STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHYLLIS ANNE BROWNE, BEVERLY ENGELLAND, ELEANORE PELISKA, BETTY C. BASSETT, YETTA DEITCH, VIRGINIA LEMBERGER, DONNA SCHLAEFER, KATHERINE L. HANNA, LORRAINE TESKE, JUDITH D. BERNS, NINETTE SUNN, MARY MARTINETTO, CHARLOTTE M. SCHMIDT and ESTHER PALSGROVE, Complainants, vs. THE MILWAUKEE BOARD OF SCHOOL DIRECTORS; THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; JOSEPH ROBISON, Director of District Council 48; LOCAL 1053, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; MARGARET SILKEY, as President of Local 1053; and FLORENCE TEFELSKE, as Treasurer of Local 1053, Respondents.	Case 99 No. 23535 MP-892 Decision No. 18408-D
GILLIS W. GERLEMAN, CAROL WEGNER, DYCIA HARDTKE, LEWIS SNYDER, LA VERNE LANTZ, WILLARD SCHULTZ, and MARGARET BERG, Complainants, vs. THE MILWAUKEE BOARD OF SCHOOL DIRECTORS; NATIONAL EDUCATION ASSOCIATION; HELEN WISE, as President of National Education Association; WISCONSIN EDUCATION ASSOCIATION; LAURI WYNN, as President of Wisconsin Education Association; MILWAUKEE TEACHERS EDUCATION ASSOCIATION; and EUGENE GUZNICZAK, as President of Milwaukee Teachers Education Association, Respondents.	Case 100 No. 23558 MP-897 Decision No. 16635-D

Appearances:

Mr. Willis B. Ferebee, Attorney at Law, 1129 North Jackson Street, Room 309, Milwaukee, Wisconsin 53202, on behalf of the Complainants, in Browne and in Gerleman.

(Appearances continued on Page 2)

(Appearances continued)

Mr. Raymond J. LaJeunesse, Jr., Attorney at Law, National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Springfield, Virginia 22160, on behalf of the Complainants in Browne.

Kirschner, Weinberg, Dempsey, Walters & Willig, Attorneys at Law, by Mr. Larry P. Weinberg, 1100 17th Street, N.W., Suite 800, Washington, D.C. 20036, and Zubrensky, Padden, Graf and Maloney, Attorneys at Law, by Mr. James P. Maloney, 828 North Broadway, Milwaukee, Wisconsin 53202, on behalf of the Respondent, American Federation of State, County and Municipal Employees, AFL-CIO.

Lawton & Cates, Attorneys at Law, by Mr. John H. Bowers, 110 East Main Street, Madison, Wisconsin 53703, on behalf of District Council 48, and its affiliate Local 1053.

Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, on behalf of the Respondent Wisconsin Education Association Council.

Perry, First, Reiher, Lerner and Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, 1219 North Cass Street, Milwaukee, Wisconsin 53202-2770, on behalf of the Respondent Milwaukee Teachers' Education Association.

ORDER DENYING MOTION FOR RECONSIDERATION OF INITIAL FINDINGS OF FACT AND INITIAL CONCLUSIONS OF LAW IN LIGHT OF ELLIS V. RAILWAY CLERKS

The Complainants in Browne, et al. vs. Milwaukee Board of School Directors, et al. having, on July 16, 1984, filed with the Commission a Motion for Reconsideration of Initial Findings of Fact and Initial Conclusions of Law in light of the U. S. Supreme Court's decision Ellis v. Railway Clerks 1/ wherein they requested that the Commission reconsider its Stage I decision in that case 2/ regarding which categories of Respondent Unions' expenditures are properly included in determining the cost of collective bargaining and contract administration for the purpose of establishing the sums of money required to be paid to Respondent Unions pursuant to a fair-share agreement existing between Respondent Unions and Respondent Board of School Directors, within the meaning of Sec. 111.70(1)(f) of the Municipal Employment Relations Act; and the Complainants in Gerleman, et al. vs. the Milwaukee Board of School Directors, et al. having, on July 18, 1984, filed with the Commission a Petition for Temporary Consolidation wherein they noted that the Commission's determinations of the categories of expenditures and their inclusion or exclusion are almost identical in both Browne and Gerleman 3/ and that the Commission's conclusion as to the effect of the U. S. Supreme Court's decision in Ellis on those determinations would also be identical, and so as to avoid the necessity of separate and duplicative litigation, they requested that the two cases be temporarily consolidated for the purpose of having the Commission rule on the Motion for Reconsideration and thereafter be returned to their separate status; and the Commission having given the other parties an opportunity to respond to said Petition for Temporary Consolidation; and the other parties not having objected to the temporary consolidation of the two cases; and the Commission having, on February 11, 1985, issued its Order temporarily consolidating the two cases for the purpose of ruling on Complainants' Motion for Reconsideration of the Commission's Phase I decisions in those cases; and the parties having, by March 25, 1985, completed the submission of written arguments concerning Complainants' Motion for Reconsideration; and the Commission having considered the arguments of the parties and the law, and being satisfied that the Complainants' Motion for Reconsideration of Initial Findings of Fact and Initial Conclusions of Law in Light of Ellis v. Railway Clerks should be denied;

1/ 104 SCt 1883 (1984).

2/ Dec. No. 18408 (WERC, 2/81).

3/ Dec. No. 16635-A (WERC, 5/82).

NOW, THEREFORE, it is

ORDERED

That the Complainants' Motion for Reconsideration of Initial Findings of Fact and Initial Conclusions of Law in Light of Ellis v. Railway Clerks be, and the same hereby is, denied. 4/

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of September, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

4/ These cases having been temporarily consolidated for the purpose of ruling on the Complainants' Motion for Reconsideration, and the issuance of this Order having fulfilled that purpose, henceforth, the cases will be processed separately.

MILWAUKEE BOARD OF SCHOOL DIRECTORS, 99, Decision No. 18408-D and 100, Decision No. 16635-D

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION FOR RECONSIDERATION OF INITIAL FINDINGS OF FACT AND INITIAL CONCLUSIONS OF LAW IN LIGHT OF ELLIS V. RAILWAY CLERKS

Background

On September 18, 1978, and September 25, 1978, subsequent to the transfer of the cases to the Commission, the Complainants in Browne and Gerleman, respectively, filed amended complaints wherein, in material part, they alleged that:

> . . . a significant number of activities of the Unions involved herein, for which fair-share deductions were and are utilized, were, and are, unrelated to collective bargaining and contract administration, and were not, and are not, necessary to the negotiation and administration of collective bargaininng agreements with the Board, or to the adjustment and resolution of grievances and disputes of the employes in the bargaining unit involved herein, and, further, that such expenditures were not, and are not, necessary or germane to the duty of representation owed such employes, including the Complainants, imposed by the provisions of MERA. 5/

In both cases the Commission followed a format of holding a hearing on the different categories of union expenditures and issuing an initial decision (Stage I) setting forth the categories of expenditures that the Commission found to be permissible and impermissible. In Browne the parties were able to stipulate to the different categories prior to the hearing; however, in Gerleman the parties were unable to agree on the different categories, and it was, therefore, necessary for the Commission to determine and clarify those categories of expenditures in our initial decision. Subsequent to issuing our initial findings of fact and initial conclusions of law in these cases, the U. S. Supreme Court issued its decision in Ellis v. Railway Clerks, supra, and we then offered the parties the opportunity to submit arguments as to the possible impact of the Court's decision on the legal issues in these cases. In addition to submitting arguments as to the impact of the Ellis decision, the Complainants in Browne filed a motion requesting that the Commission reconsider its decision in Stage I of that case, i.e., our initial findings of fact and initial conclusions of law. The Complainants in Gerleman subsequently filed a motion requesting that we temporarily consolidate the two cases for the purpose of ruling on the Motion for Reconsideration. The issues in the two cases being basically identical, and there having been no objection to a temporary consolidation of the two cases for that limited purpose, we granted the request and temporarily consolidated the two cases.

