STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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-F

Appearances:

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

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

Perry, First, Lerner, Quindel & Kuhn, S.C., Attorneys at Law, by Mr. Richard Perry, 823 North Cass Street, Milwaukee, Wisconsin 53202, on behalf of the Respondent Milwaukee Teachers Education Association.

Cullen, Weston & Pines, Attorneys at Law, by Mr. Lee Cullen and Mr. Steve Dettinger, 20 North Carroll Street, Madison, Wisconsin 53703, on behalf of District 1199W/United Professionals for Quality Health Care, as amicus curie.

ORDER DENYING MOTION TO COMPEL REFUND OF FAIR-SHARE DEDUCTION TO COMPLAINANTS AND ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGEMENT

Complainants having, on August 26, 1983, filed with the Commission a Motion to Compel Refund of Fair-Share Deductions to Complainants wherein it was requested that the Commission order the Respondents Milwaukee Board of School Directors (hereinafter the Board), the National Education Association (hereinafter NEA) and the Wisconsin Education Association Council (hereinafter WEAC) to refund to all Complainants the fair-share fees deducted from their pay by the Respondent Board from January 1, 1973 through August 31, 1974 and forwarded to Respondents NEA and WEAC, plus interest thereon from the time the fees were collected to the date of repayment; and Respondent Milwaukee Teachers Education Association, hereinafter the MTEA, having, on October 3, 1983, filed its brief in opposition to Complainants' motion; and thereafter Complainants and Respondents NEA and WEAC having entered into settlement discussions which resulted in resolving their dispute in some respects, but which left a dispute remaining as to those Complainants that joined the suit as part of the class action; and Respondents NEA and WEAC having, on February 7 and March 16, 1984, filed letter responses in opposition to Complainants' motion; and Complainants having, on March 19, 1984, filed a memorandum in response to those of Respondents NEA and WEAC and the

brief of the MTEA; and Respondents NEA, WEAC and MTEA (while affiliated with the NEA) having, on May 18, 1984, 1/ filed a Motion for Partial Summary Judgement wherein it was requested that the Commission dismiss the claims against them of those Complainants who joined the suit as class members more than a year after Respondent MTEA became disaffiliated with Respondents NEA and WEAC; and District 1199W/United Professionals for Quality Health Care having, on May 20, 1984, filed an amicus brief in support of the motion of Respondents NEA, WEAC and MTEA; and Complainants having, on July 17, 1984, filed a brief in response to Respondents' motion and arguments in support thereof; and Complainants in Browne v. Milwaukee Board of School Directors 2/ 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 decision of the U.S. Supreme Court in Ellis v. Railway Clerks; 3/ and Complainants in this case having, on July 18, 1984, filed a Petition for Temporary Consolidation wherein they requested that the Commission temporarily consolidate the cases for the purpose of ruling on the Motion for Reconsideration; and the other parties in the cases having not objected and the Commission having been satisified the cases should be consolidated, the two cases were ordered temporarily consolidated for the purpose of ruling on the Motion for Reconsideration; 4/ and following the receipt of briefs in the matter, the Commission having, on September 19, 1985, issued its Order Denying Motion for Reconsideration of Initial Findings of Fact and Initial Conclusions of Law in light of Ellis v. Railway Clerks; 5/ and the Commission having considered the procedural status of this case and the arguments and positions of the parties, and being satisfied that the respective motions should be denied;

NOW, THEREFORE, it is

ORDERED

That Complainants' Motion to Compel Refund of Fair-Share Deductions and Respondents' Motion for Partial Summary Judgement be, and same hereby are, denied.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

1/ A corrected motion was filed by Respondents on May 25, 1984.

2/ Case 99 No. 23535 MP-892.

3/ 104 S. Ct. 1883 (1984).

4/ Dec. No. 18408-C, 16635-C (WERC, 2/85).

5/ Dec. No. 18408-D, 16635-D (WERC, 9/85).

MILWAUKEE BOARD OF SCHOOL DIRECTORS

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO COMPEL REFUND OF FAIR-SHARE DEDUCTIONS TO COMPLAINANTS AND ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGEMENT

BACKGROUND

On August 26, 1983 Complainants in this case filed a Motion to Compel Refund of "Fair Share" Deductions to Complainants wherein they requested that the Commission order Respondents NEA and WEAC "to forthwith refund to all Complainants in this matter the monies extracted from their earnings as 'fair share' payments by the Respondent BOARD and forwarded by it to the Respondents unions, the NEA and the WEAC for the period commencing January 1, 1973 through August 31, 1974, together with interest thereon for the period from the date of collection thereof by the Respondent BOARD to the date of repayment of such 'fair share' payments by the Respondent NEA and WEAC and/or the BOARD, and for such other and further relief deemed appropriate by this Commission." The basis of the motion, discussed in more depth below, is the alleged refusal and/or inability of Respondents NEA and WEAC to comply with Complainant's request for certain financial documents and information regarding the period from January 1, 1973 to August 31, 1974. 6/

On May 25, 1984 Respondents NEA, WEAC and MTEA, hereinafter together Respondent Associations, filed a Motion for Partial Summary Judgement wherein they requested that the Commission "find that the claims of all 'class members,' other than the named plaintiffs, be dismissed with respect to the NEA affiliated unions."

