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, and 57 other named individuals, 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 Dec. No. 18408-G
WALTER J. JOHNSON, MARSHALL M. SCOTT, GERALD LERANTH, OLIVER J. WALDSCHMIDT, ERNA BYRNE, CHRISTINA PITTS, MILDRED PIZZINO, JOHN P. SKOCIR, HELEN RYZNAR, ANNABELLE WOLTER, CHERRY ANN LE NOIR, DORIS M. PIPER, LYNN M. KOZLOWSKI, EDWARD L. BARLOW, IRVING NICOLAI, and ANNE C. TEBO, and the 12 additional complainants whose joinder was moved 11-16-83 and not opposed by Respondents, Complainants, vs. COUNTY OF MILWAUKEE, a body Corporate; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, and JOSEPH ROBISON, its Director; LOCAL 594, AFSCME, affiliated with District Council 48; LOCAL 645, AFSCME, affiliated with District Council 48; LOCAL 882, AFSCME, affiliated with District Council 48; LOCAL 1055, AFSCME, affiliated with District Council 48; LOCAL 1654, AFSCME, affiliated with District Council 48; and Local 1656, AFSCME, affiliated with District Council 48, Respondents.	Case 161 No. 29581 MP-1322 Dec. No. 19545-G

Appearances:

Mr. Raymond J. LaJeunesse, Jr., National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, Virginia, 22160, on behalf of the Complainants.

Davis & Kuelthau, S.C., by Mr. David J. Vergeront, First Savings Plaza, Suite 1800, 250 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202, on behalf of the Complainants in Browne.

Lindner & Marsack, S.C., by Mr. Charles P. Stevens, 700 North Water Street, Milwaukee, Wisconsin, 53202, on behalf of the Complainants in Johnson.

Kirschner, Weinberg & Dempsey, Attorneys at Law, by Mr. Larry P. Weinberg and Mr. John J. Sullivan, 1615 L Street, N.W., #1360, Washington, D.C., 20036 and Zubrensky, Padden, Graf & Maloney, Attorneys at Law, by Mr. James P. Maloney, 828 North Broadway, Suite 410, Milwaukee, Wisconsin, 53202, on behalf of Respondent American Federation of State, County and Municipal Employees, AFL-CIO.

Lawton & Cates, Attorneys at Law, by Mr. John H. Bowers, 214 West Mifflin Street, Madison, Wisconsin, 53703, on behalf of Respondent District Council 48 and the Respondent Locals.

Mr. Stuart S. Mukamal, Assistant City Attorney, Office of City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin, 53202, on behalf of Respondent Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainants in Browne, having, on April 22, 1986, filed a request that, in light of the U.S. Supreme Court's decision on March 4, 1986 in Chicago Teachers Union v. Hudson, 106 S.Ct. 1066 (1986), hereinafter Hudson, after hearing, the Commission make final findings of fact, conclusions of law and order in the matter, along with their proposed findings, conclusions and order and supporting argument; and on April 23, 1986 the Complainants in Johnson having filed a similar request with the Commission along with proposed, findings, conclusions and order and supporting argument; and the Commission having on May 9, 1986 issued its Order to Show Cause and Notice of Hearing in each of these cases and on the same date having issued an Order Temporarily Consolidating Cases wherein it ordered these cases consolidated for purpose of hearing on the matters raised in the Orders to Show Cause; and Respondent Unions having, on May 27, 1986, filed their respective Responses to Order to Show Cause; and hearing having been held in the matters of the Orders to Show Cause on May 30, 1986 before the full Commission 1/ in Madison, Wisconsin; and prior to the close of the hearing on May 30, 1986 Complainants in Browne and Johnson having moved that the Commission order Respondent Unions to: (1) immediately reduce Complainants' fair-share fees by the percentage the Respondent Unions conceded is not chargeable to dissenting fair-share fee payors and escrow the balance of Complainants' fair-share fees from the date of the U.S. Supreme Court's decision in Hudson, (2) pay interest at the statutory rate on the stipulated refunds for the period prior to January 1, 1983, and (3) to submit the refunds to the Complainants in Johnson pursuant to the stipulation of the parties in Johnson; and the Respondent Unions having objected to said motions by Complainants; and the Commission having granted Complainants' first motion, and denied the rest, and ordered the Respondent Unions, effective from March 4, 1986, to immediately refund to Complainants the percentage portion of their fair-share fees that the Respondent Unions concede is nonchargeable to dissenters and to immediately begin advance rebating their fees in the same amount and to escrow or place in a separate interest-bearing account the remainder of their fees, which account is not to be drawn upon or in any way spent until further ordered by the Commission; and a stenographic transcript having been made of said hearing; and Complainants in these cases having, on July 10, 1986, filed a post-hearing brief in support of their position on the matters raised at hearing, along with Supplemental Proposed Findings of Fact and Conclusions of Law; and Complainants having, on July 14, 1986, filed a request with the Commission that the transcript of the May 30, 1986 hearing be corrected to which request Respondents have not objected; and the Respondent Unions in these cases having, on July 28, 1986, filed a post-hearing brief in support of their position on the matters raised at the May 30, 1986 hearing; and the Complainants [illegible] and the Respondent Unions having, on August 21, 1986, filed

1986, filed a Reply to Respondent Unions' Response to Complainants' Motion to Supplement the Record (and Opposition to the Respondent Unions' Request to Supplement the Record); and the Complainants in Browne and Dorothy A. Koch having, on December 15, 1986, filed a Motion for Intervention of Dorothy A. Koch and Amendment of Complaint and the Affidavit of Koch, pursuant to Sec. 111.70(2)(a), Stats., and ERB 10.12(2) and 12.02(5)(a), Wis. Adm. Code; and the parties having been given until January 5, 1987 to file a response to said motion to intervene and amendment of complaint, and none having been received; and the parties having continued throughout to submit additional argument and case law in support of their respective positions; and the Commission having considered the record, the applicable statutory law and case law and the arguments of the parties;

NOW, THEREFORE, the Commission makes and issues the following:

FINDINGS OF FACT 1A/

1. That at all times material herein, Complainants Phyllis Ann Browne, Beverly Engelland, Eleanore Peliska, Betty C. Bassett, Yetta Deitch, Virginia Lamberger, Donna Schlaefer, Katherine L. Hanna, Lorraine Teske, Judith D. Berns, Ninette Sunn, Mary Martinetto, Charlotte M. Schmidt, and Esther Palsgrove, have been, and are, individuals residing in Wisconsin; that the aforesaid individual Complainants are representative of a class of 57 employes, identified in the Amended Complaint filed on September 18, 1978 and employed in the bargaining unit involved herein, all of whom, at all times material, were not, and are not, members of Respondent Local 1053, and which employes on February 1 and March 30, 1972 protested to the Respondent Board and to Respondent Local 1053 with respect to the compulsory exaction from their wages sums of money for fair-share deductions, any portions thereof which had been, or which were to be, used for purposes other than collective bargaining and contract administration; and that the 57 individuals who joined the suit via the class action did so by December 31, 1977 pursuant to the October 19, 1977 Order of the Milwaukee County Circuit Court.

2. That the Respondent Milwaukee Board of School Directors, hereinafter referred to as the Respondent Board, is a municipal employer and operates a K through 12 school system in Milwaukee, Wisconsin, and has its offices at 5225 West Vliet Street, Milwaukee, Wisconsin.

3. That the Respondent American Federation of State, County and Municipal Employees, hereinafter referred to as Respondent AFSCME, is a labor organization and has its principal offices at 1625 L Street, N.W., Washington, D.C.

4. That the Respondent District Council 48, AFSCME, hereinafter referred to as Respondent District Council 48, is a labor organization chartered by AFSCME and has its offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin; that Respondent John Parr, hereinafter referred to as Parr, is the Director of District Council 48, and Parr maintains his office at 3427 West St. Paul Avenue, Milwaukee, Wisconsin; and that Respondent Joseph Robison preceded Parr as Director of District Council 48.

5. That the Respondent Local 1053, AFSCME, hereinafter referred to as Respondent Local 1053, is a labor organization, subordinate to and affiliated with Respondents AFSCME and District Council 48 and has its offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin; and that Respondents Margaret Silkey and Florence Tefelske, hereinafter referred to as Silkey and Tefelske, 2/ are respectively President and Treasurer of Local 1053, and they maintain their offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

1A/ Findings of Fact 1, 2 and 5 through 23 are made as to Browne, Findings of Fact 3 and 4 are made as to both Browne and Johnson, and Findings of Fact 24 through 38 are made as to Johnson.

2/ Any reference hereinafter to Silkey and Tefelske are intended to include said individuals, and their successors in office, in their representative capacities unless the context implies or requires a different meaning.

6. That the fourteen (14) named Complainants designated in Finding of Fact 1 brought suit in Milwaukee County Circuit Court on June 4, 1973 on behalf of themselves and similarly situated non-union employes; that the complaint filed in said suit challenged the constitutionality, facially and as applied, of Secs. 111.70(1)(h) (now (f)) and (2), Stats., authorizing fair-share agreements between Respondent Board and the Respondent Unions; and that Complainants' suit was ordered referred to the Commission as a class action; and that the amended complaint in this case was filed with the Commission on September 18, 1978.

7. That at all times material herein the Respondents District Council 48 and Local 1053 have represented employes of the Board in a bargaining unit consisting of secretarial, clerical and technical employes, for the purposes of collective bargaining on wages, hours and conditions of employment; that at all times material herein the individual Complainants identified in Finding of Fact 1 have been employed in said bargaining unit; and that Respondent Local 1053 and the Respondent Board have been parties to successive collective bargaining agreements covering the wages, hours and conditions of employment of the employes in said bargaining unit.

8. That on March 9, 1972 Respondent Local 1053 and the Respondent Board entered into their initial fair share agreement, effective March 1, 1972, which provided in relevant part that all employes in the bargaining unit:

> who have completed sixty calendar days of service and are not members of the Union, shall be required, as a condition of employment, to pay to the Union each month a proportionate share of the cost of the collective bargaining process and contract administration. Such charge shall be deducted from the employe's paycheck in the same manner as Union dues and shall be the same amount as the Union charges for regular dues, not including special assessments or initiation fees.

9. That since entering into said agreement Respondent Local 1053 and the Respondent Board have entered into successor agreements containing a similar provision; and that the agreement in existence at the time of the Stage 1 hearing herein contained language identical to that noted above, except that an additional condition was included affecting the application of such provision - namely that such deductions would be limited to only those employes in the unit who had not only completed 60 days of service, but who also were compensated for 20 or more hours in a biweekly pay period.

10. That, pursuant to said fair share agreements, the Respondent Board has deducted from the wages of employes in the bargaining unit covered by the aforesaid agreements, who are not members of Respondent Local 1053, sums of money denominated as fair-share deductions, in the same amounts as the amounts of dues paid by members of Respondent Local 1053, and has transmitted said sums to Respondent District Council 48, which has transmitted a portion of said sums to Respondent Local 1053 and to Respondent AFSCME, as well as to the Wisconsin State AFL-CIO, the Milwaukee County Labor Council, and to the Wisconsin Coalition of American Public Employees (CAPE), all consisting of organizations, which have among their affiliates various labor organizations representing employes throughout the State of Wisconsin.

11. That during the course of the Stage I proceeding in Browne the parties agreed that Respondents AFSCME, District Council 48 and Local 1053, hereinafter collectively referred to as Respondent Unions, directly or indirectly, expend sums of monies from membership dues, as well as from fair-share exactions from the earnings of Complainants and other non-member employes of the Respondent Board employed in the collective bargaining unit in which Complainants are employed, for certain activities engaged in by said Respondent Unions, their officers and agents, with respect to the bargaining unit in which Complainants are employed, as well as with respect to other bargaining units and work locations where employes other than Complainants are employed, which activities are set forth in paragraph 11 of our Initial Findings of Fact in Browne and incorporated herein by reference; that certain of the activities of said Respondent Unions, their agents and officers, and the expenditures of said Respondent Unions for such activities, do not relate to the Respondent Unions' representational interest in the collective bargaining process or to the administration of collective bargaining agreements, which activities are set forth in paragraph 12 of our Initial Findings of Fact in Browne and incorporated herein by reference; that

certain of the activities of Respondent Unions, their officers and agents, and the expenditures of the Respondent Unions for such activities, relate to the Respondent Unions' representational interest in the collective bargaining process or to the administration of collective bargaining agreements, which activities are set forth in paragraph 13 of our Initial Findings of Fact in Browne and incorporated herein by reference; and that certain of the activities of the Respondent Unions, their officers and agents, and the expenditures of the Respondent Unions for such activities, in part relate, and in part do not relate, to the Respondent Unions' representational interest in the collective bargaining process or to the administration of collective bargaining agreements, which activities are set forth in paragraphs 14, 15 and 16 of our Initial Findings of Fact in Browne and incorporated herein by reference.

12. That in their respective Responses to Complainants' Request for Admissions filed in Browne, 3/ Respondent Unions and Respondent Board admit that at no time since Respondent Unions and the Respondent Board entered into their initial fair-share agreement has the agreement provided, or required Respondent Unions to provide, any procedures to ensure that nonunion employees pay fair-share fees only for the cost of the collective bargaining process and contract administration.

13. That in their respective Responses to Complainants' Request for Admissions filed in Browne, Respondent Unions and Respondent Board admitted that since Respondent Local 1053 and Respondent Board entered into their initial fair-share agreement, and up until Respondent District Council 48's procedures in response to the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson were implemented on May 23, 1986, the procedure set forth in Article IX, Section 10 of the AFSCME International Constitution, as amended at the 24th International Convention, June 9-13, 1980, has been the only procedure that Respondent Unions have provided by which employees could receive any relief from the payment of fair-share fees in the amount that Respondent Unions charge for regular dues; that said procedures, as amended in 1980, provided as follows:

ARTICLE IX
Subordinate Bodies

> **Section 10.** Any member, or any other person making service or similar payments to a local union in lieu of dues under agency shop or similar provisions, who objects to the expenditure of any portion of such payments for partisan political or ideological purposes shall have the right to dissent from such expenditures. The amount of the union's expenditures for such purposes shall be determined annually in the following manner. For the International Union, the International Secretary-Treasurer shall by April 1 each year ascertain the total expenditures of the described kind during the preceding fiscal year, and shall determine therefrom mathematically the portion of per capita payment or its equivalent which is subject to rebate. For each council and local union which has made expenditures of the described kind, its chief fiscal officer shall make like calculations by April 1 or, if some other date is more appropriate to the council or local fiscal year, then by such other year. An objector shall file written notice of an objection by registered or certified mail with the International Secretary-Treasurer between April 1 and April 16 of each year, stating those subordinate bodies to which dues or service fee payments have been made. An objection may be renewed from year to year by written notification to the International Secretary-Treasurer during the stated period each year. Each year, during February, the International Union shall set forth in its regular publication a description of this system including the dates within which notice of objection must be filed.

3/ Respondent Unions' Response to Complainants' Request for Admissions filed in Browne on May 30, 1986 and Respondent Board's Response to same filed on May 22, 1986.

If a law authorizing an agency shop or similar service fee requires a rebate based on criteria other than those set forth above and if the required criteria would result in the rebate of a larger portion of the fee paid, this Section shall be applied so as to insure that the larger amount is rebated to any objector paying an agency shop or similar service fee under such law.

The International Secretary-Treasurer shall transmit each objection received to the chief fiscal officer of each involved subordinate body. Rebates shall be provided by registered or certified mail, or otherwise receipted delivery, by the International Union and each involved subordinate body to each individual who has timely filed a notice of objection, as provided herein.

If an objector is dissatisifed with the proportional allocation that has been established on the ground that assertedly it does not accurately reflect the expenditures of the International Union or subordinate body in the defined areas, an appeal may be taken to the Judicial Panel. Any such appeal must be filed in writing within fifteen days of receipt of the rebate check from which appeal is made. If an appeal has been timely filed, the Judicial Panel shall schedule a hearing under the rules of procedure of the Judicial Panel. The decision of the Judicial Panel on such appeal shall be issued within a reasonable time. If an objector is dissatisfied with the decision of the Judicial Panel, a further and final appeal may be taken as follows: An AFSCME member who has proceeded through the preceding steps and who wishes to do so may appeal the decision of the Judicial Panel to the next International convention. A non-member who has paid a service or similar fee and has proceeded through the preceding steps and who wishes to do so may appeal the decision of the Judicial Panel to the Review Panel established in Article XII. Any appeal to the Review Panel must be filed in writing within fifteen days of receipt by the non-member of the decision of the Judicial Panel. The Review Panel shall decide such appeals, as expeditiously as possible consistent with the right of an appellant to a full and fair proceeding. 4/;

that the "Review Panel" referred to in ARTICLE IX is provided for in ARTICLE XII of Respondent AFSCME's Constitution, as amended by the 24th International Convention, June 9-13, 1980:

ARTICLE XII

The Review Panel

Section 1. In order to ensure objective disposition of complaints by non-members about rebates of sums paid to the unions under agency shop or similar provisions, there shall be established a Review Panel composed of prominent citizens who are not otherwise a part of or employed by AFSCME.

Composition

Section 2. The Review Panel shall consist of not more than five members, including the Chairperson. The International President shall, with the approval of the International Executive Board, designate the members, including the Chairperson of the initial Review Panel. Thereafter, whenever a vacancy

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4/ Exhibit 1 to Affadavit of William Lucy, Secretary-Treasurer of AFSCME, filed on November 5, 1982, and Respondent AFSCME's Answer to Amended Complaint filed in Browne.

shall occur on the Review Panel, said vacancy shall be filed by the International President, with the approval of the International Executive Board, from a list of names submitted by the remaining members of the Review Panel.

Authority **Section 3.** The Review Panel shall have the authority and power to make final and binding decisions in non-member rebate cases appealed to it from the Judicial Panel, as provided in Article IX, Section 10.

Rules of procedure **Section 4.** The Review Panel shall formulate such rules of procedure and establish such practices as it finds necessary to its proper functioning.

Report **Section 5.** The Review Panel shall submit to the International Executive Board an annual report of its activities, which report shall contain a summary of all cases brought before the Panel during that year. Copies of this annual report shall be available on requests to all members and non-members subject to an agency shop or similar provision.

Expenses **Section 6.** The expenses of the Review Panel shall be provided for by the International Secretary-Treasurer, who shall establish the necessary bank account(s), and shall deposit therein such sums as are designated by the International Executive Board semi-annually. The International Executive Board shall designate the necessary sums on the basis of a budget submitted to it by the Review Panel. The Chairperson of the Review Panel shall have its books and financial record audited annually, and such audits shall be submitted to the International Secretary-Treasurer and through the Secretary-Treasurer, to the International Executive Board. For the purpose of ensuring the impartiality and independence of the Review Panel, the budget shall be approved unless grossly excessive. 5/;

and that the procedures set forth in Article IX, Sec. 10, and Article XII of Respondent AFSCME's Constitution, as amended in 1980, did not provide for a reasonably prompt decision by an impartial decisionmaker with regard to the proper fee to be charged to a dissenting fair-share fee payor.

14. That in their respective Responses to Complainants' Request For Admissions filed in Browne, Respondent Unions and Respondent Board admitted that at no time since Respondent Unions and the Respondent Board entered into their initial fair-share agreement and prior to May 23, 1986, have Respondent Unions disclosed to all nonmembers in the collective bargaining unit involved in this proceeding, in advance of objection, an accounting of Respondent Unions' expenditures, with verification by an independent certified public accountant, or a breakdown of their expenditures for collective bargaining and contract administration.

15. That in Response to Complainants' Request For Admissions filed in Browne, Respondent Unions and Respondent Board admitted that at no time prior to the May 30, 1986 show-cause hearing in this case have either the Respondent Board

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5/ Ibid.

or Respondent Unions escrowed any of the fair-share deductions made from the earnings of the Complainants and class members in this proceeding. 6/

16. That on May 23, 1986, the Respondent District Council 48 promulgated to all fair-share fee payors in bargaining units it represents, including the bargaining unit in which Complainants are, or have been, employed, the "Notice to All Nonmember Fairshare Payors" attached hereto as "Appendix A" and incorporated herein by reference; that, in summary, said "Notice" provides:

a) A listing of the activities the Respondent Unions view as "chargeable" to dissenting fair-share fee payors (Appendix A, pp. 1-2);

b) A listing of the activities the Respondent Unions view as not chargeable to dissenting fair-share fee payors (Appendix A, pp. 2-3);

c) A listing of the audited totals for the major categories of expenses of Respondent AFSCME for the fourth quarter of 1985 and unaudited total expenses Respondent AFSCME views as chargeable in those categories to dissenting fair-share fee payors (Appendix A, pp. 3-4);

d) A listing of Respondent District Council 48's total for expenditures for the period of November 1, 1984 to October 31, 1985, which figure of $994,126.72 has been verified by an independent auditor, and the various accounts of expenses listed by their accounting code with the audited totals for those accounts and unaudited breakdowns of those account totals into chargeable and nonchargeable amounts by activity categories, as well as a breakdown of the time spent by Respondent District Council 48's employes (other than its clerical employes) in chargeable and nonchargeable activities (Appendix A, pp. 4-14);

e) A statement as to the expenses of the local unions affiliated with Respondent District Council 48 that they had total expenses of $598,761.47 and that "In accordance with decisions of the federal courts on the question of how local union expenditures may be allocated for the purpose of determining a fair-share fee, Council 48 has determined that the percentage of chargeable activities of these local unions is at least as great as the percentage of chargeable activities of Council 48." (Appendix A, p. 14);

f) A procedure for "objecting" to the Respondent Unions' use of the non-member's fair-share fee for activities that Respondent District Council 48 has determined to not be chargeable to dissenters, which procedure provides for a monthly payment of an advance rebate to the "objector" in an amount "equal to the difference between the fees collected from the objecting non-member and that portion of the dues or fees found chargeable by AFSCME Council 48 in accordance with the calculation set forth in this Notice." (Appendix A, pp. 14-15);

g) A procedure for "challenging" Respondent District Council 48's calculation of "chargeable" versus "non-chargeable" expenses, which procedure calls for a "challenger" to file a "charge" with the Wisconsin Employment Relations Commission if the Commission asserts jurisdiction over challenges and that if it does not, Respondent District Council 48 will follow the

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6/ Our findings in Findings of Fact 12 through 15 are also based on the Answer to Amended Complaint "Second Defense," paragraphs 28 through 35, dated October 9, 1978 and filed by Respondents District Council 48 and Local 1053; and the Answer to Amended Complaint, "First Affirmative Defense," paragraphs 1 through 7 and "Second Affirmative Defense," paragraphs 8 through 11, dated October 9, 1978 and filed by Respondent AFSCME.

arbitration procedures set out in the notice before an arbitrator selected by the American Arbitration Association, and that in either case the challenger's fair-share fees will be placed in an "interest-bearing escrow account" effective from March 4, 1986 and the escrowed figures will be independently verified and the fees will be distributed upon issuance of, and pursuant to, the arbitrator's ruling; and that said calculations and procedures are to cover the period from March 4, 1986 through June 30, 1987.

17. That in response to Hudson, on April 30, 1986 Respondent AFSCME's International Executive Board held a special meeting, at which a resolution was adopted directing Respondent AFSCME to create agency fee procedures to comply with Hudson; that Respondent AFSCME created a new agency fee procedure in response to the Executive Board's directive (attached hereto as "Appendix B"); that at the time of the May 30, 1986 hearing in these cases the Executive Board had not yet adopted said procedure through resolution and said procedure was still subject to amendment; that Respondent AFSCME's counsel, Sullivan, testified, and the AFSCME procedures indicate, that the agency fee procedures of a council or local affiliated with Respondent AFSCME must be consistent with the procedure adopted by Respondent AFSCME; and that the agency fair-share fee procedure applicable to Complainants is that which is provided by Respondent District Council 48.

