010

cc Mr Wolfson
Mr Hoskyns

Prime Minister CC. Mr Wolfson
These papers have gone to the TUC and CBI. They will go to the press on Monday. (The paper on picketing would have been clearer if it had spelt out the meaning of the existing legislation).
TL 8/7

I agree - the structure of the 2 papers is different. The closed shop is better. TL

PRIME MINISTER

Following the discussion of my proposals for legislation on picketing, the closed shop and funds for union ballots at E Committee on 19 June, I have prepared working papers on each of these subjects as a basis for formal consultations. Copies of these papers and of my covering letters to the TUC and CBI are attached.

The working papers set out in detail the proposals agreed by E and will enable me to carry forward the discussions I have already had with the TUC and CBI and also to seek the views of a wide range of other organisations, both of employers and employees.

Iam hoping to conclude consultations on these subjects in time to report to E Committee with detailed proposals for legislation before the end of September and have made this clear in the covering letter. This will allow 2-3 months for consultations.

I am sending copies of the papers to the TUC and CBI today. I intend to send copies to other organisations on Monday 9 July. Because of the inevitability of press leaks, I propose to release the working papers to the press on 9 July with a brief notice pointing out that they are part of the consultative process and that the proposals they contain are in line with our Manifesto commitments.

I am sending copies of this minute and its enclosures to other members of E Committee, the Lord Chancellor, the Paymaster General, the Solicitor-General and Sir John Hunt.

J.P.

JP

4 July 1979

WORKING PAPER FOR CONSULTATIONS ON PROPOSED INDUSTRIAL RELATIONS LEGISLATION

CLOSED SHOP

Introduction

1 The Government's Manifesto affirmed that the law on the closed shop must be changed and set out the nature of the changes required:-

- existing employees and those with personal conviction must be adequately protected, and if they lost their jobs as a result of a closed shop they must be entitled to ample compensation;

- all agreements for a closed shop must be drawn up in line with the best practice followed at present and only if an overwhelming majority of the workers involved vote for it by secret ballot;

- there should therefore be a statutory code under Section 6 of the 1975 Employment Protection Act to give guidance on best pratice ;

- people arbitrarily excluded or expelled from any union must be given the right of appeal to a court of law.

2 These commitments reflect the widespread public conern at some features of the closed shop which have led both the CBI and TUC to offer guidance to their members on the subject, and to the testing of the UK legislation before the European Commission on Human Rights. The changes proposed, while crucial, are limited. The Government recognise that although closed shop agreements limit individual freedom employers and unions have long had practical reasons for entering into such agreements. The aim is therefore to ensure that closed shops are established only with the wholehearted support of the workers covered and that there is a remedy for abuses of individual rights.

The Present Law

3 Both statute and the common law are involved. The main statutory provisions relevant to the closed shop are S 58(3) of the Employment Protection (Consolidation) Act 1978, and Section 30 of the Trade Union and Labour Relations Act 1974 as amended by the 1976 Act. Under these provisions the dismissal of an employee for not being a member of a union, in compliance with a union membership agreement, is to be regarded as fair unless the employee concerned genuinely objects on grounds of religious belief to being a member of any union; and a union membership agreement is defined to cover an agreement or arrangement which has the effect of requiring the relevant employee to be or become a member of the relevant union(s).

4 The remedies available under the common law to a union member who is expelled, or an applicant for union membership who is excluded, are limited. If a union expels a member for reasons which are not provided for in its rules, or in any way that contravenes the principles of natural justice, this is actionable, but where the application of the rules is otherwise unreasonable the position of the member is doubtful. The legal position of the applicant for union membership who is excluded is even less certain.

5 At present there is no legal constraint - either statutory or under the common law - on the way in which a closed shop agreement is introduced. There is therefore no protection for existing non-union employees, and no requirement that a closed shop agreement should be approved by those who will be affected by this major change in their terms and conditions of employment. Furthermore the sole statutory exemption in cases of dismissal is restricted to those with specifically religious objections to union membership.

6 The following proposals aim to rectify these deficiencies.

7 It is proposed to extend the protection against dismissal for non-membership of a union in a closed shop - a protection now limited to those with genuine religious belief. The new categories of employees who would be entitled to compensation if dismissed in these circumstances would be:-

(a) existing employees - ie those in the employment of the employer at the time of the operative date of the closed shop agreement and not members of the union(s) concerned;

(b) those with deeply held personal conviction - on this the question arises whether the protection should follow the existing "religious belief" provision and so apply only to a person who genuinely objects on grounds of deeply held personal conviction to being a member of any trade union whatsoever, or whether it should be widened to those who object on grounds of deeply held personal conviction to being a member of a particular union or those who object on reasonable grounds to being a member of a particular union as in the 1974 Act, (Schedule 1 para 6(5)).

