STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC., Complainant, vs. JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE, AND THE BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 8, et al, Respondents.	Case VIII No. 15210 MP-107 Decision No. 11271

Appearances:

Madison City Attorney, by Mr. Gerald Kops, Assistant City Attorney, appearing on behalf of the Respondents.

Mr. Robert C. Kelly, Attorney at Law, appearing on behalf of the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Teachers, Inc. having on January 6, 1972, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Joint School District No. 8, City of Madison, et al, and the Board of Education of said school district had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act; and hearing in the matter having been conducted on February 28, 1972 at Madison, Wisconsin by the Wisconsin Employment Relations Commission, Chairman Morris Slavney and Commissioner Zel S. Rice II being present; and the Commission, having reviewed the evidence and briefs of Counsel, as well as briefs amicae filed by the Wisconsin Education Association, and the National Right To Work Legal Defense Foundation, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Madison Teachers, Inc., hereinafter referred to as MTI, is a labor organization, having its principal office at 121 South Hancock Street, Madison, Wisconsin.

2. That the Respondent Joint School District No. 8, City of Madison, Villages of Maple Bluff, and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, and Burke, hereinafter referred to as the District, operates a school system in said city, villages and towns, and has its principal office at 545 West Dayton Street, Madison, Wisconsin; and that Respondent Board of Education of the District, hereinafter referred to as the Board, is an agent of the District and is charged with the possession, care, control and management of the property and the affairs of the District.

3. That MTI is the majority collective bargaining representative for all regular full-time and regular part-time certificated teaching personnel employed by the District, including psychologists, psychometrists, social workers, attendants and visitation workers, work experience coordinator, remedial reading, University Hospital teacher, trainable group, librarians, guidance counselors, teaching assistant principals (except at Sunnyside School), teachers on leave of absence, but excluding on-call substitute teachers, interns and all other employes, principals, supervisors and administrators, having been certified as such by the Wisconsin Employment Relations Commission on June 7, 1966.

4. That since 1966, MTI and the Board have, as a result of conferences and negotiations, entered into a series of collective bargaining agreements covering the wages, hours and conditions of employment of the aforementioned bargaining unit personnel, the last of such written agreements had for its term the period commencing January 1, 1971 and ending December 31, 1971; that said agreement included among it provisions the following in Article II:

"A. CONFERENCE AND NEGOTIATION

. . .

c. Each party to this Agreement desiring to be represented by agents for negotiating agrees to furnish to the other party a list of its duly authorized agents for such purposes. Each party agrees to negotiate only with said agent and no others, including their principals, namely, the Board of Education or Madison Teachers, as the case may be, unless the latter as principals authorize negotiations with others or themselves.

d. If matters which are proper subjects of negotiations are brought, whether in the form of a grievance, petition or otherwise, to the attention of either of the parties to this Agreement by any individual, group of individuals or organization other than the other party to this Agreement or its duly authorized agents such latter party shall be punctually informed of such action."

5. That by letter dated January 25, 1971, MTI gave the Board timely notice of its desire to modify the existing written agreement as of the end of its term; that MTI accompanied such notice with its written proposal of modifications, deletions and additions to be made in such existing agreement for the 1972 agreement; that included in such proposal was a proposal that the 1972 agreement, covering the 1972 calendar year, contain a fair share agreement.

6. That conferences and negotiations between the parties for a successor agreement covering the calendar year 1972 continued until October 4, 1971; that the fair share proposal was a subject of such conferences and negotiations during this entire period of time; that the Board objected to incorporating the proposed fair share agreement into the 1972 agreement, for one of the reasons that fair share agreements were not permitted under the law, specifically under Section

111.70 of the Wisconsin Statutes as then promulgated; that on October 4, 1971, MTI submitted a revised fair share proposal to the Board in negotiations, wherein the MTI proposed that the parties agreed to incorporate a fair share agreement into the 1972 agreement, but that such fair share agreement would not become effective until such provisions were specifically permitted by enabling legislation; and that the fair share agreement proposal continued to be a subject under discussion at the bargaining table.

7. That Chapter 124, Laws of 1971, as adopted by the Legislature was published on November 10, 1971, becoming effective by virtue of Section 990.05, Wis. Stats. on November 11, 1971; that Chapter 124, Laws of 1971, among other things amended Section 111.70(2), Wis. Stats. so as to permit municipal employers and the majority representative of its employes to enter into a fair share agreement as defined by Section 111.70(1)(h) of the Statutes; that thereafter, on November 17, 1971, MTI submitted to the Board in negotiations, a third fair share proposal, which proposal complied with the provisions of Municipal Employment Relations Act established by Chapter 124, Laws of 1971, relative to fair share agreements.

8. That by November, 1971 the number of unresolved issues between the parties was reduced to approximately thirteen, including issues with respect to MTI's proposals of binding arbitration of nonrenewal of teacher contracts and teacher dismissals, as well as the fair share agreement; that the Board had stood fully opposed to providing for binding arbitration of teacher nonrenewals and teacher dismissals during the entire period of negotiations first commencing on January 25, 1971; that, likewise, the Board had consistently taken a position against MTI's fair share proposal; that however, at one time in the latter part of October, or early part of November, Paul Olson, Chief Negotiator for the Board, during a meeting Chief Negotiator for MTI, indicated that he could see no way in which the Board would grant bindining arbitration of teacher nonrenewal and dismissal, but that there was a distinct possibility that the Board would grant fair share; and that Olson had also indicated to MTI that there were two members of the Board who would grant the fair share proposal if MTI would drop its demand for binding arbitration of teacher nonrenewal and dismissal.