18. That while the "Notice to all Nonmember Fairshare Payors" distributed by Respondent District Council 48 refers to filing a "charge" with the Commission as a possible procedure for challenging the Respondent Unions' calculation of the fee amount, Parr testified at the May 30, 1986 hearing that the Respondent Unions would not require that a charge or complaint be filed, but would instead request that the Commission provide an arbitrator or a panel of arbitrators to be the impartial decisionmaker to determine the proper fee amount.

19. That the Respondent Unions in fact have not required that "challengers" file a "charge" with the Commission to challenge the fee amount, but instead their counsel, Attorney Bowers, made the following request to the Commission by letter dated July 17, 1986:

> Wisconsin Employment Relations Commission
> P.O. Box 7870
> Madison, WI 53707-7870
>
> Attention: Peter G. Davis, General Counsel
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> Re: Impartial Determination of Challenges to Fair Share Fees
>
> Dear Mr. Davis:
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> On behalf of the Respondent Unions in the above Arbitration matter, we hereby request the Wisconsin Employment Relations Commission to appoint an impartial arbitrator for the determination of the challenges to the fair share determinations of the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), AFSCME Council 48, and the AFSCME local unions affiliated with Council 48 and who are named respondents to the above Arbitration matter.
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> Under the procedures developed by AFSCME, and AFSCME District Council 48, in response to the decision of the United States Supreme Court in Chicago Teachers Union, Local 1 v. Hudson, 106 S.Ct. 1066 (1986), all challenges to the amount of the fair share fees will be consolidated into a single proceeding, including all challenges to the fair share fee of the local unions affiliated with District Council 48.
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> Given the nature and complexity of the issues in this proceeding, the Respondent Unions request that the WERC appoint an impartial arbitrator with substantial public sector experience. In view of time constraints, the arbitrator selected should be able to begin the hearing in this proceeding on September 10, 1986. Due to the importance of resolving these challenges in a reasonably prompt manner, the

arbitrator should be able to issue an award with a supporting decision within 120 days of June 27, 1986, the close of the challenge period, which is October 27, 1986.

When the arbitrator is selected by the WERC, the Respondent Unions, by counsel, will supply the parties and the arbitrator with a statement of the issues to be decided in the arbitration together with a list of the names and addresses of all of the challengers.

If there are any questions concerning this matter, please feel free to contact me at my office.

Very truly yours,

JOHN H. BOWERS;

that Complainants' counsel, Attorney LaJeunesse, objected to the Commission providing such an arbitrator; that the Commission initially appointed Morris Slavney as the independent arbitrator and notified the parties' counsel of the appointment by letter of July 23, 1986; that on September 11, 1986, Slavney sent a "Notice of Hearing" to those who had "challenged" the Respondent Unions' computation of the fair-share fee, which notice indicated the hearing would be held on September 24, 1986 in Milwaukee, Wisconsin, with additional dates if it was necessary to continue the hearing; that by the following letter dated September 11, 1986 counsel for Respondent Unions advised the "challengers":

Dear Sir or Madam:

You should by now have received notice of hearings in the above-entitled matter which are scheduled to be heard on September 24, September 29, 30 and October 1, 1986 at the Park East in Milwaukee, Wisconsin.

This is to advise you that the exhibits which will be offered at those hearings by AFSCME, District Council 48, and the following Local Unions:

City of Milwaukee Locals 33, 426, 550, 1238; Milwaukee Public Schools Local 1053; Milwaukee County Locals 526, 594, 882, 1055, 1654 and 1656,

will be available for your review, and copying at your expense, at the headquarters of District Council 48, 3427 West St. Paul Avenue, Milwaukee, Wisconsin, from September 15, 1986 until September 23, 1986, the day prior to the first hearing. The exhibits, of course, will be available during the hearings on September 24, September 29, September 30 and October 1, 1986. Please advise me whether you will be participating in the hearing and whether you will be represented by counsel.

It is requested that counsel of record listed at the bottom of this letter, in the Browne and Johnson cases, and who are receiving a copy of this letter, inform me whether or not they will be participating in these proceedings, and in whose behalf they are appearing;

that by letter dated September 17, 1986, to Attorney Bowers, Attorney LaJeunesse indicated that the Complainants would not participate in the fee arbitration and also indicated his objection to Slavney as the arbitrator; that by letter dated September 19, 1986, Slavney advised the Commission and the parties that he was withdrawing as the arbitrator due to the objection indicated by LaJeunesse; and that at the request of counsel for Respondent Unions, and over the objection of Complainants' counsel, the Commission appointed another independent arbitrator, June Weisberger, to replace Slavney as the impartial decisionmaker.

20. That Respondent District Council 48's "Notice to All Nonmember Fairshare Payors" does not provide any financial information for the local unions affiliated with Respondent District Council 48 other than their aggregate total expenditures for the period reported, and does not provide any basis for a presumption that the percentages of chargeable expenses for each local is at least equal to that of Respondent District Council 48; that Parr testified at the May 30, 1986 hearing that the basis of Respondent District Council 48's determination that its affiliated local unions' chargeable expenses are at least as great as those of Respondent District Council 48, is his "experience looking at local operating statements, knowing what kind of functions and activities they do, and function of the aggregate of 35 locals that are operating within the Council, and knowing what the responsibilities are;" that said notice, and the procedures set forth therein, distinguish between "objectors" and "challengers" in that only those who "challenge" the Respondent Unions' calculation of the fee amount chargeable to dissenters will receive any additional rebate and reduction in the fee as a result of the determination of the chargeable fee amount by the impartial decisionmaker; that said notice is not clear as to the aforesaid consequences of "objecting" rather than "challenging;" that said notice, and the procedures set forth therein, require that "objections" and "challenges" be filed with Respondent District Council 48 annually and within a designated thirty day period by certified mail, and that "challenges" be accompanied by a check or money order in the amount of Five Dollars ($5.00) payable to Respondent District Council 48 to defray the cost of the impartial decisionmaker; that said certified mail requirements and the Five Dollar ($5.00) fee to "challenge" constitute unwarranted obstacles to pursuing "objections" or "challenges;" that although said notice refers to filing a "charge" with the Commission as a possible procedure for initiating a "challenge," the Respondent Unions' have implemented a different procedure involving requesting the Commission to appoint an independent arbitrator, and to that extent the notice is unclear as to what the procedure is to obtain a determination of the proper fee amount by an impartial decisionmaker; that said notice, and the procedures set forth therein, do not address the rights of those employes who become subject to Respondents' fair-share fee deductions subsequent to the close of Respondent Unions' annual dissent period; that under said procedures the Respondent Unions are continuing to deduct fair-share fees equal to full dues from those fair-share payors who do not "object" or "challenge," that Parr testified that the fees of "objectors" and "challengers" will be advance rebated by deducting the regular dues amount from their pay and sending them a check for the rebate amount upon notification via the employer's payroll registry that the fee has been deducted from the individual's paycheck, with the rebate checks being sent prior to the deducted fees being placed in Respondent District Council 48's account; that only those who "challenge" will have their fees "escrowed"; that the "escrow" of "challengers'" fees during the pendency of the determination by the impartial decisonmaker provided for in said notice consists of Respondent District Council 48 establishing a master account under its control, with subaccounts for each "challenger," in a manner that would permit independent verification of the amounts deposited in each account, the interest earned in each account and the disbursement of the amounts, with such disbursement to be made upon issuance of the decision by the impartial decisionmaker; and that the aforesaid procedure, while interest-bearing and adequately verifiable through bank statements, does not constitute a true "escrow," because it does not remove the fund from Respondent District Council 48's control.

21. That on December 15, 1986, Complainants in Browne and Dorothy A. Koch filed with the Commission a motion to intervene in this proceeding and to amend the complaint in Browne to add Koch as a party complainant; that accompanying and in support of said motion is Koch's affidavit in which she deposes that she is a resident of Milwaukee, Wisconsin, that she has been employed by Respondent Board in the bargaining unit represented by Respondent District Council 48 and its affiliated Respondent Local 1053 since September of 1981, that she has been subject to full fair-share deductions since that time and that she objects to the use of her fee for purposes other than collective bargaining and contract administration and made her objections known to Respondent District Council 48 by certified mail on June 20, 1986 and did not do so earlier because she did not know of her rights until she received Respondent District Council 48's "Notice to All Nonmember Fairshare Payors;" and that Respondent Unions have not objected to Koch being added as a complainant.

22. That counsel for the parties in Browne executed a "Stipulation Re Past-Years' Fair-Share Deductions and Protest Dates" dated December 9, 1982 and filed with the Commission on December 14, 1982 and incorporated herein by

reference and attached hereto as "Appendix C;" that pursuant to said Stipulation Respondent AFSCME agreed to refund 100% of the "per capita taxes" it had received from Complainants from "the appropriate beginning date" through December 31, 1981 and Respondents District Council 48 and Local 1053 agreed to jointly and severally refund 75% of the fees they had received from Complainants for the same period; that said refunds were agreed to in lieu of litigating that portion of Complainants' fees spent for activities not chargeable to them for those years prior to and through December 31, 1981; and that the parties left the determination of the "appropriate beginning date" for the Commission to decide.

23. That counsel for the parties in Browne executed a "Stipulation Re 1982 Fair-Share Deductions" dated July 14, 1983 and filed with the Commission on July 18, 1983 and incorporated herein by reference and attached hereto as "Appendix D"; that pursuant to said Stipulation Respondent AFSCME agreed to refund to Complainants 100% of the "per capita taxes" it had received from Complainants' fair-share fees paid during the period from January 1, 1982 through December 31, 1982; that Respondents District Council 48 and Local 1053 agreed to jointly and severally refund 75% of the monies they received from Complainants' fair-share fees paid during the aforesaid period; and that said refunds were agreed to in lieu of litigating that portion of their fee spent for activities not chargeable to Complainants during the period from January 1, 1982 to December 31, 1982.

24. That at times material herein, Complainants Walter J. Johnson, Edward L. Barlow, Erna Byrne, Lynn Kozlowski, Cherry A. Le Noir, Gerald Leranth, Irving E. Nicolai, Doris M. Piper, Christina Pitts, Mildred Pizzino, Helen Ryznar, Marshall M. Scott, John P. Skocir, Anne C. Teba, Oliver J. Waldschmidt, and Annabelle Wolter, have been, and are, individuals residing in Wisconsin.

25. That Respondent Milwaukee County, hereinafter referred to as Respondent County, is a municipal employer and has its principal offices at Milwaukee County Courthouse, Milwaukee, Wisconsin.

26. That Respondents Local 594, AFSCME; Local 645, AFSCME; Local 882, AFSCME; Local 1053, AFSCME; Local 1654, AFSCME; and Local 1656, AFSCME, hereinafter referred to collectively as Respondent Locals, are labor organizations chartered by, subordinate to, and affiliated with Respondents AFSCME and District Council 48, and have their offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

27. That the named Complainants designated in Finding of Fact 24 brought suit in Milwaukee County Circuit Court on July 10, 1973 on behalf of themselves and other similarly situated non-union employes in bargaining units represented by the Respondent Unions; that the complaint filed in said suit challenged the constitutionality, facially and as applied, of Secs. 111.70(1)(h) (now (f)) and 111.70(2), Stats., authorizing fair-share agreements between Respondent Unions and Respondent County; that Complainants' suit was ultimately ordered referred to the Commission without the Court having certified it as a class action; and that the amended complaint in this case was filed with the Commission on March 19, 1982.

28. That at all times material herein the Respondent Locals and Respondent District Council 48 have represented employes of the Respondent County in the bargaining unit(s) consisting of numerous classifications of employes, for purposes of collective bargaining concerning wages, hours and conditions of employment; that at the times material herein the individual Complainants named in Findings of Fact 24 and 37 have been employed in said bargaining unit(s); and that the Respondent Locals and the Respondent County have been parties to sucessive collective bargaining agreements covering the wages, hours and conditions of employment of all employes in said bargaining unit(s).

29. That on or about February 16, 1973, the Respondent Locals and the Respondent County initially entered into an agreement entitled "fair share," which became effective on or about March 10, 1973, and provided in relevant part as follows:

> (1) Effective in accordance with the provisions of paragraph (4) of this Section, and each pay period thereafter during the term of the current collective bargaining agreement between the parties, and unless otherwise terminated as hereinafter provided, the employer shall deduct from the

biweekly earnings of the employes specified herein an amount equal to such employe's proportionate share of the cost of the collective bargaining process and contract administration as measured by the amount of dues uniformly required of all members, and pay such amount to the treasurer of the certified bargaining representative of such employe within ten (10) days after such deduction is made, provided:

(a) That as to persons in the employ of the employer as of the effective date of this agreement, such deduction shall be made and forwarded to the treasurer of the certified bargaining representative from the biweekly earnings of all bargaining unit employes.

(b) That such deduction shall be made and forwarded to the treasurer of the certified bargaining representative from the biweekly earnings of new bargaining unit employes in the first pay period.

(c) In order to insure that any such deduction represents the proportionate share of each employe in the bargaining unit of the cost of collective bargaining and contract administration, and recognizing that the dues of the constituent Locals of District Council 48, the only certified bargaining representative, vary from one Local to another, it is agreed as follows:

> 1. That prior to the implementation of the Agreement, District Council 48 shall submit to the County a schedule of monthly dues uniformly levied by each of its constituent Locals, and its jurisdiction.
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> 2. Any increase in dues or fair share amounts to be deducted shall be certified by the Union at least fifteen (15) days before the start of the pay period the increased deduction is to be effected.
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> 3. The Union agrees that no funds collected from non-members under this fair share agreement will be allocated for, or devoted directly or indirectly to, the advancement of the candidacy of any person for any political office.

* * *

In the event of any acton brought challenging the provisions of this fair share agreement, or the right of the Union and the County to enter into such an agreement, after it is determined by an administrative body or a court of competent jurisdiction that deductions made pursuant to the provisions hereof are in any manner in conflict with the rights of the challenging party, all sums which the County has agreed to deduct from the earnings of the employes covered by the agreement and transmit to the Treasurer of District Council 48, except sums deducted pursuant to voluntary checkoff cards on file with the employer, shall be placed in trust with Midland National Bank pending the ultimate disposition of such action. In the event the outcome of such action favors the continuance of the fair share agreement, the monies held in trust, together with the interest earned thereon, shall be paid to the Union upon entry of judgment in such action.

30. That since entering into the initial fair share agreement, the Respondent Locals and the Respondent County have entered into successive collective bargaining agreements containing similar provisions to that cited in Finding of Fact 29.

31. That pursuant to said fair share agreements, the Respondent County has deducted from the wages of employes in the bargaining unit(s) covered by the aforesaid agreements, who are not members of the Respondent Locals, sums of money denominated as fair-share deductions, in the same amounts as the amounts of dues paid by members of the Respondent Locals, and has transmitted said sums to Respondent District Council 48, which in turn has transmitted portions of said sums to the Respondent Locals and to Respondent AFSCME, as well as to the Milwaukee County Labor Council, the Wisconsin State AFL-CIO, and the Wisconsin Coalition of American Public Employees (CAPE).

32. That during the course of the Stage I proceeding in Johnson the parties agreed pursuant to a stipulation executed on August 10, 1982 7/ that the Respondent Unions, directly or indirectly, expend sums of monies from membership dues, as well as from fair share exactions from the earnings of Complainants and employes of the Respondent County employed in the collective bargaining unit(s) in which Complainants are employed, for certain activities engaged in by the Respondent Unions, their officers and agents, with respect to the bargaining unit(s) in which Complainants are employed, as well as with respect to bargaining units, and work locations where employes other than the Complainants are employed, which activities are set forth in paragraph 10 of the Examiner's Initial Findings of Fact in Johnson 8/ and incorporated herein by reference; that certain of the activities of the Respondent Unions, their officers and agents, and the expenditures of the Respondent Unions for such activities, do not relate to the Respondent Unions' representational interest in the collective bargaining process or to the administration of collective bargaining agreements, which activities are set forth in paragraph 11 of the Initial Findings of Fact in this case and incorporated herein by reference; that certain of the activities of the Respondent Unions, their officers and agents, and the expenditures of the Respondent Unions for such activities, relate to the Respondent Unions' representational interest in the collective bargaining process or to the administration of collective bargaining agreements which activities are set forth in paragraph 12 of the Initial Findings of Fact in this case and incorporated herein by reference; and that certain of the activities of the Respondent Unions, their officers and agents, and the expenditures of the Respondent Unions for such activities, in part relate, and in part do not relate, to the Respondent Unions' representational interest in the collective bargaining process or to the administration of collective bargaining agreements, which activities are set forth in paragraphs 13, 14 and 15 of the Initial Findings of Fact in this case and incorporated herein by reference.

33. That in their respective Responses to Complainants' Request for Admissions 9/ filed in Johnson, Respondent Unions and Respondent County admitted in Johnson, the same facts parallel to those facts admitted by Respondents in Browne and set forth in Findings of Fact 12 through 15, above, and the facts set forth in Findings of Fact 12 through 15, as they also pertain to the Respondent Unions in Johnson, are incorporated herein by reference.

34. That in their respective Responses to Complainants' Request for Admissions filed in Johnson, Respondent Unions and Respondent County admitted that at no time has Respondent County requested or received from Respondent Unions an accounting of their expenditures for collective bargaining and contract administration. 10/

7/ The parties in Johnson stipulated that the categories of expenditures for Respondent Unions are the same as set forth in paragraph 11 of the Commission's Initial Findings of Fact in Browne and that the Commission's initial findings of fact and initial conclusions of law with regard to those categories as set forth in paragraphs 12-16 of those Initial Findings of Fact and Initial Conclusions of Law at pages 5-10, may be adopted in Johnson without need of hearing as initial findings of fact and initial conclusions of law.

8/ Dec. No. 19545-B (Honeyman, 2/83).

9/ Respondent Unions' Response to Request For Admissions filed on May 23, 1986 and Respondent County's Response filed on April 30, 1986.

10/ Ibid.

35. That in their respective Responses to Complainants Request For Admissions in Johnson, both Respondent Unions and Respondent County admitted that when Complainants asked that fair-share deductions be placed in escrow pursuant to the terms of the fair-share agreement after Decision No. 19545-B was issued in this proceeding, Respondent Unions contended that escrow was not required by the agreement and demanded contract grievance arbitration of the question, and that in the subsequent contract grievance arbitration proceedings, in which Complainants were denied participation, the arbitrator ruled that escrow was not required by the fair-share agreement.

36. That the facts set forth in Findings of Fact 16 through 20, above, are repeated here and incorporated herein by reference.

37. That on November 16, 1983, by motion dated November 15, 1983, Complainants moved they be permitted to amend their complaint to add the following sixteen individuals as complainants: Barbara Barrish, Doris M. Conner, Terese G. Fabian, Kathleen S. Fleury, Mary E. Jaeger, Regina S. Karpowitz, Carolyn Kossert, Kenneth E. Multhauf, Mildred Noffz, Teresa Patzke, Carol S. Peters, Dorothy E. Riedel, Cynthia Schneider, Ruth Cheryl Thompson, Ione Trachsel and Delores V. Winter; that on May 28, 1982 Complainants in Johnson filed with the Examiner appointed by the Commission a "Motion For Order Approving Notice of Pendency of Class Action," and in support of said motion filed the affidavits of Barrish, Fleury, Karpowitz, Kossert, Noffz, Peters and Trachsel, wherein they indicated they had notified the union that they objected to the use of their fair-share fee for any purposes other than collective bargaining or contract administration, as well as affidavits of other individuals not in issue in regard to their admission as complainants; that subsequent to the filing of said motion the Complainants submitted the affidavit of Jaeger; that along with their "Reply in Support of Motion for Order Approving Notice of Pendency of Class Action" filed on August 9, 1982, Complainants submitted the affidavits of Winter and Fabian; that attached to Complainants' Motion to Add Complainants were letters from Complainants' counsel, Attorney LaJeunesse, to Respondent Unions' counsel at the time, Attorney Kraft, stating that the following individuals objected to the Respondent Unions' use of their fair-share fee for purposes other than collective bargaining and contract administration: Multhauf (letter of May 19, 1983), Hawley, 11/ Patzke, Conner, Riedel (letter of May 27, 1983), and Schneider (letter of June 23, 1983); that Complainants' Motion to Add Complainants and the affidavits submitted by the following individuals admit that Karpowitz left the employ of Respondent County on or about December 31, 1980, that Noffz left the employ of Respondent County on or about April 2, 1978 and that Winter left the employ of Respondent County on or about June 22, 1981; that Complainants' Motion to Add Complainants admits that Patzke left the employ of Respondent County in October of 1977; that on December 14, 1983 Respondent Unions filed their response to Complainants' Motion to Add Complainants wherein the Respondent Unions indicated they do not contest the addition as party complainants of Barrish, Conner, Fabian, Fleury, Jaeger, Kossert, Multhauf, Peters, Riedel, Schneider, Thompson and Trachsel, but do oppose the addition as party complainants of Karpowtiz, Noffz, Patzke and Winter on the basis that their claims are wholly time-barred under Sec. 111.07(14), Stats.; and that the prohibited practices alleged as to Karpowitz, Noffz, Patzke and Winter took place more than one year prior to the date their addition as complainants was moved.

38. That on January 30, 1986 counsel for the parties in Johnson executed a "Stipulation Re Past-Years' Fair-Share Deductions and Protest Dates" filed with the Commission on February 4, 1986 and incorporated herein by reference and attached hereto as "Appendix E"; that pursuant to said Stipulation Respondent AFSCME agreed to refund 100% of the "per capita taxes" it had received from Complainants and from certain objecting individuals Complainants have moved to add, from the "appropriate beginning date" through December 31, 1982 "in lieu of discovery and litigation regarding that portion of fair-share fees paid during the period prior to December 31, 1982, and spent for activities not chargeable to complainants and other objecting employees under Section 111.70, Wis. Stats."; that pursuant to said Stipulation Respondents District Council 48 and the Respondent Local Unions agreed jointly and severally to refund 75% of the monies received by them from fair-share fees paid by Complainants and certain objecting

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11/ Hawley was not included in the Motion to Add Complainants and therefore has not been added as a complainant herein.

individuals Complainants have moved to add, from the "appropriate beginning date" through December 31, 1982 "in lieu of discovery and litigation regarding that portion of fair-share fees paid during the period prior to December 31, 1982, and spent for activities not chargeable to complainants and other objecting employees under Section 111.70 Wis. Stats."; and that pursuant to said Stipulation the parties left the determination of the "appropriate beginning date" for the Commission to decide.

On the basis of the foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That Barbara Barrish, Dorothy M. Conner, Terese G. Fabian, Kathleen S. Fleury, Mary E. Jaeger, Carolyn Kossert, Kenneth E. Multhauf, Carol S. Peters, Dorothy E. Riedel, Cynthia Schneider, Ruthy Cheryl Thompson and Ione Trachsel are parties in interest in the proceedings in Johnson v. Milwaukee County, within the meaning of Sec. 111.07(2)(a), Stats., and are appropriately added as co-complainants in that case effective November 16, 1983.

2. That Regina S. Karpowitz, Mildred Noffz, Teresa Patzke and Dolores V. Winter are parties in interest in the proceedings in Johnson v. Milwaukee County, within the meaning of Sec. 111.07(2)(a), Stats., but their addition as co-complainants in that case is barred by the operation of the one year statute of limitations set forth in Sec. 111.07(14), Stats., and made applicable by Sec. 111.70(4)(a), Stats.

3. That Dorothy A. Koch is a party in interest in the proceedings in Browne v. Milwaukee Board of School Directors, within the meaning of Sec. 111.07(2)(a), Stats., and is appropriately added as a co-complainant in that case effective December 15, 1986.