In support of their motion the Respondent Associations have alleged the following:

> 1. MTEA disaffiliated from the NEA and WEAC on or before August 31, 1974.
>
> 2. Other than the originally named plaintiffs in the original circuit court action filed in December no other employes informed the NEA of their objection to any fair share expenditures prior to the disaffiliation of the MTEA. In fact, other than the originally named plaintiffs, no employe informed any representative of the NEA of his or her objection to any fair share expenditure until on or about October, 1977, when approximately 55 employes joined as "class members" pursuant to a class action certification initially accepted on September 12, 1977.

On those bases, the Respondent Associations have requested that:

> the Commission find that the claims of all subsequent class members against the NEA be dismissed for failure to state a claim against NEA; or, in the alternative, that their claims be dismissed or barred by the one year statute of limitations set forth in Section 111.07(14), Wis. Stats.

A settlement was apparently 7/ reached between the Respondent Associations and the seven originally named complainants as to that period during which Respondent MTEA was affiliated with Respondents NEA and WEAC. However, the dispute continues as to those complainants added via the class action.

6/ The period during which the MTEA was affiliated with Respondents NEA and WEAC.

7/ We use the term "apparently" since, although having received copies of the correspondence between counsel regarding settlement efforts and the Respondents having alluded to such a settlement in their brief, the Commission has never been officially notified of the settlement.

Subsequent to the filing of the motions, this case was temporarily consolidated with Browne for the purpose of ruling on Complainants' motion for reconsideration of the Commission's Stage I decisions in those cases in light of the U.S. Supreme Court's decision in Ellis v. Railway Clerks. Thereafter, Complainants' counsel in this case became ill and removed himself from the case. Complainants were able to retain new legal counsel in 1986 and moved to have this case again consolidated with Browne and Johnson v. Milwaukee County which were proceeding to hearing on the issue of compliance with the requirements set forth in Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986). That motion was denied due to differences in the identities of the respondent unions and the procedural aspects of the cases. 8/ Complainants' counsel subsequently withdrew from the case and Complainant Gerleman has been acting on behalf of Complainants while they seek to retain new legal counsel.

MOTION TO COMPEL REFUND OF FAIR-SHARE DEDUCTIONS

Complainants

In support of their motion to require the Respondents NEA and WEAC to refund the fair-share fees deducted from Complainants' pay and forwarded to those unions, plus interest, Complainants assert that NEA and WEAC are unable or unwilling to provide the financial documents Complainants requested from them. Complainants note that the summary of the prehearing conference on August 17, 1982 provided in part that:

> Mr. Ferebee will be submitting a request for information to Mr. Meredith on or before August 27, 1982, and Mr. Meredith will respond to said request on or before Setpember 7, 1982. Thereafter Mr. Ferebee may file a motion to compel discovery. 9/

Counsel for Complainants requested information from Respondent MTEA which was subsequently provided. Complainants made a similar request in September of 1982 to the NEA and WEAC for such information for the period from January 1, 1973 to August 31, 1974, however, in February of 1983 they received a letter from those Associations' counsel which Complainants' counsel has characterized as indicating:

> a.) that the records may have been destroyed.
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> b.) that if not, they would be warehoused in the outskirts of Madison, and the respondent unions were not disposed to search for them, or
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> c.) graciously offered to consider the possibility of allowing the Complainants to search the warehouse for such documents, provided however:
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> 1.) that Complainants defray the cost of the WEAC staff employees time while the Complainants sought the documents, if any,
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> 2.) the Complainants pay the cost to WEAC of producing all copies of documents made, if any, and
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> 3.) that Attorney Mitch Roth, in Washington, D.C. would deal with Complainants' counsel with regard to NEA responses. 10/

8/ Dec. No. 16635-E (WERC, 5/86).

9/ Letter to the parties from then Chairman Covelli dated August 12, 1982, summarizing the prehearing conference held on that date.

10/ The letter from Attorney Meredith referenced by Complainants refers to NEA's attorney meeting with an attorney on the staff of the National Right to Work Legal Defense Foundation and not counsel for Complainants.

As summarized by Complainants, Complainants' counsel responded that:

a.) he would accept such budget and audit documents for what they were worth subject to his determination, after review, as to whether they were adequate responses to Complainants (sic) requests,

b.) the Complainants would not defray the costs of copies proposed to be sent, and

c.) that if the WEAC chooses to submit no response to Complainants (sic) requests - or cannot do so - that the matter be returned to this Commission for a determination whether the WEAC and NEA have sustained their burden of proof that their expenditures are within the statutory requirements.

According to Complainants, they did not receive any further response from NEA and WEAC prior to the filing of their motion and they characterize those Associations' prior responses as revealing that the information requested by Complainants:

a.) may have been totally destroyed under a previously established record disposal program, or

b.) if not destroyed, such records may not cover the full span of the time period under investigation (nor is there provided any estimate of how much of the time span might be covered by the records if still in existence), and

c.) in any event, the Unions do not intend to search its (sic) records warehouse to see if the records are still in existence, and if they are not destroyed, does not intend to locate them in its (sic) warehouse.

