

B. Mr. James

36. Mr. James, who was born in 1928, was engaged by British Rail on 27 March 1974 as a leading railwayman. He had previously been employed by British Rail for two periods of some years.

37. In 16 October 1975, he had a meeting with his immediate superior and a representative of NUR who informed him that, as a result of the closed shop agreement, he was required to join NUR and that, as a shunter, he was not eligible for membership of any other union. Mr. James was willing to join - in fact, he had previously been a member of NUR - but he was not convinced that membership was advantageous and he believed in freedom of choice. He deferred his final decision pending clarification of a question, submitted by one of his colleagues to NUR, regarding an apparent difference between his salary and that of his colleague who was working the same hours. Before applying for membership, Mr. James wished to see NUR's reply in order to assess how members' problems were dealt with. In the event, he formed the view that the union's examination of the matter and explanation of its conclusions were unsatisfactory and that it had not looked after its member's interests properly; therefore he did not wish to join the union.

38. By letter of 18 December 1975, the applicant indicated that he refused to join the union since it had not replied to his own query about his hours of work.

On 23 February 1976, he received a dismissal notice stating that, by reason of his non-compliance with the July 1975 agreement, his services would no longer be required as from 5 April 1976.

39. On 8 April 1976, Mr. James presented a complaint of unfair dismissal to an industrial tribunal, before which he appeared on 18, June. On 6 July, he received a copy of its decision rejecting his complaint. The grounds were, firstly, that the applicant had never sought exemption from union membership in accordance with the procedure laid down in the closed shop agreement and, secondly, that as he had at no time based his refusal to join NUR on religious grounds, the tribunal was bound under paragraph 6 (5) of Schedule 1 to TULRA (as modified by the Amendment Act) to find that the dismissal was fair.

C. Mr. Webster

40. Mr. Webster, who was born in 1914, commenced employment with British Rail on 18 March 1958.

41. At the time of the conclusion of the 1970 closed shop agreement (see paragraph 29 above), the applicant had objected to joining a union on grounds which he set out in a letter to the Administrative Services Officer. However, as that agreement was not put into effect, he was not called upon

to appear before the appeal body to which he had agreed to submit his claim.

42. In or around September 1975, the applicant had a meeting with his immediate supervisor and the local representative of TSSA who informed him about the closed shop agreement - the effect of which in his case was that, as a clerical officer, he was required to join either TSSA or NUR - and of the grounds of exemption applicable at that time (see paragraph 29 above).

43. Mr. Webster was opposed to joining a union for reasons - in his eyes equally valid for TSSA and NUR - which included the following:

(a) he was opposed to the trade union movement as it currently operated since it was unrepresentative, had detrimental effects - particularly through unjustified collective wage demands - in the economic, industrial and social spheres, and did not act in the best interests of workers or of the country in general; he also found it utterly repugnant to be obliged to participate in any strike which caused loss to the general public or workers elsewhere;

(b) he believed that the individual should enjoy freedom of choice as regards union membership and should be able to express and abide by his opinions and convictions without being threatened with the loss of his livelihood as a result of the closed shop practice, which practice would not remedy the disabilities inherent in the trade union system.

44. On 29 October 1975, Mr. Webster wrote to his supervisor explaining some doubts which he had as to the courses open to him to claim exemption and seeking guidance on certain aspects. He said that he wished to apply for exemption on conscientious grounds (other than specifically religious grounds) and he asked that, if this was still possible, his 1970 submissions be accepted as his case, though he also indicated that he would again wish to present a full and closely argued case. He added that he was an opponent of the trade union movement "as it operates today". On 2 April 1976, that is after the entry into force on 25 March 1976 of the Amendment Act (see paragraph 23 above), he was advised by letter that his application would be examined four days later by representatives of British Rail and the unions in accordance with the procedure prescribed in the 1975 agreement. The applicant requested two weeks' postponement to enable him to prepare written submissions. On 28 April, by which time he had received replies, through his solicitors, to only some of the questions posed in his October letter, he was instructed to attend a hearing on 6 May. On that day, he appeared before an appeal body composed of three persons representing, respectively, British Rail, TSSA and NUR.

On 3 June 1976, Mr. Webster received a dismissal notice stating that his application had been disallowed and that his contract of employment would terminate on 28 August 1976.