4. That Respondent Milwaukee Board of School Directors, its officers and agents, have not committed prohibited practices within the meaning of the Municipal Employment Relations Act by deducting fair-share fees from the pay of the Complainants and other non-member fair-share payors in the bargaining unit represented by Respondent Local 1053 and turning those fees over to Respondent Unions pursuant to fair-share agreements with Respondent Local 1053.

5. That Respondent Milwaukee County, its officers and agents, have not committed prohibited practices within the meaning of the Municipal Employment Relations Act by deducting fair-share fees from the pay of Complainants and other nonmember fair-share payors in bargaining unit(s) represented by said Respondent Unions and turning those fees over to those Respondent Unions pursuant to fair-share agreements with the Respondent Locals.

6. That because the Wisconsin Supreme Court has held that the fair-share provisions of the Municipal Employment Relations Act, Secs. 111.70(1)(f) and 111.70(2), Stats., are constitutional on their face and are to be interpreted in a manner consistent with the U.S. Constitution, those statutory provisions must be deemed to require that a union must first establish and implement the procedural safeguards, held by the U.S. Supreme Court to be constitutionally required in its decision in Chicago Teachers Union v. Hudson, before the union may lawfully exact a fair-share fee from nonmembers it represents.

7. That the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson did not establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed, hence it does not constitute a clear break with existing law, and therefore applies retroactively.

8. That in the presence of a valid fair-share agreement and the constitutionally required procedural safeguards set forth in the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson, Secs. 111.70(1)(f) and 111.70(2) of the Municipal Employment Relations Act permit a union to collect and spend a fair-share fee equal to regular dues from the nonmember employes it represents as the exclusive collective bargaining representative if those nonmembers have not made their dissent known to the union in the manner and time the union may lawfully require.

9. That the Respondent Unions in Browne v. Milwaukee Board of School Directors AFSCME, District Council 48 and Local 1053, having directly or indirectly expended sums of monies from fair-share fees paid by Complainants, and other nonmember fair-share fee payors employed in the bargaining unit represented by Respondent Local 1053, for the activities set forth in Initial Conclusion of Law 2 in that case; that said activities are not related to the ability of said Respondent Unions to carry out their representational interest as the exclusive collective bargaining representative of the employes of Respondent Board in the bargaining unit represented by Respondent Local 1053 in the collective bargaining process and contract administration with Respondent Board within the meaning of the Muncipal Employment Relations Act; and that therefore, expenditures by the Respondent Unions for said activities cannot be 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 by dissenting fair-share payors pursuant to a fair-share agreement existing between Respondent Local 1053 and Respondent Milwaukee Board of School Directors, within the meaning of Sec. 111.70(1)(f) of the Municipal Employment Relations Act.

10. That the Respondent Unions in Johnson v. Milwaukee County, AFSCME, District Council 48 and the Locals, have directly or indirectly expended sums of monies from fair-share fees paid by Complainants, and other nonmember fair-share fee payors employed in the bargaining unit(s) represented by Respondent Locals, for the activities set forth in Initial Conclusion of Law 2 in that case; that said activities are not related to the ability of said Respondent Unions to carry out their representational interest as exclusive collective bargaining representative of the employes in the bargaining unit(s) represented by Respondent Locals in the collective bargaining process and contract administration with Respondent Milwaukee County within the meaning of the Municipal Employment Relations Act; and that therefore, expenditures by the Respondent Unions for said activities cannot be 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 by dissenting fair-share payors pursuant to a fair-share agreement existing between Respondent Locals and Respondent Milwaukee County, within the meaning of Sec. 111.70(1)(f) of the Municipal Employment Relations Act.

11. That the procedures set forth in Article IX, Section 10, and Article XII of the Constitution of Respondent American Federation of State, County and Municipal Employees, as amended by the 24th International Convention, June 9-13, 1980, and set forth in Finding of Fact 14, did not provide the constitutionally required procedural safeguards set forth in Chicago Teachers Union v. Hudson.

12. That by exacting (i.e., collecting and using) a fair-share fee from Complainants and other nonmember fair-share fee payors in the absence of any procedural safeguards other than the procedures noted in Conclusion of Law 11, and therefore in the absence of the constitutionally required procedural safeguards, the Respondent Unions in Browne v. Milwaukee Board of School Directors, AFSCME, District Council 48 and Local 1053, their officers and agents, committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats.

13. That by exacting (i.e., collecting and using) a fair-share fee from Complainants and other nonmember fair-share fee payors in the absence of any procedural safeguards other than the procedure noted in Conclusion of Law 11, and therefore in the absence of the constitutionally required procedural safeguards, the Respondent Unions in Johnson v. Milwaukee County, AFSCME, District Council 48 and the Locals, their officers and agents, committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats.

14. That the "Notice To All Nonmember Fairshare Payors," and the procedures set forth therein, distributed on May 23, 1986 to all nonmember fair-share payors represented by the Respondent District Council 48 and its affiliated locals provide some, but not all, of the constitutionally required procedural safeguards set forth in the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson and is constitutionally, and hence statutorily, deficient in the respects identified in our Memorandum in this decision; and that, therefore, on and after May 23, 1986, the Respondent Unions in Browne v. Milwaukee Board of School Directors, AFSCME, District Council 48 and Local 1053, their officers and agents, commit prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats., by continuing to exact fair-share fees from the Complainants, and other nonmember

fair-share payors employed by Respondent Milwaukee Board of School Directors in the bargaining unit represented by Respondent Local 1053, without having established the required procedural safeguards.

15. That the "Notice To All Nonmember Fairshare Payors," and the procedures set forth therein, distributed on May 23, 1986 to all nonmember fair-share payors represented by the Respondent District Council 48 and its affiliated locals provide some, but not all, of the constitutionally required procedural safeguards set forth in the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson and is constitutionally, and hence statutorily, deficient in the respects identified in our Memorandum in this decision; and that, therefore, on and after May 23, 1986, the Respondent Unions in Johnson v. Milwaukee County, AFSCME, District Council 48 and the Locals, their officers and agents, commit prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats., by continuing to exact fair-share fees from the Complainants, and other nonmember fair-share payors employed by Respondent Milwaukee County in bargaining unit(s) represented by Respondent Locals, without having established the required procedural safeguards.

Based on the foregoing Findings of Fact and Conclusions of Law,

NOW, THEREFORE, it is

ORDERED 12/

1. That the Motion to Add Complainants filed in Johnson v. Milwaukee County is hereby granted as to Barbara Barrish, Dorothy M. Conner, Terese G. Fabian, Kathleen S. Fleury, Mary E. Jaeger, Carolyn Kossert, Kenneth E. Multhauf, Carol S. Peters, Dorothy E. Riedel, Cynthia Schneider, Ruth Cheryl Thompson and Ione Trachsel, effective November 16, 1983, and is hereby denied as to Regina S. Karpowitz, Mildred Noffz, Teresa Patzke and Dolores V. Winter.

12/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the

(Footnote 12 continued on the bottom of Page 19.)

2. That the Motion For Intervention filed in Browne v. Milwaukee Board of School Directors to permit Dorothy A. Koch to intervene and to amend the complaint therein to add her as a complainant in that case, is hereby granted effective December 15, 1986.

3. That the Motion to Correct Transcript filed by Complainants in these cases on July 28, 1986 regarding the transcript of the May 30, 1986 hearing in these cases is hereby granted. 13/

4. That the Motion to Supplement Record filed by Complainants in these cases on September 22, 1986, and the motion of the Respondent Unions to admit additional evidence filed on October 21, 1986 as part of their Response to Complainants' Motion to Supplement Record, are hereby granted.

5. That the Respondent Unions in Browne v. Milwaukee Board of School Directors, AFSCME, District Council 48, Local 1053, their officers and agents, and the Respondent Unions in Johnson v. Milwaukee County, AFSCME, District Council 48, Local 594, Local 645, Local 882, Local 1055, Local 1654 and Local 1656, all affiliated with District Council 48, their officers and agents, shall, to the extent they have not already done so, immediately:

> a) Refund to Complainants, at the percentages set forth in the respective "Stipulations Re Past-Years' Fair-Share Deductions and Protest Dates," the fair-share fees paid by Complainants, and not already refunded, from the time they became subject to fair-share deductions 14/ through

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(Footnote 12 continued from Page 18.)

> decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.
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> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
>
> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

13/ The requested corrections are attached hereto as "Appendix F."

14/ Except that as to the twelve additional Complainants added in Johnson and Koch in Browne, such refunds shall be limited to one year prior to the effective date they were added as complainants in these cases. As to the other Complainants, these suits were filed in Milwaukee County Circuit Court within one year of the initial fair-share deductions.

December 31, 1982, plus interest at the rate of seven percent (7%) per annum 15/ on the amounts so refunded to them from the dates the fees were taken to the dates they were/are refunded.

b) Properly escrow in an interest-bearing account 16/ an amount equal to the fair-share fees deducted from the pay of Complainants from January 1, 1983 17/ up to March 4, 1986, the date of the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson, plus interest at the rate of seven percent (7%) per annum from the dates the fees were taken to the date the proper amounts are placed in escrow. The monies are to remain in escrow until the Commission has determined in Stage II of these cases the amount that was properly chargeable to Complainants as a fair-share fee for each of those years, at which time the Commission will order the escrow monies, including the bank interest earned, to be immediately disbursed in accord with its determination.

c) Correct the deficiencies in their fair-share notice and procedures noted in this decision so as to comply with the requirements set forth in the U.S. Supreme Court's decision in Chicago Teachers Union v. Hudson.

6. That the Respondent Unions in Browne v. Milwaukee Board of School Directors, AFSCME, District Council 48 and Local 1053, their officers and agents, shall continue the advance rebate for "objectors" and "challengers," and immediately escrow in an interest-bearing account any and all fair-share fees deducted from, and not advance rebated to, all fair-share fee payors in the bargaining unit represented by Respondent Local 1053, including Complainants, from the date of the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson, March 4, 1986, plus interest at the rate of seven percent (7%) per annum on the fees collected from all such fair-share fee payors, from the date such fees were taken until they are placed in escrow, until the Commisson has determined, by hearing had at the request of any of the Respondent Unions in Browne or by the agreement of the parties, that the Respondent Unions are prepared to provide adequate notice to all fair-share fee payors in the bargaining unit and have established the proper fair-share procedures. Upon such a determination by the Commission, or agreement by the parties, and after the approved notice has been distributed and the time to "object" or "challenge" has run: (1) the fees that have been collected from the fair-share fee payors who have not filed a "challenge" under the corrected notice and procedures, (plus any amount of the fees deducted from "challengers" not reasonably in dispute, provided the breakdown into chargeable and nonchargeable categories has been verified by an independent auditor,) will be disbursed in accordance with the revised and approved procedures, (2) the fair-share fees thereafter collected shall be disbursed or escrowed in accordance with the revised and approved procedures, and (3) the fees of those fair-share fee payors who have filed "challenges" under the corrected notice and procedures, as well as Complainants, shall remain in escrow until the impartial decisionmaker has rendered his/her decision on the amount of the fair-share fee chargeable to those who elected to challenge, with such determination to date back to the date of the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson.

7. That the Respondent Unions in Johnson v. Milwaukee County, AFSCME, District Council 48, Local 594, Local 645, Local 882, Local 1055, Local 1654 and Local 1656, their officers and agents, shall continue the advance rebate for "objectors" and "challengers," and immediately escrow in an interest-bearing

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15/ The rate set forth in Sec. 814.04(4), Stats., at the times these cases were intially filed. See footnote 64, infra.

16/ There will have to be separate accounts established for the two cases, and as we have found, to be a proper escrow the accounts must be outside the control of the Respondent Unions.

17/ As to Koch it would be one (1) year prior to December 15, 1986, the date she was added.

account all fair-share fees deducted from, and not advance rebated to, all fair-share fee payors in the bargaining unit(s) represented by the Respondent Locals, including Complainants, from the date of the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson, March 4, 1986, plus interest at the rate of seven percent (7%) per annum on the fees collected from all such fair-share fee payors from the dates such fees were taken until they are placed in escrow, until the Commission has determined, by hearing had at the request of any of the Respondent Unions in Johnson or by the agreement of the parties, that the Respondent Unions are prepared to provide adequate notice to all fair-share fee payors in the bargaining unit (5) and have established the proper fair-share procedures. Upon such a determination by the Commission, or agreement by the parties, and after the approved notice has been distributed and the time to "object" or "challenge" has run: (1) the fees that have been deducted from the fair-share fee payors who have not filed a "challenge" under the corrected notice and procedures, (plus any amount of the fees deducted from "challengers" not reasonably in dispute, provided the breakdown into chargeable and nonchargeable categories has been verified by an independent auditor,) will be disbursed in accordance with the revised and approved procedures, (2) the fair-share fees thereafter collected shall be disbursed or escrowed in accordance with the revised and approved procedures, and (3) the fees of those fair-share fee payors who have filed "challenges" under the corrected notice and procedures, as well as Complainants, shall remain in escrow until the impartial decisionmaker has rendered his/her decision on the amount of the fair-share fee chargeable to those who elected to challenge, with such determination to date back to the date of the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson.

8. That the Respondent Unions in Browne v. Milwaukee Board of School Directors and the Respondent Unions in Johnson v. Milwaukee County shall notify the Commission, in writing, within twenty (20) days of the date of this Order as to what steps they have taken to comply herewith.

9. That this Order supercedes our Order for interim relief issued at the close of the May 30, 1986 hearing in these cases.

10. That the Browne and Johnson cases shall remain consolidated for purposes of any hearing concerning the adequacy of the revised notice and procedures, referred to in Order Paragraphs 6 and 7 above, but they are not consolidated for purposes of any Stage II hearings referred to in Order Paragraph 5, above.

11. That except as otherwise noted above, the Complaints filed in these matters and the requests for relief advanced herein by Complainants shall be, and hereby are, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of April, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

MILWAUKEE PUBLIC SCHOOLS, MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDERS

BACKGROUND

On March 4, 1986 the U.S. Supreme Court issued its decision in Chicago Teachers Union v. Hudson wherein it held that the First Amendment requires that a union's agency fee/fair-share procedures contain certain procedural safeguards before the union may exact a fair-share fee from the nonmembers in the bargaining unit(s) that it represents. Our Wisconsin Supreme Court had previously held in Browne v. Milwaukee Board of School Directors, 83 Wis.2d 316, 332-333 (1978), that the fair-share provisions of MERA 18/ are constitutional on their face and referred the case to the Commission for determination of the factual issues and how MERA is to be applied.

18/ SUBCHAPTER IV

MUNICIPAL EMPLOYMENT RELATIONS

111.70 Municipal employment.(1) DEFINITIONS. As used in this subchapter:

. . .

(f) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.

. . .

(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated. The Commission shall declare any fair-share agreement suspended upon such conditions and for such times as the commission decides whenever it finds that the labor organization involved has refused on the basis of race, color, sexual orientation, creed or sex to receive as a member any employe of the municipal employer in the bargaining unit involved, and such agreement shall be made subject to this duty of the commission. Any of the parties to such agreement or any municipal employe covered thereby may come before the commission, as provided in s. 111.07, and ask the performance of this duty.

As we noted in our Orders to Show Cause issued in these cases, in light of the U.S. Supreme Court's decision in Hudson, the Complainants served Requests for Admissions and Interrogatories with Request for Documents on the Respondents seeking to determine whether Respondents had established the procedural safeguards required by Hudson for the implementation of a fair-share agreement. Shortly thereafter Complainants filed their respective requests that, in light of Hudson, the Commission make final findings of fact, conclusions of law and orders after a hearing to be held within forty days of their request. The orders requested by the Complainants in Browne can be summarized as follows:

> (1) That the Respondent Unions be required to return to all Complainants, with interest at the rate of seven percent (7%) per annum from the date of commencement to the date of return, all fair-share fees received by Respondent AFSCME International from the Complainants that have not already been returned and seventy-five percent (75%) of all fair-share fees received by Respondents District Council 48 and Local 1053, AFSCME, from Complainants that have not already been returned, from the commencement of the deductions through December 31, 1982, and all fees received from the Complainants thereafter, and that the Respondent Unions be required to pay the Complainants interest at the rate of seven percent (7%) per annum on all monies previously returned to Complainants from the date of deduction till the date of refund;
>
> (2) That the Respondent Board cease and desist from deducting fair-share fees from the earnings of all nonunion employes in the bargaining unit involved that are in excess of a proportionate share of the costs of collective bargaining and contract administration, and that Respondent Unions cease and desist from inducing the Board to do so; and
>
> (3) That the Respondent Board cease and desist from making any fair-share deductions from the earnings of all nonunion employes in the bargaining unit involved until the Commission has determined, after hearing upon any Respondent's request, that the Respondents have provided for: "an adequate advance explanation to all nonunion employees of the basis for the fair-share fee, verified by an independent certified public accountant; a reasonably prompt opportunity for employees to challenge the amount of the fee before an impartial decision-maker; and an escrow, for at least the amounts determined by the impartial decisionmaker reasonably to be subject to dispute, while such challenges are pending." 19/

The orders requested by Complainants in Johnson can be summarized as follows:

> (1) That the complaint be amended to add the sixteen (16) individuals named in Complainants' Motion to Add Complainants filed on November 16, 1983, as co-complainants;
>
> (2) That the Respondent Unions be required to return to all Complainants, with interest at the rate of seven percent (7%) per annum from the date of commencement to the date of return, all fair-share fees received by Respondent AFSCME International from the Complainants that have not already been returned and seventy-five percent (75%) of all fair-share fees received by Respondents District Council 48 and the Local Unions from Complainants that have not already returned, from the commencement of the deductions through December 31, 1982, and all fees received from the Complainants thereafter, and that the Respondent Unions be required to pay the Complainants

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19/ In their amended complaint filed with the Commission Complainants in Browne requested that Respondent Unions' privilege of entering into and enforcing a fair-share agreement be suspended for one year. That request no longer appears as part of Complainants' request for relief. See footnote 58, infra.

interest at the rate of seven percent (7%) per annum on all monies previously returned to Complainants from the date of deduction till the date of refund;

(3) That the Respondent County cease and desist from deducting fair-share fees from the earnings of all nonunion employes in the bargaining units involved that are in excess of a proportionate share of the costs of collective bargaining and contract administration, and that Respondent Unions cease and desist from inducing the County to do so; and

(4) That the Respondent County cease and desist from making any fair-share deductions from the earnings of all nonunion employes in the bargaining units involved until the Commission has determined, after hearing upon any Respondent's request, that the Respondents have provided for: "an adequate advance explanation to all nonunion employees of the basis for the fair-share fee, verified by an independent certified public accountant; a reasonably prompt opportunity for employees to challenge the amount of the fee before an impartial decisionmaker; and an escrow, for at least the amounts determined by the impartial decisionmaker reasonably to be subject to dispute, while such challenges are pending." 20/

We issued Orders to Show Cause in these cases and consolidated the cases for the purposes of hearing on the Orders. The various Respondents submitted their respective responses to Complainants' interrogatories and on May 30, 1986 a hearing was held before the Commission at which time the Respondent Unions submitted evidence as to the notice they had provided to fair-share fee payors following the decision in Hudson and the procedures they would follow to comply with the requirements of Hudson. The evidence submitted in that regard consisted primarily of District Council 48's "Notice to All Nonmember Fairshare Payors," the affidavit of John Parr, Executive Director of District Council 48, the affidavit of John Sullivan, counsel for Respondent AFSCME, and the testimony of both Parr and Sullivan. After the hearing both Complainants and Respondent Unions moved to supplement the record in certain respects, including evidence regarding the nature and operation of the Respondent Unions' arbitration procedure. We have herein granted both of those motions and have considered all of said additional evidence to be a part of the record.

Summary of Issues and Decision

In general, the primary issues decided in this decision are whether the Respondent Unions' notice, objection procedures and escrow meet the requirements of Hudson, whether Hudson is to be applied retroactively and what, if any, relief is appropriate at this point in the proceedings. For the reasons set forth below, we have held that the Respondent Unions' notice and procedures are legally deficient in several aspects and legally sufficient in others; that Hudson is to be retroactively applied; and that certain relief is appropriate at this point in the proceedings. Specifically, we have held that:

(1) The Respondent Unions' notice must at a minimum list the major categories of the respective unions' expenses, and those figures must be verified by an independent auditor. The notice must also indicate the amounts for the chargeable categories of expenses, but those amounts listed do not have to be verified by an independent auditor if the union elects to escrow 100% of the fee being collected from "challengers" less any advance rebate. Although the instant financial breakdowns were sufficient for Respondents AFSCME and District Council 48, there were not any breakdowns or auditor verifications of figures for the local unions or a sufficient basis for the presumption that the percentage of chargeable expenses for the locals is at least as great as that of Respondent District Council 48;

(2) The Respondent Unions may distinguish between those fair-share fee payors who dissent but agree to accept the Respondent Unions' computations ("objectors" under Respondent Unions' notice and procedures), and those who

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20/ Complainants in Johnson initially made a request for relief similar to that set forth in footnote 19. See also footnote 58, infra.

dissent and challenge the Respondent Unions' computations ("challengers" under the Respondent Unions' notice and procedures). The Respondent Unions may restrict the benefit of the arbitration of the fee amount to the latter group, as long as the notice makes clear the difference between "objecting" and "challenging," but the Respondent Unions' notice herein is deficient in that it fails to put the reader on clear notice as to the consequences of "objecting" rather than "challenging;"

(3) It is constitutionally permissible for unions to rely on the expenses of the prior year to determine the appropriate chargeable fee for the present year, and unions are not required to make an end-of-the-year adjustment to reflect actual expenses for that year;

(4) Requiring "objections" and "challenges" to be submitted by certified mail and requiring that one challenging the Respondent Unions' computations contribute toward the cost of the proceeding before the impartial decisionmaker constitute unwarranted obstacles discouraging the use of the procedures and are not constitutionally permitted;

(5) Unions may require that fair-share fee payors make their dissent known annually, where annual notice is given by the union, and may require that dissent be submitted in writing to be effective;

(6) It is not an unwarranted obstacle, and hence is permitted, to require that "objections" or "challenges" be submitted within a designated thirty day period annually, assuming adequate prior notice from the unions, and provided that new hires and members who terminate their membership in the union and become subject to fair-share after the close of the dissent period are given adequate notice and a thirty day period to "object" or "challenge" and that their fair-share fees are placed in escrow until they have had the opportunity to dissent, and that thereafter the procedures pertaining to non-dissenters, "objectors" or "challengers" are applied as appropriate;

(7) The Respondent Unions' notice here is unclear as to what the challenge procedure is and is deficient under Hudson in that respect;

(8) Under Hudson a fair-share procedure for challenging the union's computations must provide for a reasonably prompt decision by an impartial decisionmaker and this includes giving challengers adequate access to relevant information, adequate time to prepare and sufficient advance notice of the hearing;

(9) The Hudson requirement that the portion of the challenger's fair-share fee reasonably in dispute be escrowed pending the outcome of the impartial decisionmaker's decision, requires that control of the monies be turned over to a neutral third party, such as a bank, to be disbursed upon issuance of, and in accordance with, the decision of the impartial decisionmaker;

(10) The segregated savings accounts established by Respondent District Council 48 in these cases do not meet the aforesaid requirement;

(11) Hudson does not require that the fees continue to be held in escrow after the impartial decisionmaker's decision has been rendered;

(12) In the presence of the procedural safeguards set forth in Hudson, the fair-share provisions of MERA permit a union to collect and spend a fair-share fee equal to regular dues from the nonmembers it represents if those nonmembers do not make their dissent known to the union in the manner and time the union may lawfully require;

(13) Hudson is to be applied retroactively, and therefore appropriate relief is to be fashioned retroactive to the date Complainants became subject to fair-share deductions by Respondents subject to the application of Sec. 111.07(14), Stats.