Joinder

9 The normal remedies for unfair dismissal under the Employment Protection (Consolidation) Act 1978 would be available for dismissal in these situations. Because, in the cases of dismissal in closed shops, union pressure may cause the dismissal, there would seem a strong case for enabling the employer, if he chooses, to join a union in any case brought against him. It would then be open to the tribunal in such cases to apportion any compensation payable between employer and union, as it thought appropriate. This process of joinder should, it is thought, only be available to the employer in the case and not to the applicant.

Overwhelming support before closed shop agreements introduced

10 The Government have been considering how to give effect to the requirement that new agreements for a closed shop must be drawn up in accordance with best practice, and only if an overwhelming majority of the workers involved voted for it by secret ballot. It is thought that this might best be done by providing, in primary legislation, that a new union membership agreement (UMA) could only furnish an employer with a defence against unfair dismissal where it had been introduced following a secret ballot of those of whom it was to apply,

in which an overwhelming majority had voted in favour of the UMA. The statutory Code of Practice (see para 11) could cover such detailed matters as decisions as to the constituency, what percentage of the vote or workforce would constitute overwhelming support for a proposed closed shop, and who would be responsible for arranging and conducting the ballot. Views on these and other matters concerning the ballot are sought before the Government make their decisions.

Code of Practice

11 As well as detailed guidance on the ballot, the Government envisage that a statutory Code would give practical advice, based on current best practice, on introducing and applying closed shops, perhaps including the holding of periodic reviews of the support for current agreements. The Code would have status in law in that it could be taken into account in court proceedings. Views on what should be covered in the Code are invited.

12 The question then arises who should produce the Code. One possibility would be for ACAS to draw up a Code, subject to Government approval. In any case it is intended to amend Section 6 of the Employment Protection Act 1975 to give a power for the Secretary of State to produce a Code.

Arbitrary Exclusion or Expulsion

13 The Government propose that this new right should be analogous to Section 5 of the 1974 Act (repealed by the 1976 Amendment Act). It would apply to any worker, whether in a closed shop or not or whether in employment or not, who is arbitrarily or unreasonably excluded or expelled from union membership. Questions obviously arise about the operation of such a provision, including the basis for assessing appropriate compensation in some cases, and the Government wish to discuss these.

14 In determining what should be regarded as "arbitrary" or "unreasonable" in this context the test might be similar to that which S 57(3) of the Employment Protection (Consolidation) Act 1978

establishes for unfair dismissal. This would require the action of the union to be judged according to the substantial merits of the particular case and not just on the basis of particular union rules. An alternative approach might be to lay down detailed criteria.

15 The Government propose that the adjudicating body for this new right should be the High Court: there would be a strong affinity between the basis of the new right and the long standing principle of the common law that a man should not be prevented from practising his trade or selling his labour.

Voluntary procedures

16 The provision of this statutory right would not conflict with voluntary procedures for handling these types of problems. It will be clearly valuable to individuals and unions that such procedures should continue to be available where parties avail themselves of them. The more effective voluntary procedures are made the greater the chance that these cases could be satisfactorily dealt with without recourse to the law.

Conclusion

17 The Government would welcome views on the matters set out in this paper.

WORKING PAPER FOR CONSULTATIONS ON PROPOSED INDUSTRIAL RELATIONS LEGISLATION

PICKETING

The Manifesto commitment

1 The Government are committed to introducing early legislation to amend the law on picketing. The Government believe that the function of the law in the case of picketing as in the case of other forms of industrial action is to describe with clarity the rights, immunities and liabilities of those who take part. In the words of the Manifesto:

> "Workers involved in a dispute have a right to try peacefully to persuade others to support them by picketing but we believe that right should be limited to those in dispute picketing at their own place of work ... We shall ensure that the protection of the law is available to those not concerned in the dispute but who at present can suffer severely from secondary action (picketing, blacking and blockading). This means an immediate review of the existing law on immunities in the light of recent decisions, followed by such an amendment as may be appropriate of the 1976 legislation in this field. We shall also make any further changes that are necessary so that a citizen's right to work and go about his or her lawful business free from intimidation or obstruction is guaranteed".