9. That in November, 1971 Ralph K. Reed and Albert Holmquist, teachers employed by the District, neither of whom are members of MTI, drafted a document, made a part hereof as Appendix "A", and mailed same on November 14, 1971 to all teachers in the employ of the District.

10. That Reed and Holmquist received approximately two hundred replies to such letter, the majority of which were favorable to their position on fair share; that thereafter Reed and Holmquist called a meeting of those teachers who had indicated they would work actively against any fair share agreement; that such meeting was held on Thursday, December 2, 1971, and was attended by fourteen teachers, seven of whom were MTI members and seven of whom were not; that as a result of said meeting additional three documents, made a part hereof as Appendix "B", "C", and "D", were prepared and printed and hand delivered or mailed to certain teachers, who distributed said documents to other teachers during their free periods in the various schools between December 2nd and 6th, 1971.

11. That on December 6, 1971 Reed, upon his request, was given permission by the Principals of Van Hise Elementary and Junior High Schools to circulate the "petition" among teachers in said schools on Reed's free time, as well as permission to use the teachers' school mailboxes for the distribution of a letter, made a part hereof as Appendix "E".

12. That a regular meeting of the Board was held during the evening of December 6, 1971; that among others present at said meeting, were officers and representatives of MTI, as well as three to four hundred teachers, who were members of MTI; that Reed and Holmquist were also present; that during a portion of said meeting, described in the meeting agenda as "Public Appearances", the president of MTI, Paul Du Vair, addressed the Board, urging the Board to resume negotiations with MTI and to reach an agreement on the provisions of the 1972 collective bargaining agreement; that upon the conclusion of his remarks, Du Vair presented to the Board a statement, containing the signatures of between thirteen and fourteen hundred teachers, setting forth that "We the undersigned wish the parties to resume negotiations and reach agreement as quickly as possible"; that Holmquist was also permitted to speak to the Board; that Holmquist prefaced his remarks to the Board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package.";

that Holmquist then read to the Board the text of the Petition he had circulated among the teachers dated December 6, 1971; that in so doing he stated as follows:

> "To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public."
>
> "We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to

this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

13. That at the conclusion of Holmquist's remarks, Mrs. Doyle, President of the Board, asked Holmquist, "Do you intend to communicate these petitions to the Board when you have them all."; that Holmquist replied in the affirmative; and that no other Board member spoke to Holmquist on the matter; that immediately after its regular public meeting the Board went into executive session, during which the unresolved issues, including arbitration of teacher nonrenewal and dismissal and fair share were discussed by the Board; that as a result of such discussion a resolution was adopted by the Board as follows:

"It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and not including agency shop; if the MTI does not accept this as a total package the offer of arbitration is withdrawn".

14. That on December 7, 1971, authorized representatives of MTI met with authorized representatives of the Board in a previously scheduled negotiations meeting; that Dr. Ritchie, Superintendent of Schools, and an agent of the District, at the opening of such negotiation meeting, gave the representatives of MTI a copy of the above resolution informing such representatives that such resolution stated the Board's position, indeed "that this was the deal"; that discussions concerning the Board's position and fair share took place during such meeting; that the Board's representatives remained adamant in their position and in the afternoon of that day the parties reached tentative agreement upon MTI accepting the Board's position and that such tentative agreement was accepted as the Agreement by both parties on December 14, 1971.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

That Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, in permitting teacher Albert Holmquist to appear and speak at a meeting of the Board on December 6, 1971, as a representative of a minority of the teachers in its employ, on the matter of the fair share agreement, a matter subject to negotiations between said Municipal Employer and Madison Teachers, Inc., the majority bargaining representative of certificated teaching personnel in the employ of said Municipal Employer, violated its duty to bargain in good faith with Madison Teachers Inc., and Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, thereby interfered

with the rights of employes represented by Madison Teachers Inc. to bargain collectively with representatives of their own choosing, and further thereby Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al, committed prohibited practices within the meaning of Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

IT IS ORDERED that Joint School District No. 8, City of Madison, Villages of Maple Bluff and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burke, and the Board of Education of Joint School District No. 8, et al,

1. Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc.

2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act;

(a) Officially incorporate the instant Findings of Fact, Conclusions of Law and Order in the minutes of the Board of Education.

(b) Immediately notify Madison Teachers Inc. that they will not permit any employe in the bargaining unit represented by Madison Teachers Inc., other than a representative of Madison Teachers Inc., to appear and speak on matters subject to collective bargaining between them and Madison Teachers Inc.

(c) Notify the Wisconsin Employment Relations Commission within thirty (30) days of the receipt of a copy of this Order as to what steps they have taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner

APPENDIX "A"

"Dear Fellow Madisonian Educator,

E. C. - O. L. O. G. Y.

Educator's Choice - Obligatory Leadership Or Grievance by You

SAVE FREEDOM OF CHOICE

A Closed Shop (agency shop) Removes This Freedom

1. Does an organization which represents the best interests of teachers and pupils NEED mandatory membership deductions?

2. Need relationships between administrators and teachers be further strained by LEGALLY providing for mandatory adversary camps?

3. Should minority voices be mandatorily SILENCED?

4. Could elimination of outside dissent produce NON-RESPONSIVENESS to change?

5. And...

isn't this lack of FREEDOM OF CHOICE undemocratic?