It is contended by Complainants that it would be futile for them to file a motion for discovery as "it is obvious that the unions would take the same position as it (sic) does now." The law does not require a party in a proceeding to engage in futile efforts. Therefore, the only alternative remedy is for the Commission to order Respondents NEA and WEAC to refund to Complainants, with interest, the fair-share fees deducted by the Board and forwarded to the MTEA for partial distribution to NEA and WEAC for the period from January 1, 1973 to August 31, 1974. The basis for the order is the failure of those Associations to sustain their burden of proof to show that the expenditure of those fair-share fees were for proper purposes under MERA.

Regarding discovery rights, Complainants cite the following from the Judicial Council Committee Notes with reference to Sec. 804.12(2)3, Stats., W.S.A.:

> "This . . . section provides strong sanction (sic) against parties resisting discovery. Any party who seeks to evade or thwart full and candid discovery incurs risk of serious consequences which may involve . . . rendering judgment by default"

In response to the Respondent Associations, Complainants contend that Respondents NEA and WEAC have merely reiterated their original response regarding the availability of the information requested by Complainants. The Respondent Associations' response to Complainants' request "creates a stalemate". It is asserted that Complainants requested whatever information is available and still received no response. The Respondent Associations have the burden of proof and if they do not have sufficient documentation to meet that burden, it would be futile for Complainants to spend their limited resources just to find that the records have been destroyed or are of no value in making a determination as to the expenditures. Complainants do not intend to seek discovery, rather they desire an end to the delays and the Associations' refusal to respond to their request.

In response to the MTEA's brief in opposition to Complainants' motion, Complainants deny they failed to comply with the parties' agreement reached on August 17, 1982. That "agreement" did not require that Complainants file a motion for discovery, rather, it stated that they "may." Thus, it was optional, not mandatory. As to the propriety of including the Respondent Board in their requested order, Complainants note they did so only on the basis that the Board is a co-respondent and liable for any refund ordered if the Respondent Associations are unable or fail to pay the refund. Complainants note that their requested order does not ask that they be relieved from paying their fair-share fees, but only that they be refunded those fees collected by WEAC and NEA for that limited period. 11/

Respondents

Respondent Associations contend that the Supreme Court and the Commission have consistently held that dissenting fair-share payors are not entitled to a rebate prior to the adjudication of their claims. Citing, Browne v. Milwaukee Board of School Directors, 83 Wis.2d 316, 340 (1978); Clinton Community School District, Dec. No. 20081-A (WERC, 1/83). It is asserted that by their motion Complainants are claiming they are entitled to a rebate in this case because WEAC has not adequately cooperated by providing all of the discovery material Complainants requested and because even if WEAC had cooperated, the information obtained would not be sufficient for WEAC to reasonably expect to prevail on the merits. Respondent WEAC asserts it has not refused to provide the discovery material, rather, it has indicated to Complainants' counsel that the records sought are ten years old and much of the supporting data is no longer easily obtainable or has been destroyed. The records WEAC has are randomly contained in boxes in a warehouse and Complainants may inspect and copy, at their own expense, all the records WEAC and NEA have for the period when MTEA was affiliated with them. WEAC asserts that it does not have to, and will not, retrieve and produce any records at its own expense that are not "reasonably available" to WEAC and NEA. The Associations have offered to make the search and possible retrieval of the documents, if Complainants are willing to reimburse them.

Respondents WEAC and NEA note that if this were a civil proceeding and subject to Wisconsin's rules of civil procedure, Complainants' request would be in the nature of a motion to compel discovery, to which the Associations would argue that the request was "unduly burdensome and costly" or they would seek a protective order requiring Complainants' counsel to agree to pay the additional costs of making such a search. In such cases courts have been given significant discretion to allow, deny or limit discovery based on a balancing of the burden and expense against the anticipated value of the information sought. Vincent & Vincent, Inc. v. Spacek, 102 Wis.2d 266, 272 (Ct. App., 1981). Where, as here, the Association has alleged "good cause" for not producing the requested information at its own expense and Complainants have failed to demonstrate bad faith on the Association's part, a court will not compel production. Gipson Lumber Co. v. Schickling, 56 Wis.2d 164, 169 (1972). At least a hearing is needed to determine the benefits and costs involved and it is Complainants' burden to show that the request is not unduly burdensome. Since the Commission's practice is typically more restrictive in permitting discovery than the courts, the cited cases set the minimum protection to be afforded the Respondent Associations.

The Associations note that the thrust of Complainants' arguments is not discovery, but the likely lack of supporting documentation for those records of expenditures of ten years ago. They concede there will likely be a lack of such supporting information, but contend that this does not automatically mean Complainants will prevail. While the union bears the burden of proof to show that expenditures were for collective bargaining, it does not follow that it must produce a "paper trail" for every expenditure. Although WEAC's and NEA's

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11/ Complainants' arguments regarding the Respondent Associations' contention that the Complainants added by the class action do not have a cause of action against Respondents NEA and WEAC are set forth in the section of our decision addressing the Motion For Partial Summary Judgement.

explanation of its expenditures may be in more general terms than in cases where more documentation is available, they expect to be able to prove that certain expenditures were related to collective bargaining. Hence, Complainants' request for such broad relief has no basis in precedent.