Positions of the Parties

Complainants 6/

According to the Complainants, in its decision in Ellis the U. S. Supreme Court "adopted a general standard defining the collective bargaining and contract administration costs for which dissenters may be charged . . . and applied it to certain specific union expenses." They then contend that Ellis is persuasive precedent, if not controlling, in these cases for two reasons. First, while partly based upon statutory construction, Ellis has "constitutional underpinnings." In that regard, the Complainants note that in Ellis the Court

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5/ Supra, Note 2 at 13, Note 3 at 12.

6/ With the exception of the Wisconsin Education Association Council, the parties in Gerleman have relied on the arguments submitted by the parties in Browne.

stated Abood v. Detroit Board of Education, 7/ Railway Clerks v. Allen, 8/ and Machinists v. Street 9/ "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." Ellis, 104 SCt at 1890. They allege that the Court construed the Railway Labor Act (RLA) as it did so as "to avoid the constitutional difficulty" and that the Court "explicitly recognized that 'the First Amendment does limit the cases to which the union can put funds obtained from dissenting employees.'" Id., at 1890, 1896.

The Complainants then cite the Wisconsin Supreme Court's holding in Browne v. Milwaukee Board of School Directors, 83 Wis.2d 316 (1978), that "the statute is interpreted so that only money for constitutional purposes can be collected under it," and that "(t)he statute itself forbids the use of fair-share funds for purposes unrelated to collective bargaining or contract administration." Id., at 330-331. They go on to note that the Court quoted with approval the statement of the trial court that MERA "'is more restrictive of the union's rights than the plaintiffs' First Amendment rights.'" Id., at 330. (emphasis supplied by the Court). The Complainants assert that, on that basis, the limitations on the use of compulsory union fees which the U. S. Supreme Court in Ellis found to be implicit in the RLA "a fortiori must apply under Sections 111.70(1)(h) 10/ and 111.70(2), Wis. Stats."

As a second reason for finding Ellis to be persuasive, if not controlling, precedent in this case, the Complainants contend that in Browne the Wisconsin Supreme Court relied heavily on the U. S. Supreme Court's decisions in Allen, supra, and Street, supra, both of which involved the RLA, as precedent supporting a denial of plaintiffs' request for escrow relief, citing Browne, 83 Wis.2d at 337-340b. They also assert that in Browne the Court "explicitly recognized that its limiting construction of the Wisconsin Statute was 'similar' to that placed upon the RLA by the U. S. Supreme Court in Street," citing Browne, 83 Wis.2d at 331, n. 7. Thus, according to the Complainants, since the decision in Ellis answered some of the major questions left unanswered in Street and Allen, as well as Abood, supra, Ellis is persuasive precedent in this case.

The Complainants next argue that the Commission's definition of when an activity is chargeable to fair-share employes was too permissive even before Ellis, and that the Court's decision in that case confirms this. They allege that in Ellis the Court adopted a standard "which limits chargeable expenses to activities directly tied to the union's performance of its duties as exclusive representative of the employees in a particular bargaining unit." Therefore, to determine the proper fee "the computation must be one which includes only bargaining-related expenditures attributable to the particular unit, plus a rational allocation of overhead costs applicable to bargaining more than one unit." They contend that the Commission's standard is contrary to the test in Ellis in two respects: (1) The Commission's standard "focusses (sic) on whether the activity affects the employees as employees, not on whether the activity is performed by the union in its role as an exclusive representative carrying out statutory functions"; and (2) the Commission's standard allows the union "to charge non-union employees for activities performed on behalf of 'other employes represented by said union and its affiliates,' not just 'employes in the bargaining unit involved.'" 11/ The Complainants argue that, conversely, the test in Ellis limits chargeable activities to those a union performs "as exclusive representative of the employees in the bargaining unit." Ellis, 104 SCt at 1892, 1894-95. (emphasis added by Complainants).

7/ 431 U.S. 209 (1977).

8/ 373 U.S. 113 (1963).

9/ 367 U.S. 740 (1961).

10/ Renumbered as Sec. 111.70(1)(f), Stats.

11/ Citing, Dec. No. 18408 at 21-23 and comparing with Ellis at 1890-92, 1894-95.

The Complainants then argue for reconsideration on the basis that a number of the categories the Commission found to be permissible "are either not chargeable or too broad under Ellis." Specifically noted by the Complainants are those categories which fall under the headings of organizing, litigation, lobbying and representation of other bargaining units.

In regard to those categories of expenditures falling under the heading of organizing, the Complainants contend that the following categories are not chargeable to fair-share employes:

(9) organizing within the bargaining unit in which complainants are employed;

(10) organizing bargaining units in which complainants are not employed;

(11) seeking to gain representation rights in units not represented by respondent unions, including units where there is an existing designated representative;

(12) defending respondent unions against efforts by other unions or organizing committees to gain representation rights in units represented by respondent unions; and,

(14) seeking recognition as exclusive representative of bargaining units in which complainants are not employed. 12/

The Complainants note that the Commission held that the above categories may be charged to non-members on the basis that such activities enhance "a union's capacity to deal effectively with the employer of the instant bargaining unit employes." They assert that the U. S. Supreme Court in Ellis rejected "this attenuated connection with collective bargaining" as a basis for holding that organizing activities are chargeable to objecting employes. Id., at 1894. It is contended that of the three reasons the Court gave for its conclusion, two are equally applicable in this case. The first reason is that where agency or union shop agreements are in effect, the employes in the bargaining unit are already organized in that they are represented by the union. According to the Complainants, the Court found that it would be "perverse" to read the statute "as allowing the union to charge objecting nonmembers part of the costs of attempting to convince them to become members," and hence, the costs of recruiting new members within the unit are not chargeable. Id., at 1894, n. 13. All other organizing expenses would by definition be spent on employes outside the unit, and would therefore not qualify under the Court's standard. The Court's second reason alleged to be applicable here is that the "free-rider rationale" that is the legislative justification for compulsory union fees does not extend to organizing, since money spent for such activities "is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues. Any free-rider problem here is roughly comparable to that resulting from union contributions to pro-labor candidates." Id., at 1894-95 (emphasis added by Complainants). The Complainants contend that, therefore, organizing expenses are "outside the legislative justification for fair-share deductions" and "cannot be charged to non-union employees without impermissibly infringing upon first-amendment rights", citing, Abood, 431 U.S. at 232-37. 13/

The Complainants assert that unless the following litigation expenses involve the members of the particular bargaining unit, they may not be charged to the fair-share employes in the unit:

12/ The numbering of the categories here and henceforth corresponds to that used in Initial Finding of Fact 11 in Browne, Dec. No. 18408 at 3-5.