SUPPORT FREEDOM OF CHOICE - OPPOSE AGENCY SHOP

- -

I wish to maintain freedom of choice:

I oppose agency shop on principle _____

I oppose agency shop and would sign a petition stating so _____

I oppose agency shop and would work actively to maintain freedom of choice _____

Let us hear from YOU.

Al Holmquist /s/
Al Holmquist

Ralph Reed /s/
Ralph Reed
Teacher co-chairmen"

E.C.-O.L.O.G.Y.
P.O. Box 5184
Madison, WI 53705

APPENDIX "B"

"Dear Colleague,

1) The enclosed petition was drawn up Thursday night by a group of teachers.

2) Accompanying it is a letter of current, pertitant information. It may be used as a source for your own personal reference, posted on bulletin boards or even dittoed for mailbox stuffing (which is allowable). Please add information you may have to make it as specific to your situation as possible. (as below)

3) The following people in your school:

have written they would also work actively

have written they would sign the petition

have written they are opposed to the concept of agency shop on principle

Thirty-five others mailed in unsigned responses but indicated that they would sign the petition.

4) It is imperative to work quickly. We would like to present a first-day's total to MTI and the Board of Education this MONDAY night, Dec. 6. (It is the night of the last board meeting under our present contract)

Please call in 1) the number of signers
2) the percentage of your faculty contacted the first day

_____ between 5 and 7pm

5) When you have contacted everyone in your school affected by the contract please return the petition to Concerned Educators, Box 5184, Madison, Wi 53705

Who will sign for certain?

Who will sign after others do?

Which others?

Who might sign if you ask them first but might not sign later?

Who won't sign? (Don't be sure. Half of the people who wrote the petition are MTI members. Many MTI'ers responded to the original letter. And this point was included in the negotiation package by a close vote of the board of directors)

Would a closed system be as responsive? to individual members

Isn't a loyal opposition necessary?

Freedom of Choice?

Ability to influence an organization by withholding of dues?

Thank you for your efforts and your support.

The Committee"

APPENDIX "C"

"POINTS OF INFORMATION

1. FAIR-SHARE, agency shop, and union shop need not be the same thing

   fair-share - the bargaining unit collects that portion of dues that goes directly toward negotiation and contract administration costs

   agency shop - the bargaining unit collects uniform dues and fees from members and non-members as a condition of employment

   union shop - you have thirty days to join the union or you have no job.

2. However, the current fair-share agreement proposal, in its language, EQUATES fair-share agreement and agency shop by definition.

   'It is understood and agreed by and between the parties herto that the employer will deduct from the monthly earning of the employees in the collective bargaining unit a fair share, SUCH AMOUNT BEING the monthly dues certified by Madison Teachers as the current dues UNIFORMLY REQUIRED OF ALL MEMBERS.'

3. This proposal, as is, was included as a point for negotiation by a close vote of the MTI board of directors.

4. MTI has refused to poll its membership on this perhaps critical individual point of negotiation.

5. It is true that legally, one need not join MTI under the fair share proposal.

6. However, even with a real fair-share agreement (as well as with the present proposal) everyone covered by the contract must become a MEMBER OF WEA and NEA. Right now part-time teachers who pay partial MTI dues must pay full NEA and WEA dues as full members.

7. For even a real fair-share proposal to take effect it must have the support of the majority of all affected by the contract.

8. The enabling legislation, Senate bill 198A, is constitutional according to our legal advice.

9. The petition is not to be construed as anti-MTI. All that is asked is that the present fair-share proposal be deffered this year until adequate study and dissemination of information - and your opinion is known.

for communication, not confrontation"

APPENDIX "D"

"To: Madison Board of Education

Madison Teachers, Incorporated

We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be defered this year. We propose the following:

1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.

2) The findings of this study be made public.

3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.

4) The results of this written ballot be made public.

_____	_____
_____	_____
_____	_____
_____	_____"

APPENDIX "E"

"Dear fellow Van Hise Teachers, Dec. 6, 1971

In the next few days you will be asked to sign a petition asking that the FAIR SHARE (AGENCY SHOP) proposal being negotiated between M.T.I. and the Board of Education be deferred until the topic has been studied, information from the study has been disseminated to all concerned, and all teachers have been balloted as to their position on this important issue.

Please consider the following informational points:

1. FAIR-SHARE, agency shop, and union shop need not be the same thing.

   Fair-share: The bargaining unit collects that portion of dues that goes directly toward negotiation and contract administration costs.

   Agency shop: The bargaining unit collects uniform dues and fees from members and non-members as a condition of employment.

   Union shop: All employees have thirty days to join the union or they loose their job.

2. The current fair-share proposal, in its language, EQUATES fair-share agreement and agency shop by definition.

   'It is understood and agreed by and between the parties hereto that the employer will deduct from the monthly earning of the employees in the collective bargaining unit a fair share, SUCH AMOUNT BEING the monthly dues certified by Madison Teachers Incorporated, as the CURRENT DUES UNIFORMLY REQUIRED OF ALL MEMBERS.' (emphasis mine)

3. This proposal was included as a point for negotiation by a very close vote of the MTI board of directors.

4. MTI has refused to poll its membership in this perhaps critical individual point of negotiation.

5. Legally, it is true that one need not joint MTI under the fair share proposal.

6. However, even with a 'real' fair-share agreement (as well as with the present proposal) everyone covered by the contract must become a MEMBER of WEA and NEA. Presently, part-time teachers who pay partial MTI dues MUST pay FULL NEA and WEA dues as full members.