2. This paper outlines for consultation specific proposals on the legislative means of giving effect to the Manifesto commitments on picketing.

The Background to the Government's Proposals

3. The Government's commitment to amend the law on picketing reflects the widespread public concern at recent developments in the use of picketing as a weapon in disputes. In the last few years there has been a greater tendency to use picketing to bring pressure to bear on companies not directly involved in disputes. The effect has been to put at risk the livelihood of working people who have no dispute with their employer, and to damage enterprises which have no dispute with their employees. In some cases the community as a whole has suffered considerable hardship.

4. These developments in the use of picketing are the result partly of easier communication and transport, which has made it possible for pickets to travel much longer distances than in the past; and partly of a greater degree of organisation of picketing, which is sometimes the work of unofficial groups rather than official union leaders. The growth and greater formalisation of the closed shop since 1974 has reinforced the effectiveness of picketing as a form of industrial action. There are indications of an increasing use of intimidation on picket lines, whether directly through the threat of physical violence or indirectly through the threat of loss of union membership, and, as a consequence, of jobs. The disputes of last winter showed how far these developments had gone and the need for early action to limit them.

The Importance of Voluntary Guidance

5. These developments pose a direct threat to the tradition of peaceful picketing in this country. The TUC and some of the trade

unions concerned felt it necessary to issue their own guidance on the conduct of industrial disputes earlier this year, and the Government believe that there is and will continue to be an important role for voluntary guidance of this kind. Nevertheless, the Government are firmly of the view that voluntary guidance alone will not ensure that effective limits are set to the use of picketing in industrial disputes. It is necessary to supplement voluntary guidance with a new legislative definition of the position in law of those who take part in picketing.

The Government's Proposals

6. In drawing up proposals for consultation the Government has been mindful of the need not to create sources of conflict gratuitously, and not to place an impossible burden on the police. The police already have powers to limit the number of pickets at any one site and to deal with obstruction, violence, threatening behaviour and breaches of the peace. It is not therefore proposed that picketing outside redefined limits should be made a criminal offence.

7. Instead it is proposed that the redefinition of the limits of lawful picketing should be achieved by an amendment of S.15 of the Trade Union and Labour Relations Act 1974. This section now provides that:

> "It shall be lawful for one or more persons in contemplation or furtherance of a trade dispute to attend at or near -
> (a) a place where another person works or carries on business; or
> (b) any other place where another person happens to be, not being a place where he resides,
> for the purpose only of peacefully obtaining or communicating

information, or peacefully persuading any person to work or abstain from working".

8. The Government's proposal is that this section be amended so that its application is restricted:

(i) to those who are party to the trade dispute which occasions the picketing, and

(ii) to the picketing which they carry out at their own place of work.

9. However that by itself would not provide sufficiently effective limitation. Some change in S.13 of the 1974 Act as amended in 1976 is also necessary.

10. One approach would be to amend S13 so as to limit <u>in respect of picketing</u> the immunity conferred by this section to persons who picket within the redefined limits of S.15. This would mean that anyone who picketed outside the limits laid down in the amended S.15 would not be protected by S.13 if that picketing induced breaches of contract. It would then be for the employer concerned to initiate action when he thought that picketing was unlawful and damaging his firm's operations.

11. The approach described in para 10 involves distinguishing between picketing and other forms of industrial action. Another approach would be to limit the immunity conferred by S.13 in respect of <u>all</u> forms of industrial action. In practice picketing of employers, for example, with whom the pickets are not in dispute usually involves interference

with commercial contracts, and the same is true of other forms of so called "secondary" action (eg blacking). A further possibility, therefore, would be to amend S.13 so that it reverts to the wording of the 1974 Act, so that the immunity it confers is limited to inducing breaches of contracts of employment. The effect of this would be to reduce the extent to which S.13 protects interference with commercial contracts.

12. Any changes in S.13 of the 1974 Act will need to be considered in the context of the Government's current review of the existing law on trade union immunities. However the Government wish to discuss their belief that amendments to S.13 of the kind described in paras 10 and 11 would, in conjunction with the amendment of S.15 described in para 8, lead to an effective limitation of picketing in line with its Manifesto commitments.