13/ The Complainants also cite in this regard Cumero v. Public Employment Relations Board, (Cal. Ct. App., April 23, 1985).

(13) proceedings regarding jurisdictional controversies under the AFL-CIO constitution;

(27) impasse procedures, including factfinding, mediation, and arbitration, over provisions in collective bargaining agreements; and

(28)(b) the prosecution or defense of litigation or charges concerning issues other than ratification, interpretation, or enforcement of bargaining agreements.

According to the Complainants, the Commission's definition of chargeable litigation expenses is overly permissive under the decision in Ellis. They contend that in Ellis the Court held that dissenters may only be charged the cost of litigation "that is conducted by the union as exclusive representative on behalf of employees in the particular bargaining unit," citing Ellis, 104 SCt at 1895.

As to lobbying expenses, the Complainants note the Commission held that "(l)obbying for collective bargaining legislation or regulations or to effect changes therein, or lobbying for legislation or regulations affecting wages, hours and working conditions of employes generally before Congress, state legislatures, and state and federal agencies" is chargeable, and excluded lobbying "not related to the representational interest in the collective bargaining process and contract administration, or with respect to matters not related generally to wages, hours and conditions of employment." 14/ Although the Court did not expressly address lobbying activities in Ellis, the Complainants contend that the Commission's definition of what are chargeable expenses in this area does not satisfy the general standard created by the Court in Ellis. Applying the standard in Ellis and citing a number of federal district court cases, 15/ the Complainants argue that unions should be allowed to charge fair-share employes "at most only for that lobbying which 'might be seen as an integral part of the bargaining process': lobbying public authorities for approval of the collective bargaining agreement and lobbying the Milwaukee Board of School Directors to budget and appropriate funds agreed upon in the contract," citing Abood, 431 U.S. at 236. Legislation concerning wages, hours and conditions of employment of employes generally would not meet the test and, therefore, would not be chargeable. 16/

The Complainants also contend that the cost of representation of other bargaining units, i.e., category (15) "Serving as exclusive representative of bargaining units in which Complainants are not employed," is not chargeable to fair-share employes in this unit. It is asserted that the standard adopted in Ellis, and the Court's application of that standard to organizing and litigation, make it clear that "only the cost of serving as exclusive representative in a bargaining unit is properly chargeable to employees in that unit." Ellis, 104 SCt at 1892, 1894-95.

The Complainants' final argument regarding the application of Ellis to the Commission's determination of chargeable categories of expenses is that Ellis confirms that the Commission is correct in concluding that expenditures for a number of activities must be allocated. They note that we have initially concluded that in addition to lobbying and litigation, the following are allocable categories of expenditures:

14/ Supra, Note 2 at 8-9.

15/ Olsen v. Communications Workers, 559 F. Supp. 754, 770 (D.N.J. 1983); Robinson v. New Jersey, 547 F. Supp. 1297, 1316-17 (D.N.J. 1982); Arrow v. Dow, 544 F. Supp. 458, 461-63 (D.N.M. 1982). Also cited is Falk v. State Bar, 411 Mich. 63, 116-17; 305 N.W.2d 201, 217-18 (1976) (plurality opinion).

16/ The Complainants note their disagreement with the manner in which the California court applied Ellis in this regard in Cumero, supra, Note 13.

(6)(b) the public advertising of responndent unions' positions on subjects other than the negotiation of, or provisions in, collective bargaining agreements;

(7)(c) purchasing books, reports and advance sheets used in activities for purposes other than negotiating and administering collective bargaining agreements and processing grievances;

(8)(c) paying technicians in labor law, economics and other subjects for services used in activities other than negotiating and administering collective bargaining agreements and in processing grievances;

(22) supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing complainants' employment;

(24) membership meetings and conventions held, in part, for purposes other than to determine the positions of employes in complainants bargaining unit on provisions of collective bargaining agreements covering their employment or on grievance administration pursuant to the provisions.

(26) publishing newspapers and newsletters which, in part, concern subjects other than provisions of the collective bargaining agreement covering complainants' employment, or grievance administration pursuant to its provisions;

(29) social and recreational activities;

(30) payments for insurance, medical care, retirement, disability, death, and related benefit plans; and,

(31) administrative activities allocable in some part, to each of the other categories of union activity.

The Complainants assert that Ellis confirms that those categories are allocable, so long as the allocations are made in accord with the general standard adopted in Ellis. According to the Complainants, while the Court did not rule on each of the above categories, its holding with regard to publications illustrates the proper approach, i.e., that a union may charge objecting employes for the cost of reporting to employes about its representational functions, but may not charge them for reporting about non-chargeable activities. Id., at 1894 and n. 11.

As to any argument by the Respondent Unions that expenses for conventions, social activities, and members-only benefits are wholly chargeable to fair-share employes, the Complainants argue that such an argument "would read Ellis too broadly."

Relative to the costs of conventions the Complainants note that in Ellis the Railway Clerks were held to be able to charge the costs of national conventions to "elect officers, establish bargaining goals and priorities, and formulate overall union policy." Id., at 1892. They further note that in Ellis the national union was the exclusive bargaining representative that bargained the agreements covering the dissenting employes and assert that the Court limited its conclusion to such conventions. Further, the Court did not hold that political expenses at such conventions would be chargeable. Thus, in this case, the Commission having found that the bargaining representative for the bargaining unit jointly consists of Local 1053 and District Council 48, under Ellis, only "the costs of the regular conventions and business meetings" of those two unions would be chargeable to fair-share employes. The costs of conventions and meetings of Respondent AFSCME International and other affiliates would not be chargeable "unless a direct relationship to representation of complainants' bargaining unit is proven for a particular expense." The Complainants also contend that even the costs of such conventions or meetings of Local 1053 and District Council 48 are not chargeable to the extent they "serve a purpose which could not itself be charged to fair-share employees."

The Complainants next assert that the Court in Ellis held that the cost of a bargaining representative's "de minimis social activities which are incidental to its business operations and 'are formally open to nonmember employees'" are chargeable. Id., at 1893. It is argued that it does not follow that social activities that do not fall within that description would be chargeable. The Complainants conclude that the Commission's ruling that social or recreational activities are chargeable only if they are for those who are "providing services to a union in its representative interest in collective bargaining and contract administration," 17/ is consistent with Ellis.