Relying on the statute of limitations set forth in Sec. 111.07(14), Stats., and the need to have the employe make his/her objection known to the union, the Respondent Associations also contend that even if they are not able to prove that a significant portion of their dues were used for permissible purposes, only the seven original complainants would be able to recover damages. Those arguments are set forth in the section addressing their motion for partial summary judgement.

Respondent MTEA, while not a subject of Complainants' motion, also responded to Complainants' claims. First, it contends that the parties agreed to a procedure whereby Complainants would first request certain information and after the response they might file a motion to compel discovery. Instead Complainants filed their motion to compel refund, which if it were granted, would eliminate the Respondent Associaitons' right to contest whether some of the information requested is relevant. Regarding Complainants' inclusion of the Respondent Board in their requested order, MTEA asserts that is inappropriate as the Board has no information as to the Associations' expenditures. The appropriate response of Complainants if they feel WEAC and NEA have not cooperated in supplying information is to file a motion to compel discovery. Lastly, MTEA contends that both the Circuit Court and the Wisconsin Supreme Court have held that plaintiffs in fair-share cases must continue to pay fair-share fees during the pendency of the litigation.

Discussion Regarding Motion to Compel Refund of Fair-Share Deductions

The Complainants' motion to compel refund of the fair-share fees deducted from Complainants and paid over to Respondents WEAC and NEA is based on two assumptions: (1) That the Associations would respond to an order for discovery from the Commission the same as they have responded to Complainants' request for information, and (2) that regardless, the Associations do not possess sufficient records to meet their burden of proof regarding their expenditures for the period of time in question. We note, however, that it would be speculation at this point as to how the Associations would respond to an order for discovery and whether they will be able to meet their burden of proof. The Commission cannot assume the worst as a basis for its decision. Rather, if Complainants feel the Associations' response to their request for information was inadequate, they may request an order for discovery, and the Associations must be given the opportunity to comply.

We also note that as to the Associations' concerns about the costs of producing the information sought, in granting discovery the Commission has ordered that the requesting party pay any expenses incurred in connection with the discovery. 12/

Based on the foregoing, we have concluded that Complainants' Motion to Compel Refund of Fair-Share Deductions should be denied.

MOTION FOR PARTIAL SUMMARY JUDGEMENT

Respondent Associations

In support of their motion Respondents NEA and WEAC first take the position that the complainants added through the class action do not state a claim upon which relief can be granted. It is contended that Sec. 111.70(1)(f), Stats., is designed to operate the same as its federal counterparts and, as under those counterparts, no cause of action arises until an employe informs the union of his/her objection to the union's proposed expenditures. The private sector cases

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12/ Milwaukee Board of School Directors (Browne), Dec. No. 18408-A (WERC, 10/81) 18408-B (WERC, 5/84).

arising under the Railway Labor Act (RLA) established that "dissent is not be presumed." Citing, I.A.M. v. Street, 367 U.S. 740 (1961) and Brotherhood of Railway Clerks v. Allen, 373 U.S. 110, 53 LRRM 2128 (1963). In Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Supreme Court made clear that the requirement of affirmatively notifying the union of the employe's objection also was required under general constitutional analysis and that the principles underlying private sector law in this area apply to the public sector as well.

The Associations contend that although the wording of the federal statutes and Sec. 111.70(1)(f), Stats., appears to be different, the Supreme Court decisions have interpreted the federal statutes so as to have virtually the same scope as Sec. 111.70(1)(f). The legislative history of the Wisconsin statute demonstrates that the similarity with federal law was intended. To the extent there is any difference, Sec. 111.70(1)(f) appears to be broader and more favorable to the unions in permitting them to exact the full measure of financial support subject only to constitutional limitations. There is nothing in the statute or its legislative history to suggest that, unlike the federal statutes, dissent is to be presumed.

Section 111.70(3)(a)6, Stats., is also cited by the Associations as being indicative of the legislature's intent that the fair-share obligation be the same as a member's dues obligation. That provision requires signed dues authorization cards in order for a municipal employer to deduct union dues from its employes' pay "except where there is a fair-share agreement in effect." That requirement only makes sense if the obligation is the same under either and if dissent is not to be presumed.