PROCEEDINGS BEFORE THE COMMISSION

45. Mr. Young and Mr. James applied to the Commission on 26 July 1976 and Mr. Webster on 18 February 1977; they each made identical complaints, relying on Articles 9, 10, 11 and 13 (art. 9, art. 10, art. 11, art. 13) of the Convention. They submitted that the enforcement of TULRA and the Amendment Act, allowing their dismissal from employment when they objected on reasonable grounds to joining a trade union, interfered with their freedom of thought, conscience, expression and association with others. They further complained that no adequate remedies had been available to them.

46. The application of Mr. Young and Mr. James and that of Mr. Webster were declared admissible by the Commission on 11 July 1977 and 3 March 1978, respectively.

In its report of 14 December 1979 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion:

- by fourteen votes to three, that there had been a violation of Article 11 (art. 11);
- that it was not necessary to deal separately with the issues arising under Articles 9 and 10 (art. 9, art. 10);
- by eight votes to two, with two abstentions, that there was no additional breach of Article 13 (art. 13).

The report contains four separate opinions.

FINAL SUBMISSIONS MADE TO THE COURT

47. At the hearings on 4 March 1981, the Government maintained the submissions set out in their memorial, whereby they had requested the Court:

> "(I) With regard to Article 11 (art. 11)
>
> (i) to decide and declare that the facts found do not disclose a breach by the United Kingdom of their obligations under Article 11 (art. 11);
>
> alternatively, if the request at (i) should be rejected, then
>
> (ii) to decide and declare that the responsibility of the United Kingdom, if any, under the Convention in respect of the termination of the contracts of employment of the three applicants is engaged exclusively by reason of the enactment of the Acts of 1974 and 1976 and is not engaged on the ground that British Rail is an organ of the State or on the ground that the Government of the United Kingdom is to be regarded as the employer of British Rail or of the applicants.
>
> (2) With regard to Articles 9 and 10 (art. 9, art. 10)

(i) to decide and declare that the provisions of Articles 9 and 10 (art. 9, art. 10) of the Convention are inapplicable in the circumstances of the present cases;

alternatively, if the request at (i) should be rejected, then

(ii) to decide and declare that the facts found do not disclose a breach by the United Kingdom of their obligations under Articles 9 and 10 (art. 9, art. 10) of the Convention.

(3) With regard to Article 13 (art. 13)

(i) to decide and declare that Article 13 (art. 13) of the Convention has no application in the present cases in that no rights or freedoms set forth in the Convention were involved or affected by reason of the dismissal of the applicants from their employment;

alternatively,

(ii) to decide and declare that the facts found do not disclose a breach by the United Kingdom of their obligations under Article 13 (art. 13) of the Convention additional to any breach of Article 11 (art. 11) of the Convention."

AS TO THE LAW

I. PRELIMINARY: RESPONSIBILITY OF THE RESPONDENT STATE

48. Mr. Young, Mr. James and Mr. Webster alleged that the treatment to which they had been subjected gave rise to violations of Articles 9, 10 and 11 (art. 9, art. 10, art. 11) of the Convention, in particular read collectively, and of Article 13 (art. 13). Before the substance of the matter is examined, it must be considered whether responsibility can be attributed to the respondent State, the United Kingdom.

The Government conceded that, should the Court find that the termination of the applicants' contracts of employment constituted a relevant interference with their rights under Article 11 (art. 11) and that that interference could properly be regarded as a direct consequence of TULRA and the Amendment Act, the responsibility of the respondent State would be engaged by virtue of the enactment of that legislation.

A similar approach was adopted by the Commission in its report.

49. Under Article 1 (art. 1) of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention"; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that

violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis. Accordingly, there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control.

II. THE ALLEGED VIOLATION OF ARTICLE 11 (art. 11)

50. The main issues in this case arise under Article 11 (art. 11), which reads as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

I. THE EXISTENCE OF AN INTERFERENCE WITH AN ARTICLE 11 (art. 11) RIGHT

51. A substantial part of the pleadings before the Court was devoted to the question whether Article 11 (art. 11) guarantees not only freedom of association, including the right to form and to join trade unions, in the positive sense, but also, by implication, a "negative right" not to be compelled to join an association or a union.