As to "members-only" benefits, the Complainants contend that in Ellis the Court "made it clear" that such benefits would not be lawfully chargeable, even though the Court declined to rule on the chargeability of a death benefit program operated by the union and under which non-members were eligible for benefits. Id., at 1895 and n. 14. Thus, it is asserted that the Commission was correct in holding that payments for union benefit plans are not chargeable unless they are considered compensation for those providing "bargaining-related services to the union." 18/

On the bases of the foregoing, the Complainants assert that the Commission should reconsider and vacate its initial findings of fact and conclusions of law to the extent they are inconsistent with Ellis and should issue revised findings and conclusions consistent with that decision.

Respondent Unions

The Respondent Unions disagree with the Complainants' contention that Ellis is persuasive, if not controlling, precedent in this case. Contrary to the Complainants, they assert generally that "while the Supreme Court could have decided the Ellis case on broad constitutional principles, it clearly declined to do so." Ellis, 104 SCt at 1890. Instead, the Court decided Ellis on the bases of its interpretation of the RLA and its analysis of the purpose and legislative history of Section 2, Eleventh of that Act. According to the Respondent Unions, "the Court's analysis is primarily factual and does not constitute a significant addition to its prior statutory analysis of the union security provisions of the Railway Labor Act first articulated in International Association of Machinists v. Street," supra. They contend that the Court's interpretation of the union security provisions of the RLA is irrelevant to the Commission's analysis of the fair-share provisions of MERA.

More specifically, the Respondent Unions argue that the Court relied on its earlier analysis on the history and purpose of Section 2, Eleventh, in Street and "went on to consider whether the expenditures at issue were germane to collective bargaining under the Railway Labor Act." Reviewing Street, the Unions contend that the Court found it unnecessary in that case to consider the constitutional claims, since it concluded that Congress did not authorize the collection of funds for political and ideological causes under Section 2, Eleventh. The Court allegedly based its conclusion on its analysis of the history of union security in the railroad industry and its recognition that Congress had modified the RLA in 1950 in realization "that it had imposed unique burdens on rail unions," along with the concomitant costs of those burdens, and with the purpose of eliminating the "free riders." In Street the Court held that the RLA permitted unions to finance their participation in "collective bargaining and conflict resolution mandated by Congress." The Respondent Unions argue that determining the amount that may be collected from dissenting employes under the RLA, "by necessity involves an identification of the union activities that are a part of the unique statutory scheme of labor relations in the railroad industry as well as the unique role played by railroad unions in that scheme." The Respondent Unions assert that determinations made under the RLA cannot be applied beyond the rail industry and that an analogy between labor relations under the RLA and public sector collective bargaining statutes are "particularly suspect" due to the varying determinations made by the different legislative bodies regarding the structure of collective bargaining.

17/ Supra, Note 2 at 33.

18/ Citing our discussion at 33, Note 2, supra.

The Respondent Unions maintain that in Ellis the Court made its determinations as to what activities were related to collective bargaining and contract administration under the RLA based upon its prior interpretation of that Act and the nature of collective bargaining under that Act, and that, therefore, those determinations are neither binding, nor relevant, in this case. They also cite Abood, supra, in support of their contention that the U. S. Supreme Court has recognized there are fundamental distinctions between bargaining in the public sector and bargaining under the RLA, and that in drawing the "fine line" between activities that are chargeable to dissenting non-members and those that are not, the line is hazier in the case of the public sector due to the unique character of the employer.

In specifically addressing the Complainants' Motion for Reconsideration, the Respondent Unions make a number of additional and related arguments. First, in regard to the Complainants' citing of the Court's holding in Ellis on the inadequacy of a pure rebate remedy as supporting their claim that the decision has "constitutional underpinnings," the Unions question whether the holding was constitutionally based and assert that the question of the adequacy of a rebate procedure is irrelevant, since the question of remedy was not considered in our Phase I decision. The Unions contend that the Complainants "are attempting to boot strap the entire Ellis decision into this case as a matter of constitutional law." Since the Court's holdings in Ellis regarding which expenditures may be charged to objecting non-members were based upon the legislative history of the RLA and the nature of bargaining under that Act, the Court's holdings are not binding on the Commission as a matter of constitutional law, nor as a basis for overturning the Commission's Phase I decision.

Secondly, the Respondent Unions contend that the limitations recognized by the Court in Ellis on the use of compulsory union fees under the RLA "do not apply a fortiori to union expenditures under the MERA." The fact that both the federal courts and the Wisconsin courts have construed the RLA and MERA, respectively, as imposing limitations on union expenditures so as "to avoid the constitutional difficulty" raised by employes' First Amendment challenges, does not mean those limitations are identical or that the limitations found in Ellis apply under MERA. The Respondent Unions contend that both the U. S. Supreme Court and the Commission have recognized that "in determining the constitutional limitation on union expenditures a reviewing body must balance the infringements on constitutional rights against the governmental interest in stable labor relations and the smooth functioning of the collective bargaining process and contract administration." Citing, Ellis, 104 SCt at 1896; Commission's Phase I decision at p. 23. Further, the Court recognized in Abood, supra, that in drawing the line between constitutionally permissible and impermissible expenditures, the line might be "hazier" in the public sector. The Respondent Unions conclude that, therefore, the wholesale transfer of the limitations on union expenditures found appropriate in Ellis, as a matter of constitutional law, is not supported by any U. S. Supreme Court decisions.

Third, it is argued by the Respondent Unions that the standard used by the Court in Ellis to determine which activities are germane to collective bargaining does not apply under MERA. They assert that the standard formulated by the Commission in Phase I "is appropriate to the realities of public sector collective bargaining. . ." Contrary to the Complainants, the Respondent Unions contend that limiting chargeable expenses to those for activities of the union as the exclusive representative of the employes in a particular bargaining unit, as the Complainants argue follows from Ellis, "would be inconsistent with the nature of the system of collective bargaining in the public sector and the union's role in that system." According to the unions, the uniqueness of collective bargaining in the public sector is due to the special character of the employer, and that special character will have an impact on what expenditures are "necessary or reasonably incurred in representing public employes." Citing, Abood, 431 U.S. at 230; Ellis, 104 SCt at 1892. They also maintain that public sector labor relations are unique in that "many of the factors that influence the wages, hours and working conditions of public employees originate outside of the collective bargaining unit and affect employees in many bargaining units equally." The Unions cite such examples as civil service laws and local ordinances regarding promotions, legislative action regarding pension plans, interest arbitration, etc. They conclude that it would be inappropriate to impose the limitations in the Ellis standard in determining the scope of chargeable

union activities in this case, "Given the unique character of collective bargaining in the public sector and the interdependence of public employees across bargaining unit lines."

Fourth, regarding the Complainants' contention that organizing expenses are not properly chargeable to objecting non-members, the Respondent Unions argue that the Commission's holding and rationale in this regard are appropriate. The Unions assert that the Court's finding in Ellis that such expenses had only an "attenuated connection" with bargaining was based upon the Court's analysis of collective bargaining under the RLA. Hence, the Court's finding in Ellis in that regard does not automatically apply in this case. According to the Respondent Union, given the unique character of collective bargaining in the public sector, "The relationship between organizing and collective bargaining in the public sector . . . is real and immediate," vis a vis the relationship that exists under the RLA.