7. For any fair-share proposal to take effect it must have the support of a majority of all affected by the contract.

8. The enabling legislation, Senate bill 198A, is constitutional according to our legal advice.

9. The petition being presented is NOT to be construed as anti-MTI. All that is asked is that the present fair-share proposal be deferred this year until adequate study and dissemination of information -- and your opinion is known.

For communication, not confrontation,

Ralph K. Reed /s/
Ralph Reed
Rm. 111"

See me if you have additional questions not covered above.

JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE, AND THE BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 8, et al, VIII, Decision No. 11271

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

In its complaint MTI alleged that, by permitting Holmquist, as an individual employe and as the representative of seventy-two other employes, to attempt to influence the School Board, hereinafter referred to as the Board, on behalf of the District, in its decision regarding the issue on the fair-share agreement as proposed by the MTI during bargaining, the District negotiated with an individual employe or a group of employes, and that thereby the Board interfered with and restrained bargaining unit employes in their right to bargain collectively through representatives of their own choosing in violation of Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act, hereinafter referred to as MERA, and further, that the Board thereby failed and refused to bargain collectively with MTI in violation of Sec. 111.70(3)(a)4 of MERA. MTI would have the Commission order the Board to cease and desist from such activity "now and in the future", and further requests the Commission to order that the Board expunge from its official minutes "any and all reference to the remarks" made by Holmquist at the December 6, 1971 meeting of the Board, and further that the Board expunge from its minutes and records "any reference to any written petitions, including such written petitions themselves" received by the Board from Holmquist on December 6, 1971.

In its answer the District contended that Holmquist's remarks made at the Board meeting of December 6, 1971 "involved solely the giving of a position statement at an ordinary meeting of a public body and thus cannot be labeled as negotiating", that Holmquist was not questioned by the Board, and that the Board refrained from any discussion or conversation with Holmquist during and after his statement. The District denied the commission of any prohibited practices and requested that the complaint be dismissed.

The Facts

All the facts dispositive of the issues involved herein are set forth in detail in the Findings of Fact.

The Positions of the Parties

As indicated in the preface of the Commission's decision both the MTI and the District filed briefs. 1/ Upon permission from the Commission, briefs amicus were filed by the Wisconsin Education Association and the National Right to Work Legal Defense Foundation. The Commission appreciates the thoroughness and quality of said briefs, and in that regard commends those who prepared same. 2/

1/ MTI also filed a reply brief.

2/ A review of the record, which refreshes a recollection of the hearing, warrants complimenting Attorney Kelly and Attorney Kops for their attitude, conduct and competency in making the record in the instant matter.

The Position of MTI

MTI sets forth two basic arguments in support of its complaint that the District committed the prohibited practices as alleged in the complaint filed herein. It contends that:

1. "In permitting a representative of a minority of its bargaining unit employes to appear at a public meeting of the Board and to speak to the Board on fair share, a mandatory subject of bargaining, the Board failed and refused to collectively bargain with MTI as the representative of a majority of its employes in violation of Section 111.70(3)(a)4, Wis. Stats., and interfered with the right of said bargaining unit employes to collectively bargain through MTI as the representative of their own choosing in violation of Section 111.70(3)(a)1, Wis. Stats."

2. "A Municipal Employer cannot base its decision to reject a fair share proposal on a poll of its bargaining unit employes."

In support of its first contention MTI argues that the Board was bound to "deal exclusively" with it as the exclusive representative of its teachers, and that therefore a minority union, 3/ or a minority group of employes, 4/ cannot negotiate with the Board and likewise the Board is prohibited from negotiating either with a minority union or a minority group of employes, and if it does so, the Board violates its duty to bargain with the exclusive bargaining representative.

In said regard MTI argues:

> "Holmquist as the representative of a minority of teachers was permitted to discuss with the Board, i.e. to convey to the Board the minority's ideas and thoughts on a mandatory subject of bargaining, and to possibly influence the decision of the Board as concerns such subject. Whether a two-sided conversation took place or not is immaterial. Holmquist as a minority representative was permitted to influence the Board in its decision making role and on a question of conditions of employment. Whether the remarks made by Holmquist did in fact influence the Board in its decision making process is also immaterial. His remarks could have had that affect. Indeed a strong inference arises from the facts in this matter that his remarks did so influence the Board in its bargaining position.
>
> Immediately after the public meeting during which such remarks were made, the Board went into executive session. During such session it discussed the unresolved issues of fair share, the issue discussed previously by Holmquist, and arbitration of teacher nonrenewals and dismissals. Up to that time the Board had refused to accept MTI's proposals as concerns either issue. During such discussion the Board changed its

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3/ Milwaukee Board of School Directors v. WERC, 42 Wis 2d 637 (1968)

4/ M & M Chevrolet Co. (4083-A) 4/56

position in this regard. Indeed the Board by resolution agreed for the first time to accept binding arbitration of teacher renewals and dismissals and at the same time resolved to reaffirm its position against fair share. In effect the Board to some extent accepted the position proposed by the minority."

In support of its second principal contention MTI argues, in material part, as follows:

"If a majority bargaining representative proposes during negotiations that the parties agree upon a fair share agreement incorporating the same into a written collective agreement, the employer must meet and confer with such majority representative at reasonable times, in good faith, with respect to such conditions of employment, with the intent of reaching an agreement thereon. While the employer is not compelled to agree to any fair share agreement proposed or to make any concession concerning the same, it is required to meet and confer at reasonable times relative to such agreement, in good faith with the intention of reaching agreement. The employer cannot negotiate publicly or privately with a minority as concerns fair share agreements or base its refusal to accept fair share on the premise that a number of bargaining unit teachers do not support a fair share agreement.