Whilst the majority of the Commission stated that it was not necessary to determine this issue, the applicants maintained that a "negative right" was clearly implied in the text. The Government, which saw the Commission’s conclusion also as in fact recognising at least a limited negative right, submitted that Article 11 (art. 11) did not confer or guarantee any right not to be compelled to join an association. They contended that this right had been deliberately excluded from the Convention and that this was demonstrated by the following passage in the travaux préparatoires:

> "On account of the difficulties raised by the ‘closed-shop system’ in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which ‘no one may be compelled to belong to an association’ which features in [Article 20 par. 2 of] the United Nations Universal

Declaration" (Report of 19 June 1950 of the Conference of Senior Officials, Collected Edition of the "Travaux Préparatoires", vol. IV, p. 262).

52. The Court does not consider it necessary to answer this question on this occasion.

The Court recalls, however, that the right to form and to join trade unions is a special aspect of freedom of association (see the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 17, par. 38); it adds that the notion of a freedom implies some measure of freedom of choice as to its exercise.

Assuming for the sake of argument that, for the reasons given in the above-cited passage from the travaux préparatoires, a general rule such as that in Article 20 par. 2 of the Universal Declaration of Human Rights was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention, it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 (art. 11) and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 (art. 11) as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee (see, mutatis mutandis, the judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 32, par. 5, the Golder judgment of 21 February 1975, Series A no. 18, p. 19, par. 38, and the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 24, par. 60).

53. The Court emphasises once again that, in proceedings originating in an individual application, it has, without losing sight of the general context, to confine its attention as far as possible to the issues raised by the concrete case before it (see, inter alia, the Guzzardi judgment of 6 November 1980, Series A no. 39, pp. 31-32, par. 88). Accordingly, in the present case, it is not called upon to review the closed shop system as such in relation to the Convention or to express an opinion on every consequence or form of compulsion which it may engender; it will limit its examination to the effects of that system on the applicants.

54. As a consequence of the agreement concluded in 1975 (see paragraph 29 above), the applicants were faced with the dilemma either of joining NUR (in the case of Mr. James) or TSSA or NUR (in the cases of Mr. Young and Mr. Webster) or of losing jobs for which union membership had not been a requirement when they were first engaged and which two of them had held for several years. Each applicant regarded the membership condition introduced by that agreement as an interference with the freedom of association to which he considered that he was entitled; in addition, Mr. Young and Mr. Webster had objections to trade union policies and activities coupled, in the case of Mr. Young, with objections to the political affiliations of the specified unions (see paragraphs 34, 37 and 43 above). As

a result of their refusal to yield to what they considered to be unjustified pressure, they received notices terminating their employment. Under the legislation in force at the time (see paragraphs 17 and 20-23 above), their dismissal was "fair" and, hence, could not found a claim for compensation, let alone reinstatement or re-engagement.

55. The situation facing the applicants clearly runs counter to the concept of freedom of association in its negative sense.

Assuming that Article 11 (art. 11) does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention.

However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union.

In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11 (art. 11). For this reason alone, there has been an interference with that freedom as regards each of the three applicants.

56. Another facet of this case concerns the restriction of the applicants' choice as regards the trade unions which they could join of their own volition. An individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value (see, mutatis mutandis, the Airey judgment of 9 October 1979, Series A no. 32, p. 12, par. 24).

The Government submitted that the relevant legislation (see paragraph 26 above) not only did not restrict but also expressly protected freedom of action or choice in this area; in particular, it would have been open to the applicants to form or to join a trade union in addition to one of the specified unions. The applicants, on the other hand, claimed that this was not the case in practice, since such a step would have been precluded by British Rail's agreement with the railway unions and by the Bridlington Principles (see paragraph 27 above); in their view, joining and taking part in the activities of a competing union would, if attempted, have led to expulsion from one of the specified unions. These submissions were, however, contested by the Government.

Be that as it may, such freedom of action or choice as might have been left to the applicants in this respect would not in any way have altered the compulsion to which they were subjected since they would in any event have been dismissed if they had not become members of one of the specified unions.

57. Moreover, notwithstanding its autonomous role and particular sphere of application, Article 11 (art. 11) must, in the present case, also be considered in the light of Articles 9 and 10 (art. 9, art. 10) (see, mutatis

mutandis, the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1976, Series A no. 23, p. 26, par. 52).