Relative to the Complainants' argument that charging lobbying expenses to non-members would violate those employes' First Amendment rights, the Respondent Unions note that the Court did not specifically address lobbying expenses in Ellis. They reassert that the standard in Ellis, upon which the Complainants rely, does not apply in this case. The Unions also cite Robinson v. State of New Jersey, 741 F.2d 598, 117 LRRM 2001 (3rd Cir. 1984) and Champion v. California, 738 F.2d 1082, 117 LRRM 2030 (9th Cir. 1984), as two post-Ellis decisions where lobbying activities were found to be at least in part pertinent to the union's role in the collective bargaining process in the public sector, and, therefore, chargeable to objecting non-members.

Lastly, and in regard to the Complainants' contention that the Commission's Phase I decision should be reconsidered in light of the Court's decision in Ellis on other categories of union expenditures, the Respondent Unions maintain that the standard applied in Ellis cannot be applied in the context of collective bargaining in the public sector. Their position is based upon their assertion that "(t)he interests of public employees in wages, hours and working conditions transcend narrow bargaining unit boundaries. In addition, the legitimate activities of public employee unions attempting to serve these interests are unique and distinguishable from the customary activities of private sector unions." The Unions cite Abood, Robinson and Champion, supra, as recognizing that public employe unions engage in political processes in order to promote the interests of the employes they represent.

On the basis of the foregoing, the Respondent Unions submit that the Motion for Reconsideration should be denied.

Wisconsin Education Association Council

The Wisconsin Education Association Council, hereinafter referred to as Respondent WEAC, is among the respondents in the Gerleman case which has been temporarily consolidated with Browne for the purpose of ruling on Complainants' Motion for Reconsideration. Respondent WEAC has submitted additional arguments for denying the motion and takes the position that the "possible significance" of Ellis in this case is limited to three areas: (1) the nature of the requisite union rebate procedure, (2) expenses relating to organizing activities, and (3) expenses relating to union conventions and functions." Respondent WEAC makes several arguments in support of its position.

First, WEAC contends that Ellis is not controlling precedent here since the Court in Ellis and the Commission in Browne and Gerleman based their respective conclusions on interpretations of different statutory provisions. While the three cases were decided "against the backdrop of the general limitations of the First Amendment," those limitations, as they apply to union expenditures, have only been squarely addressed by the Court in Abood, supra. It is asserted that Ellis was decided primarily on a statutory basis, with the Court relying heavily on the legislative history of the RLA. The constitutional analysis in Ellis is "minimal" and "is largely a recapitulation of the Court's prior holdings" according to WEAC, and that rather than representing a modification of the prior law, it affirms the basic analysis in Abood upon which the Commission has relied in these cases.

Regarding the Complainants' citing of the quote from the trial court in the Wisconsin Supreme Court's decision in Browne that MERA "is more restrictive of the union's rights than the plaintiffs' First Amendment rights," WEAC contends that the Court quoted that language from the trial court's decision only for the purpose of demonstrating that the trial court had considered the constitutionality of Sec. 111.70(1)(f), Stats., as applied. Rather than intending the quote as a substantive interpretation of MERA, the Court cited the language to show that remand to the Commission for determination of the substantive rights under MERA was appropriate.

WEAC contends that even if MERA is interpreted to be more restrictive of a union's rights than the First Amendment, it still does not follow that the Ellis decision is significant. In this regard, WEAC asserts that Complainants' argument may be stated as being: since Sec. 111.70(1)(f), Stats., is more restrictive than the First Amendment and Section 2, Eleventh of the RLA is also more restrictive than the First Amendment, the Court's interpretation of Section 2, Eleventh, should control in interpreting Sec. 111.70(1)(f). According to WEAC, the "association principle" does not hold that two items that are both unequal to a third item are therefore equal to each other. Hence, Section 2, Eleventh, may be more restrictive than Sec. 111.70(1)(f), Stats.

Next, WEAC contends that Ellis is consistent with this Commission's decision in Clinton Community School District. 19/ It is alleged by WEAC that the Court specifically relied on statutory grounds to hold that a pure rebate procedure was inadequate, and that even if Ellis is assumed to have constitutional significance, the only problem with the rebate procedure under review in that case was that there was no concurrent escrowing of funds. It is alleged that in Clinton the Commission refused to grant interim relief where, unlike in Ellis, the union was escrowing a portion of the disputed funds.

Third, WEAC asserts that the decision in Ellis raises concern only with respect to two categories of expenditures, i.e., organizing and conventions, and is consistent with Commission precedent in all other respects. It is argued by WEAC that, contrary to the Complainants' assertions, Ellis was not intended to restrict the allowable fair-share fees to only those expenses that can be directly related to the fair-share employes' particular bargaining unit, and that even if it were, that decision is not binding on the Commission. It is also argued that the only two appellate courts that have considered this and related issues have rejected most of the contentions made here by the Complainants, citing Robinson and Champion, supra. WEAC contends further that the Complainants' arguments fail to recognize the need for workers to engage in mutual aid and protection and the benefits of their doing so. WEAC also alleges that there are differences between a union's role in the particular industry involved in Ellis and the more typical union situations involved here, and asserts that, therefore, the Court's analysis in Ellis of what constitutes the "collective bargaining representative" and the "collective bargaining unit" might not apply in these cases.

Relative to the Complainants' argument that chargeable litigation expenses are limited to those which are taken directly on behalf of members of the bargaining unit, WEAC contends that such an argument misconstrues both Ellis and the nature of collective bargaining. WEAC cites the Court's discussion of litigation expenses and asserts that the Court's use of the word "concern" in discussion of chargeable litigation expenses, "other than litigation before agencies or courts that concern bargaining unit employees," was intended to encompass litigation whose effects go beyond advancing a particular employe's contractual rights. Citing, Ellis, 104 SCt at 1895. WEAC cites as an example of such a chargeable expense, its filing of an amicus curiae brief in a case where the issue was the appropriate evidentiary standard where it is alleged that a discharge was for union activities. According to WEAC, the expense of its filing such a brief would not be chargeable to fair-share employes under the Complainants' theory, as the case did not directly involve the bargaining unit, but the case was of "concern" to members of the bargaining unit represented by WEAC and, hence, chargeable. It is also contended that the Complainants' standard is, practically speaking, unworkable in many bargaining units, citing the example of expensive discharge litigation in a small unit where it would allegedly take years of dues to pay for the one case. If the cost of such litigation may not be

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18/ Dec. No. 20081-C (WERC, 7/84).

spread across all of the units represented by a union and charged to members and fair-share employes alike, it would be unlikely that the fair-share employes could ever be required to contribute toward the cost of such litigation even in their own bargaining unit. WEAC asserts this is so because Sec. 111.70(1)(f), Stats., appears to limit the fair-share fee "to its proportionate share of the cost as measured by the dues uniformly required of members." (emphasis added by WEAC) Therefore, WEAC contends, it would seem that a union could not charge to fair-share employes the heavy assessment on unit members necessary to pay for such litigation, since Sec. 111.70(1)(f), Stats., does not appear to permit the collection of assessments. The only other option WEAC could suggest would be to establish and periodically collect for a "litigation fund," but posits that such an alternative "frequently is politically impossible."