The Respondent Associations also argue that common sense considerations regarding the administration of union security agreements and the Circuit Court's prior disposition of the class action certification support their position. If dissent is presumed, there would be disputes created even where no one is concerned about the union's expenditures. If dissent is not presumed, then employes who are concerned have an adequate method for addressing those concerns and problems are not created where none exist. There also would be no need to "opt in" to the class to determine who wished to proceed if dissent were to be presumed. Thus, the Court's disposition of the case implicitly recognized dissent is not presumed. 13/

According to the Respondent Associations, the filing of a class action in these cases does not trigger an immediate cause of action for all class members who subsequently inform the union of their objection. While conceding that in a typical federal tort action the filing of a class action suit generally commences the action for all subsequent individuals included in the class, the Associations assert that the doctrine is not applicable where, as here, individual dissent is a necessary element of the cause of action. The Wisconsin Supreme Court has reserved judgement as to whether it will follow the federal law concepts regarding class actions set forth in American Pipe and Construction Company v. State of Utah, 414 U.S. 538 (1974). Citing, Mercury Records v. Economic Consultants, 91 Wis.2d 482, 491 (Ct. App. 1979); Browne v. Milwaukee Board of School Directors, 69 Wis.2d 169, 183 (1975). Thus, state law must be considered regardless of the federal analysis. The "major policy values" recognized in American Pipe are the desire to conserve the litigants' and the court's resources by having one spokesperson for the certified class versus the defendant's right to timely notice of potential claims and defendant's interest in "repose." In a typical case the filing of the class action gives the defendant adequate notice of potential claims. The cause of action is triggered as soon as members of the class are harmed by the defendant's negligent or illegal acts. However, that concept is not applicable where, by statute or judicial decision, individual objection is an integral part of the cause of action itself. In these cases the defendant does not breach any legal obligation to an individual until it is made aware of that person's objection. In this case the NEA and WEAC were not aware until 1977 that anyone other than the original complainants objected to the

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13/ District 1199, UPQHC, submitted an amicus brief in support of the Associations' position that dissent is not to be presumed.

manner in which they spent fair-share funds. Thus, no cause of action arose as to the subsequent class members until they made their objection known to the Associations.

The Respondent Associations also cite the following from Allen in support of their position that fair-share employes are not entitled to relief until they have made their objection known to the union:

> But we made clear in Street that "dissent is not to be presumed -- it must affirmatively be made known to the union by the dissenting employe." (Citation omitted). At trial, only 14 of the respondents testified that they objected to the use of exacted sums for political causes. No respondent who does not in the course of the further proceedings in this case prove that he objects to such use will be entitled to relief. This is not and cannot be a class action. (Emphasis added).

53 LRRM 2130-31. The Court rejected in Allen an attempt to obtain relief for all nonmembers. Also cited is Kentucky Educators Public Affairs Council v. Kentucky Registry of Elections, 677 F.2d 1125 (6th Cir. 1982), where the court upheld a "reverse checkoff" system requiring individual notice to the union by the member to prevent the union from forwarding a portion of the member's salary to a union political action fund. Besides holding that since dissent was not presumed the union could rely on its members' inaction as agreement, the court also concluded a class action was not appropriate and relied on the Supreme Court's reasoning in Street that dissent is not to be presumed in these cases. Id. at 1135-36.

The Respondent Associations do not contend that class actions are inappropriate per se in federal union security litigation, rather, they assert that those decisions and the Circuit Court's certification in this case should be interpreted as permitting a class action in this area "if the class consists of only individuals who have personally informed the union of their dissent, and that any subsequent relief based thereon is restricted from the date of their notification." (Emphasis Respondents') Citing, Metowski v. Traid Corporation, 104 Cal. Reptr 599 (1972), a case involving the Uniform Commercial Code, which imposes an obligation similar to that in fair-share litigation where certain types of claims are involved. The court allowed a class action provided the class certification did not attempt to circumvent the requirement of individual notification. The class action was allowed for purposes of determining those elements common to all plaintiffs who could establish timely notification had been made. Id. at 604. Such a concept would apply here and one of the common legal issues would be when the cause of action of subsequent class members arose. The mere filing and certification of a class action does not excuse the individuals from establishing that they gave timely notice to the Associations. Since there was no notice given to Associations by these additional Complainants until 1977, and MTEA was no longer affiliated with the NEA and WEAC after August 31, 1974, it is undisputed that there was no notice whatsoever from those individuals to the Associations. Therefore, if it is concluded dissent is not to be presumed and that no individual cause of action under Sec. 111.70(1)(f), Stats., arises until the individual employe notifies the union of his/her dissent, the Commission must conclude that those individuals who joined the class in 1977 are not entitled to any relief from the NEA.

The Respondent Associations also contend that their position is "substantially superior" with respect to equity. Rather than opposing the use of class actions generally in these cases, the Associations only oppose their use to create dissent where it does not exist and to avoid the notice requirement. They offer the instant case as an example of the unfairness that would result under the Complainants' approach, i.e., until 1977 the Associations had no idea of the potential liability in the case. Allowing a few individuals to toll the statute of limitations for an unspecified number of individuals who can later enter the case, permits a "potential for a significant retroactive expansion of liability" that is unfair to the unions. Further, the principle that dissent is not to be presumed, along with the very short statute of limitations under the federal statute and MERA, "create a particularly strong 'repose interest' on the part of the union with respect to fair share claims." The Associations made financial

commitments based on their belief that they had very limited liability. This also can affect the manner in which a union conducts fair-share litigation, e.g., determining whether it pays to contest certain expenditures or to preserve evidence based on the potential liability. Conversely, the fair-share employes are only required to notify the union of their objection. The individual only loses his/her right to recover for the period for which they did not bother to object. Thus, balancing the unions' repose and reliance interest against any possible infringement on the individual's rights, equity favors the Associations' position. The only interests advanced under Complainants' position are those institutional interests of such organizations of the National Right to Work Committee and its various subsidiaries.