The statute does give the employer the right to petition the Commission for a referendum and does provide that such a petition must be supported by proof that at least 30% of the employees in the bargaining unit desire that the fair share agreement be terminated.

The statute therefore clearly permits the employer to receive from its employes, and through other than the majority representative, proof that such employes do not favor the fair share agreement. Obviously the proof may be obtained in unsolicited employe petitions.

When may the employer receive such proof? Certainly not during negotiations when in its decision making role it must decide whether to agree to a fair share proposal or not. It may only receive such information when a fair share agreement is already agreed upon by the employer and the majority bargaining representative and the question is does a majority of the bargaining unit employes favor the continuance of such agreement. . . .

ERB 15.06 (of the Commission's rules) entitled "Stipulation for Referendum Seeking Authorization to Implement Fair-Share Agreement" provides that when a municipal employer and the majority bargaining representative of its employes in their negotiations with respect to the inclusion of the fair-share agreement in their collective bargaining agreement, jointly desire to determine whether the employes in the involved collective bargaining unit favor the implementation of a fair-share agreement, such municipal employer and such labor organization, or anyone lawfully authorized to act on their behalf, may file a stipulation for a referendum for said purpose. Such stipulation must contain a statement by the municipal employer that it will incorporate a fair-share agreement into the collective

bargaining agreement if the required number of employes vote in favor of implementing such agreement. Conversely, such Stipulation must contain a statement by the labor organization that it agrees to withdraw its request in negotiations for a fair-share agreement in the event the required number of employes do not vote in favor of the implementation of such agreement. Resort to such a stipulation and employe self determination through the election process then can only occur after the employer and the majority labor organization have come to agreement on a fair-share agreement.

There simply is no provision allowing or permitting the employer to poll his employes or to accept and consider a written poll of his employes as part of the decision making process in deciding whether to accept or reject a fair-share agreement.

An election may be had, in which employes can approve or disapprove of the continuation of a previously agreed upon fair-share agreement, pursuant to a Petition or a Stipulation. An election may also be had in which employes indicate whether or not they favor the implementation of a fair-share agreement, but only if the employer states in writing that it will incorporate a fair-share agreement into the collective bargaining agreement upon a favorable employe vote.

The employer cannot refuse or reject a fair-share agreement proposed in negotiations basing such refusal on the fact that a number, even a majority, of its bargaining unit employes have disclosed to it orally or in writing that they do not favor fair share.

Chaos would result if the rule were otherwise. If an employer could rely on petitions signed by a substantial minority of its employes or even a majority of its employes as the basis for rejecting fair-share agreements, the secret balloting provision of the election process established by the WERC would be rendered valueless.

A multitude of legal questions could and would arise as to the validity of the signatures on the petition, whether the employes understood what they were signing, whether the petition was unsolicited or whether it was obtained directly or indirectly through improper management persuasion, and so on.

Fair-share agreements simply are not unique subjects of bargaining upon which the employer can bargain with the minority either privately or in public.

In the instant matter the Board permitted Holmquist as the representative of an informal minority of bargaining unit employes to appear at a public meeting of the Board and to speak against the fair-share arrangements proposed by MTI as the majority bargaining representative. In doing so the Board consciously undermined the bargaining position of MTI as the majority representative of its bargaining unit employes."

The District, in support of its answer that the complaint should be dismissed, in its brief sets forth three basic contentions as follows:

1. The Board in permitting Holmquist to speak and present the petition involved, during an ordinary Board meeting and in the presence of MTI officials, acted within its duty "to recognize and respect the constitutional rights of all its employees to speak freely and petition their government.

2. The Board did not violate its duty to bargain with MTI or interfere with the rights of its employes, when in the presence of MTI officers "it merely listened to a representative of an informal committee of bargaining unit employees during the public appearance portion of a regularly scheduled meeting, read a petition concerning 'fair share' circulated among Madison teachers and heard that 417 teachers had signed the petition".

3. The Board acted "in conformity with its responsibilities under Section 111.70" in listening to Holmquist regarding negotiable matters, receiving information, thoughts or sentiments of employes in the bargaining unit "in the absence of an express or implied desire by the employer to deal directly with the employes and affirmative action soliciting or inducing the employees to deal directly with" the Board.

In support of its first argument the District contends that the First Amendment to the federal constitution, 5/ as well as Article I, Section 3 of the Wisconsin Constitution, guarantees the right of persons to petition the government or any party thereof, and the right to speak and publish sentiments freely. Therefore the District concludes that all teachers in its employ, as citizens, "possess the right to speak freely and the right to petition" the Board, and that the Board has the responsibility to refrain from obstructing such right.

Secondly the District argues that it recognizes its duty to bargain exclusively with MTI on the issue of a fair share agreement, however, that the Board's action in the meeting involved with respect to listening to Holmquist did not constitute a failure in its duty to bargain with MTI.

In support of its third basic argument the District, in its brief argues, in part as follows:

> "There is no evidence in this record that either the Board of Education recognized an obligation or intended to assume an obligation to meet and confer with Mr. Albert Holmquist or his group at reasonable times with an intention of reaching an agreement with those individuals. There is no evidence, expressed or implied, that the Board wished to deal with persons other than the certified representative. Further, there is no evidence to indicate the Board or Administration solicited or induced direct dealing with employees in derogation of the collective bargaining representative. The Board merely received information. Listening is not bargaining.