(14) Respondent Board and Respondent County have not committed prohibited practices within the meaning of MERA by deducting fair-share fees equal to full dues from the pay of Complainants and turning those fees over to the Respondent Unions pursuant to their fair-share agreements;

(15) The appropriate retroactive relief in these cases consists of ordering the Respondent Unions to (a) refund with interest at the rate of seven percent (7%) per annum and in the percentages set forth in their stipulations, those fees paid by Complainants from the time they became subject to fair-share deductions 21/ through December 31, 1982, that have not already been refunded to them, (b) pay interest at the rate of seven percent (7%) per annum to Complainants on the amounts already refunded to them for the period the amounts refunded were held by Respondent Unions, and (c) escrow an amount equal to the fair-share fees paid by Complainants since January 1, 1983 to March 4, 1986, the date of the U.S. Supreme Court's decision in Hudson, plus interest at the rate of 7% per annum from the date the fees were taken to the date the funds are placed in escrow in compliance with this Order, with the Commission in subsequent Stage II proceedings to determine the proper disbursement of the escrow monies based on the chargeable/nonchargeable proportions of the fees for each of the years involved;

(16) The appropriate prospective relief is an order that the Respondent Unions immediately correct their notice and procedures to comply with Hudson, continue the present advance rebate, properly escrow in an interest-bearing account all fair-share fees deducted since the date of the Supreme Court's decision in Hudson and currently being deducted from all fair-share fee payors in the covered bargaining units, including Complainants, and not being advance rebated, plus interest at the rate of seven percent (7%) per annum on all such fees collected from the date of the Supreme Court's decision in Hudson until they have been placed in escrow; after the Commission has determined and declared that the Respondent Unions have established the procedures required by Hudson and after adequate notice has been given and the time for "objecting" or "challenging" has run, the fees in escrow, and those collected thereafter, will be disbursed/escrowed in accordance with the approved procedures, and the fees of the "challengers," including Complainants, will remain in escrow until their disbursement is authorized by the decision of an impartial decision-maker as regards the period dating back to the date of the decision in Hudson. Upon such a determination the escrowed monies are to be disbursed in accord with said decision, including the bank interest earned during the escrow. Complainants are to be deemed "challengers" in any such proceedings.

A detailed explanation of the issues, the positions of the parties and the rationale for our holdings in these cases are set forth below.

I. Sufficiency of Respondent Unions' Pre-Hudson Procedures

Discussion

The U.S. Supreme Court held in Hudson that the First Amendment requires that before a union may exact a fair-share fee it must establish the following procedural safeguards: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 106 S.Ct. at 1078. The Wisconsin Supreme Court held in Browne that MERA is constitutional on its face, hence MERA must be construed to require at least the same procedural safeguards held in Hudson to be constitutionally required. Having concluded herein that Hudson is to be applied retroactively, it is necessary to determine whether the Respondent Unions' pre-Hudson procedures met the procedural requirements set forth in Hudson. As we did in our Orders to Show Cause issued in these cases, we note that in both cases the Respondent Unions asserted as affirmative defenses in their respective Answers to Amended Complaint the existence of internal union rebate procedures since 1974. See Footnote 1 in both Orders, Browne, Dec. No. 18408-E at 6; Johnson, Dec. No. 19545-E at 7. A review of the admissions and assertions of the Respondent Unions in their pleadings and responses regarding their objection and rebate procedures, and a comparison of those procedures with the requirements of Hudson, establishes that, at least prior to the implementation of the Respondent Unions' new procedures in light of Hudson, which are retroactive to the date of the Hudson decision, the Respondent Unions' fair-share procedures did not meet the requirements set forth in Hudson.

21/ See footnote 14.

II. Sufficiency of Respondent Unions' Post-Hudson Procedures

A. Financial Information in Notice Regarding the Respondent Unions' Expenses

Complainants

Relying on Hudson and McGlumphy v. Fraternal Order of Police, 633 F. Supp. 1074, 1082 (N.D. Ohio, 1986) Complainants assert that the breakdown of the Respondent Unions' expenses into chargeable and nonchargeable categories must be verified by an independent auditor. Since Respondents' notice does not include such verification of the breakdowns, the notice does not meet the requirements of Hudson. Complainants also assert that the local unions must meet this requirement and that the federal cases cited by the unions as permitting a presumption that the percentage of a local's expenses chargeable to objecting fair-share payors is at least the same as for the parent union, are not good precedent as the issue was not raised in those cases.

Respondent Unions

The Respondent Unions contend that Hudson only requires that a union have "all its expenditures" in "major categories" verified by an independent auditor, and that the union must only provide an "explanation" of the share of chargeable expenses and not "verification". They also contend that it is impossible, as a practical matter, consistent with the standards of the accounting profession, for an auditor to determine the legitimacy of the related expenses. That judgement cannot be made through the application of "generally accepted accounting principles." Further, requiring independent verification of the breakdown of expenses would be "pointless and repetitive," since the union is required to justify its calculations in an expeditious adversarial proceeding before an impartial decisionmaker. Respondent Unions take a similar position regarding the notice of the local union's expenditures. The unions will bear the burden regarding the actual expenditures of the locals before the impartial decision-maker. They also contend that a presumption as to the percentage of the local's expenditures chargeable to objecting fair-share payors is justified based upon the decisions in Beck v. CWA, 112 LRRM 3069, aff'd, 776 F.2d 1187 (4th Cir., 1985); Dolan v. Rockford School District No. 205, 121 LRRM 2862 (N.D. Ill., 1985); and Ellis v. BRAC, 108 LRRM 2648, rev'd on other grounds, Ellis v. Railway Clerks, 104 S.Ct. 1883 (1984).

Discussion

The U.S. Supreme Court held in Hudson that:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the non-union employees in the dark about the source of the figure for the agency fee - and requiring them to object in order to receive information - does not adequately protect the careful distinctions drawn in Abood.

Hudson, 106 S.Ct at 1076. The Court held that the union's notice in that case was inadequate for the following reasons:

> Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members - and for which nonmembers as well as members can fairly be charged a fee - the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.

Id. at 1076. In a footnote following the above text the Court provided a further explanation of what it is requiring in this regard:

> We continue to recognize that there are practical reasons why "(a)bsolute precision" in the calculation of the charge to

> nonmembers cannot be "expected or required." Allen, 373 U. S., at 122, quoted in Abood, 431 U. S., at 239-240, n. 40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceeding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, see n. 4. supra. for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

Id. at 1076, n. 18.

In the instant cases Respondent Unions have provided all of its fair-share fee payors with a notice that includes:

a) a list of activities the Respondent Unions spend money on preceded by a statement that:

> The AFSCME International ("AFSCME") and AFSCME Council 48 and its affiliated locals spend a portion of all fees collected from nonmembers on the following activities. AFSCME Council 48 has determined that a pro rata portion of the expenses associated with these activities are chargeable to all nonmembers paying Fairshare Fees to AFSCME Council 48. 22/

b) a list of activities that the Respondent Unions spend money on preceded by a statement that:

> AFSCME and AFSCME Council 48 and its affiliated locals spend a portion of all fees collected from members and nonmembers on the following activities. AFSCME Council 48 has determined that none of the expenses associated with these activities are chargeable to objecting nonmember Fairshare Fee payors. 23/

c) a statement regarding the application of the above criteria to Respondent Unions' respective expenses:

22/ Examples of the activities listed by the Respondent Unions in their notice as "chargeable" to all fair-share fee payors are:

(a) Gathering information in preparation for the negotiation of collective bargaining agreements;

(b) Gathering information from employees concerning collective bargaining positions;

(c) Negotiating collective bargaining agreements;

(d) Adjusting grievances pursuant to the provisions of collective bargaining agreements;

(e) Administration of ballot procedures on the ratification of negotiated agreements;

. . .

(y) Administrative activities allocable to each of the categories described in categories (a) through (x) above.

23/ Examples of the activities listed by the Respondent Unions in their notice as not chargeable to objecting fair-share fee payors are:

(Footnote 23 continued on bottom of Page 29.)

Applying these criteria to the activities and expenses of AFSCME and AFSCME Council 48 and its affiliated locals for the time period November 1, 1984 through October 31, 1985, AFSCME Council 48 has determined that 92.123% of the total combined expenses are chargeable to objecting nonmember Fairshare Fee payors. This percentage is based on the weighted average of the total expenses of AFSCME Council 48's affiliated locals that are chargeable to objecting nonmember Fairshare Fee payors. This is based on the following:

AFSCME	$ 557,855.45	x 86.111% =	$ 480,374.90
AFSCME Council 48	970,574.15	x 94.26 % =	914,863.19
Affiliated Locals	598,761.47	x 94.26 % =	564,392.56
Totals	$2,127,191.07		$1,959,630.65

$$\frac{1,959,630.65}{2,127,191.07} = 92.123\%$$

This calculation will be effective from the date of this Notice until June 30, 1987. Prior to June 30, 1987 you will receive a new Notice containing a new calculation of chargeable versus nonchargeable expenses based on financial information for fiscal year 1986.

The AFSCME Council 48 calculation of expense for which objecting nonmember Fairshare Fee payors can be charged a pro rata share is based on the following audited financial information. This financial information sets forth the expenditures of AFSCME and AFSCME Council 48 in major catgories of expenditures, audited by an independent accountant, and states the amounts of expenditures which are chargeable to objecting nonmember Fairshare Fee payors pursuant to the criteria set forth above.

AFSCME International Financial Information
Expenses for the Fourth Quarter of 1985

Category of Expenses	Total 4th Quarter Audited Expenses	Total Expenses Chargeable to Objecting Fee Payors
Field Services	$ 5,247,795	$ 5,231,228
Education and Training	201,361	200,160
Women's Rights/Community Action	176,656	146,951
Research and Collective Bargaining	323,605	323,605

(Footnote 23 continued from Page 28.)

(a) Training in voter registration, get-out-the-vote, and campaign techniques;

(b) Supporting and contributing to charitable organizations, political organizations and candidates for public office, idealogical causes and international affairs;

(c) The public advertising on matters not related to the representational interest in the collective bargaining process and contract administration;

(d) Purchasing books, reports, and advance sheets utilized in matters not related to the representational interest in the collective bargaining process or contract administration;

(e) Paying technicians for services in matters not related to the representational interest in the collective bargaining process an (sic) contract administration;

. . .

(m) Administrative activities allocable to each of the categories described in categories (a) through (l) immediately above;

Legislation	156,406	143,779
Political Action/People	783,136	(36,070)
Public Policy	162,422	162,422
Public Affairs	988,292	934,321
President's Office	599,654	451,183
Convention	408,322	359,323
Inter-Union Affiliations	1,184,856	740,426
International Affairs	77,363	- 0 -
Legal Services	466,743	410,734
Executive Board	297,139	297,139
Personnel	41,988	36,949
Judicial Panel	99,818	99,818
Secretary-Treasurer's Office	158,830	139,520
Financial & General Operating	1,709,116	1,624,828
Totals	$13,083,502	$11,266,316
Total Chargeable International Expenses	**$11,266,316**	
- - - - - - - - - - - -	- - - - - -	**= 86.111%**
Total International Expenses	**$13,083,502**	

AFSCME MILWAUKEE DISTRICT COUNCIL 48 AFL-CIO
SUMMARY FOR PERIOD 11/01/84 - 10/31/85 BASED UPON ACTIVITY REPORTS AND ACCOUNTING SUMMARIES OF 20 May 1986*

TOTAL EXPENDITURES	$994,126.72
ALLOCATED BY EXPENDITURE CATEGORY	
NON-CHARGEABLE	$ 42,530.83
CHARGEABLE	$123,614.18
ALLOCATED BY TIME SPENT ON ACTIVITY	
NON-CHARGEABLE	$ 14,489.68
CHARGEABLE	$813,492.03
TOTAL CHARGEABLE	$937,106.21
CHARGEABLE PERCENTAGE	94.26%

* This Period has been audited by Holman, Butal, Fine.

AFSCME MILWAUKEE DISTRICT COUNCIL 48 AFL-CIO
SUMMARY FOR PERIOD 11/01/84 - 10/31/85
BASED UPON ACTIVITY REPORTS AS OF 20 MAY 1986

Activity Code	Employee Code 0001	0002	0003	0004	0005	0006	0007	0008	0009	Other	Total
A1	48.0	48.0	8.0	96.0	80.0	44.0	77.0	88.0	120.0	96.0	705.0
A2	152.0	128.0	56.0	56.0	104.0	32.0	211.0	128.0	184.0	120.0	1171.0
A3	0.0	40.0	72.0	28.0	16.0	0.0	20.0	84.0	8.0	48.0	316.0
A4	48.0	40.0	0.0	32.0	0.0	40.0	48.0	40.0	0.0	40.0	288.0
A5	0.0	64.0	0.0	0.0	16.0	0.0	0.0	24.0	0.0	0.0	14.0
MR7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	14.0	0.0	0.0	14.0
NR1	2035.0	1599.5	1998.0	1881.5	1680.5	1221.0	1530.5	1527.0	1775.0	1337.0	16585.0
NR2	0.0	0.0	137.0	0.0	3.0	0.0	22.0	0.0	0.0	50.0	212.0
					. . .						24/
R1	0.0	0.0	0.0	0.0	0.0	0.0	20.0	0.0	0.0	0.0	20.0
R3	0.0	4.0	0.0	0.0	5.0	0.0	9.5	0.0	0.0	3.5	22.0
R5	0.0	0.0	0.0	0.0	55.0	5.0	1.5	0.0	0.0	9.0	70.5
R6	6.5	0.0	0.0	0.0	8.0	0.0	1.5	0.0	0.0	0.0	16.0

24/ The notice includes definitions of the activity codes and accounting codes. See Appendix A, pp. 7-14.

R7	9.5	0.0	0.0	12.5	130.0	11.0	15.5	1.0	0.0	12.0	191.5
R10	0.0	35.5	0.0	0.0	14.0	0.0	19.0	0.0	0.0	0.0	68.5
Total	2467.5	2243.0	2934.0	2440.0	3415.0	1867.0	2592.0	2175.0	2345.0	2320.5	24799.0
Total Hours Worked	2219.5	1923.0	2798.0	2228.0	3199.0	1751.0	2236.0	1797.0	2033.0	2016.5	22201.0
Total Hours Chargeable	2203.5	1883.5	2798.0	2215.5	2987.0	1735.0	2169.0	1796.0	2033.0	1992.0	21812.5
Percent Chargeable	99.3%	97.9%	100.0%	99.4%	93.4%	99.1%	97.0%	99.9%	100.0%	98.8%	98.3%

. . .

20 May

AFSCME Council 48 Affiliated Locals Financial Information
Expenses for November 1, 1984 to October 31, 1985

AFSCME Council 48 has 35 affiliated local unions. During the period November, 1984 to October 31, 1985 these local unions had total expenses of $598,761.47. In accordance with decisions of the federal courts on the question of how local union expenditures may be allocated for the purpose of determining a fair share fee. Council 48 has determined that the percentage of chargeable activities of these local unions is at least as great as the percentage of chargeable activities of Council 48. As calculated above, the percentage of Council 48's local expenses which are chargeable to fair share fee payors is 94.26%. Applying this percentage to the toal expenses for Council 48's affiliated Locals ($598,761.47 x 96.24%) 25/ results in a total chargeable expense for the affiliated locals of $564,392.56.

The Executive Director of Respondent District Council 48, John Parr, testified that as to Respondent District Council 48's financial information in the notice, the "Total Expenditures" figures and the figures in the "Total" column for the different account codes had been independently audited by certified public accountants, but that the breakdown of those totals into the different chargeable and nonchargeable activity codes had not been audited. (Tr. 58-60.) Similarly, counsel for Respondent AFSCME, John Sullivan, testified that the figures in the column headed "Total 4th Quarter Audited Expenses" had been audited, but that the figures in the second column headed "Total Expenses Chargeable to Objecting Fee Payors" had not been audited. (Tr. 95.) Parr also testified that the figure of $598,761.47 given as the total of the expenditures of all the locals affiliated with District Council 48 had not been audited. The expenses of the individual locals also have not been audited. (Tr. 60-61.) Parr testified that his determination that the percentage of chargeable activities of these locals is at least as great as the percentage of chargeable activities of District Council 48 is based upon his experience "looking at local operating statements, knowing what kind of functions and activities they do, and function of the aggregate of 35 locals that are operating within the Council, and knowing what the responsibilities are." (Tr. 61.)

The Court's decision in Hudson addresses what is required in the union's notice by way of breakdowns of union expenses and verification by an independent auditor in its discussion regarding the adequacy of the union's notice, 106 S.Ct. at 1076, and n. 18, and in its discussion regarding escrow. 106 S.Ct. at 1077-78, and n. 21. In its discussion regarding the notice the Court held that the

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25/ This percentage appears to be a transposition error as the product ($564,392.56) shows 94.26% was the multiplier used to arrive at that figure.

notice must identify expenditures for collective bargaining and contract administration, i.e., expenses for which dissenting fair-share fee payors may be charged and clarified in note 18 that:

> The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, see n. 4, supra, for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

106 S.Ct. at 1076.

Complainants assert that note 18 is to be read to require verification by an independent auditor of the breakdowns into chargeable and non-chargeable categories as well. Such an interpretation, however, would not be consistent with the Court's discussion of when and why a 100% escrow would not be required:

> We need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain. If, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories. 23 On the record before us, there is no reason to believe that anything approaching 100% "cushion" to cover the possibility of mathematical errors would be constitutionally required. Nor can we decide how the proper contribution that might be made by an independent audit, in advance, coupled with adequate notice, might reduce the size of any appropriate escrow.

106 S.Ct. at 1078. (Emphasis added)

The Court's discussion appears to us to indicate that verification by an independent auditor of the figures in the notice for the chargeable categories is an alternative the unions have to escrowing 100% of the fee. This interpretation is supported by note 23 where the Court clarifies its above-cited discussion:

> If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.

106 S.Ct. at 1078. Further, the Court held that one of the constitutionally required safeguards is "an escrow for the amounts reasonably in dispute while such challenges are pending." 106 S.Ct. at 1078. If the union is required to have its figures for the chargeable categories in the notice verified by an independent auditor, and if the union need not escrow those amounts for the chargeable categories listed and verified by an independent auditor as having been spent in those categories, the question arises as to what categories of expenses are left that need be escrowed as being "reasonably in dispute."

We conclude that Hudson requires that, in this regard, the union's notice must at least list the major categories of the union's expenses and those figures must be verified by an independent auditor. While the notice must also indicate the amounts for the categories related to collective bargaining and contract administration, the union may elect to either have those amounts verified by an independent auditor or it must escrow 100% of the fee being collected, and not advance rebated, from a dissenting fair-share fee payor who is challenging the union's computations until the determination of the proper fee amount has been made by the impartial decisionmaker.

In the notice before us in these cases the financial information provided by both Respondents AFSCME and District Council 48, as far as a breakdown of the expenses and explanation of what activities the Respondent Unions consider to be chargeable, is sufficient to meet the requirements of Hudson. The information on the breakdown of expenses provided by those two Respondents probably represent the two ends of the spectrum of what is required, with the information provided by Respondent AFSCME representing the minimum of what is required.

As to the information provided in the notice for the affiliated local unions, there is only an unverified single amount that is alleged to represent the total expenses for all of those locals. There is neither a sufficient breakdown and explanation of the expenses, nor an audit of such figures. While we recognize the practical problems with requiring the unions to provide such information as to the locals' expenditures, we cannot accept, and do not read the Court in Hudson as accepting, a presumption as to the chargeable portion of locals' expenses based upon a union official's experience. The federal district court cases cited by Respondent Unions provide little guidance on the point. In Ellis, the District Court's findings as to the locals was based upon testimony of the locals and an examination of their books and records, as well as a stipulation. Ellis, 108 LRRM at 2650. Such a presumption was not an issue before the Court in Dolan, and in Beck the Special Master found that the defendant local unions had failed to meet their burden of proof and that "only by evaluating the evidence in the light most favorable to them could the Special Master justify an allocation equal to that of the CWA." Beck, 112 LRRM at 3072. These cases preceded the Supreme Court's decision in Hudson and we note that the Supreme Court did not mention such a presumption in its discussion of what it was requiring as far as a notice requirement. However, we also note the Court's recognition of the practical problems involved in meeting its requirements and the Court's efforts to find practical solutions, e.g.,

> We continue to recognize that there are practical reasons why "(a)bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." Allen, 373 U.S., at 122, quoted in Abood, 431 U.S. at 239-240, n. 40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, . . .
>
> . . .
>
> We do not agree, however, with the Seventh Circuit that a full-dress administrative hearing, with evidentiary safeguards, is part of the "constitutional minimum." Indeed, we think that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Union's unrestricted choice.
>
> . . .

Hudson, 106 S.Ct. at 1076-1077. (Emphasis added)

We think that were an independent auditor to take a random sampling of a representative number of the local unions and audit their records, and if that sampling established to the auditor's satisfaction that the locals' expenditures always have a lesser percentage of non-chargeable expenses than does Respondent District Council 48, such a presumption would be established and would be sufficient for notice purposes. See Andrews, et al vs. Connecticut Education Association, et al, No. H 83-481 (JAC) (D.C. Conn. 1987). We note, however, that a union would not be relieved of its burden of proving the validity of the presumption to the satisfaction of the arbitrator or legal tribunal if its figures are challenged.

B. Scope of the Determination by the Impartial Decisionmaker

Complainants

Complainants note that the Respondent Unions' procedures distinguish between fair-share fee payors who do not object to the unions' use of their fee for

purposes other than collective bargaining and contract administration, those who do object, but do not challenge the unions' figures, and those who challenge the unions' figures. Under the Respondent Unions' procedures only the latter classification, i.e., the "challengers," are entitled to the benefit of the impartial decisionmaker's determination. Complainants assert that as a matter of statutory law the determination must be applied to all of the Respondent Unions' fair-share fee payors because MERA limits the amount which a union may collect from all such employes to their proportionate share of the costs of collective bargaining and contract administration, and that neither an objection or a challenge is necessary to limit that amount. In support of their position Complainants cite the Wisconsin Supreme Court's decision in Browne v. Milwaukee Board of School Directors, 83 Wis.2d 316 (1978) where it cited the trial court's statements that MERA is more restrictive of the unions' rights than are plaintiffs' First Amendment rights. Further, Complainants contend that as a matter of constitutional law the decision must be applied to all "objectors," and not just to "challengers."

Respondent Unions

The Respondent Unions' argue that MERA requires a fair-share fee payor to object in order for the limitation on the amount that may be collected as a fee to apply. They argue that it is the union's refusal to act upon the objection once it has been made known to the union that is the violation of MERA, and they rely primarily on the language from the Wisconsin Supreme Court's decision in Browne where it likened the trial court's analysis of MERA to the U.S. Supreme Court's approach with respect to the Railway Labor Act in International Ass'n of Machinists v. Street, 367 U.S. 740, 768-769 (1961). As to an "objector's" constitutional rights, the Respondent Unions assert that all fair-share fee payors are given the option under their procedure of either "objecting" or "challenging," and that these options are clearly described in the notice to fair-share fee payors. They argue that, "Once the fee payor has elected to object and to receive an advance rebate consistent with the unions' calculation, they have waived their right to an additional rebate, if any, based upon the finding of the impartial decisionmaker." (Respondent Unions' brief at pp. 8-9.) This "knowing and voluntary waiver" by fee payors of the right to challenge is not violative of their constitutional rights. Citing D.H. Overmyer Company, Inc. of Ohio v. Frick Company, 405 U.S. 174 (1972); White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979).