Mr. Young and Mr. Webster had objections to trade union policies and activities, coupled, in the case of Mr. Young, with objections to the political affiliations of TSSA and NUR (see paragraphs 34 and 43 above). Mr. James' objections were of a different nature, but he too attached importance to freedom of choice and he had reached the conclusion that membership of NUR would be of no advantage to him (see paragraph 37 above).

The protection of personal opinion afforded by Articles 9 and 10 (art. 9, art. 10) in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11 (art. 11). Accordingly, it strikes at the very substance of this Article (art. 11) to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions.

In this further respect, the treatment complained of - in any event as regards Mr. Young and Mr. Webster - constituted an interference with their Article 11 (art. 11) rights.

2. The existence of a justification for the interference found by the Court

58. The Government expressly stated that, should the Court find an interference with a right guaranteed by paragraph 1 of Articles 9, 10 or 11 (art. 9-1, art. 10-1, art. 11-1), they would not seek to argue that such interference was justified under paragraph 2.

The Court has nevertheless decided that it should examine this issue of its own motion, certain considerations of relevance in this area being contained in the documents and information with which it has been furnished.

59. An interference with the exercise of an Article 11 (art. 11) right will not be compatible with paragraph 2 (art. 11-2) unless it was "prescribed by law", had an aim or aims that is or are legitimate under that paragraph and was "necessary in a democratic society" for the aforesaid aim or aims (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 29, par. 45).

60. The applicants argued that the restrictions of which they complained met none of these three conditions.

The Court does not find it indispensable to determine whether the first two conditions were satisfied, these being issues which were not fully argued before it. It will assume that the interference was "prescribed by law", within the meaning of the Convention (see the above-mentioned Sunday Times judgment, pp. 30-31, par. 46-49), and had the aim, amongst other things, of protecting the "rights and freedoms of others", this being the only of the aims listed in paragraph 2 that might be relevant.

61. In connection with the last point, the Court’s attention has been drawn to a number of advantages said to flow from the closed shop system in general, such as the fostering of orderly collective bargaining, leading to greater stability in industrial relations; the avoidance of a proliferation of unions and the resultant trade union anarchy; the counteracting of inequality of bargaining power; meeting the need of some employers to negotiate with a body fully representative of the workforce; satisfying the wish of some trade unionists not to work alongside non-union employees; ensuring that trade union activities do not benefit of those who make no financial contribution thereto.

Any comment on these arguments would be out of place in the present case since the closed shop system as such is not under review (see paragraph 53 above).

62. On the other hand, what has to be determined is the "necessity" for the interference complained of: in order to achieve the aims of the unions party to the 1975 agreement with British Rail, was it "necessary in a democratic society" to make lawful the dismissal of the applicants, who were engaged at a time when union membership was not a condition of employment?

63. A number of principles relevant to the assessment of the "necessity" of a given measure have been stated by the Court in its Handyside judgment of 7 December 1976 (Series A no. 24).

Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful" or "desirable" (p. 22, par. 48). The fact that British Rail’s closed shop agreement may in a general way have produced certain advantages is therefore not of itself conclusive as to the necessity of the interference complained of.

Secondly, pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" (p. 23, par. 49). Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Accordingly, the mere fact that the applicants’ standpoint was adopted by very few of their colleagues is again not conclusive of the issue now before the Court.

Thirdly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued (p. 23, par. 49).

64. The Court has noted in this connection that a majority of the Royal Commission on Trade Unions and Employers’ Associations, which reported in 1968, considered that the position of existing employees in a newly-introduced closed shop was one area in which special safeguards were desirable (see paragraph 14 above). Again, recent surveys suggest that, even prior to the entry into force of the Employment Act 1980 (see paragraph 24 above), many closed shop arrangements did not require existing non-union

employees to join a specified union (see paragraph 13 above); the Court has not been informed of any special reasons justifying the imposition of such a requirement in the case of British Rail. Besides, according to statistics furnished by the applicants, which were not contested, a substantial majority even of union members themselves disagreed with the proposition that persons refusing to join a union for strong reasons should be dismissed from employment. Finally, in 1975 more than 95 per cent of British Rail employees were already members of NUR, TSSA or ASLEF (see paragraph 31 above).