5/ Citing Pickering v. The Board of Education, 391 U.S. 563 (1968)

It is also clear Mr. Holmquist's remarks cannot be considered 'collective bargaining' within the statutory definition. Mr. Holmquist merely wished to inform the bargaining parties that some teachers were confused about the 'fair-share' proposal presently on the bargaining table. His testimony indicates that he was not interested in establishing a bargaining relationship with the Board of Education. On the contrary, his remarks clearly recognized that Madison Teachers Incorporated was the exclusive bargaining representative for the teachers. His efforts were aimed at getting the bargaining parties off dead center, not undermining the majority representative.

Mr. Holmquist recognized the Board of Education and Madison Teachers Incorporated as the sole bargaining parties for the teachers in the District. Additional support for this suggestion can be seen in the petition itself which was read to the Board. The petition is addressed to Madison Teachers Incorporated and the Board of Education. Transcript Page 94.

The act of the Board of Education in permitting Mr. Holmquist to speak cannot be considered 'collective bargaining' in light of the statutory definition.

Section 111.70(4)(d) of the Wisconsin Statutes (1971) provides additional support for the Respondent's position that an employer may receive information from and listen to bargaining unit employees concerning bargaining matters without running afoul of its responsibilities under the act.

The only contact between Mr. Holmquist and the Board of Education or the School Administration was in the presence of the officials of the majority representative of the teachers of the District. Indeed, on December 6th, the President, Executive Secretary and Chief Negotiator for Madison Teachers were present in the audience when Mr. Holmquist made his statement. The statute safeguards the right of an employee to communicate with an employer. In this case the Board merely listened and, in so doing, allowed what is declared lawful by statute.

Finally, the legislature has provided a procedure by which a union security agreement entitled 'Fair-Share' may be terminated. Section 111.70(2) Wisconsin Statutes (1971). This procedure may be initiated by an employer or a labor organization upon a 30% showing of interest by the employees in the bargaining unit. This section thus assumes that unsolicitated information from employees concerning 'fair-share agreements' may be received after an agreement on fair-share by the parties. It thus further assumes that receipt of information by the employer after an agreement from dissenting members of the bargaining unit is not 'bargaining' or 'negotiating' with third parties.

The Complainant argues that this legislative enactment merely allows the receipt of information from employees after agreement and, therefore, does not presume that an employer may receive information prior to agreement on fair-share. However, the Complainant misses the point of

the argument. Complainant's argument suggests that the receipt of information on negotiable matters from employees prior to the agreement is bargaining while receipt of information after agreement with the bargaining representative is not bargaining. He presumes that the legislature would allow bargaining by third parties after an agreement had been reached but prevent bargaining by third parties before an agreement was reached. This argument does not make sense.

It is more consistent with the intent of the act to suggest that the legislature understood that the mere receipt of information is not 'bargaining' prior to or after a collective bargaining agreement is reached and thus, it established a procedure where it is presumed the employer will receive information. The Complainant's argument suggests that the legislature would sanction activity considered direct bargaining after an agreement was reached but prohibited activity considered direct bargaining before agreement. The Respondent suggests the legislature understood listening and receiving information is not bargaining."

In support of its argument that an employer may receive information concerning bargaining matters from employes and discuss matters of collective bargaining with employes and listen to negative information "about the majority representative without violating its duty to bargaining and without interfering with the bargaining rights of its employes", the District cites a number of decisions of the National Labor Relations Board. 6/

Further, the District would distinguish the instant events from the applicability of Wisconsin Supreme Court's decision in Milwaukee Board of School Directors, supra, contending that the Board meeting of December 6th was "an ordinary meeting of the Board" and not "a public bargaining session or the meeting at which the Board was to take final action on the Negotiated Agreement with the majority representative". In addition the District contends that herein Holmquist merely gave a position statement, and that the "Supreme Court suggested that under these circumstances it would have some difficulty in labeling the conduct 'negotiating'", and therefore not violative of the Act.

The District contends "to suggest that a municipal employer must stifle a minority organization would obviously be action that would discourage membership in a minority organization and encourage membership in the majority union, a clear violation of Section 111.70(3)(a)3 of the Wisconsin Statutes."

Finally, the District argues that Article II, 2 of the collective bargaining agreement existing between the parties contemplated the activity involved herein.

6/ White Sulphur Springs Co. CA DC (1963) 316F. (2d) 410; Lawn Boy Div. Outboard Marine Corp., 143 NLRB 535, (1963); Baldwin County Electric Membership Corp., 145 NLRB 1316 (1964); Coast Broadcasting Corp., 151 NLRB No. 117 (1965); American Printing Co., 173 NLRB No. 17 (1968); Tobasco Concrete Co., 177 NLRB No. 101 (1965)

In its brief amicus the National Right to Work Legal Defense Foundation supports the argument of the District that to require the Board to "stifle the speech of a teacher removes the constitutional protection for freedom of expression"; that the Milwaukee Board of School Directors case is distinguishable from the instant matter, contending that Holmquist's remarks "cannot be interpreted as negotiation"; that there is no evidence that the Board was motivated to undermine the MTI as the certified bargaining representative; and that Sec. 111.70(4)(d)1 protects the right of individual employes to present grievances.

In its reply brief MTI contends that had the Board denied Holmquist the opportunity to speak it would not have infringed upon or abridged Holmquist's right of free speech, since "freedom of speech" cannot be used to engage in conduct constituting a refusal to bargain in good faith with MTI as the exclusive bargaining representative.