Discussion

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:

> The nonmember's "burden" is simply the obligation to make his objection known. See Machinists v. Street, 167 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 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. When Bill AB198, containing the 1971 amendments to MERA and including a proposed provision for fair-share agreements between municipal employers and labor organizations, was jacketed it read in relevant part as it reads today:

> "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the costs of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. . . . (Emphasis added)

The Legislative Reference Bureau described the Bill as making two major changes in MERA:

1. Repeal of present no-strike ban.

2. Establishment of a system of "fair-share agreement," whereby non-union members of a collective bargaining unit may be required to contribute to the union by payroll withholding of a sum measured by union costs of collective bargaining.

A number of amendments to Bill AB198 were offered, including the following addition to the proposed fair-share language:

> No portion of dues so collected from any employee shall be used for political purposes without the written approval of the employee.

That amendment would have required the prior approval of the employe, and without it the union would have been precluded from using the fee for such purposes. The version coming out of the Senate Subcommittee again contained the original wording - "measured by the amount of dues uniformly required of all members," and not the above-cited amended language.

A subsequent amendment was offered by Senator Swan that would have made the following changes:

> "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the costs of the collective bargaining process and contract administration measured by the proportion of dues uniformly required of all members for such purposes. Such an agreement shall contain a provision requiring the employer to deduct the proportionate share as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.
>
> . . .

(Emphasis added)

The final version of AB198 passed by the Legislature did not include the above-cited amendment which would have limited, without an objection from the employe, the amount a union could collect from any fair-share employe in the first instance.

Regarding the Wisconsin Supreme Court's decision in Browne, we note that the Court did not expressly address the issue of whether an objection is required under MERA, although a portion of the trial court's decision cited by the Court speaks of what is needed to protect an "objecting nonmember":

> "Further the uncontroverted affidavits relate numerous expenses unrelated to the confines of the statute. Thus there may be an unconstitutional application of the funds collected.
>
> "Since all the defendant unions receive a portion of plaintiffs' funds (albeit slight in the case of the state and national organizations) a strict accounting procedure should be instituted, if same has not already been accomplished to ensure that any objecting nonmember is reimbursed for any of his dues which are not strictly related to the collective bargaining process or contract administration . . . ."

Browne, 83 Wis.2d at 330. (Emphasis added)

The Complainants have noted that in Browne the Court cited the trial court's statements that MERA is more restrictive of the union's rights than are plaintiffs' First Amendment rights. The following is the context in which the Court cited those statements:

> The plaintiffs contend that the trial court decision still leaves open questions about whether the statute is being constitutionally applied to them, but at a June 29, 1977 hearing after the opinion was issued the trial court stated that,
>
> "Although the Court declared the Wisconsin Statute constitutional on its face, a further constitutional issue would normally be apparent in this case on First Amendment rights, but that issue really is moot since the statue (sic) itself indicates the expenditures by the unions of fair-share monies are limited to contract administration and collective bargaining, which gives greater rights to the plaintiffs than solely First Amendment rights."
>
> At an August 22, 1977 hearing the trial court referred to its previous decision and stated that,
>
> "There is no question that the issue before the Court in the May 16th decision was solely the question of whether or not that portion of the statutes was unconstitutional on its face. The Court did make referral in its opinion to certain expenditures that would be placed in the record by the plaintiffs concerning a number of different expenditures in both the Browne and Gerleman cases, and only for purpose of guidance for an agency or referee that will be adopted when it makes its determination on findings of fact and conclusion of law as to whether or not the expenditures come within the statute, which, as I have indicated on a number of occasions, is more restrictive of the union's rights than the plaintiffs' First Amendment rights." (emphasis added).
>
> Based on the above statement the trial court must have determined that the issue of the "as-applied" constitutionality of the statute was foreclosed by the statute itself. Sec. 111.70(1)(h), Stats. (1975), provides that fair-share employees are required to pay the costs of collective bargaining and contract administration. The trial court evidently reasoned that these costs determine the largest amount due from non-union employes and not the ". . . amount of dues uniformly required of all (union) members." Sec. 111.70(2), Stats., supra. Under this paragraph issues of constitutional application of the statue (sic) are settled because that statute is interpreted so that only money for constitutional purposes can be collected under it.

83 Wis.2d at 330-331. (Emphasis added)

The Wisconsin Supreme Court cited the trial court's statements, and the trial court made those statements, in the context of discussing what type of union expenditures non-members may be charged for under MERA. This indicatesthat the courts viewed MERA as being more restrictive than the First Amendment in that it limited the activities for which a union may charge an agency fee payorover his/her objection to a greater extent than did the First Amendment. Atthe time of the Court's decision in Browne the First Amendment concerns had only been raised as to charges for political and ideological activities of a union over the employe's objection. Abood, 431 U.S. at 232-237.

We also note that the Wisconsin Supreme Court, with apparent approval, likened the trial court's analysis and construction of MERA to the U.S.Supreme Court's analysis and construction of the RLA in Street:

> We agree with the trial court's interpretation of sec. 111.70(2), Stats. The statute itself forbids the use of fair-share funds for purposes unrelated to collective bargaining or contract administration. 7/
>
> . . .
>
> ---
>
> 7/ The trial court's approach is also similar to the one used by the U.S. Supreme Court in International Ass'n of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L. Ed.2d 1141 (1961). That case involved a constitutional challenge to a union shop provision applicable to the Railway Labor Act. The record contained findings that the union treasury, to which all members were required to contribute, had been used to finance political campaign and propagate political and economic ideologies.
>
> The court stated that these findings raised grave constitutional questions. In resolving these questions the court made an exhaustive review of the legislative history of the Railway Labor Act and determined that only expenditures for negotiating and administering the collective bargaining agreement and adjusting grievances fell within, "the reasons . . . accepted by Congress why authority to make union shop agreements was justified." Street, supra at 367 U.S. 768. The Court therefore ruled that the use of compulsory union dues for political purposes violated the purpose of the act and it,
>
> ". . . is to be construed to deny the unions, over an employee's objection, the power is to use his exacted funds to support political causes which he opposes." Street, supra at 367 U.S. 768, 769.

Browne 83 Wis.2d at 332, n. 7. (Emphasis added) In both Street and Railway Clerks v. Allen, 373 U.S. 113 (1963) the Court concluded that there was no violation and no entitlement to relief absent the employe's having made known to the union his objection to the use of his fees for political purposes. Street, 367 U.S. at 771, 774; Allen, 373 U.S. at 118-119. The Wisconsin Court did not indicate the inapplicability of such a requirement in similar cases arising under MERA.

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.

The Respondent Unions' procedures also do not extend the benefit of the decision to a nonmember who "objects," rather than "challenges" the Respondent Unions' figures. In their briefs they characterize the "objector's" choice as a

"knowing and voluntary waiver" of their right to challenge and to the benefit of a successful challenge. We agree that such a distinction is permissible, both constitutionally and under MERA. Just as an adequately informed fair-share fee payor may choose not to object, and thereby waive his/her rights to a reduced fee, a nonmember may knowingly choose to "settle" for the union's figures and to forego the challenge of those figures and any benefit that might result from such a challenge. We conclude that a union's procedure may distinguish between a fair-share fee payor who dissents, but does not challenge the union's computations, and one who challenges the union's computations, if the union's notice to its fair-share fee payors is clear both as to the distinction and as to the consequences of opting not to challenge.

In this case the Respondent Unions' notice provides the following statements regarding "objections" and "challenges:"

AFSCME Council 48 Procedure for Objecting to the Expenditure of Fairshare Non-Chargeable Activities

AFSCME Council 48 has established the following procedure for non-members who object to the expenditure of a portion of their Fairshare fees on activities that AFSCME Council 48 has determined are non-chargeable and who want an advance rebate of that portion of their dues or fees spent on those activities. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THESE PROCEDURES IN ORDER TO REGISTER AN OBJECTION AND RECEIVE AN ADVANCE REBATE.

A. Objections

Non-members who pay Fairshare fees to AFSCME Council 48 who wish to object to the expenditure of a portion of their fees on those activities and expenses that AFSCME Council 48 has determined are non-chargeable must so inform AFSCME Council 48 in writing by certified mail. The written objection must include the objecting non-member's name, address, social security number, job title, employer, and work location.

The written objection must be sent to AFSCME Council 48 at the following address, by certified mail and post-marked no later than **June 27, 1986.**

AFSCME Council 48
3427 W. St. Paul Avenue
Milwaukee, WI 53208

B. Advance Rebate

Upon receipt of the written objection AFSCME Council 48 will pay to the objecting non-member an advance rebate equal to the difference between the fees collected from the objecting non-member and that portion of the dues or fees found chargeable by AFSCME Council 48 in accordance with the calculation set forth in this Notice. This advance rebate will be paid from the date of this Notice until June 30, 1987. The advance rebate will be paid on a monthly basis.

AFSCME Council 48 Procedure for Challenging Its Calculation of Chargeable vs. Non-Chargeable Expenses

AFSCME Council 48 has established the following procedures for individual non-members who pay Fairshare fees and who wish to challenge the Council 48 calculation of chargeable versus non-chargeable expenses. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THIS PROCEDURE IN ORDER TO CHALLENGE THE AFSCME COUNCIL 48 CALCULATION OF CHARGEABLE VERSUS NON-CHARGEABLE EXPENSES.

A. Challenges

Individual non-member Fairshare fee payors who wish to challenge the AFSCME Council 48 calculation of chargeable versus non-chargeable expenses must inform AFSCME Council 48 of their challenge in writing by certified mail. The written challenge must include the challenging Fairshare payor's ("Challenger's") name, address, social security number, job title, employer, and work location. The written challenge must be accompanied by a check or money order in the amount of $5.00 payable to AFSCME Council 48 to cover a portion of the costs of the arbitration process (i.e., the Arbitrator's fee).

The written challenge must be sent to AFSCME Council 48 by certified mail at the following address and post-marked no later than **June 27, 1986.**

AFSCME Council 48
3427 W. St. Paul Avenue
Milwaukee, WI 53208

. . .

We do not deem the above to be sufficient to put the fair-share fee payors on notice that failure to engage in the "challenge" procedure will preclude one from receiving the benefit of the impartial decisionmaker's determination as to the amount chargeable even if one "objects."

We note that inclusion of a statement such as that quoted above from the Respondent Unions' brief would go a long way toward curing this deficiency. 26/

C. End of Year Adjustment

Complainants

Complainants assert that if at the end of a fiscal year a union finds that its actual expenditures for non-chargeable purposes were greater than accounted for by the advanced reduction, they must refund the additional amount to all objectors, or under MERA, to all non-member fair-share fee payors. Citing, Abood at 238-240. The converse is also true if the union underestimated its actual chargeable costs for the fiscal year. AFSCME's procedures do not provide for these types of adjustments and, therefore, cause either "coerced subsidization of non-chargeable activities or payment of less than a fair-share of chargeable costs by non-members."

Respondent Unions

Respondent Unions contend that Complainants' assertion is clearly inconsistent with the Court's decision in Hudson. The Court in Hudson reaffirmed its prior holding in Allen, that "absolute precision" in the calculation was not to be "expected or required." 106 S.Ct. at 1076, n. 18. The Court went on to state that "the union cannot be faulted for calculating its fee on the expenses of the preceeding year." Id. The Court implicitly recognized that while the percentage of union expenditures that are chargeable may vary from year to year, such variations even out over time. The allegedly required end of the year adjustment would effectively require the union to calculate, or retroactively adjust, the fee to achieve "absolute precision" in the calculation. Further, the administrative burden imposed on the union in making such adjustment would be "a nightmare."

26/ "Once the fee payer has elected to object and to receive an advance rebate consistent with the unions' calculation, they have waived their right to an additional rebate, if any, based upon the finding of the impartial decision maker." (Respondent Unions' Brief, pp. 8-9.)

Discussion

Respondent Unions correctly cite the Court's decision in Hudson. The Court indicated its awareness of the practical problems involved in calculating the proper fee:

> We continue to recognize that there are practical reasons why "(a)bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." Allen, 373 U.S., at 122, quoted in Abood. 431 U.S. at 239-240, n. 40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year.
>
> Hudson, 106 S.Ct. at 1076, n. 18.

The Court appears satisfied that using the union's expenses for the prior year to calculate the fee will be reasonably accurate and will adequately minimize the danger of a dissenting nonmember being charged for the union's nonchargeable activities, while at the same time being workable. We find no reference in the Court's decision to an additional adjustment over that provided by the determination by the impartial decisionmaker and no indication that it would require such an adjustment. We therefore conclude that a union is neither constitutionally required, nor required under MERA, to make an "end of the year adjustment" in its fair-share fee to reflect its actual expenses for that year.

D. Certified Mail Requirement and Five Dollar Fee

Complainants

Complainants contend that "The government and union have a responsibility to provide procedures . . . that facilitate a non-union employe's ability to protect his rights." Hudson, 106 S.Ct. at 1076, n. 20. (Emphasis added) In Re: Board of Education of Town of Boonton 99 N.J. 523, 551-52 (1985), cert. denied sub. nom. Kramer v. Public Employment Relations Commission, 106 S. Ct. 1388 (1986); Perry v. Machinists Local 2569, 708 F.2d 1258, 1262 (7th Cir. 1983) are cited as holding that these procedures must provide an uncomplicated, efficient, and readily accessible process for contesting the representation fee. "Such a process must contain no features or conditions that would in any manner inhibit or restrain a non-member employe from utilizing it." Town of Boonton, 551-52. It is alleged that the new procedures contain several features that do not "facilitate a non-union employe's ability to protect his rights," but that rather will inhibit the employes from using those procedures. Among the aspects of the Respondent Unions' procedures that Complainants contend are improper and/or inadequate are the requirements that an individual who wishes to challenge the Respondent Unions' calculations must put his/her "challenge" in writing and send it to Respondent District Council 48 by certified mail, and that a "challenge" be accompanied by a check or a money order in the amount of Five Dollars ($5.00) payable to District Council 48. It is asserted by Complainants that under Hudson the non-member's burden is simply to make his objection known, yet the Respondent Unions add to that burden the requirements that "objections" and "challenges" must be sent by certified mail and the "challenges" must be accompanied by a Five Dollar fee to cover a portion of the cost of arbitration. (AFSCME Procedure paragraphs 10, 12, 15; District Council 48 Notice at 14-15.) Citing the cost of certified mail and a first class stamp, Complainants conclude that a "challenger" has to pay $5.97 to challenge an advance reduction of $13.96. It is alleged that, adding to that the inconvenience of having to go to the post office to use certified mail, it is clear that the foregoing conditions are "not only cumbersome, but designed to discourage all but the most zealous employee" from "objecting" or "challenging." Citing, School Committee v. Greenfield Education Association, 385 Mass. 70, 78 n. 4 (1982). The Respondent Unions' claim that the purpose of certification is to prevent fraud is unpersuasive, since that purpose is already served by the requirement that the "objection" or "challenge" must be effected in writing and include the non-member's name, address, social security number, job title, employer and work location. There is no justification for the arbitration fee since an employe cannot be required to pay for the exercise of his constitutional right to challenge the amount of the fee before an impartial decisionmaker, and the government and the union have a responsibility to provide that review. Hudson, 106 S.Ct. at 1076 and n. 20.

Respondent Unions

Respondent Unions assert that the certified mail has been required to minimize the potential for fraud in the submission of "objections" and "challenges." Since the filing of an "objection" will obligate the union to pay advanced rebates to the "objector", and the filing of a "challenge" will require the union to expend "considerable sums of money" on the impartial challenge procedure, the union has a right to verify that valid "challenges" or "objections" were submitted. If there is a dispute as to whether an "objection" or "challenge" had been received by the union, the fee payor should be required to produce evidence in the form of a return receipt that the union received the "objection" or "challenge." The identifying information provided by the "objector" or "challenger" will not serve that purpose. Such identifying information is generally available through public disclosure laws. Further, contacting an individual alleged to be an "objector" or "challenger" is not an adequate substitute for confirmed receipt of the "objection" or "challenge" by the union. As to the Five Dollar fee, it is neither unreasonable, nor violative of the challengers' constitutional rights, to require him/her to pay a very small fraction of the costs of the arbitration process invoked. The arbitration procedure costs a great deal of money, regardless of whether the arbitrator is appointed by the Commission or by the AAA, an average daily fee being approximately $500. Further, since the union has the burden of proof, it will have to put in its case and make arguments even if the "challenger" never appears at the hearing or submits any argument.

Discussion

As Complainants contend, the Court indicated in its decision in Hudson the procedures must "facilitate a non-union employee's ability to protect his rights." Hudson, 106 S.Ct. at 1076, n. 20. We interpret the Court's statement to require that the procedure not place an undue burden on the nonmember employes and that it not place unwarranted obstacles in their way. The Respondent Unions' contention that the certified mail requirement is justified in order to confirm receipt of the "objection" or "challenge" and to protect the Respondent Unions from fraud is not persuasive. There are less burdensome and less restrictive methods of achieving those ends, e.g., issuing receipts to nonmembers who have filed their "objection" and/or "challenges." Further, the requirement does not protect the Respondent Unions from fraud since certified mail does not verify the identity of the sender. We would note, however, that if a nonmember employe does not take any steps to verify the unions' receipt of his/her "objection" or "challenge," that individual takes a risk if the Respondent Unions claim they did not receive it. We do not, however, consider it to be an unwarranted obstacle for the Respondent Unions to require that "objections" and "challenges" be submitted in writing.

We also find the Five Dollar fee requirement to "challenge" to be a constitutionally impermissible burden. While requiring "challengers" to pay something toward the cost of arbitration would enhance the arbitrator's appearance of impartiality, the Court has found it to be sufficient evidence of impartiality that the union is not in sole control of the selection of the arbitrator. It is the responsibility of the unions, not the dissenting nonmember, to establish and maintain adequate procedures. The expense of providing the arbitration forum is the unions' to bear.

E. Thirty-Day Dissent Period and Requiring Annual Submission of Objections and Challenges

Under the Respondent Unions' procedure an objection is timely only during a 30 day period after notice of Respondent District Council 48's calculation of the chargeable expenses is sent out, and an objection does not continue in effect once made, but must be renewed every year. (AFSCME Hudson Procedure, paragraphs 9, 13; Tr. at 39-40, 51, 83-84.

Complainants

In addition to reiterating their contention that MERA does not require any objection, Complainants contend that even assuming an objection is required under MERA, a limitation on the period in which an objection may be filed, and requiring

it to be renewed annually, are impermissible under Hudson because they are "procedural hurdles" to the exercise of the right of dissent. Citing, Perry; and In re UAW District 65, (N.J. Public Employee Relations Commission, April 11, 1986.) They constitute obstacles that permit the Respondent Unions to coerce dissenting employes into subsidizing non-chargeable activities in two circumstances: (1) Where a non-member does not object during the objection period, but wishes to object later in the year; and (2) where an employe resigns from union membership during the year and after the objection period. (Tr. 83-84.) Both circumstances violate the employes' First Amendment rights. To be constitutional, an objection procedure must allow an employe to object and begin paying a reduced fee at any time after receiving notice of his options. Complainants concede that an employe who has been notified of the right to object cannot delay his objection and then later demand a refund for periods during which the Hudson procedures have been in effect and he did not object.

Respondent Unions

The Respondent Unions assert that the objection to the thirty day period to object may be a "non-issue." They assert it is their intent to send a notice to all employes as they become subject to the fair-share fee. Parr testified that notice will go to all employes as they are hired or change their status to fee payors as soon as the Respondent Union is notified of that fact by the employer through the payroll process. When they receive the notice, employes will be afforded a thirty day period in which to submit their objection. It is asserted that Complainants' problem with requiring "objections" and "challenges" annually is based upon their reading of MERA as not requiring an objection and the Respondent Unions refer to their earlier arguments on that point. The Respondent Unions assert that requiring annual objections is not violative of, but consistent with, the underlying rationale of the procedural safeguards established in Hudson. Hudson reaffirmed the principle first articulated in the agency fee context in Street that "dissent is not to be presumed . . . it must affirmatively be known to the union by the dissenting employees." Citing, also Allen, Abood, and Hudson. Presuming a fee payor desires to object in one year because he objected in the prior year would violate the requirement that the fee payor affirmatively make his objections known to the union. Complainants' argument is also inconsistent with the procedural safeguards established in Hudson. The purpose of the notice requirement is to give the fee payors sufficient information to permit them to intelligently decide whether they wish to exercise their rights to "object" or to "challenge." "If objection is presumed, the fee payor will lose their (sic) constitutional right not to object to the unions' expenditures based upon the information contained in the notice." If one's "objection" or "challenge" continues automatically from year to year, there would be little point in sending the notice to the individual. Hudson clearly intended that the notice, as well as the objection or challenge, be renewed on a periodic basis.

Discussion

Hudson does not specifically address the issues of time limits for objecting and requiring the annual submission of objections, however, the Court reiterated its prior holdings in its decisions in the agency fee cases that "dissent is not to be presumed." Hudson, 106 S.Ct. at 1075 and 1076, n. 16. Further, as Respondent Unions point out, in order to give all fair-share fee payors an informed choice, the Court is requiring unions to provide them with timely and up-to-date notice disclosing their expenses and the amounts chargeable to dissenting fair-share fee payors. Since dissent is not to be presumed, and given the timely notice unions are required to provide, it is not unduly burdensome to require the nonmember to file his/her "objection" or "challenge" each year.

As to the thirty day period in which "objections" and "challenges" must be filed, we do not find that to be an unwarranted obstacle. Having a set period to dissent only requires the nonmember to make his/her decision so that the union can respond in an efficient manner, and places no undue burden on the individual. The court in Lehnert v. Ferris Faculty, 27/ a post-Hudson decision, concluded that:

27/ 643 F. Supp. 1306 (W.D. Mich., 1986).

> In the spirit of Hudson, I think it is constitutionally required that nonmembers have at least two weeks after receipt of "adequate information about the basis for the proportionate share" in which to consider the information and make a reasoned decision whether to object.

Id. at 1332-1333.

In Gilpin v. AFSCME, 28/ another post-Hudson decision, the court held on a related point:

> Adequate notice also implies timely notice. Although the timing of the notice provided to the Plaintiffs in Hudson was not at issue before the Supreme Court, this Court finds that adequate notice requires notification a sufficient time prior to the deprivation so as not to present the deprived party with a fait accompli.

Id. at 737.

As long as individuals are given a reasonable amount of time after receipt of adequate notice from the union, and prior to the union's using the fair-share fee, we find a thirty day dissent period to be sufficient time to make the decision and submit one's "objection" or "challenge." See also, Andrews, et al vs. Connecticut Education Association, et al, No. H 83-481 (JAC) (D.C. Conn. 1987).

The same principles would apply to individuals who become subject to fair-share after the annual dissent period, i.e., new employes and those who terminate union membership after the dissent period, but remain in a covered bargaining unit. Those individuals must be given adequate prior notice and a reasonable period of time thereafter to exercise their right to "object" and/or "challenge," and until they have, an appropriate percentage of their fees must be placed in escrow. They must have the right to "object" and receive an advance rebate or to "challenge" and receive the benefit of the challenge in addition to the advance rebate. However, in our view it is not required under Hudson to permit latecomers to participate in the arbitration procedure where to do so would unduly burden the procedure or cause a delay in completing the procedure. If the challenge arbitration has been completed, latecomers who "challenge" must receive the benefit of the outcome of the arbitration. If there were no "challenges" filed prior to the new fair-share fee payor's "challenge," at the union's option, the procedure must either permit the latecomer to initiate a "challenge" and complete the procedure, or to have his/her fee escrowed under the same conditions as any other "challenger," but he/she would be required to wait until the next dissent period, his/her "challenge" would be automatically applied to the new period and the arbitration would be applied retroactively as well to the date he/she became subject to fair-share. Parr testified as to how latecomers would be treated. However, testimonial evidence as to a union's intent is not sufficient, either as evidence of, or notice of, the procedure; both the notice and existing written union policy must make clear the rights of new hires and those employes who quit the union and become covered by a fair-share provision after the dissent period for that year. Ellis v. Western Airlines, Inc., and Air Transport Employees, Civil No. 86-1041-E (S.D. Cal. 1986). Further, Parr's testimony indicated that members who terminate membership in the union and become subject to fair-share would not have the same right to "object" or "challenge," that new hires would have, but would have to wait until the next dissent period. 29/ (Tr. 83-85). In our view, however, members who become fair-share payors after the annual dissent period has passed must be treated the same as the new hires.