All these factors suggest that the railway unions would in no way have been prevented from striving for the protection of their members' interests (see the above-mentioned National Union of Belgian Police judgment, p. 18, par. 39) through the operation of the agreement with British Rail even if the legislation in force had not made it permissible to compel non-union employees having objections like the applicants to join a specified union.

65. Having regard to all the circumstances of the case, the detriment suffered by Mr. Young, Mr. James and Mr. Webster went further than was required to achieve a proper balance between the conflicting interests of those involved and cannot be regarded as proportionate to the aims being pursued. Even making due allowance for a State's "margin of appreciation" (see, inter alia, the above-mentioned Sunday Times judgment, p. 36, par. 59), the Court thus finds that the restrictions complained of were not "necessary in a democratic society", as required by paragraph 2 of Article 11 (art. 11-2).

There has accordingly been a violation of Article 11 (art. 11).

III. THE ALLEGED VIOLATION OF ARTICLES 9 AND 10 (art. 9, art. 10)

66. The applicants alleged that the treatment of which they complained also gave rise to breaches of Articles 9 and 10 (art. 9, art. 10). This was contested by the Government.

Having taken account of these Articles (art. 9, art. 10) in the context of Article 11 (art. 11) (see paragraph 57 above), the Court, like the Commission, does not consider it necessary to determine whether they have been violated in themselves.

IV. THE ALLEGED VIOLATION OF ARTICLE 13 (art. 13)

67. Having regard to its decision on Article 11 (art. 11) (see paragraph 65 above), the Court does not consider it necessary to determine whether there has in addition been a violation of Article 13 (art. 13), on which the applicants also relied.

V. THE APPLICATION OF ARTICLE 50 (art. 50)

68. Counsel for the applicants indicated that, should the Court find a violation, his clients would seek just satisfaction under Article 50 (art. 50) in respect of material losses, legal costs and allied expenses, non-material damages and the damage, both pecuniary and moral, suffered in being deprived of rights and freedoms guaranteed by the Convention. He did not fully quantify their claims and suggested that this issue might be adjourned for further consideration.

The Government confined themselves to observing that the question of the application of Article 50 (art. 50) was not relevant at this stage.

69. Accordingly, although it was raised under Rule 47 bis of the Rules of Court, this question is not ready for decision and must be reserved; in the circumstances of the case, the Court considers that the question should be referred back to the Chamber under Rule 50 par. 4 of the Rules of Court.

FOR THESE REASONS, THE COURT

1. Holds by eighteen votes to three that there has been a breach of Article 11 (art. 11) of the Convention;

2. Holds unanimously that it is not necessary also to examine the case under Articles 9 or 10 (art. 9, art. 10);

3. Holds unanimously that it is also not necessary to determine whether there has been a violation of Article 13 (art. 13);

4. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;
   (a) accordingly reserves the whole of the said question;
   (b) refers the said question back to the Chamber under Rule 50 par. 4 of the Rules of Court.

Done in English and in French, the English text being authentic, at the Human Rights Building, Strasbourg, this thirteenth day of August, one thousand nine hundred and eighty-one.

Gérard WIARDA
President

Marc-André EISSEN

Registrar

The following separate opinions are annexed to the present judgment in accordance with Article 51 par. 2 (art. 51-2) of the Convention and Rule 50 par. 2 of the Rules of Court:

- concurring opinion of Mr. Ganshof van der Meersch, Mrs. Bindschedler-Robert, Mr. Liesch, Mr. Gölcüklü, Mr. Matscher, Mr. Pinheiro Farinha and Mr. Pettiti;

- concurring opinion of Mr. Evrigenis;

- dissenting opinion of Mr. Sørensen, joined by Mr. Thór Vilhjálmsson and Mr. Lagergren.

G. W.
M.-A. E.

CONCURRING OPINION OF JUDGES GANSHOF VAN DER MEERSCH, BINDSCHEDLER-ROBERT, LIESCH, GÖLCÜKLÜ, MATSCHER, PINHEIRO FARINHA AND PETTITI

(Translation)

We voted in favour of the operative provisions of the judgment, but the reasons which it contains do not appear to us to reflect properly the scope of freedom of association as guaranteed by Article 11 (art. 11) of the Convention.