With respect to the District's argument that federal cases support a conclusion that in permitting Holmquist to speak the Board did not fault its duty to bargain with MTI, the latter argues that the cases cited by the District are not in point, but, on the contrary, the factual situations therein are distinguishable from those in the instant proceeding. MTI attacks the District's contention that the Board acted in conformity with its responsibilities under MERA in listening to bargaining unit employes on negotiable matters or discusses such matters with employes in the absence of the bargaining representative in the absence of an expressed or implied desire "to deal directly with the employes and affirmative action soliciting or inducing employes to deal directly" with the Board. MTI argues that a finding of prohibited interference does not require a finding of anti-union animus. 7/

Further, MTI contends that the total conduct of the Board's agents, including the permitting of the distribution of letters to teachers through teacher mailboxes, the circulation of the petition in the school buildings, all with the permission of the principals involved, permitting Holmquist to speak at the Board meeting, and the timing of the Board's final offer, are supportive of a conclusion that the Board committed prohibited practices as alleged.

In reply to the defense that the Board's action with respect to the receipt of the petition was consistent with Article II, 2(d) of the collective bargaining agreement between the parties, MTI replies as follows:

> "Section 2 (c) makes it crystal clear that matters which are the proper subject of negotiations are to be dealt with by the authorized agents and only the authorized agents of the respective parties. It is improper for a principal to the agreement on the one side and a group which is neither principal nor agent, on the other side, to discuss matters which are proper subjects of negotiation. Neither party in such a discussion is properly taking part in such discourse. Any such action, by the express terms of Article II 2 (c), is in direct violation of the Agreement.

7/ City of Milwaukee (8420) 2/68

Article II 2 (d) simply makes it clear that each party has the duty to bring to the attention of the other any such deviation from the proper negotiating process. If others than an authorized party should bring matters, which are the proper subject of negotiations, to one of the parties to the Agreement, such party has the duty to promptly notify the other party of that fact so that any problems caused by such improper conduct may be quickly resolved. Section 2 (d) provides a procedure to remedy improper activity in negotiations; its purpose is not to provide a vehicle to admit unauthorized parties into the negotiation process.

When paragraphs 2 (c) and 2 (d) of Article II (A) of the Negotiated Agreement, entitled 'Conference and Negotiation' are read together, as they must be, it is clear that the Negotiated Agreement does not support the position advanced by the Respondent."

In response to the Board's contention that the receipt by the Board of a showing of interest opposing a fair share agreement does not constitute bargaining or negotiation, MTI contends that MERA does not permit a municipal employer to accept or consider a written poll of its employes as part of its decision with respect to the acceptance or rejection of a proposal with respect to a fair share agreement, since the statute does not require any balloting of employes prior to the implementation of a fair share agreement, and that a showing of interest executed by at least 30% of the employes in the unit is necessary only to initiate a vote to determine whether an existing fair share agreement should be continued.

Finally, the MTI contends that Holmquist's appearance and remarks before the Board cannot be considered a grievance as contemplated in Sec. 111.70(4)(d) of the Act.

The Wisconsin Education Association, in its brief amicus, supports MTI's argument that a ruling that the Board violated its duty to bargain would not abridge Holmquist's constitutional rights; that anti-union animus need not be established to find a refusal to bargain in good faith; and that the only real issue herein involves whether the receipt of Holmquist's communication constitutes a violation of the Board's duty to bargain only with the exclusive representative. In that regard the WEA contends:

"Holmquist told the Board what it wanted to hear, what it hoped would have a negative influence on the union's bargaining position. Would the Board have been as anxious to hear a speaker in opposition to Holmquist, or ten speakers, or 1,200 speakers? Would it care to hear 1,200 speakers on each of the 13 unresolved items that were then on the table? Would it care to hear 1,200 speakers on all of the items that were originally put on the table? And if 1,200 speakers is distinguishable from one speaker by virtue of their numbers, where would the line be drawn? The 'obligation to treat with the true representative . . . and the negative duty to treat with no other' 8/ was a wise statutory policy. It has stood the test of time.

8/ NLRB v. Jones & Laughlin Steel Corp. 501 U.S. 1 (1937)

Because of the wisdom of the policy and because of the havoc that the opposite could wreak on collective bargaining as a successful institution, all dealings outside of the recognized representative should be discouraged. In applying the term 'bargaining' to fact situations, it should be given broad construction to include everything but the most insubstantial, innocuous, and indeed unplanned communication between employers and employees. It should certainly include situations such as the present one where:

1. It related specifically to a demand the union had on the table;

2. it involved not a person speaking only as an individual, but rather as a representative;

3. it was preceded by planning and effort to gain support from other employees;

4. it was presented in a formal way at a meeting of the Board with all members present;

5. it was specifically intended to influence the Board in its dealings with the Union.

A contrary ruling in a case such as this would only be a formal invitation to dissident employees to address their employers on wages, hours, and conditions of employment. It would be an invitation to unions to stack employer's meetings with loyalists to defend their bargaining positions. It could make a mockery and a shambles out of collective bargaining."

Discussion

There are four basic issues which the Commission must determine herein. They are as follows:

1. Would the Board have violated Holmquist's right of constitutional free speech by denying him the opportunity to speak and orally present the petition involved?

If the Commission finds in the negative on Issue 1:

2. In permitting Holmquist to speak and orally present the petition, did the Board violate its statutory duty to bargain with MTI as the exclusive collective bargaining representative?

3. Does Article II, A of the collective bargaining agreement permit the activity involved without affecting the Board's duty to bargain?