The Respondent Associations also take the position that the claims of the additional Complainants are barred by operation of the one year statute of limitations set forth in Sec. 111.07(14), Stats. According to the Associations, Complainants made several claims in their initial civil action, one being premised on the unconstitutionality per se of fair-share agreements in the public sector and First and Fourteenth Amendment violations based on the nature of the Associations' expenditures. The first was rejected by the Wisconsin Supreme Court and the other federal claims, which appear to parallel their claims under MERA, could not arise until the additional complainants notified the Associations of their objections. Hence, their only arguable claims must be those arising under Sec. 111.70(1)(f), Stats., and such claims are governed by the one year statute of limitations set forth in Sec. 111.07(14), Stats.

Under Wisconsin law, tolling of the statute of limitations extinguishes both the right and the remedy. Haase v. Zawicki, 20 Wis.2d 308 (1963). It is noted by the Respondent Associations that the Commission has strictly construed Sec. 111.07(14), Stats. The Associations contend that although the Wisconsin Supreme Court has allowed an amended pleading adding a separate claim by a new plaintiff after the statute of limitations has run to relate back to the original filing of the action, it held that the concept would only apply in those cases where the defendant could not show it was prejudiced. Korkow v. General Casualty Company, 117 Wis.2d 187, 197 (1984). The Associations claim they can show significant prejudice in this case as their potential liability was increased eight fold by the addition of the later class members. While in Korkow the defendant was fully aware of any and all claims that could be made against it, here the adding of the later complainants created new, unforseen claims for which the Associations had no idea they would be liable. This is the type of prejudice Korkow sought to avoid. Therefore, the Commission must find that all claims arising more than one year prior to the entry of the added complainants into the suit are barred by Sec. 111.07(14), Stats.

Complainants

Complainants' response for the most part addresses the Association's contentions regarding the proper interpretation of Sec. 111.70(1)(f), Stats.

Regarding the need to object, Complainants point out that the original complaint filed in Circuit Court by the named plaintiffs was also filed "on behalf of all others similarly situated" and alleged that the unions had spent and would continue to spend a portion of their fair-share fees "over their objections for purposes unrelated to collective bargaining . . . " This was the same allegation made in Browne where the Wisconsin Supreme Court held the case could proceed as a class action:

> ". . . the complaint alleges that all non-union employees in the class object to the deduction of fees from their wages. There is no allegation that the plaintiffs represent all non-union employees, but only those similarly situated, whoes (sic) numbers are in excess of 150. We conclude that this complies with the class action statute, Sec. 260.12 stat. . .
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> "The union also argues that . . . class action could not be maintained because recovery was available only to those employees who had objected to the use of the funds deducted for political purposes.

". . . the complaint specifically alleges that the plaintiffs had objected."

69 Wis.2d at 182. The Court went on to note that the issue of whether plaintiffs represented a substantial class could be decided later in the trial.

In its later decision in Browne, the Court held that MERA is interpreted

"so that only money for constitutional purposes can be collected under it . . . the statute itself forbids the use of fair share funds for purposes unrelated to collective bargaining or contract administration."

83 Wis.2d at 330-31. In Allen the U.S. Supreme Court required that plaintiffs object to the use of their dues for political purposes in order to be entitled to relief, but found that they had made their objection known by filing the complaint and that was early enough. 373 U.S. at 118. In Street the Court found it sufficient that plaintiffs had made their objection known in the course of that action. 367 U.S. at 771. Therefore, a prior objection is not required in order to obtain relief. An objection is only required in order to identify who is entitiled to relief and does not determine the period for which relief is to be granted.

Regarding whether Sec. 111.70(1)(f), Stats., provides for a fair-share fee equivalent to dues, the Complainants assert that the wording of the statute makes clear the legislature's intent to avoid constitutional infirmities. The statute provides for the union to compute the proportionate share of the costs of collective bargaining and contract administration and to apply that proportion to the dues amount to compute the amount that it may deduct as a fair-share fee. This interpretation gives effect to all of the parts of the provision and does not bring about a constitutional infirmity. The statute clearly establishes an "advance reduction of dues" such as was suggested in Ellis v. Railway Clerks, 104 S. Ct. 1883 (1984) as an alternative to rebate schemes.

Complainants also respond that the Respondent Associations' attempt to distinguish the rights of the fifty-six complainants added by the class action from those of the seven original complainants on the basis of the one year statute of limitations is contrary to the Circuit Court's order and notice of pendency of a class action in this case. Complainants cite the following from the Court's order issued on October 19, 1977 where it stated that this case

". . . may be maintained as a class action consisting of all former and current 'Fair Share' teacher employees of the Milwaukee School Board as of January 1, 1973 and subsequent thereto who notify the Court in writing that they wish to be included as a class member no later than December 31, 1977."

On that same date the Circuit Court issued its "Notice of Pendency of Class Action" stating that the purpose of the notice was

". . . to inform you of this class action lawsuit, thus enabling you to make an informed decision on whether or not you wish to participate." (Emphasis added by Complainants.)