WEAC also contends that the Complainants' position on what are chargeable litigation expenses is flawed on a theoretical level in that the Complainants fail to recognize the practical value of solidarity where members of different bargaining units represented by the same union engage in mutual aid and support. WEAC offers as an example the affiliation of a local organization with a state and national organization and the financial responsibilities the latter organizations assume on behalf of the locals in the area of litigation. WEAC contends further that the Complainants do not understand the legal relationship between the local organization and the state and national organizations with which the local is affiliated. It asserts that contrary to the Complainants' view, a bargaining unit member is represented by all three organizations, and that the local bargaining agent is an "amalgam of the local, state and national union" and is not limited to the local signatory to a given contract, arguing that the latter view ignores the "historic operations of unions." It is alleged it can be assumed that in passing Sec. 111.70(1)(f), Stats., the legislature was aware that collective bargaining encompassed both the historical and ongoing methods by which unions advance and protect workers' economic interests and that it intended continuation of that practice.

Regarding lobbying activities, WEAC asserts that Ellis did not deal with the issue at all, and hence, there is no basis for the Commission to alter its decision regarding that category in light of Ellis. Further, the Commission's conclusions as to lobbying are consistent with the current federal precedent expressly dealing with that issue.

Relative to the Commission's conclusions regarding the chargeability of organizing expenses, WEAC contends that while the concern is more substantial in this area, the Complainants do not offer a compelling basis for the Commission to change its decision. According to WEAC, the Court based its finding in Ellis that organizing expenses are not chargeable on the legislative history of Section 2, Eleventh, and it alleges that the legislative history of Sec. 111.70(1)(f), Stats., does not indicate a similar intent on the part of the Wisconsin legislature. WEAC also asserts that, unlike Ellis where the Court found that the Union had failed to establish a clear nexus between its organizing activities and the working conditions of the employes represented by the Union, in Wisconsin there is such a nexus in the public sector and cites the mediation-arbitration law, Sec. 111.70(4)(cm), Stats., as one of the bases for finding that nexus. Finally, in this regard, WEAC suggests that if the Commission decides that Ellis is persuasive precedent in the area of organizing, it should carefully consider and analyze separately each of the various categories under organizing that it developed in Browne and Gerleman.

In regard to the chargeability of union conventions, WEAC concludes that Ellis allows unions to charge dissenting non-members for the full cost of its conventions, even if there are some expenses related to political activity involved. While WEAC considers the Commission's position that convention expenses must be allocated between chargeable and non-chargeable activities to be reasonable, it suggests that the Court's approach in Ellis is more practical in that it avoids the significant costs to all of litigating the allocations.

Discussion

In support of their Motion for Reconsideration the Complainants have contended that the U. S. Supreme Court's decision in Ellis should be considered persuasive, if not controlling, precedent for similar cases arising under MERA, and that, therefore, the test adopted by the Court in Ellis for determining

whether union expenses for certain activities are chargeable to non-members applies in these cases as well. The Complainants have offered two bases in support of their contention: (1) The decision in Ellis has "constitutional underpinnings" and the Wisconsin Supreme Court has held that MERA is more restrictive of a union's rights than the non-member employes' First Amendment rights; and (2) in Browne the Wisconsin Supreme Court relied heavily on the U. S. Supreme Court's decisions in the earlier cases arising under the RLA in denying the Complainants' request for escrow relief, and expressly found that its limiting construction of MERA was "similar" to that placed on the RLA by the U. S. Supreme Court in Street.

While we agree that the Court's decision in Ellis provides some guidance in the area of what the First Amendment requires by way of permanent relief and what it permits in several areas of certain union expenditures, 20/ we note that the Court relied almost entirely on, and for the most part limited its analysis to, Section 2, Eleventh of the RLA and its legislative history, both in developing and in applying its test for determining whether expenditures for certain union activities are chargeable to objecting employes. The Court's analysis of whether the First Amendment permits unions to charge objecting employes for those expenditures the Court found chargeable under the RLA is limited to a discussion of its prior decisions in Abood, Street, and Allen, supra, and Railway Employes' Department v. Hanson, 351 U.S. 225 (1956). 21/ In Abood the Court discussed and relied extensively on its prior decisions in the RLA cases, as well as discussing the collective bargaininng process in the public sector. In reaching our Phase I decisions in these cases we were guided to a significant degree by the majority opinion in Abood, and relied largely on that case and our Wisconsin Supreme Court's decision in Milwaukee Federation of Teachers, Local No. 252 v. WERC, 83 Wis.2d 588 (1978), both in arriving at a standard for determining the scope of union expenses that are chargeable under MERA and in making the determinations as to whether expenses for particular activities are chargeable. In addition to relying on our Supreme Court's analysis of the purpose and effect of Sec. 111.70(1)(f), Stats., and its legislative history, we also relied on our analysis of the collective bargaining process in the public sector in Wisconsin and what is involved in a union's functioning in its representative capacity in Wisconsin's public sector.

Therefore, while the Court's decision in Ellis included a discussion and analysis of the plaintiffs' First Amendment rights, rather than being an addition to the constitutional case law considered previously by this Commission in its Phase I decisions, that discussion and analysis was limited to a restatement of its holdings in its prior decisions in this area. Moreover, as Justice Powell points out in his concurring opinion in Ellis, the Court's decision is based for the most part on its analysis of the RLA and its legislative history, rather than on constitutional considerations. That analysis of the RLA does not necessarily apply in cases arising under MERA, since it involves a different statute which developed, and which exists, in a different context. 22/

20/ The Court concluded in Ellis that it was only necessary to make a constitutional determination as to those categories of union expenditures in issue that it had found were chargeable to dissenting employes under Section 2, Eleventh, i.e., conventions, social activities and publications.

21/ In Robinson, supra, the Third Circuit Court of Appeals concluded that "The recent decision in Ellis does not depart from the governing case law developed in the Railway Act trilogy and Abood" 741 F.2d at 610.

22/ See our discussions in our Phase I decision in Browne regarding collective bargaining in Wisconsin's public sector (Dec. No. 18408 at 22, 29, 30), the statutory provisions for final and binding interest arbitration for municipal employes and employers in Wisconsin (Sec. 111.70(4)(cm)6, 7, Stats., Sec. 111.77(3), (4) and (6), Stats.), and the U. S. Supreme Court's discussion in Abood regarding the differences between collective bargaining in the public sector and collective bargaining in the private sector. Abood, 431 U.S. at 227-30, 236. Also, see the Court's extensive discussion in Street of the history of Sec. 2, Eleventh of the RLA and the unique character of labor relations and bargaining in the interstate carrier industry, Street, 367 U.S. at 750-64; as well as its discussions of the legislative history of that provision in its decision in both Street and Ellis. Street, 367 U.S. at 750-70; Ellis, 104 SCt at 1890-95.