4. Does the fact that Holmquist's presentation before the Board related to MTI's fair share proposal affect the Board's duty to bargain?

Issue 1

Holmquist appeared and orally presented the petition involved to the Board, not as an agent of MTI, the exclusive collective bargaining representative, but as a claimed representative of a minority of teachers who were opposed to the Board's granting of a fair share agreement. Our Supreme Court in Milwaukee Board of School Directors, supra, rejected the contention that prohibiting a representative of a minority union to speak before the school board, while the latter had not completed its negotiations with the majority organization, violated the constitutional rights of said minority representative. 9/ We see no distinction in the fact that Holmquist did not represent a "minority organization". He did in fact represent a minority of the teachers, whose views were opposed to those of MTI with respect to a fair share agreement. Therefore we conclude that the Board would not have violated Holmquist's constitutional right of free speech by denying him the opportunity to speak and orally present the petition involved.

Issue 2

In Milwaukee Board of School Directors, supra, the school board involved, on two separate occasions denied a representative of a minority organization the opportunity to speak at its open meeting. In said case our Supreme Court stated "....if the minority union representative is permitted to influence the decision of the school board by his argument, then he is truly negotiating". Holmquist intended to influence the Board on the fair share issue. His statement is clear to that matter. After the public meeting the members of the Board went into executive session, returned and announced its offer to the MTI representatives, which rejected a fair share agreement. Whether the Board rejected the fair share proposal as a result of, or not a result of, Holmquist's remarks, is not necessary for the Commission to determine. The fact is that Holmquist's motive and purpose was intended to persuade the Board not to agree to the fair share agreement as proposed by the exclusive collective bargaining representative. The Board's activity with respect to the Holmquist incident, which occurred during the Board's open meeting, constituted an erosion of its duty to bargain exclusively with the MTI and with no other organization, group of employes, or a single employe. The cases cited by the District in its brief are not applicable to the circumstances involved in the instant proceeding.

Issue 3

Article II A. d. of the collective bargaining agreement existing between the parties at the time of the event involved, in our opinion, does not "legalize" the Board's activity with respect to Holmquist's remarks to the Board at its open meeting. The provision involved, when viewed in context with subpara c. of the Article, indicates that the Board and MTI agreed that negotiable subjects may only be negotiated by the Board and the MTI, even though such matters may be brought to the attention of either the Board or MTI. Various supervisory personnel of the Board were aware of Holmquist's activity prior to the open meeting. He could have properly presented his petition to the Board by means other than an appearance at the open Board meeting. If that would

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9/ The Court reversed the Commission's conclusion in said regard.

have occurred the Board was contractually obligated to immediately inform MTI thereof. Even if the Board members were not aware of Holmquist's intentions at the open meeting, prior to his remarks an inquiry should have been made as to the intent and purpose for which he sought to speak. Had he indicated the purpose of his appearance and remarks, the Board should have denied him recognition and informed him to submit a written statement to both the Board and MTI. Perhaps the recognition of Holmquist and the receipt of his oral statement was not motivated by any anti-union animus on behalf of the Board, nevertheless by so doing the Board did not fulfill its statutory duty to bargain in good faith with the MTI as the exclusive collective bargaining representative.

Issue 4

The pertinent portion of Sec. 111.70(2) of MERA material to this particular issue reads as follows:

> " . . . except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. . . ."

We do not agree with MTI that the statute does not permit an employer to accept or consider a written poll of its employes as part of its decision to accept or reject a fair share proposal. The statute permits the implementation of a fair share agreement without a referendum among the employes authorizing same. After the implementation of a fair share agreement, either the employer or a labor organization may file a petition for a referendum to determine whether the employes involved desire the continuation of the fair share agreement. Such a petition must be supported by a showing of interest of at least 30% of the employes in the unit involved. There is nothing in the statute which prohibits an employer from receiving a showing of interest opposing the fair share agreement prior to the implementation of a fair share agreement. The rules of the Commission provide for a stipulation requesting a referendum prior to implementation of a fair share agreement, provided therein the employer agrees to implement same should the required number of employes favor same, and, further, providing the union involved agrees to withdraw its fair share proposal should the required number of employes not vote in favor thereof. 10/

The presentation of a showing of interest by the employes may very well have an impact on whether the parties will execute such a stipulation. And if so, the results of the referendum would be binding, and thus stabilize any possible issue with respect to the implementation of a fair share agreement. If the employes vote in favor of a fair share

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10/ ERB 15.03

agreement, and such an agreement is implemented following the referendum, pursuant to the rules of the Commission, 11/ an isolation period for the conduct of a subsequent referendum is established, thus further stabilizing the collective bargaining relationship.

However, in the instant proceeding, the manner in which the Board received the "showing of interest", namely permitting Holmquist to speak on a bargaining issue at an open Board meeting, exceeded the bounds of permissable conduct with reference to the receipt of a showing of interest requesting the conduct of a referendum, either seeking an initial referendum or, assuming an existing fair share agreement, a subsequent referendum.

Conclusion

In accordance with the above rationale the Commission has concluded that the District, by its Board, committed prohibited practices as alleged in the complaint. The Commission does not deem it necessary to effectuate the policy of MERA to require the Board to expunge from its official minutes any references therein relating to the appearance and remarks of Holmquist at the December 6, 1971 meeting. However, it has ordered the School Board to incorporate the Commission's decision in its official minutes.

Dated at Madison, Wisconsin, this 13th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Jos. B. Kerkman, Commissioner

11/ ERB 15.11(2)(c)