28/ 643 F.Supp. 733 (C.D. Ill., 1986).

29/ We note that the Sullivan Affidavit states at Paragraph 2 that the International Executive Board of AFSCME convened on April 30, 1986 and adopted a resolution "directing the International to create procedures to comply with the requirements of Hudson." Attached to the Affidavit as Exhibit 1 is the AFSCME procedure. Section 13 of that procedure provides:

(Footnote 29 continued on the bottom of Page 44.)

F. Clarity of Notice of Challenge Procedures

Complainants

Complainants also allege that Respondent District Council 48's Notice, in describing the "challenge" procedure, is uncertain, confusing, and ambiguous and that it speaks both of a "challenger" filing a charge with the Commission and of an impartial arbitration procedure should the Commission not assert jursidiction. (Notice at 15.) The Respondent Unions claimed at hearing that the notice does not mean what it plainly says and that the procedure is actually arbitration (Tr. 31, 63-66). However, both counsel for Complainants and a Commission member read the notice as referring to a prohibited practice charge. Hence, the notice is wrong and misleading or the Respondent Unions' claims are not true. Johnson v. General Motors, 641 F.2d 1075, 1079-83 (2nd Cir. 1981) is cited as holding that a union member asserting statutory claims cannot be required to exhaust intra-union appellate procedures if the procedures are so confusing that "a typical rank and file union member cannot understand and follow them." Hence, it follows that a non-union employe whose First Amendment rights are affected has not been provided an opportunity to challenge the amount before an impartial decisionmaker when the nature of the challenge procedures is uncertain and the employe has not been given clear notice of how they work. McGlumphy, 633 F.Supp. at 1082-83. Complainants assert that since the precise procedure is unclear it cannot and need not address its specifics. 633 F.Supp. at 1083. If the procedure requires a dissenter to file a prohibited practice charge with the Commission, that does not satisfy Hudson since "some attempt at meaningful review should be available before a non-union contributer (sic) must seek redress through (ordinary) administrative or judicial channels." Citing, McGlumphy, 633 F.Supp. at 1083; Hudson, 106 S. Ct. at 1076 n. 20. If the procedure is arbitration by an arbitrator selected by the AAA and in accord with that Association's "Rules For Impartial Determination of Union Fees," there are several reasons for finding the procedure unsatisfactory, which Complainants reserve the right to address if the applicability of the AAA arbitration is "ever more than an uncertain possibility."

(Footnote 29 continued from Page 43.)

> 13. Individuals hired after the close of the objection and challenge period set forth in the Notice or who are employed in bargaining units that initially become subject to fair share fee, agency fee or union shop arrangements after the close of the objection and challenge period shall be provided with a copy of the Notice within 30 days of the employer's notifying the union of the employee's name and address. These employees will be informed by the union that they can object to the union's expenditure of their fee on nonchargeable activities, and receive an advance rebate, where appropriate, by filing their objection in writing within 30 days of their receipt of the Notice. Objecting employees will receive an appropriate advance rebate covering the period from their initial payment of the fee to the end of the certification year. These employees will also be informed that they can file a challenge to the union's calculation of chargeable expenses contained in the Notice for the subsequent certification year during the next regular challenge period.

We also note, however, that Paragraph 3 of the Affidavit states:

> 3. Because the AFSCME Hudson procedures are intended to apply to all Councils and Locals that collect agency or fair share fees, or are parties to union shop agreements, the requirements of these procedures are stated in general terms. Council 48 has established its own set of procedures, in conformity with the AFSCME Hudson procedures and the requirements of Hudson. It is the Council 48 procedure that will be applicable to the Complaintants (sic) in the above-captioned consolidated case.

Respondent Unions

The Respondent Unions assert that the description in the notice is a "clear statement of the alternatives available to a fee payor wishing to challenge the AFSCME Council 48 fair share fee at the time the Notice was issued." Although the Court in Hudson indicated that a state could choose to provide "extraordinarily swift judicial review for these challenges," it also clearly stated that its requirement for an impartial resolution of fee challenges could be met in at least two ways, through adjudication by a state court or agency or through an internal union procedure. The Commission has primary jurisdiction of challenges to fair-share fees collected under agreements entered into pursuant to MERA. Given this jurisdiction, the Commission has the power to establish procedures affording challengers the "extraordinarily swift judicial review." However, at the time the notice was prepared it was unclear whether the Commission would adopt procedures for the "extraordinarily swift" review required by Hudson. In the absence of such procedures, the Respondent Unions have a responsibility to establish their own procedure resulting in a reasonably prompt decision by an impartial decisionmaker. The Respondent Unions have implemented their procedure by requesting the appointment of an impartial arbitrator from the Commission's list. While the Complainants have attempted to derail that procedure, the Respondent Unions' procedure complies with the requirements of Hudson and was fully and accurately described in Respondent District Council 48's Notice.

Discussion

We agree with Complainants to the extent that adequate notice also means that the procedure to be followed is to be clearly set forth in the notice. We have reviewed the "objection" and "challenge" procedures set forth in the notice and find them to be unclear as to how an individual is to start the process for resolving the "challenge."

The notice sets forth the following:

> **AFSCME Council 48 Procedure for Challenging its Calculation of Chargeable vs. Non-Chargeable Expenses**
>
> AFSCME Council 48 has established the following procedures for individual non-members who pay Fairshare fees and who wish to challenge the Council 48 calculation of chargeable versus non-chargeable expenses. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THIS PROCEDURE IN ORDER TO CHALLENGE THE AFSCME COUNCIL 48 CALCULATION OF CHARGEABLE VERSUS NON-CHARGEABLE EXPENSES.
>
> **A. Challenges**
>
> Individual non-member Fairshare fee payors who wish to challenge the AFSCME Council 48 calculation of chargeable versus non-chargeable expenses must inform AFSCME Council 48 of their challenge in writing by certified mail. The written challenge must include the challenging Fairshare payor's ("Challenger's") name, address, social security number, job title, employer, and work location. The written challenge must be accompanied by a check or money order in the amount of $5.00 payable to AFSCME Council 48 to cover a portion of the costs of the arbitration process (i.e., the Arbitrator's fee).
>
> The written challenge must be sent to AFSCME Council 48 by certified mail at the following address and post-marked no later than **June 27, 1986.**
>
> **AFSCME Council 48**
> **3427 W. St. Paul Avenue**
> **Milwaukee, WI 53208**
>
> **B. Procedure for challenging the AFSCME Council 48 calculation of chargeable versus nonchargeable expenses.**

The Wisconsin Employment Relations Commission may assert jurisdiction over challenges to fairshare fee calculations. In the event that the Commission does assume jurisdiction over such challenges the challenger should file a charge with the Commission at the following address:

Wisconsin Employment Relations Commission
Post Office Box 7870
Madison, WI 53707
608-266-1381

Upon receipt of the charge and during pendancy of the challenge before the Commission, AFSCME Council 48 will escrow the fairshare fees collected from the challenger.

In the event that the Commission does not assert jurisdiction over fairshare challenges, AFSCME Council 48 has adopted the following procedure for resolving challenges to its calculation of chargeable versus nonchargeable expenses. This procedure will result in an expeditious decision on the challenge by an impartial arbitrator selected by the American Arbitration Association.

Procedure Under the AFSCME Council 48 Arbitration

All challenges to the AFSCME Council 48 calculation will be consolidated into a single proceeding. The impartial arbitrator will hold hearings in which challengers can participate personally or through a representative. In these hearings AFSCME and AFSCME Council 48 will have the burden of proof regarding the accuracy of the calculation of chargeable versus non-chargeable expenses. The challengers will be given the opportunity to present their own evidence and to present written arguments in support of their position. The arbitrator will issue a decision and award on the basis of the evidence and argument presented.

Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

C. **Escrow of Fairshare Fees**

Upon receipt of a written challenge AFSCME Council 48 shall place an amount equal to the Challenger's Fairshare fees in an interest bearing escrow account. In addition, AFSCME Council 48 shall escrow an amount equal to all Fairshare fees paid by a Challenger from March 4, 1986. As required by the United States Supreme Court, the escrowed figures will be independently verified. The Fairshare fees shall remain in escrow until the arbitration award issues and shall be distributed to AFSCME Council 48 and the Challenger pursuant to the arbitrator's ruling.

The above language referring to filing a "charge" appears to require a "challenger" to file a "charge" of prohibited practices with the Commission against the Respondent Unions, 30/ however, Parr testified that the intended procedure is to have Respondent District Council 48 request that the Commission provide either an arbitrator or a panel of arbitrators as opposed to a complaint proceeding. The problem, as Complainants note, is that the language in the notice in no way communicates the Respondent Unions' "intended" procedure to the individual reading the notice. Further, since the language seems to require the individual "challenger" to file a "charge" with this Commission, and a Twenty-five

30/ We also note in this regard that, as Complainants point out, in McGlumphy, supra, the federal district court concluded that some attempt at meaningful review should be available before a non-union contributor must seek redress through administrative or judicial channels. 633 F.Supp. at 1083.

Dollar ($25.00) filing fee is required to file a charge, i.e., a complaint, see Sec. 111.71(2), Stats., a potential challenger's decision as to whether to "challenge" the Respondent Unions' calculation of chargeable expenses could be affected by the cost of filing the charge. At best, the language is misleading and cannot be considered sufficiently clear as to the procedure so as to constitute adequate notice. Apart from that confusion, the description in the notice of the arbitration process itself is sufficient.

G. Challenge Determination Procedure

Notwithstanding the reference in Respondent District Council 48's Notice to filing a charge with the Commission should the Commission assert jurisdiction over challenges to fair-share fees, 31/ Parr testified that upon receipt of the "challenges" Respondent District Council 48 would arrange for an arbitration hearing, either by obtaining a panel of arbitrators or a staff arbitrator from the Commission. 32/ If the Commission will not provide a panel or an arbitrator, then Respondent District Council 48 will request an arbitrator from the American Arbitration Association (AAA). In that case the AAA's "Rules for Impartial Determination of Union Fees" (Attached as Exhibit 2 of Sullivan Affidavit) will apply to the arbitration proceeding pursuant to the International's "Hudson Procedure," Section 16. 33/ Once an arbitrator has been provided, the Respondent Unions will notify the challengers as to the date, time and place of the arbitration hearing.

31/ Section 17 of Respondent AFSCME's "Hudson Procedures" provides that in states where administrative agencies have taken jurisdiction over challenges the notice will provide information on how to file a complaint or charge with the agency.

32/ See also Section 14 of Respondent AFSCME's "Hudson Procedures":

> 14. The Council or Unaffiliated Local shall establish a procedure for resolving challenges consistent with the constitutional requirements set forth in Hudson. If the Council or Unaffiliated Local represents employees in a jurisdiction where a state or local administrative agency has adopted procedures that will result in a "reasonably prompt" decision on the challenges, the Council or Unaffiliated Local can establish a procedure which refers challengers to the administrative agency. In jurisdictions where there is no administrative agency with jurisdiction over agency fee challenges, or where the agency has not adopted procedures that will result in a prompt decision on the challenges as required by Hudson, the Council or Unaffiliated Local shall establish an arbitration procedure for the prompt resolution of challenges by an impartial decisionmaker.

33/ See Section 16:

> 16. Upon receipt of the written challenge and the $5.00 fee, the Council or Unaffiliated Local will contact the challenger by mail and provide the challenger with a copy of the AAA Rules concerning the arbitration of agency fee challenges or other rules applicable to the arbitration procedure. In addition, the Council or Unaffiliated Local will inform the challenger that copies of documents upon which the calculation was based and exhibits that the International, Council and Unaffiliated Local intend to introduce into the record of the arbitration proceeding, except for rebuttal exhibits, will be made available for inspection in advance of the arbitration hearing at the offices of the Council or Unaffiliated Local during regular business hours. The challengers will also be informed that if they wish to receive a set of these documents, the documents can be obtained for the cost of duplication and mailing.

(Footnote 33 continued on bottom of Page 48.)

Respondent District Council 48's Notice provides the following regarding its arbitration procedure:

> In the event that the Commission does not assert jurisdiction over fairshare challenges, AFSCME Council 48 has adopted the following procedure for resolving challenges to its calculation of chargeable versus nonchargeable expenses. This procedure will result in an expeditious decision on the challenge by an impartial arbitrator selected by the American Arbitration Association.
>
> **Procedure Under the AFSCME Council 48 Arbitration**
>
> All challenges to the AFSCME Council 48 calculation will be consolidated into a single proceeding. The impartial arbitrator will hold hearings in which challengers can participate personally or through representative. In these hearings AFSCME and AFSCME Council 48 will have the burden of proof regarding the accuracy of the calculation of chargeable versus non-chargeable expenses. The challengers will be given the opportunity to present their own evidence and to present written arguments in support of their position. The arbitrator will issue a decision and award on the basis of the evidence and argument presented.
>
> Challengers will receive further information regarding this procedure upon the union's receipt of their challenge. 34/

(Footnote 33 continued from Page 47.)

See also Section 19:

> 19. If the Council or Unaffiliated Local elects to adopt an arbitration procedure for the resolution of challenges such procedure shall contain the following elements.
>
> a. $5.00 filing fee for challengers to cover a portion of the cost of arbitration process.
>
> b. Selection of a qualified impartial arbitrator either by the American Arbitration Association, or similar impartial agency or organization.
>
> c. Consolidation of all challenges within a given Council or Unaffiliated Local into a single proceeding.
>
> d. A requirement that arbitration begin within 30 days after the close of the challenge period and that the arbitrator's award issue no later than 120 days after the close of the challenge period.

34/ As the letters admitted in granting the parties' respective motions to supplement the record show, Respondent District Council 48's counsel requested that this Commission appoint an independent arbitrator to hear the fair-share challenges, which we have done over the objection of Complainant's counsel. We have, however, indicated that our decison herein would not await the outcome of that arbitration procedure. Those letters also indicate that the Respondent Unions notified challengers that the exhibits the Respondent Union intends to offer at the arbitration were to be available for the challengers to review and to copy, at their own expense, at Respondent District Council 48's offices in Milwaukee. (Bowers' letter of September 11, 1986.) The exhibits were to be made available from September 15 to September 23, 1986 (presumed at the time to be one day prior to the arbitration).

Complainants

For the most part Complainants attack the Five Dollar fee "challengers" are to be charged under the Respondent Unions' procedures and the alleged inadequacy of the notice for the "challenge" procedure. Complainants do not address the arbitration procedure itself other than to describe it as "at best unclear," assert that requiring a "challenger" to file a complaint with the Commission is not sufficient to satisfy Hudson, and to reserve the right to address the specifics of the procedures if at some point the arbitration is by an arbitrator selected by AAA and is run in accordance with AAA's "Rules for Impartial Determination of Union Fees."

Respondent Unions

The Respondent Unions assert that the Court noted in its decision in Hudson the impartial resolution of a challenge could be met in either of two ways, adjudication by a state court or agency or through an internal union procedure. Hudson, 106 S.Ct. at 1076, n. 20. Since the Commission has primary jurisdiction over challenges to fair-share fees and the authority to establish procedures affording challengers the required "extraordinarily swift judicial review," and given the uncertainty as to whether the Commission would adopt such procedures, the Respondent Unions were required to establish alternative procedures in case the Commission chose not to assert its jurisdiction. The Respondent Unions note that they have implemented their procedures by requesting that the Commission appoint an impartial arbitrator from its lists and assert that even though Complainants have attempted to derail the procedures, those procedures meet the requirements of Hudson.

Discussion

While to a limited extent the parties address the propriety of requiring "challengers" to file a complaint with the Commission as a procedure for determining the "challenge", we do not find it necessary at this time to decide that issue as the Respondent Unions have not attempted to implement that procedure. We do note, however, that the Court in Hudson stated that an "expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's selection did not represent the Respondent Union's unrestricted choice." Hudson, 106 S.Ct. at 1077, n. 21.

Hudson requires that a union's challenge procedure provide for a "reasonably prompt decision by an impartial decisionmaker" and that the fair-share fee payor whose First Amendment rights are affected and who bears the burden of objecting "is entitled to have his objections addressed in an expeditious, fair, and objective manner." Hudson, 106 S.Ct. at 1076. We would add that "fair" requires that challengers be given adequate access to information relevant to the determination of the correct fee amount, adequate time to prepare for the hearing and similarly, adequate notice of the hearing.

The sufficiency of the clarity of notice aside, the procedure actually implemented by the Respondent Unions has been to request that this Commission appoint an arbitrator who has experience in the public sector and who can hold a hearing within a short time and issue a decision within 120 days of the close of the dissent period. 35/ The letters admitted via our granting the respective motions to supplement the record show that the "challengers" were initially to be given less than a week's prior notice of when the Respondent Unions' exhibits would be available for their review, and less than two weeks notice of the date of the hearing. Further, those exhibits would be available for the nine days just prior to the hearing. Notwithstanding the requirements that a union's procedure provide for a "reasonably prompt" decision, had a request been made for a later hearing date and not granted, we would not find that to be sufficient time to prepare for the arbitration hearing or sufficient advance notice of the hearing date, absent agreement on the date. We note, however, that no such request was in fact made. Hence, we can make no finding on whether the actual procedure provides adequate advance notice of the hearing date. As to adequate access to information, the extent of the information being made available is unclear as it

35/ Bowers' letter to Commission's General Counsel dated July 17, 1986.

is not known what exhibits the Respondent Unions chose to submit and no additional information was requested by the "challengers." "Challengers" or their counsel should have adequate access to the relevant information necessary to permit them to effectively participate in the hearing. That may not be restricted to only that information a union elects to offer as evidence at the hearing. We do not see a problem with consolidating the "challenges" into one proceeding or with having this agency appoint an ad hoc arbitrator to hear and decide the "challenges." In conclusion, aside from the confusion in the notice itself, we find that the arbitration procedure, as set forth in the notice, would be sufficient. However, due to the lack of evidence at this point as to its actual application we are unable to reach a conclusion as to whether the procedure, as applied, meets the requirements of Hudson.

H. Escrow

Complainants

Complainants assert that the escrow provided by AFSCME lacks two characteristics of an "escrow" that made it possible for the Court to conclude in Hudson that a 100 percent escrow would completely avoid the risk that dissenters' contributions could be used improperly. 106 S.Ct. at 1077. First, it is not a true escrow account and there's no guarantee the funds will not be released to the unions prior to a determination by an impartial decisionmaker, since the account is a regular bank account under the unilateral control of Respondent District Council 48. The terms of the account do not condition disbursement of the deposited fees upon the bank's receipt of the impartial decisionmaker's order or award. (Tr. 70-71.) Escrow is defined in the dictionary as "a deed, a bond, . . . delivered to a third person to be delivered by him to the grantee only upon fulfillment of a condition." Webster's New Collegiate Dictionary (1976 ed.). Secondly, Respondent District Council 48 will distribute all of the escrowed funds at the time of the determination by the impartial decisionmaker even if that decision is challenged. (Notice at 16; Tr. at 66-67.) In Hudson, the union's escrow arrangement provided that the fund would not be released until a final judicial determination had been made. While the Court has held that a 100 percent escrow is not constitutionally required, it did rule that the Constitution requires escrow for the amounts reasonably in dispute while challenges are pending. 106 S.Ct. at 1077-78. Hence, some portion of the fees should continue in escrow if the determination is appealed.

Respondent Unions

Respondent Unions allege that they have established an escrow account for 100 percent of the fair-share fees paid by "challengers," minus the advance rebate paid to these individuals by the Respondent Unions. Complainants' objections to this escrow on the bases that "it is not a true escrow account" and because the funds in the account will be released prior to an arbitrator's award are baseless. While the Court of Appeals in Hudson observed that "it would be best if the union turned management and not just custody of the account over to a bank or trust company," the Supreme Court did not adopt the "trust account" concept in its decision, but merely required the "interest bearing escrow account" remedy suggested in Ellis. There is no basis in this record, or elsewhere, for the Complainants' assertion that such a trust account is required because the union may improperly take the money out before the impartial decisionmaker renders a decision. Further, Complainants' assumption of the unions' unlawful conduct was obviously not shared by the Supreme Court, since the Court did not adopt the third party custodian requirement for the escrow fees suggested by the Court of Appeals. Complainants' fears regarding the funds in the escrow account are baseless. The Respondent Unions and the bank have worked to establish a procedure where both the contributions to the escrow account for each individual "challenger" and the amount of the interest on deposited funds can be independently verified. (Tr. 32-33.) This procedure will protect the "challengers'" interest in the escrowed funds, and will insure that such funds cannot be improperly used by the union during the pendency of the "challenge."

Regarding Complainants' assertion that the funds should remain in escrow during an appeal of the impartial decisionmaker's determination, Respondent Unions contend that argument is flawed in at least two respects. First, Hudson only required that the escrow be established and maintained during the pendency of the procedures required by the Court in Hudson, and did not require that the escrow be established and maintained for some indefinite period. 106 S.Ct. at 1078.

The escrow requirement was not extended to cover exhaustion of additional and unspecified challenge procedures. Second, requiring the disputed funds to remain in escrow during the pendency of an appeal of the determination by the impartial decisionmaker would deprive the Respondent Unions and the "challengers" of access to their money for an indefinite period. While the challenge procedure must be "reasonably prompt", there is no such requirement attached to the procedures for appealing the determination. Since the statute of limitations for a Section 1983 action filed in Wisconsin is three years, an appeal of the determination could be filed three years after the award. Citing, Wilson v. Garcia, 105 S.Ct., 1938 (1985); Sec. 893.90, Stats., (1977). Depriving the union of funds "that it is unquestionably entitled to retain" for such an indefinite period would violate the balance struck in Hudson between the interests of the challengers and of the union. It would also require a successful challenger to wait until the unions exhaust all appeals of the award.

Discussion

In its decision in Hudson the Supreme Court held that a union must escrow the amounts reasonably in dispute while a challenge to the amount of the fair-share fee is pending. Hudson, 106 S.Ct. at 1078. In explaining the escrow requirement the Court stated:

> We need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain. If, for example, the original disclosure by the Union had included a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories. 23/ On the record before us, there is no reason to believe that anything approaching a 100% "cushion" to cover the possiblity of mathematical errors would be constitutionally required. Nor can we decide how the proper contribution that might be made by an independent audit, in advance, coupled with adequate notice, might reduce the size of any appropriate escrow.
>
> . . .
>
> 23/ If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the indepedent audit, and the escrow figure must itself be independently verified.

Id., at 1078. (Emphasis added)

In Lehnert, supra, the federal district court interpreted Hudson as requiring that:

> . . . the union must either deposit 100% of objectors' service fees into an independently controlled, interest bearing escrow account until such time as an impartial decisionmaker has rendered his final decision on the validity of the reduced fee calculation, or have their data for its reduced fee calculation and the data on which it bases its limited escrow verified by an independent audit by a certified public accountant.