The notice also informed the potential class members that the Court

". . . has referred this case to the Wisconsin Employment Relations Commission (WERC) for determinations on whether any of the 'Fair Share' payments contravened the statutory restrictions. The Defendant unions have the burden of showing that all or a part of the 'Fair Share' payments are for collective bargaining and contract administration. Any amounts not so proved will be rebated to members of the class." (Emphasis added by Complainants.)

The Court did not qualify or mention any limitation on the class members' right to recover any improper expenditures. The protest of the members was established

when the complaint was filed. The purpose of the Notice of Pendency of Class Action was to establish the identity of the class.

Discussion Regarding Motion For Partial Summary Judgement

The Respondent Associations have moved that the complaint should be dismissed against NEA and WEAC as to those complainants who joined the suit in 1977 pursuant to the order and notice of class action. They offer essentially two bases for their motion: (1) That since those individuals never notified NEA and WEAC that they objected to the use of their fair-share fees for purposes unrelated to collective bargaining or contract administration, they have no cause of action against those Associations, and (2) that since they joined the action in 1977, more than three years after the MTEA was no longer affiliated with NEA and WEAC, the claims of those additional complainants against NEA and WEAC are barred by the one year statute of limitations, Sec. 111.07(14), Stats.

Both the Respondent Associations and Complainants have made a number of arguments regarding whether a fair-share payor must inform the union of his/her objection in order to establish a claim under MERA. The Commission decided that issue in its decisions in Browne and Johnson v. Milwaukee County 14/ and Joint School District No. 3, Village of Hartland and accompanying cases. 15/ Relying on the Supreme Court's decision in Hudson, we concluded in Browne and Johnson that dissent is required under MERA:

> We note first that it is now clear that, assuming adequate prior notice and disclosure by the union, in order to trigger his/her First Amendment rights, the fair-share fee payor must make his/her dissent known to the union.
>
> In its decision in Hudson the Court expressly stated:
>
> In Abood, we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof:
>
> . . .
>
> Hudson, 106 S.Ct. at 1075. Further, at Note 16 the Court pointed out:
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> > The nonmember's "burden" is simply the obligation to make his objection known. See Machinists v. Street, 367 U.S. 740, 774 (1961) ("dissent is not to be presumed - it must be affirmatively made known to the union by the dissenting employee"); Railway Clerks v. Allen, 373 U.S. 113, 119 (1963); Abood supra, 431 U.S., at 238.
>
> 106 S.Ct., at 1076.
>
> It is clear from the Court's statements that regardless of whether it is a matter of construing the Railway Labor Act (RLA), or a matter of an employe's First Amendment rights, the employe has the burden of making his/her objection known before the statutory or constitutional restrictions on the amount of the agency fee a union may collect will apply, assuming the employe has been given adequate prior notice and disclosure as to the amount of the fee. Thus, assuming adequate prior disclosure by the union, if a fair-share fee payor

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14/ Dec. No. 18408-G, 19545-G (WERC 4/87) at p. 34-5, 37.

15/ Dec. No. 18577-D, 18578-D, 19307-D, 20081-E, 19467-F (WERC, 9/87) at p. 36-7.

> does not inform the union of his/her objection, that fee payor will not be entitled to complain as to the amount of the fee being collected, nor will he/she be entitled to the benefit of the impartial decisionmaker's determination.
>
> As to the Complainants' contention that MERA does not require a fair-share fee payor to object in order that the statutory limitation on the amount of the fee apply, we do not read either the statute or the Wisconsin Supreme Court's decision in Browne as requiring or intending such a result. This conclusion is supported by the legislative history of Sec. 111.70(1)(f), Stats.
>
> . . .
>
> We have reviewed both the Court's decision in Browne and the language of Secs. 111.70(1)(f) (formerly Sec. 111.70(1)(h)) and 111.70(2), Stats., and have not found any basis in either the decision or MERA for distinguishing MERA from the First Amendment as to the need for nonmembers to make their dissent known to the union. Therefore, assuming adequate prior notice and disclosure by the union, a fair-share fee payor who does not make his/her dissent known to the union is not entitled to the benefit of the determination by the impartial decisionmaker.

Browne at 34-35, 37.

While we held that it is necessary for the fair-share payor to have made his/her objection known to the union in order to find a violation of MERA, we also held that the requirement of making one's objection known to the union is premised on the union's having provided adequate prior notice and financial disclosure to the fair-share payors, as held by the court in Hudson to be constitutionally required. Having held in Browne and Joint School District No. 3, Village of Hartland that Hudson applies retroactively, 16/ the requirement that the fair-share payor's dissent be made known to the union in order to have a cause of action against the union, would not be held to apply unless the Associations can establish that they had provided the fair-share payors in the bargaining unit with adequate notice of their right to dissent and disclosure of the Associations' expenditures for the period in question. Therefore, the alleged failure of the additional complainants to inform the Associations at the time that they objected to the use of their fees for purposes unrelated to collective bargaining or contract administration is not by itself determinative and cannot, at this point, be the basis for dismissing the complaint as to Respondent NEA and WEAC.