By confining itself strictly to what it calls the "substance" of the right, the Court’s judgment leaves outside the protection of the Convention numerous situations entailed by legislation permitting the closed shop.

In fact, as we understand Article 11 (art. 11), the negative aspect of freedom of association is necessarily complementary to, a correlative of and inseparable from its positive aspect. Protection of freedom of association would be incomplete if it extended to no more than the positive aspect. It is one and the same right that is involved.

The "travaux préparatoires" of the Convention - which anyway are not conclusive - speak only of "undesirability" and so do not enable one to conclude that the negative aspect of trade union freedom was intended to be excluded from the ambit of Article 11 (art. 11).

In its judgment, the Court rightly states that, in the present case, Article 11 (art. 11) has implications in the area covered by Articles 9 and 10 (art. 9, art. 10) of the Convention. We should like to point out that it is not necessary, for there to be a violation of Article 11 (art. 11), that the refusal to join an association was justified by considerations, connected with freedom of thought, of conscience or of religion, or with freedom of expression. In our view, the mere fact of being obliged to give the reasons for one’s refusal constitutes a violation of freedom of association.

Trade union freedom, a form of freedom of association, involves freedom of choice: it implies that a person has a choice as to whether he will belong to an association or not and that, in the former case, he is able to choose the association. However, the possibility of choice, an indispensable component of freedom of association, is in reality non-existent where there is a trade union monopoly of the kind encountered in the present case.

Here, the sanction - be it the giving of notice or dismissal -, which was a consequence of the system instituted by the law, did not give rise to but simply aggravated the violation. The violation, already constituted by compulsion in the shape of obligatory membership, is irreconcilable with the freedom of choice that is inherent in freedom of association.

CONCURRING OPINION OF JUDGE EVRIGENIS

(Translation)

Whilst I agree with the majority as regards the operative provision of the judgment finding a violation of Article 11 (art. 11) in the present case, I would like to make the following observations with respect to the reasons:

(a) In paragraph 52 of the judgment it is stated "that the right to form and to join trade unions is a special aspect of freedom of association". On its own, this phrase might give the impression that, for the purposes of the Convention, trade union freedom amounts, as it were, to no more than a general and individualistic concept of freedom of association. Yet both the wording of Article 11 § 1 (art. 11-1) and the Court's case-law demonstrate that the content of trade union freedom is to a large extent determined by its character as a collective right. When attempting to strike a fair balance, account has to be taken of the welfare of the public and of the collective interest of the trade union organisation that are at stake as well as of the individual's freedom of association (National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, pp. 17-18, §§ 38-39; Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, pp. 14-16, §§ 39-40; Schmidt and Dahlström judgment of 6 February 1976, Series A no. 21, pp. 15-16, §§ 34 and 36).

(b) I consider that at least in the circumstances of this case and there being no submission to that effect on the part of the Government, the Court should not examine of its own motion whether the interference with the exercise of the right guaranteed by paragraph 1 of Article 11 (art. 11-1) was justified under paragraph 2 (art. 11-2).

The nature of the exception contemplated by paragraph 2 (art. 11-2) presupposes that the State concerned has taken some action in order to bring the exception into operation both within the framework of the domestic legal system and in the context of the review machinery established by the Convention. Although the measures which the State is entitled to take by virtue of paragraph 2 (art. 11-2) may be reviewed by the Court as regards their compatibility with the Convention, they are to a large extent motivated by political considerations of which it is for the State to take advantage. This feature is brought out by the discretionary power left by the Convention in this area to the national authorities. The Court cannot declare legitimate, for the purposes of paragraph 2 (art. 11-2), a domestic measure which the State itself has no wish to regard as such. Conversely, the Court cannot review a measure of this kind and conclude that it is incompatible with the Convention when the State concerned refrains from making such a submission and from advancing reasons which, from its point of view, might justify the contentious measure under the Convention.

DISSENTING OPINION OF JUDGE SØRENSEN, JOINED BY JUDGES THÓR VILHJÁLMSSON AND LAGERGREN

To my regret I am unable to agree that Article 11 (art. 11) of the Convention has been violated in the present case, and I wish to state the reasons of dissent as follows.