Lehnert, 643 F.Supp. at 1333. (Emphasis added)

As did the Court in Lehnert, we read Hudson as requiring that control of the account be turned over to a third party. Parr testified that Respondent District Council 48 would set up a separate master account, with sub-accounts for each individual, in order to be able to have an audit trail of deposits and withdrawals into the accounts, and that those monies plus interest would be distributed upon receipt of the arbitrator's decision. While there is no reason

to believe the Respondent Unions would attempt to use the fees while they are in a separate account awaiting the arbitrator's decision, we also have no basis for finding that the U.S. Supreme Court, made up of nine lawyers, used the term "escrow," when they in fact meant something other than what is traditionally considered to be an escrow. 36/ If the Court had intended a separate account as opposed to an escrow, they would not have used the term "escrow." That the Court intended for the unions to relinquish control of the escrowed fees to a third party is demonstrated by the Court's discussion:

> We need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain.
>
> . . .

Hudson, 106 S.Ct. at 1077-78.

As to when the escrowed funds are to be dispersed, we agree with the decision in Lehnert that the Court intended that the fees be held in escrow only until the determination is made by the impartial decisionmaker.

III. Application of the Hudson Decision

Complainants

Complainants contend that Hudson applies to all time periods involved in this case because it is not a "clear break" with controlling precedent and, hence, it must be applied retroactively. According to Complainants, the Respondent Unions implicitly concede that they did not satisfy the constitutional requirements of Hudson prior to that decision, but argue Hudson should not be applied retroactively. Federal law is controlling since the issue is the scope of a federal constitutional decision, and Hudson applies to this case under federal case law on retroactivity. Complainants characterize the Respondent Unions' argument as being that "judicial decisions are applied prospectively unless the

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36/ Black's Law Dictionary defines "escrow" as follows:

> ESCROW. A scroll, writing, or deed, delivered by the grantor, promisor or obligor into the hands of a third person, to be held by the latter until the happening of a contingency or performance of a condition, and then by him delivered to the grantee, promisee or obligee. Squire v. Branciforti, 131 Ohio St. 344, 2 N.E.2d 878, 882; McPherson v. Barbour, 93 Or. 509, 183 P. 752, 755; Love v. Broun Development Co. of Michigan, 100 Fla. 1373, 131 So. 144, 146; Johnson v. Walden, 342 Ill. 201, 173 N.E. 790, 792; Minnesota & Oregon Land & Timber Co. v. Hewitt Inv. Co., D.C.Or., 201 F.752, 759.
>
> The state or condition of a deed which is conditionally held by a third person, or the possession and retention of a deed by a third person pending a condition; as when an instrument is said to be delivered "in escrow." This use of the term, however, is a perversion of its meaning.
>
> A grant may be deposited by the grantor with a third person, to be delivered on the performance of a condition, and on delivery by the depositary it will effect. While in the possession of the third person, and subject to condition, it is called an "escrow." Civil Code Cal. 1057; Comp.Laws N.D. 1913, 5498; Comp. Laws S.D. 1929, 527.

Revised 4th ed., p. 641.

party urging retroactive application establishes certain criteria set out in Chevron," 37/ and assert that the Respondent Unions' argument "turns the law on its head."

In many of the cases cited by the Respondent Unions, judicial decisions were held not to apply retroactively to judgments that were final at the time the decision in question was rendered. The Respondent Unions justify reliance on those cases in a case such as here, where there is no judgment, by quoting the reasoning of Stovall v. Denno 38/ that "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review." That proposition, however, has been overruled by the Court's most recent decisions in the area of retroactivity, U.S. v. Johnson, 457 U.S. 537 (1982); and Shea v. Louisiana, 105 S.Ct. 1065 (1985).

In Johnson the Court considered Stovall and rejected that line of authority. The Court adopted the views of Justice Harlan in Desist v. United States, 394 U.S. 244, 258 (1969) (dissenting opinion), and Mackey v. United States, 401 U.S. 667, 681 (1971) (separate opinion):

> All "new" rules of constitutional law must, at a minimum be applied to all those cases which are still subject to direct review by this Court at the time the "new" decision is handed down. (A) proper perception of our Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was.

Johnson, 457 U.S. at 548, 562. While Johnson explicitly concerned only Fourth Amendment issues, it was recognized as having general application in Shea, a Fifth Amendment case. In Shea the Court held that the constitutional provision involved was not the significant factor and that "the primary difference between Johnson, on the one hand, and Solem v. Stumes, 39/ on the other, is the difference between a pending and undecided direct review of a judgment of conviction and a federal collateral attack upon a state conviction which has become final." 105 S. Ct. at 1069-70. Thus, the distinction between retroactive and non-retroactive application of a contitutional ruling "properly rests on considerations of finality in the judicial process." Id. at 1070.

Shea also rejected the Respondent Unions' argument that a rule which "is only prophylactic in character" is not to be applied retroactively. 105 S.Ct. at 1071. The very procedural rule that was applied only prospectively in Stumes was given retroactive effect in Shea. Decisions that impose new procedural rules for protection of constitutional rights, like any constitutional ruling, apply in all pending cases.

The general rule following Johnson and Shea is that "a federal court is to apply the law in effect at the time it adjudicates the claim" before it. Citing Landahl v. PPG Industries, Inc., 746 F.2d 1312, 1313-14 (7th Cir. 1984). The sole exception in cases where there has been no final judgment is "those situations that would be clearly controlled by existing retroactivity precedence of the Court to the contrary." Citing Shea, 105 S.Ct. at 1069-70. The Supreme Court itself can use the Chevron test to hold that a new rule of law applies prospectively only, or can leave such an analysis for the lower courts by expressly reserving the issue. Otherwise the new rule of law announced by the Court must be applied to all pending cases:

> If the Supreme Court fails to limit the substantive scope of its new rule to purely prospective cases, . . . an inferior court must assume that the rule applies in all situations.

37/ Chevron Oil Company v. Huson, 404 U.S. 97 (1971).

38/ 388 U.S. 293 (1967).

39/ 465 U.S. 638 (1984).

> The policy factors that the Supreme Court relies on in determining whether its rule should have merely prospective effect are irrelevant. . .

U.S. v. Fitzgerald, 545 F.2d, 578, 582 (7th Cir. 1976).

It is asserted that Hudson is not one of the cases in which the lower courts are free to give the Court's rulings prospective-only effect. In Hudson, the Court applied its own ruling retroactively in the case at hand. The Court rejected the constitutionality of union procedures that were no longer in effect at the time of its decision and not just the new procedures adopted while the case was on appeal, 106 S.Ct. at 1075-77 and n. 14. In directing the District Court to remedy the constitutional violation plaintiffs had established, without limiting relief to the future, the Court implicitly held that its rulings apply retroactively in other cases as well. Hence, this is not an appropriate occasion for the Chevron analysis. Citing, Fitzgerald, 545 F.2d at 582; Smith v. General Motors Corp., 747 F.2d, 372, 375 (6th Cir. 1984).

Complainants assert that even if the Chevron analysis is used, it would result in the retroactive application of Hudson. Since there is a presumption favoring retroactivity, the party invoking Chevron has the burden of demonstrating that all three of the factors in Chevron favor prospective-only application before a rule of law will be denied retroactive effect. NLRB v. Lyon and Ryan, Ford Inc., 647 F.2d 745, 757 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Citing also, Kumrow v. Teamsters Local 200, 579 F.Supp. 393, 395, (1983).

The first part of the Chevron test is that "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. Citing Johnson, 457 U.S. at 550, n. 12, Complainants assert that in the civil context this "clear break" principle is the "threshhold test for determining whether or not a decision should be applied non-retroactively" and only if it is met, should the other parts of the Chevron analysis be reached. While all of the issues determined in Hudson had not previously been decided by the Court, that is not enough to justify non-retroactivity. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 496-99 (1968); Johnson, 457 U.S. at 559-61. The announcement of an "entirely new and unanticipated principle of law":

> has been recognized only when a decision explicitly overrules a past precedent of this Court, or disapproves a practice this Court arguably has sanctioned in prior cases, or overturns a long standing and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressely approved.

Johnson, 457 U.S. at 551.

Hudson expressely overruled no clear past precedent on which the Respondent Unions may have relied. Kempner 40/ and White Cloud, 41/ cited as clear past precedent by the Respondent Unions, were not expressly overruled by Hudson and they are not clear prior Supreme Court precedents on the issues decided in Hudson. The Court in Hudson merely referred to those cases as two of "the divergent approaches of other courts to the issue" of agency shop procedures that led the Court to grant certiorari. Hudson, 106 S.Ct. at 1073 and n. 7. Further, the precedential value of the Court's summary disposition of an appeal is limited to the precise facts and issues involved in the particular case and thus, is difficult to determine. The broad interpretation of the Court's actions in Kempner and White Cloud by the Respondent Unions cannot be reconciled with the decision in Ellis v. Railway Clerks, 466 U.S. 435, 443-444 (1984), which only a

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40/ Kempner v. AFSCME (2077), 126 Mich. App. 452, 337 N.W.2d 354 (1983), appeal dismissed, 105 S.Ct. 316 (1984).

41/ White Cloud Education Association v. Board of Education, 101 Mich. App. 309, 300 N.W.2d 551 (1981), appeal dismissed, sub. nom. Gibson v. White Cloud Education Association, 105 S.Ct. 236 (1984).

few months earlier held that a "union cannot be allowed to commit dissenters' funds to improper uses even temporarily." Citing the 7th Circuit's decision in Hudson, 743 F.2d at 1196-97.

Unlike Elrod v. Burns, 427 U.S. 347 (1976) and Lemon v. Kurtzman, 403 U.S. 602 (1971), (Lemon I), cited by the Respondent Unions, Hudson did not dissapprove an established practice the Court arguably had sanctioned in earlier cases. Those prior opinions "merely suggested the desirability of an internal union remedy." Hudson, 106 S.Ct. at 1076. "Those opinions did not, nor did they purport to pass upon the statutory or constitutional adequacy of the suggested remedys." Ellis, 466 U.S. at 443. Further, in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Court explicitly disclaimed any view as to the constitutional sufficiency of intra-union procedures. 431 U.S. at 244. Neither did Hudson overturn a long-standing, widespread practice approved by nearly unanimous lower court decisions. The Court in Hudson noted the divided authority on the issue. 106 S.Ct. at 1073 and n. 7.

Hudson also did not "decide an issue of first impression whose resolution was not clearly foreshadowed." Chevron, 404 U.S. at 106. Unlike Elrod and Lemon, the decison in Hudson was unanimous and the Court's analysis made clear that the decision rests on long recognized principles of First Amendment law and is merely an extension of doctrines which had been growing and developing over the years in the line of cases that began with Machinists v. Street, 367 U.S. 740 (1961). Requiring advanced reduction and escrow was clearly foreshadowed by Ellis and Justice Stevens' concurring opinion in Abood, 42/ and requiring that non-union employes be given adequate information about the financial basis for the fee was a logical extension of the holding in Abood and Allen that unions have the burden of proving chargeable costs. Requiring a reasonably prompt decision by an impartial decision-maker was simply a particular application of the general principles of First Amendment and due process law. Citing, Hudson, 106 S.Ct. at 1074 and notes 11 to 13, 1076-77. While lower courts were divided prior to Hudson as to whether the Constitution required each of those procedures, that does not mean that Hudson's resolution of the issues were not foreshadowed. Rather, it means that "any argument by respondents against retroactive application . . . is unavailing since the existence of conflicting cases from other courts . . . made review of that issue by the Supreme Court and decision against the position of the respondents reasonably foreseeable." Citing, U.S. v. Rogers, 466 U.S. 475, 484 (1984); accord Landahl, 746 F.2d at 1314-15, and other cases, including Johnson, 457 U.S. at 559-61.

Since the decision in Hudson does not satisfy the first Chevron criterion, it is not necessary to address the other two parts of the test. However, application of the remaining two factors also does not support prospective-only application.

The second factor in the Chevron test is whether retroactive operation will further or retard operation of the rule in question. Arguing that it is too late for the Respondent Unions to afford retroactively the procedural safeguards required by Hudson because Complainants' fees have already been taken and spent, misses the point. As the Commission recognized, Hudson held that "the First Amendment requires that certain procedural safeguards must be established before a fair-share fee may be collected." (Dec. No. 18408-E at 6.) Operation of that rule is furthered by the equitable remedy of restitution, which both restores the status quo ante and gives the unions and others an incentive to provide the required procedural safeguards. Complainants contend deterence is particularly relevant in this case, "where individual constitutional rights are at the mercy of those clothed with state authority":

> If . . . rulings resolving unsettled (First) Amendment questions should be non-retroactive, then, in close cases, (union and government) officials would have little incentive to err on the side of constitutional behavior. . . . Failure to accord . . . retroactive effect to (First) Amendment rulings would "encourage (unions and public employers) to disregard the plain purport of our decisions and to adopt a lets-wait-until-its-decided approach."

42/ 466 U.S. at 244.

Citing, Johnson, 457 U.S. at 560-61. See also, Hudson, 106 S.Ct. at 1075, n. 14, 1077, n. 22.

The third Chevron criterion is whether retroactive application works a substantial inequity upon the party opposing it. 404 U.S. at 107. The Respondent Unions confuse that question by citing Carey v. Piphus, 435 U.S. 247 (1978), a case concerning what remedy is appropriate for a bare violation of procedural due process, rather than retroactivity. The issue under Chevron is not the appropriate remedy, but whether the equities of the case justify a denial of any remedy at all for the constitutional deprivation Complainants suffered prior to the date of the Hudson decision. That question answers itself in the negative here, "where the complainants' First Amendment right not to be compelled to pay fees in the absence of certain procedural safeguards must be balanced against the unions' mere statutory privilege of obtaining reimbursement for their chargeable costs." Complainants allege that the Respondent Unions have been aware of Complainants' claim that, if fair-share agreements are constitutional at all, certain procedural safeguards must be provided to prevent unconstitutional use of fair-share fees, even temporarily, for impermissible purposes. Despite the pendency of this litigation and the lack of any clear precedent permitting the practice, the Respondent Unions chose to continue to collect fair-share fees equal to full dues and to spend them for non-chargeable purposes, subject only to a possible later rebate. Complainants assert that the Wisconsin Supreme Court's decision in Browne did not uphold the constitutionality of the Respondent Unions' practice on the merits, but merely held that Complainants were not entitled to temporary escrow relief prior to final judgment unless they showed that a part of the fees were in fact being used for impermissible purposes. It is asserted that the missing element was supplied by the Commission's Initial Findings of Fact and Initial Conclusions of Law. The Respondent Unions gambled that their view of the unsettled question of law would prevail over the contrary view of the Complainants. That they now face the consequences of losing their conscious gamble hardly presents a case of inequitable hardship. The Chevron doctrine is not directed at insulating litigants from the consequences of their conscious business decisions, rather, its purpose is to avoid the hardship which can result from retroactive application of decisions which represent sudden, unexpected shifts in the law. Valencia v. Anderson Brothers Ford, 617 F.2d. 1278, 1290 and n. 16 (7th Cir. 1980), rev'd on other grounds, 452 U.S. 205 (1981). Hudson did not constitute such a dramatic break with the past. As to the equities, Complainants request the refund, with interest, only of their own past fair-share fees, "limited to stipulated percentages prior to 1983." They note the number of complainants and class members in the two cases, and the relatively small amount of money due them in their estimation.

In summary, Complainants argue that since the Court did not limit the scope of its holdings in Hudson to purely prospective cases, those holdings should be given full effect in this case without regard to Chevron criteria. 43/ Even if the Chevron test is utilized, the Respondent Unions had been unable to demonstrate that any of the three Chevron factors favor prospective-only application. Hence, the Respondent Unions committed prohibited practices before, as well as after, the date of Hudson by collecting fair-share fees from Complainants without providing the constitutionally required procedural safeguards.

Respondent Unions

The Respondent Unions contend that the Hudson requirements are not retroactive. It is conceded that the common law principle was that all judicial decisions applied retroactively, as well as prospectively, however, in Linkletter vs. Walker, 381 U.S. 618 (1965), the U.S. Supreme Court concluded that "the constitution neither prohibits nor requires retrospective effect," 381 U.S. at 629. Emphasizing that these principles concerning retroactivity would apply equally to civil as well as criminal litigation, the Court in Linkletter held that:

43/ Complainants also cite the Court's remand of Tierney and Abernathy in light of Hudson as further evidence that the Court intended Hudson to apply retroactively.

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Id. In Stovall vs. Denno, 388 U.S. 293 (1967) the U.S. Supreme Court rejected the special exception for non-retroactivity for cases pending review and held that "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review," 388 U.S. at 300. In Stovall the Court set forth the following criteria for determining whether a newly announced rule should have retroactive affect: "(a) The purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the adminstration of justice of a retroactive application of the new standard." 388 U.S. at 297.

In Chevron the Court set forth the criteria for resolving the retroactivity issue in the context of a civil proceeding as follows:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second it has been stressed that we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question; its purpose and effect, and whether retrospective operation will further or retard its operation . . . Finally, we have weighed the inequity imposed by retroactive application.

404 U.S. at 106-107 (Citations omitted).

In Fitzgerald vs. State, 81 Wis.2d 170,174 (1977) the Wisconsin Supreme Court articulated a similar standard for resolving retroactivity questions concerning new rules. That standard includes an analysis of the purpose of the new rule, the reliance of the parties on the new rule, and the effect of the retroactive application of the new rule.

The Respondent Unions assert that the Supreme Court has distinguished between decisions that establish substantive constitutional rights and decisions that establish "prophylactic constitutional rules." In the latter type of cases the decision merely sets forth the procedures designed to protect the constitutional right. The Respondent Unions cite Michigan vs. Payne, 412 U.S. 47 (1973), as applying the criteria set forth in Stovall, and as concluding that the new procedural rule set forth in the prior case would not be advanced by its retroactive application, reasoning that failure to comply with the procedure would not necessarily result in a violation of the substantive constitutional right. The Court observed that "it is an inherent attribute of prophylactic constitutional rules . . . that their retrospective application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation." 412 U.S. at 53. The Court emphasized that the individual defendant in that case still had a remedy for the violation of his underlying constitutional right even if he could not state a claim for the violation of the prophylactic procedures 412 U.S. at 54.

Next cited is the decision in Johnson vs. New Jersey, 384 U.S. 714 (1966), where the Court ruled that the procedural safeguards set forth in the Escobedo 44/ and Miranda 45/ decisions would only be applied in trials that took place after the date of those decisions. As in Michigan vs. Payne, the Court in Johnson distinguished decisions that impose new procedural rules for the protection of constitutional rights, which are not retroactive, from cases that establish new substantive constitutional rights, which are retroactive.

44/ Escobedo v. Illinois, 378 U.S. 478 (1964).

45/ Miranda v. Arizona, 384 U.S. 436 (1966).

The Respondent Unions cite a number of cases where the Supreme Court has held that the due process procedural safeguards set forth in its decisions were not retroactive. 46/ Also cited are decisions where courts have ruled on the retroactive application of decisions of the Supreme Court concerning infringement of First Amendment rights. The Courts of Appeals applied the Chevron criteria and held that Elrod v. Burns, 427 U.S. 347 (1976) was not retroactive to discharges that occurred prior to the date of that decision. 47/

Also cited is the decision of the Supreme Court in Lemon v. Kurtzman, 411 U.S. 192 (1973)(Lemon II), upholding the decision of a three judge district court, on remand from Lemon I, that had not retroactively applied the Lemon I decision. The Court emphasized that the result in Lemon I was not clearly foreshadowed and that there had been reliance upon the state of the law prior to the Lemon I decision, and therefore, retroactive application of Lemon I would be inappropriate under Chevron.

The Respondent Unions assert that the retroactivity analysis in Johnson and Shea, cited by Complainants, is not applicable to civil cases. Complainants' argument that Stovall was overruled by Johnson and Shea is overstated, and reliance on those cases for the proposition that federal courts must apply "the law in effect at the time it adjudicates the claim," to the exclusion of the Chevron criteria, is a distortion of the holding of those cases. While the Supreme Court has relied upon its precedents in the criminal area in developing its analysis of non-retroactivity in civil cases, the analogies must be made with care. In Johnson and Shea, the Court indicated an intention to distinguish cases on the direct appeal from cases where an issue was raised on collateral attack, however, such distinctions are irrelevant in civil cases, because "civil judgements, . . . cannot be collaterally attacked on the basis of subsequent judicial pronouncements." Hardison v. Alexander, 655 F.2d 1281, 1288 (D.C. Cir. 1981). Perhaps in recognition that the distinction between direct review and collateral attacks of criminal judgments is irrelevant in the civil context, the Court in Johnson held that "all questions of civil retroactivity continue to be goverened by the standard enunciated in Chevron . . . 404 U.S. at 106-107." 102 S.Ct. at 2544.

Complainants' view that Johnson and Shea establish a "bright line" test for resolving questions of retroactivity of newly announced constitutional rulings, in contrast to the balancing approach in Stovall, is in error. In Johnson, the Court noted that its holding was "subject to the exceptions stated below" and the same principle was applied in Shea. The Court stated in Johnson that it based its holding on the views of Justice Harlan stated in his dissent in Desist and his separate opinion in Mackey. In those cases, Justice Harlan argued that "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." Desist, 394 U.S. at 258. It is asserted that Complainants argue that a similar "bright line" standard should be applied here.

Complainants' error is further compounded by citing Johnson as authority for the proposition that new constitutional rules should automatically be applied in all suits pending at the time the new rule is announced. The Johnson retroactivity analysis is not a bright line requiring the new rule to be applied in all pending cases, rather, it involves a balancing of several factors, including whether the new rule is a "clear break with the past." 102 S.Ct. 2578. It is asserted that the Court's failure to adopt such a bright line test in Johnson and Shea is criticized by Justice Rehnquist in his dissent in Shea. 103 S.Ct. at 1074.

Complainants' reliance on U.S. v. Fitzgerald, 545 F.2d. 578 (7th Cir. 1976) as establishing the law in the Seventh Circuit is misplaced and their articulation of the standard set forth in that case is incorrect. Fitzgerald involved the review of an appeal of a district court verdict in a criminal case. After the

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46/ E.g., Morrissey v. Brewer, 408 U.S. 421 (1972).

47/ Marino v. Bowers, 657 F.2d 1363 (3rd Cir. 1981); Aylero v. Clark, 639 F.2d 44 (1st Cir. 1981); and Ramey v. Haber, 589 F.2d 753 (4th Cir. 1978).

judgment in the district court was issued, but before the Court of Appeals considered the case on review, the Supreme Court issued its decision in Beckwith v. U.S., 425 U.S. 341 (1976) which destroyed the legal basis of the district court's ruling. In considering the defense argument that Beckwith should not be applied retroactively, the Court held:

> This argument must fail because these cases, where a change in the law has occurred between the date on which the lower court ruled and the date on which that ruiling was considered by us on direct appeal, do not involve a true question of retroactivity.

545 F.2d at 581. The Court of Appeals relied on the Schooner Peggy doctrine. 48/ In Schooner Peggy the Court held "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, a law must be obeyed . . ." The Court of Appeals recognized that that doctrine does not involve "a true question of retroactivity," but is an analysis of the effect of an intervening change in the law of the case on appeal. The instant case concerns a "true question of retroactivity" and Fitzgerald offers no guidance.

Complainants' argument that courts are compelled to apply, without consideration of the retroactivity issue, the laws that exist at the time of judgment is also inconsistent with numerous decisions of the Seventh Circuit. The Seventh Circuit has applied the Chevron criteria to resolve questions concerning retroactivity of decisions of the Supreme Court on numerous occasions. Citing, Unger v. Consolidated Foods Corporation, 693 F.2d 703 (7th Cir., 1982); Landahl v. PPG Industria, 746 F.2d 1312 (7th Cir., 1984); and Anton v. Lehpamer, No. 85-2565 (April 3, 1986). The Seventh Circuit applied the Chevron criteria to the facts of those cases to determine whether or not the Supreme Court's decisions applicable in those cases should be applied retoractively. Smith v. General Motors Corp., 747 F.2d 172 (2nd Cir. 1984) cited by Complainants is not the applicable law in the Seventh Circuit as the court in that case considered the identical question as the Seventh Circuit did in Landahl, but did not utilize the Chevron criteria as did the Seventh Circuit.