The Respondent Associations also contend that the additional complainants' claims against them are barred by Sec. 111.07(14), Stats. That provision provides as follows:

> (14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

Section 111.70(4)(a), Stats., makes the above statute of limitations provision applicable to complaints of prohibited practices arising under MERA.

While Sec. 111.07(14), Stats., would apparently be the applicable statute of limitations since violations of MERA are alleged, Wisconsin rules of civil procedure would also be applicable as it was the Circuit Court, and not this administrative agency, that held that this case could proceed as a class action.

16/ Browne, Dec. No. 18408-G at 81; Village of Hartland, Dec. No. 18577-D at 71.

As the Associations note, in Korkow the Wisconsin Supreme Court held that the statute permitting the relation back of amendments to the original filing applied to an amendment adding plaintiffs after the statute of limitations had run. Specifically, the Court held:

> The evident purpose behind sec. 802.09(3), Stats., like the purpose behind Federal Rule 15(c), is to ameliorate the effect of the statute of limitations in situations where the original pleadings provided fair notice to the opposing party of the claim or defense raised. 6 C. Wright and A. Miller, Federal Practice and Procedure, sec. 1496 (1971). There is nothing in either the language or the purpose of the rule evidencing its inapplicability to amendments changing plaintiffs. Provided a defendant is fully apprised of a claim arising from specified conduct by the original pleading, his ability to protect himself will not be prejudicially affected if a new plaintiff is added and he should not be permitted to make a statute of limitations defense.
>
> The basic test for whether an amendment should be deemed to relate back is the identity of transaction test, i.e., did the claim or defense asserted in the amended pleading arise out of the same transaction occurrence or event set forth in the original pleading. If this test is satisfied, relation back is presumptively appropriate.
>
> Although sec. 802.09(3), Stats. states the general rule for relation back of amendments, there may be situations where simple compliance with the letter of the relation back statute does not adequately protect a party's rights and therefore should not be permitted. In considering questions of relation back of amended pleadings under the pre-1976 rules, this court has recognized the discretionary power of the trial court to deny a party leave to amend its pleadings when permitting an amendment to relate back would result in unfairness, prejudice or injustice to the other party. Wussow, 97 Wis.2d at 148; Drehmel, 75 Wis.2d at 249. Under the current rules, the trial court has discretion to grant leave to amend at any stage of the action when justice so requires. Section 802.09(1), Stats. When unfairness, prejudice or injustice is asserted, the question for the trial court is whether the party opposing amendment has been given such notice of the operative facts which form the basis for the claim as to enable him to prepare a defense or response.
>
> . . .
>
> The purpose of statutes of limitations is to ensure prompt litigation of claims and to protect defendants from fraudulent or stale claims brought after memories have faded or evidence has been lost. Gutter v. Seamandel, 103 Wis.2d 1, 24, 308 N.W.2d 403 (1981); Armes v. Kenosha County, 81 Wis.2d 309, 319-320, 260 N.W.2d 515 (1977). This purpose is accomplished by requiring that parties be given formal and seasonable notice that a claim is being asserted against them. If a party is given fair notice within the statutory time limit of the facts out of which the claim arises, as General Casualty was, it is not deprived of any protections the statute of limitations was designed to afford. The complaint filed on April 7 gave General Casualty formal and timely notice of the initiation of an insurance claim arising out of the November 5 fire. The purposes of the statute of limitations are not offended by deeming the action to have been commenced at that time and permitting the amendment adding Gerald Korkow's claim to relate back to that date.

117 Wis.2d 196-199. (Emphasis added)

Applying the above test to this case, it appears that the claims of the additional complainants would be allowed to relate back to the date of the original filing of the complaint. The Commission having held that Hudson is to be given retrospective effect, the Associations would have to establish that they had provided adequate notice and disclosure to the fair-share payors in the bargaining unit and had the requisite fair-share procedures in place during the period in question in order to have been entitled to deduct fair-share fees from any of the complainants in this case at that time. The filing of the original complaint put the Associations on notice that their taking and spending of fair-share fees in the unit at the time was being challenged. Although their potential liability is expanded, the Associations' ability to defend against the challenge is not prejudiced by permitting the claims of the additional complainants to relate back. The Associations' expenditures for the time period and their fair-share procedures at the time and their ability to prove them are not changed by the additional claims that are identical to those of the original complainants. 17/ Moreover, as Complainants note, there is no limitation mentioned in the Circuit Court's order or notice that would preclude added class members from asserting their claims for the same period as the original complainants claim.

On the basis of the above, we have concluded that the Respondent Associations' Motion for Partial Summary Judgement against those complainants other than the seven original complainants must be denied.

Dated at Madison, Wisconsin this 2nd day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

17/ Thus, even if Sec. 802.09(3), Stats., was held not to apply due to the original action having been commenced prior to the effective date of that provision, relation back would be permited since the cause of action was not changed by the addition of the new complainants via the class action. Drehmel v. Radandt, 75 Wis.2d 223, 228-229 (1977). Cf. Achtor v. Pewaukee Lake Sanitory District, 88 Wis.2d 658, 662 (1979).