1. The issue under Article 11 (art. 11) is whether or not freedom of association as protected by that Article (art. 11) implies a right for the individual not to be constrained to join or belong to any particular association, or in other words whether or not the so-called negative freedom of association or - in the terminology adopted by the Court - the negative aspect of the freedom of association is covered by Article 11 (art. 11).

2. The answer to this question must take account of the statement made by the Conference of Senior Officials in its report of 19 June 1950 (see paragraph 51 of the judgment). It clearly emerges from this element of the drafting history that the States Parties to the Convention could not agree to assume any international obligation in the matter, but found that it should be subject to national regulation only.

3. The attitude thus adopted was entirely consistent with the attitude previously adopted within the framework of the International Labour Organisation. In dealing with questions of trade union rights and freedom to organise, the competent bodies of that organisation had traditionally held that union security arrangements were matters for regulation in accordance with national law and practice and could not be considered as either authorised or prohibited by the texts adopted in the ILO (see C. Wilfred Jenks, The International Protection of Trade Union Freedom, London 1957, pp. 29-30; Nicolas Valticos, Droit international du travail, Paris 1970, pp. 268-69; Geraldo von Potobsky, The Freedom of the Worker to Organise according to the Principles and Standards of the International Labour Organisation, in Die Koalitionsfreiheit des Arbeitnehmers, Heidelberg 1980, vol. II, at pp. 1132-36). This understanding has been maintained ever since and also been expressed by the States Parties to the European Social Charter of 1961 with respect to the obligations undertaken in virtue of that instrument (See Appendix, Part II, Article 1, paragraph 2).

4. During the proceedings in the present case it was argued on behalf of the respondent Government by the Solicitor-General that "the scale of the closed shop system within Britain and the state of the common law was such that the inclusion within Article 11 (art. 11) of the right not to be compelled to join a union would inevitably have required the United Kingdom to make a reservation in respect of any such right" (verbatim record of the hearing on the morning of 4 March 1981, doc. Cour (81) 19, p. 75).

5. Reference to the "substance" of freedom of association is not relevant in the present context. Although the Court has often relied on the notion of

the substance of the rights guaranteed by the Convention, it has done so only when the question was what regulation or limitation of a right was justified. It has held that even in cases where regulation or limitations were allowed explicitly or by necessary implication, they could not go so far as to affect the very substance of the right concerned. In the present case, however, the problem is whether the negative aspect of the freedom of association is part of the substance of the right guaranteed by Article 11 (art. 11). For the reasons stated above the States Parties to the Convention must be considered to have agreed not to include the negative aspect, and no canon of interpretation can be adduced in support of extending the scope of the Article (art. 11) to a matter which deliberately has been left out and reserved for regulation according to national law and traditions of each State Party to the Convention.

6. This conclusion is perfectly compatible with the nature and function of the rights in question. The so-called positive and negative freedom of association are not simply two sides of the same coin or, as the Court puts it, two aspects of the same freedom. There is no logical link between the two.

The positive freedom of association safeguards the possibility of individuals, if they so wish, to associate with each other for the purpose of protecting common interests and pursuing common goals, whether of an economic, professional, political, cultural, recreational or other character, and the protection consists in preventing public authorities from intervening to frustrate such common action. It concerns the individual as an active participant in social activities, and it is in a sense a collective right in so far as it can only be exercised jointly by a plurality of individuals. The negative freedom of association, by contrast, aims at protecting the individual against being grouped together with other individuals with whom he does not agree or for purposes which he does not approve. It tends to protect him from being identified with convictions, endeavours or attitudes which he does not share and thus to defend the intimate sphere of the personality. In addition, it may serve the purpose of protecting the individual against misuse of power by an association and against being manipulated by its leaders. However strongly such protection of the individual may sometimes be needed, it is neither in logic nor by necessary implication part of the positive freedom of association.

7. It follows that union security arrangements and the practice of the "closed shop" are neither prohibited, nor authorised by Article 11 (art. 11) of the Convention. Objectionable as the treatment suffered by the applicants may be on grounds of reason and equity, the adequate solution lies, not in any extensive interpretation of that Article (art. 11) but in safeguards against dismissal because of refusal to join a union, that is in safeguarding the right to security of employment in such circumstances. But this right is not among those recognised by the Convention which - as stated in the Preamble - is only a first step for the collective enforcement of human

rights. At present, it is therefore a matter for regulation by the national law of each State.