The Complainants have also argued that due to the Wisconsin Supreme Court's heavy reliance on the cases arising under the RLA in deciding Browne, the Court's analysis of the RLA in Ellis provides the Commission with guidance in these cases. We recognize that there is a similarity between such statutes as MERA providing for agency shops in the public sector and Section 2, Eleventh of the RLA. That similarity, however, is primarily in the policy goal which underlies such statutes, i.e., to promote labor peace and stability through a system which provides for exclusive representation, imposes an obligation of fair representation of all those exclusively represented and which permits negotiation of a device whereby free-riders are eliminated. Ellis, 104 SCt at 1891; Abood, 431 U.S. at 221, 224; Berns v. WERC, 99 Wis.2d 252, 264-66 (1980); Milwaukee Federation of Teachers, 83 Wis.2d at 595-96. 23/ It was this similarity of the underlying policy goal of the two statutes that was relied upon by the Court in Browne in its discussion of the appropriateness of the trial court's denial of the requested interim injunctive relief. The Court cited the U. S. Supreme Court's earlier discussions in Street and Allen as to the possible impact on the goal of labor peace and stability of granting injunctive relief. Browne, 83 Wis.2d at 338-40. The limiting construction placed upon MERA by the Wisconsin Supreme Court is also similar to that placed upon the RLA by the U. S. Supreme Court, in that both courts have construed the respective statutes to only permit the use of fees collected under those statutes for purposes related to collective bargaining or contract administration. Browne, 83 Wis.2d at 332; Street, 367 U.S. at 768; Ellis, 104 SCt at 1891-92. 24/ However, while the two statutes share those similarities, the U. S. Supreme Court recognized in Abood that the collective bargaining process in the public sector differs significantly from that in the private sector, and that this results in a substantial difference in the means by which unions in the public sector, vis a vis the private sector, pursue the collective interests of the employes they represent in performing their representative functions. Abood, 431 U. S. at 236. These differences were the bases for the Court reaching the following conclusion in Abood:

> There will, of course, be difficult problems in drawing lines between collective bargaining activites, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court held in Street, as a matter of statutory construction, that a similar line must be drawn under the Railway Labor Act, but in the public sector the line may be some what hazier. Ibid. (footnotes omitted)

Similarly, in Champion v. State of California, 25/ the Ninth Circuit Court of Appeals cited Abood in recognizing that the collective bargaining process in the public sector differed from that under the RLA, and held that:

> The determination of whether certain expenditures are proper depends on the nature of the bargaining process. 738 F.2d at 1086

The Court of Appeals went on to hold that expenses for lobbying could appropriately be charged to fair-share employes under the standard adopted in Ellis. A similar result was reached by the Third Circuit Court of Appeals in Robinson v. State of New Jersey, 26/ where that Court found lobbying to be a permissible expense under the Ellis test, based upon its analysis of the collective bargaining process in New Jersey's public sector, vis a vis the private sector. The following portion of the Court of Appeals' discussion indicates the scope of the activities it considered to be part of the bargaining process in the public sector:

23/ See also our discussion in Clinton Community School District, Dec. No. 20081-C (WERC, 7/84) at 13-14.

24/ Whether the MERA limitation forbids collection of a full dues equivalent regardless of post-collection protective procedures is pending before us in another aspect of these cases, and our description of the Courts' holdings in the text above is not intended to express or imply a determination of that question.

25/ 738 F.2d 1082 (1984), cert. denied 105 SCt 1230 (1985).

26/ 741 F.2d 598 (1984), cert. denied 105 SCt 1228 (1985).

Abood itself recognizes that "(t)he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table." 431 U.S. at 236. Similarly, in a case brought under the NLRA, the Supreme Court defined the statutory "mutual aid or protection" clause under the NLRA to extend to activities in which employees "seek to improve working conditions through resort to administrative and judicial forums" and added that "employees' appeals to legislators to protect their interests as employees are within the scope of this clause." Eastex, Inc. v. NLRB, 437 U.S. 556, 566-57 (1978) (footnote omitted). See also id. at 565 n.13 (reviewing policy considerations underpinning legislative decision to allow employees to act collectively with regard to terms and conditions of employment and "the welfare of labor generally"). Taken as a whole, the agency fee case law points to a focus on collective bargaining as a process whereby unions must advance the collective interests of their members in a number of arenas. We are therefore unable to conclude under the First Amendment that New Jersey cannot extend the same scope of bargaining powers to public employee unions under state statute as has been created by Congress under the NLRA.

To decide otherwise would seriously hamper the ability of public employee unions to bargain effectively for the employees they represent. Public employee bargaining is distinctive in that at least a portion of a union's attention is directed away from the bargaining table, even for what would be designated the standard terms and conditions of employment under the NLRA:

> (I)n the private sector, the employer must send someone to the bargaining table with authority to make a binding agreement. In the public sector this may not be legally possible or politically sensible. Wages and other benefits directly affect the budget and the tax rates; but adopting budgets and levying taxes are considered, within our governmental system, fundamental legislative policies to be decided by the legislative body, not by a negotiator at the bargaining table. Dismissal procedures may be subject to constitutional requirements which limit the procedures which can be negotiated. Promotion policies may be governed by civil service principles which are written into the city charter and cannot be eliminated by bargaining. Modifications in state pension plans cannot, in most states, be made binding by negotiators, but must be ratified by the legislature. In the public sector, agreement at the bargaining table may be only an intermediate, not a final, step in the decisionmaking process.

Summers, Public Sector Bargaining: Problems of Governmental Decision-making. 44 U. of Cin. L. Rev. 669, 670-71 (1975)

. . .

For New Jersey public employees, collective bargaining is inextricably intertwined with legislative change. An examination of the mechanics of New Jersey's public employee collective bargaining agreements reveals to what extent the standard terms and conditions of employment under the NLRA or the RLA are governed by state statute or regulation.

. . .

Since many of the essential terms and conditions of employment that are mandatory subjects of bargaining under Sections 8(d) and 9(a) of the NLRA are governed by state authorities in the public employment context, a public employee union unable to lobby the state authority would be severely handicapped in performing its duties as a bargaining representative.

As the Supreme Court noted in Ellis,

> "objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."

104 S.Ct. at 1892. We do not read the legislative history of the New Jersey Act to seek the creation of ineffectual public employee unions, nor do we find any constitutional prohibition against the fulfillment of the legislative goal of promoting labor peace by permitting the enumerated activities of public employee unions. 741 F.2d at 607-609. (footnotes omitted)

The New Jersey statute under consideration in Robinson expressly provided that a union could charge non-members for the "costs of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer." While Sec. 111.70(1)(f) of MERA does not expressly provide that a public sector union may charge non-members for its attempts outside of face-to-face negotiations to further the collective interests of the employes it represents, such attempts in the different forums are no less a function of the union as the employes' exclusive bargaining representative than is its role at the bargaining table.