Code

13. Finally the Government propose that legislation should provide a power for the Secretary of State himself to draw up a Code covering all aspects of picketing. The Code would have status in law in that it could be taken into account in court proceedings. As a document approved by Parliament it could be expected to have considerable moral force, as well as helping to bring about a more consistent interpretation of the law by police and magistrates. One possibility would be for the Code to be drawn up by ACAS, subject to Government approval.

14. The Secretary of State would, however, intend to make use of the power to draw up a Code only in the absence of comprehensive and

effective voluntary guidance.

Conclusion

15. The Government would welcome views on the proposals set out in this paper.

WORKING PAPER FOR CONSULTATIONS ON PROPOSED INDUSTRIAL RELATIONS LEGISLATION

SUPPORT FROM PUBLIC FUNDS FOR UNION BALLOTS

1 The Government have indicated in the Manifesto their intention to give every encouragement to the wider use of secret ballots for decision-making throughout the trade union movement and, to this end, to provide public funds for postal ballots for union elections and other important issues.

2 There is wide public support for more extensive use of secret ballots in unions, and growing recognition within the union movement itself that secret ballots on important matters are desirable. Ballots produce greater membership involvement in decision-making, and give every trade union member the opportunity to record his or her decision without others watching and taking note. It is not practicable for every decision, whatever the circumstances, to be taken after a secret ballot of the membership and unions themselves must decide when ballots are appropriate. But the purpose of the forthcoming legislation will be to remove major financial constraints on unions from holding important ballots, and this should enable unions increasingly to employ secret ballots on important issues.

Matters to be covered by the Scheme

3 It is suggested that the Scheme should cover, initially:

- elections to full time trade union officer and to the executive or other governing body of an independent trade union;

- matters involving changes in union rules;

- the calling or ending of strikes.

4 The Government would welcome views on this list. Is it, for instance, sufficiently comprehensive? One possibility would be to frame the legislation to enable the Secretary of State to extend by Order the matters covered.

Postal Ballots

5 The Government propose that the legislation should be framed to enable a trade union to seek reimbursement of the reasonable postal costs of conducting a secret ballot on one or more of the matters listed above. This would enable unions to claim reimbursement of at least the cost of using the cheapest postal method and, at the discretion of the Certification Officer (CO) (see paragraph 8), of the cost of using first-class post.

6 There is the question whether it is practicable or necessary to provide public funds for the reimbursement of the associated administrative costs of postal ballots (for example, the fees of an external organisation administering the ballot). The Government would welcome views on whether it would be desirable to seek to do this and, if so, what non-postal costs should be reimbursed and whether these costs should be reimbursed in whole or in part.

It would also seem necessary to have safeguards to ensure that extravagant expenditure would not attract reimbursement. One approach, if any administrative costs are to qualify under the Scheme, might be to put a duty on the CO to be satisfied that the costs for which reimbursement is claimed have been reasonably incurred.

Non-Postal Ballots

7 Some unions conduct - or in the future may find it appropriate to conduct - secret ballots at the workplace. This method may involve administrative costs comparable to or greater than those associated with postal ballots. An important issue to be resolved is whether public funds should be made available for secret ballots of this kind as well as for postal ballots. This does, of course, raise the same issues of the proportion of the costs to be reimbursed and

the need to avoid extravagant expenditure referred to in paragraph 6. But it also raises questions about the proper conduct of non-postal ballots and especially about what assurance there might be of the secrecy of such ballots - an assurance more readily provided by the postal method. The reimbursement of costs of non-postal ballots might call for special safeguards on this matter.

Administration of the Scheme

8 In the Government's view, the CO would be the most appropriate person to administer the Scheme. Administration should be kept as simple as possible and reimbursement of the appropriate costs would be made if the relevant expenditure were certified by the authorised trade union officer as having been incurred through the holding of a secret ballot coming within the terms of the Scheme. The union would be required to submit copies of ballot papers, paid-up accounts and other information the CO might require to satisfy himself that the relevant expenditure was reasonably incurred and that the secrecy of the ballot was properly secured.

10 No ballot would qualify under the Scheme if it was held contrary to union rules. Nor is it envisaged that there would be any appeal from the CO if he refused reimbursement in whole or in part on the groundsthat the ballot was not secret, did not otherwise fall within the terms of the scheme, or the expenditure had not been reasonably incurred. A complainant would, of course, be able to go to the High Court if he felt that the CO had exercised his discretion unreasonably.

Conclusion

11 The Government would welcome views on the matters referred to in this paper.