Hence, while the goals of Section 2, Eleventh, of the RLA and Sec. 111.70(1)(f), Stats., are essentially the same, i.e., the elimination of "free-riders" for the sake of labor peace and stability, the contexts in which they were created, and in which they exist, differ significantly due primarily to the differences between the collective bargaining process in the public sector and the bargaining process in the private sector under the RLA. As indicated by the U. S. Supreme Court in Abood, supra, and the decisions of the federal courts of appeals in Champion and Robinson, supra, those "very real" differences in the collective bargaining processes between the public and private sectors require a different result when determining whether expenses for a union's particular activities are sufficiently related to its role as the exclusive bargaining representative of the employes it represents so as to permit the union to include such expenses in the fair-share fee. 27/

The Complainants have contended that the test we applied in our Phase I decision in Browne is contrary to the Ellis test in that it "focusses (sic) on whether the activity affects the employees as employees," as opposed to "whether the activity is performed by the union in its role as an exclusive representative carrying out statutory functions," and allows a union "to charge non-union employees for activities performed on behalf of 'other employes represented by said union and its affiliates,' not just 'employes in the bargaining unit involved.'" We do not agree. In that regard, we note that the courts in Champion and Robinson have not construed the Ellis test as necessarily further narrowing the scope of activities for which public sector unions may charge non-member employes they represent. Contrary to the Complainants' contention, there is not necessarily a substantive difference between the test in Ellis and the standard we have applied in our Phase I decisions in these cases. In Ellis the Court set forth the following as its test for determining whether the expense for a particular union activity is chargeable to objecting employes:

> . . . the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to

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27/ See Note 23, supra.

implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit. 104 SCt at 1892.

In our Phase I decision in Browne and Gerleman we applied the following:

> . . . We deem that a union, which is the collective bargaining representative of employes in a collective bargaining unit, is pursuing its representative interest by expending sums of money, either directly, or by payments to others, for activities, other than those found to be impermissible herein, relating to improving the wages, hours and working conditions of the employes in the bargaining unit involved, as well as the wages, hours and working conditions of other employes represented by said union and its affiliates, and that therefore such expenditures are properly included in the amount of fair-share payments by unit employes who are not members of said union.
>
> In determining the propriety of the various categories of expenditures in issue herein, we must determine whether the particular category or activity involved is related to the representational interest in the collective bargaining process and contract administration. If it is not, the Complainants are correct in their assertion that the expenditure for such purposes, over their objection, constitutes an impermissible infringement on their first amendment rights. Browne, at 23; Gerleman, at 21-22.

We prefaced our above statement of the test with the conclusion that:

> We cannot accept the Complainants' narrow interpretation of the term "collective bargaining process" to include only those functions relating to the negotiation of collective bargainning agreements, to the contract administration, and to the resolution of grievances arising under such agreements.

We went on to find that:

> The collective bargaining process is broader than negotiating an agreement and reducing it to written form, and in processing grievances thereunder. . . . a union performs its representational interest in expending funds seeking the enactment of legislation beneficial to employes generally, and especially to municipal employes, and in opposing legislation which would tend to have an opposite effect.

Thus, as we previously concluded in our Phase I decisions in these cases, an exclusive representative's functions and its role in the collective bargaining process in Wisconsin's public sector go beyond its direct dealings with the employer in negotiations at the bargaining table or in administering its labor agreement with the employer and encompass activities in other forums and before other bodies. Furthermore, similar conclusions were reached by the U. S. Supreme Court in Abood, by the Third Circuit Court of Appeals in Robinson, supra, and by the Ninth Circuit Court of Appeals in Champion, supra.

Throughout our Phase I decisions we noted that when we speak of activities of a union that benefit employes generally, we are including, but not limiting it to, the employes in the particular bargaining unit in question. 28/ The Complainants

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28/ See for example, our discussion in Browne regarding a union's lobbying activities where we stated "although the representational interest is not confined to direct dealings with the employer, nevertheless it is confined to activities reasonably calculated to benefit bargaining unit employes in their wages, hours, and conditions of employment.

. . .

Further, to be chargeable, a particular lobbying activity need not relate to a particular bargaining unit's benefits where it is part of an overall program with other units by which they pool their strength, in furtherance of their mutual aid or protection, to assist each other." At 30-31.

argue that the Ellis test restricts a union's chargeable expenses to those for activities which are engaged in only for the benefit of the employes in the particular bargaining unit. It appears that the Complainants are interpreting the Court's test too literally. Although the Court's test refers to a union's duties "as exclusive representative of the employees in the bargaining unit," it did not apply its test literally. In finding the union's expenses for social activities, and to a more limited extent, publications and conventions, to be chargeable to dissenting employes, the Court approved expenses for activities that benefited all of the employes the union represented. cf. the Court's discussion of litigation expenses. Ellis, 104 SCt at 1895. In its decision in Champion, supra, the Ninth Circuit Court of Appeals applied the Ellis test to a union's lobbying expenses and concluded that a union was permitted to include such expenses in its fair-share fee. The basis of the Court's conclusion was that "The importance of legislation affecting public employment, enacted in a forum apart from the meet-and-confer sessions authorized by statute, Cal. Gov't Code s. 3517, requires that public employee representatives be given broad authority to protect their members' interests before the legislature." Champion, 738 F.2d at 1086. While lobbying for such legislation benefits the employes in the bargaining units represented by the union, it obviously also benefits other public employes outside those bargaining units, yet the Ninth Circuit did not interpret the Ellis test as excluding the expenses of such lobbying activities on that basis. 29/

We therefore conclude that regardless of whether the Ellis test or our test is applied in the instant cases, the results are the same. Our conclusion is based upon (1) the nature of the collective bargaining process in Wisconsin's public sector, which differs from bargaining under the RLA in ways which significantly affect what union activities will be considered to be "reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit," and (2) our finding that the test we applied in our Phase I decisions is substantively comparable to the test in Ellis. The fact that the U. S. Supreme Court reached conclusions as to the various categories it considered in Ellis that are different from those reached by this Commission in its Phase I decisions is adequately explained by the very real differences between the collective bargaining process considered in Ellis and that involved and considered in these cases, as well as the differences in the legislative histories of Section 2, Eleventh, RLA and Sec. 111.70(1)(f), Stats.

Having concluded that the Ellis decision presents no new constitutional considerations that we had not previously considered in our Phase I decisions, and that the nature of the collective bargaining process in the public sector is a critical factor in making the determination as to which union expenditures may properly be included in a fair-share fee, and further, that application of the Ellis test, vis a vis the test we applied in Browne and Gerleman, would not require a different result in those cases, we find it unnecessary to reconsider our findings of fact and conclusions of law in our Phase I decisions in those cases.

Therefore, we have ordered that the Complainants' Motion for Reconsideration of Initial Findings of Fact and Initial Conclusions of Law in light of the U. S. Supreme Court's decision in Ellis be denied.

Dated at Madison, Wisconsin this 19th day of September, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

29/ We also note that in Cumero v. PERB, supra, Note 13 at 20, a California Court of Appeals rejected a similar argument that the Ellis test be applied literally in this regard.