The Respondent Unions also contend that the Schooner Peggy doctrine has been misstated. In U.S. v. Elrod, 627 F.2d 813, 819 (7th Cir. 1980) the Seventh Circuit recognized that Fitzgerald requires that current law applies "unless application of a new law will result in 'manifest injustice'." Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). The Supreme Court in Bradley cites an example of "manifest injustice" as the retroactive application of a new rule of law "where to do so would infringe upon or deprive a person of a right that had matured or become unconditional." 416 U.S. at 720. It is asserted that the Respondent Unions' right to that portion of Complainants' fair-share fees that are properly chargeable to objecting non-members has clearly matured and become unconditional. To apply Hudson so as to divest the Respondent Unions of the fees that were collected and spent on chargeable activities over the past decade would constitute "manifest injustice."

The Respondent Unions note that the Court did not state in Hudson that its holding is either retroactive or prospective only. The fact that a case has been remanded by the Supreme Court for further proceedings in light of a decision which announces a new rule does not mean that the new rule must be applied retroactively. A remand by the Court does not necessarily evidence an intent that its decision be applied retroactively. It could also evidence a desire by the Court to have the lower court consider the question of non-retroactivity in the first instance. In Unger v. Consolidated Foods, the Court of Appeals considered, on remand from the Court, whether a new rule announced by the Court should be applied retroactively in that case. While the Seventh Circuit Court of Appeals held that the new rule was retroactive, it reached that result on the basis of the application of the Chevron criteria. Hence, the Commission must apply the Chevron criteria in resolving the retroactivity question in this case.

48/ 1 Cranch 103 (1801).

The Supreme Court recently reaffirmed the Chevron criteria in Northern Pipeline v. Marathon Pipeline Company, 458 U.S. 50, 87-88 (1982). The Respondent Unions agree that the party arguing that a given decision is nonretroactive has the burden of proving that the Chevron criteria have been satisfied, but submit that such criteria has been amply satisfied with respect to the decision in Hudson.

The first criterion is whether the decision establishes a new principle of law, either by overruling clear past precedent upon which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. It is asserted that the decision in Hudson does both. The Court's dismissal of the appeals in Kempner and White Cloud are clear past precendents upon which the Respondent Unions were entitled to rely. Kempner involved constitutional challenges to the AFSCME internal procedures for resolving challenges to its agency fee for non-members and the absence of an escrow of fair share fees. White Cloud involved a constitutional challenge by a non-member to the payment of a union agency fee equivalent to dues rather than the payment of such fees to an escrow account. Those cases "clearly involve the same facts and legal issues at issue here." Hence, the Respondent Unions had a right to rely upon the Court's dismissal of the appeals, for want of a substantial federal question, as clear past precedent on the constitutional adequacy of a unions' internal appeals procedure for objecting non-members, as well as, the constitutional requirement of an escrow of contested fair-share fees.

The fact that Hudson was a unanimous decision does not mean the decision was not a case of first impression or that the result was clearly foreshadowed in the Court's prior cases. Complainants site no authority for their "highly questionable interpretation" of what constitutes a case of first impression. Further, the Court repeatedly emphasized the unique nature of the case, i.e., plaintiffs' exclusive focus on the procedure used by the union in setting the fee, 106 S.Ct. at 1072, n. 5; and the Court's break with its past decisions, "although we have not so specified in the past, we now conclude that the requirement of a reasonably prompt decision by an impartial decison-maker is necessary." 106 S. Ct. at 1076. That the Court arrived at a consensus as to how the case was to be resolved is irrelevant to an analysis under the Chevron criteria.

Complainants' argument that the procedural requirements mandated by Hudson were clearly foreshadowed by Ellis and Abood is not supported by those cases. The Respondent Unions assert it was "precisely those procedures that were under constitutional attack in Kempner . . . and precisely those constitutional arguments that were dismissed by the Supreme Court as not raising a 'substantial federal question.'" The procedural requirements set forth in Hudson were not even foreshadowed by the Court of Appeals' decision in that case. Moreover, there is no pre-Hudson lower court decision that comes close to imposing, as a constitutional or statutory requirement, the procedures mandated by Hudson. The Hudson procedural requirements were simply not foreshadowed, clearly or otherwise, by any decision of the Supreme Court or any lower federal or state court. To the unions' knowledge, the only decision of an agency or court addressing the issue of the retroactivity of Hudson is the New Jersey Public Employment Relations Commission Appeal Board, which ruled that "the new notice requirements mandated by Hudson (is) a change in the law which should be applied prospectively." Jonathan Mallamud v. Rutgers Council AAUP, (April 6, 1986) slip op. at 8; Bacon v. District 65, UAW, et. al., (12/86) slip op., PERC No. 87-72.

As to the second Chevron criterion, the Respondent Unions assert that it requires an analysis of the new rule and a determination of whether the retrospective application of the rule in a particular case will further or retard its operation. It is contended that the Court in Hudson established three new rules regarding the collection of agency fees: (1) notice to the payors, (2) reasonably prompt resolution of the challenge by an impartial decision maker, and (3) escrow of the fees in dispute. The key element of the procedures mandated by Hudson is the notice required to be sent to all fair-share payors regarding the calculation of chargeable v. non-chargeable expenses. The purpose of the notice is to provide the fair-share payors with sufficient information to permit them to exercise the right to object or not object to the amount of the fee, and the Court "clearly implied that this notice would be provided to the payors prior to the start of the collection of the fee." It would serve little purpose to send notice to individuals who paid fair-share fees in 1972 and 1973, or to inform them of the basis of their fee thirteen or fourteen years after they have paid it, especially since they have already objected. The Hudson requirement regarding the

procedure for a reasonably prompt resolution of challenges by an impartial decisionmaker also will not be advanced by trying to apply that requirement to events that took place fourteen years ago and retroactive application of that rule is impossible on its face. As to the escrow requirement, that also would be impossible to apply retroactively. It is also noted by the Respondent Unions that the Wisconsin Supreme Court authorized the Respondent Unions' collection of share-fair fees from the Complainants in Browne without an escrow procedure at an early stage in this litigation and that the ruling remains the law of this case. That the Respondent Unions have enjoyed an "involuntary loan" of that portion of the Complainants' fees which are used for non-chargeable activities cannot be changed by a retroactive application of the escrow. To the extent that the injury to the Complainants' First Amendment rights stems from their being forced to make an involuntary loan to the union, they cannot be made whole for that injury by a retroactive application of the escrow rule. Since the purpose of the escrow rule - to prevent an "involuntary loan" to the union, cannot be realized by retroactive application rule, such application should not be required.

It is alleged that Complainants assert that the real interest to be served by imposing the Hudson procedures retroactively on the union is deterence. Since compliance cannot be gained retroactively, Complainants argue the Respondent Unions should return all of the fair-share fees Complainants have ever paid to the Respondent Unions, with interest, including funds spent on admittedly chargeable activities. Such a result would clearly not further the constitutional interests of non-member payors the Court sought to protect when it imposed the requirements set forth in Hudson. The Court never cites deterrence as a justification for its rule, nor does the Court direct that its procedural requirements be imposed on unions in a punitive fashion. Cf. 106 S.Ct. 1077, n. 27. Further, "such a punitive application of the Hudson requirements would destroy the balance between those interests and the societal interests in stable labor relations that has been the cornerstone of the Supreme Court's entire agency fee jurisprudence." Such a refund would constitute a "windfall", rather than a make whole remedy, and would be inconsistent with the Court's prior ruling regarding appropriate relief in constitutional cases. Citing, Carey v. Piphus, 435 U.S. 247 (1978).

The third criterion requires a showing that the retroactive application of a new rule will produce "substantial inequitable results." In applying this criterion the Court's focus has traditionally been on the impact of the retroactive application of the new rule on those who have relied upon the prior law. Applying that focus to this case, the impact on the Respondent Unions is devastating. Since the start of the collection of the fair-share fees the Respondent Unions have provided services to Complainants which Complainants concede are properly chargeable. The Respondent Unions relied upon existing law concerning the collection of the fees and the procedures for resolving disputes as to the amount of the fees. Moreover, Complainants have enjoyed the benefits of the services and the Respondent Unions' entitlement to that portion of the fees spent on chargeable activities is "unconditional and absolute." To impose the Hudson requirements retroactively and to require the return of all fair-share fees with interest, would clearly produce a "substantial and inequitable result." Citing, Green v. U.S., 376 U.S. 149 (1964). It is also asserted that the Complainants have not been adversely affected by their reliance on prior law. As required by prior law, Complainants have made their dissent known to the Respondent Unions and thereby have perfected their claim to that portion of the fair-share fees spent on non-chargeable activities. Their rights have not been diminished by the decision in Hudson.

The Respondent Unions cite a number of cases where the Court did not apply the new rule retroactively in situations where a party had relied upon prior law and the changed law imposed new and unexpected burdens on that party. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); and Lemon v. Kurtzman, supra, (Lemon II). As in those cases, the Respondent Unions have acted in reliance on the prior law. Further, a retroactive application of Hudson would serve no valid constitutional or public purpose, and would impose unwarranted punitive sanctions on unions which had relied on prior law and would unjustly enrich complainants who had reaped the benefits of the unions' representation.

Requiring the Respondent Unions to repay all of the fair-share fees ever collected would seriously undermine, if not destroy, their ability to function as a collective bargaining representative. Such a result would be inconsistent with

the important "principle of exclusive union representation" and the legislative judgment "that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employes who obtain the benefit of union representation to share its cost." On that basis, the Respondent Unions conclude that it would be inequitable to apply Hudson retroactively and that the Commission should reject the Complainants' request for such relief.

Discussion

The Complainants essentially have contended that the procedural safeguards required by Hudson must be applied retroactively because the U.S. Supreme Court, in its decision in Hudson, directed that the district court apply the decision on remand in determining the appropriate remedy, and that at most the Court is silent as to whether the decision is to be applied retroactively and, hence, the lower courts must apply the decision retroactively. Therefore, according to Complainants, it is not necessary to apply the Chevron test to determine whether Hudson is to be applied retroactively in this case, and even if the Chevron factors are considered, the result is still the same. Conversely, the Respondent Unions have contended that the Commission is required to apply the Chevron test to determine the retroactivity issue, and that the result under the Chevron critera is that Hudson should not be applied retroactively.

Reviewing the Court's decision in Hudson, we are unable to find any clear indication in the decision as to whether the Court intended the decision to be applied retroactively or prospectively-only. Remanding the case for further proceedings consistent with the Court's decision is not determinative, since the Court could be referring to prospective relief as well as a remedy for past wrongs. Therefore, it is necessary to look to the law on retroactivity.

The decision that has been the basis of the decisions regarding retroactivity is U.S. v. Schooner Peggy, 1 Cranch 103 (1801):

> There, a schooner had been seized under an order of the President which commanded that any armed French vessel found on the high seas be captured. An order of condemnation was entered on September 23, 1800. However, while the case was pending before this Court the United State signed an agreement with France providing that any property captured and not "definitively condemned" should be restored.

(As summarized in Linkletter.) Chief Justice Marshall stated for the Court:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Id. at 110. It should be noted that the case involved a change in the law after the case was initiated and the lower court had ruled and that the Court was speaking to the province of an "appellate court." While the case has been cited as requiring a court to apply the law as it exists at the time of its decision, Cort v. Ash, 422 U.S. 66, 76 (1975), Bradley v. Richmond School Board, 416 U.S. 696, 711-715 (1974); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 282 (1969), those cases all involved a change in the law following the lower court's decision and prior to the appellate court's decision. That was also the case in U.S. v. Fitzgerald, 545 F.2d 578, 581 (7th Cir. 1976), cited and relied upon by Complainants. In that case petitioner argued that the Court of Appeals should make its own determination as to whether a decision of the U.S. Supreme

Court, occurring subsequent to the district court's decision and changing the applicable law, should be applied retroactively to cases on appeal. The Court of Appeals held:

> This assertion is incorrect. When the Supreme Court holds that a new rule of law should be applied only prospectively, it is itself delineating the substantive scope of that rule. As a conceptual matter, the Court is holding that its new rule is not the law with respect to cases that have already been initiated. In contrast, when the Supreme Court announces a new rule of law after a district court has ruled but before a court of appeals has passed on a case, the court of appeals can place no such substantive limitation of the scope of the new rule. If the Supreme Court fails to limit the substantive scope of its new rule to purely prospective cases, the court of appeals as an inferior court must assume that the rule applies in all situations. The policy factors that the Supreme Court relies on in determining whether its rule should have merely prospective effect are irrelevant, though they would not be if the court of appeals were determining whether to give retrospective effect to a new rule which it had itself announced. See Linkletter v. Walker, 381 U.S. 618, 625-29, 85 S.Ct. 1731, 12 L.Ed.2d 295 (1965), the leading case relied on in the petition for rehearing, where the Supreme Court distinguished the Schooner Peggy doctrine and the ability of a court or legislature to make a rule that it has itself constructed purely prospective. 49/

545 F.2d at 582. (Emphasis added)

49/ However, a different view as to when the Chevron test is to be applied was expressed in Welyczko v. U.S. Air, 733 F.2d 239, 241 (2nd Cir. 1984). In that case Del Costello v. International Brotherhood of Teamsters, 103 S.Ct. 2281 (1983) had been decided while the case was pending in district court. The District Court applied Del Costello and the Court of Appeals affirmed. In response to an argument that the Chevron test should be applied to determine if Del Costello should be applied retroactively, the Court of Appeals noted that other courts had applied Chevron and found Del Costello to be retroactive under that test and held:

> Moreover, in our view this case does not present circumstances in which the use of the Chevron test would be appropriate.
>
> Were we asked to decide if retrospective effect should be given to a new rule which our court had pronounced, the policy factors enumerated in Chevron Oil would indeed be determinative. See United States v. Fitzgerald, 545 F.2d 578, 582 (7th Cir. 1976). Similarly, had the Supreme Court given no indication whether DelCostello should apply retroactively, a Chevron Oil analysis would also be in order. But these factors are not present here. The Supreme Court not only adopted a new statute of limitations in DelCostello; it applied that time bar retroactively to govern the very claim at issue in the case before it. We have noted that "the Supreme Court is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar." Cates v. Trans World Airlines, Inc.., 561 F.2d 1064, 1073 (2d Cir. 1977). Thus, when that Court itself has given retrospective application to a newly adopted principle, "no sound reason exists for not doing so here." Holzsager v. Valley Hospital, 646 F.2d 792, 797 (2d Cir. 1981). A court of appeals must defer to the Supreme Court's directive on this issue, explicit or implicit. See United State v. Fitzgerald, supra, at 582. Certainly, its intended application is clear in this case. (Emphasis added)

Id. at 241 (Emphasis added). We note that in Del Costello the Supreme Court applied the new statute of limitations and reversed the lower court's decision. 103 S.Ct. at 2294-95.

The leading case on "nonretroactivity" is Linkletter v. Walker, 381 U.S. 618 (1965), a Fourth Amendment search and seizure case involving the issue of whether the Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961) extending the "exclusionary rule" to states via the Due Process clause of Fourth Amendment, was to be applied retroactively:

> Initially we must consider the term "retrospective" for the purposes of our opinion. A ruling which is purely prospective does not apply even to the parties before the court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). See also Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). However, we are not here concerned with pure prospectivity since we applied the rule announced in Mapp to reverse Miss Mapp's conviction. That decision has also been applied to cases still pending on direct review at the time it was rendered. Therefore, in this case, we are concerned only with whether the exclusionary principle enunciated in Mapp applies to state court convictions which had become final before rendition of our opinion.

381 U.S. at 621-622. (Emphasis added) The Court reviewed its prior decisions in this area and concluded that:

> Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, Schooner Peggy, supra, and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality"; and "of public policy in the light of the nature both of the statute and of its previous application." Chicot County Drainage Dist. v. Baxter State Bank, supra, at 374.
>
> That no distinction was drawn between civil and criminal litigation is shown by the language used not only in Schooner Peggy, supra, and Chicot County, supra, but also in such cases as State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940) and James v. United States, 366 U.S. 213 (1961). In the latter case, this Court laid down a prospective principle in overruling Commissioner v. Wilcox, 327 U.S. (1964), "in a manner that will not prejudice those who might have relied on it." At 221. Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. And "there is much to be said in favor of such a rule for cases arising in the future." Mosser v. Darrow, 341 U.S. 267, at 267 (dissenting opinion of BLACK, J.)
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> While the cases discussed above deal with the invalidity of statutes or the effect of a decision overturning long-established common-law rules, there seems to be no impediment--constitutional or philosophical--to the use of the same rule in the constitutional area where the exigencies of the situation require such an application. It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule. Petitioner contends that our method of resolving those prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication. However, we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, "We think the federal constitution has no voice upon the subject."
>
> Once the premise is accepted that we are neither required to apply, nor prohibited from applying,a decision retrospectively, we must then weigh the merits and demerits in

> each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures. Rather than "disparaging" the Amendment we but apply the wisdom of Justice Holmes that "(t)he life of the law has not been logic: it has been experience." Holmes, The Common Law 5 (Howe ed.1963).

381 U.S. at 627-629. (Emphasis added)

The Court stated the following in Linkletter regarding the factors to be considered in deciding whether a decision is to a applied retrospectively:

> We believe that the existence of the Wolf doctrine prior to Mapp is "an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." Chicot County Drainage Dist. v. Baxter State Bank, supra, at 374. The thousands of cases that were finally decided on Wolf cannot be obliterated. The "particular conduct, private and official," must be considered. Here "prior determinations deemed to have finality and acted upon accordingly" have "become vested." And finally, "public policy in the light of the nature both of the . . . (Wolf doctrine) and of its previous application" must be given its proper weight. Ibid. In short, we must look to the purpose of the Mapp rule; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of a retrospective application of Mapp.

381 U.S. at 636. (Emphasis added)

The Court considered those factors and held Mapp to not be retroactive. In a subsequent civil case (antitrust) Hanover Shoe v. United Shoe Mach., 392 U.S. 481 (1968) the Court focussed its attention on the factor of whether the "new" decision is an "abrupt and fundamental shift in doctrine as to constitute an entirely new rule." In that case the district court awarded damages against United back as far as the statute of limitations would allow and up to the date the suit was filed, i.e., July 1, 1939 to September 21, 1955. On appeal the Court of Appeals ruled that June 10, 1946, rather than July 1, 1939, marked the start of the damages period, that being the date of the Supreme Court's decision in American Tobacco Co. v. United States, 328 U.S. 781. The Court of Appeals concluded that the decision in that case "fundamentally altered" the law of monopolization, and that United's conduct should not have been held to have violated the law prior to the date of the Court's decision. The Court of Appeals opined that the Supreme Court's decisions in the criminal law area regarding retroactive application of its decisions applied to civil cases as well.

The Supreme Court, in rejecting the Court of Appeals' view of the American Tobacco decision as a major shift in the law, concluded that:

> Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble-damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals.
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> Neither the opinion in Alcoa nor the opinion in American Tobacco indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary

> to the view held by those courts. In ruling that it was not necessary to exclude competitors to be guilty of monopolization, the Court of Appeals for the Second Circuit relied upon a long line of cases in this Court stretching back to 1912. 148 F.2d, at 429. The conclusion that actions which will show monopolization are not "limited to manoeuvres not honestly industrial" was also premised on earlier opinions of this Court, particularly United States v. Swift & Co., 286 U.S. 106, 116 (1932). In the American Tobacco case, this Court noted that the precise question before it had not been previously decided, 328 U.S., at 811, and gave no indication that it thought it was adopting a radically new interpretation of the Sherman Act. Like the Court of Appeals, this Court relied for its conclusion upon existing authorities. These cases make it clear that there was no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under 2 upon a showing of predatory practices by the monopolist. In neither case was there such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one. Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extention of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks. We cannot say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation or maintenance of a monopoly, so long as they avoided direct exclusion of competitors or other predatory acts.

392 U.S. at 496-499. (Emphasis added)

In Chevron Oil Co. v. Huson, another civil law case, the Supreme Court set out its test for determining whether a decision was to be applied prospectively only. The Court considered whether a district court erred in applying the Court's decision in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, to the case in Chevron while it was pending before the district court. The Court of Appeals reversed the District Court, but did not address the respondent's argument that Rodrigue should not be applied retroactively. The Supreme Court disagreed with the Court of Appeals' rationale, but affirmed its judgment. The Court held that Rodrigue, at least in part, was not to be applied retroactively. In arriving at its decision the Court reviewed its prior decisions involving the issue of nonretroactive application of judicial decisions and noted that:

> In recent years, the nonretroactive application of judicial decisions has been most conspicuously considered in the area of the criminal process. But the problem is by no means limited to that area.
>
> . . .
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> . . . in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases. 404 U.S. at 105-106. (Citations omitted.)

The Court then enunciated the factors to be considered in determining whether a decision is to be applied nonretroactively:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board

of Elections, supra, at 372. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, at 629. Finally, we have weighed the inequity imposed by retroactive application, for "(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, at 706.

404 U.S. at 106-107. (Emphasis added)

Since the Court's decision in Chevron, the Chevron criteria have generally been applied in civil cases in order to determine whether a decision, including the decision of a higher court, is to be applied prospectively only. The Court expressly noted this in U.S. v. Johnson, 457 U.S. 537 (1982). While that case involved criminal law procedures concerning the Fourth Amendment and the application of Payton v. New York, 445 U.S. 573 (1980), in deciding the case the Court reviewed its prior retroactivity decisions:

> Thus, after Linkletter and Shott, it appeared that all newly declared constitutional rules of criminal procedure would apply retrospectively at least to judgments of conviction not yet final when the rule was established.
>
> In Johnson v. New Jersey, 384 U.S. 719 (1966), and Stovall v. Denno, 388 U.S. 293 (1967), however, the Court departed from that basic principle. Those cases held that, in the interest of justice, the Court may balance three factors to determine whether a "new" constitutional rule shoud be retrospectively or prospectively applied: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Id., at 297. See also Johnson v. New Jersey, 384 U.S., at 728. Because the outcome of that balancing process might call for different degrees of retroactivity in different cases, the Court concluded that "no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review." Stovall v. Denno, 388 U.S. at 300. See Johnson v. New Jersey, 384 U.S., at 732.
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> . . .
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> In a consistent stream of separate opinions since Linkletter, Members of this Court have argued against selective awards of retroactivity. Those opinions uniformly have asserted that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule. In Desist v. United States, 394 U.S. 244, 256 (1969) (dissenting opinion), and Mackey v. United States, 401 U.S. at 675 (separate opinion), Justice Harlan presented a comprehensive analysis in support of that principle. In his view, failure to apply a newly declared constitutional rule at least to cases pending on direct review at the time of the decision violated three norms of constitutional adjudication.
>
> First, Justice Harlan argued, the Court's "ambulatory retroactivity doctrine," Id., at 681, conflicts with the norm of principled decisionmaking.
>
> . . .
>
> Second, Justice Harlan found it difficult to accept the notion that the Court, as a judicial body, could apply a "'new' constitutional rule entirely prospectively, while

making an exception only for the particular litigant whose case was chosen as the vehicle for establishing that rule." Desist v. United States, 394 U.S., at 258 (dissenting opinion). A legislature makes its new rules "wholly or partially retroactive or only prospective as it deems wise." Mackey v. United States, 401 U.S., at 677 (Harlan, J., dissenting).

. . .

Third, Justice Harlan asserted that the Court's selective application of new constitutional rules departed from the principle of treating similarly situated defendants similarly . . .

457 U.S. at 543-547.

Justice Harlan suggested that one rule would satisfy all three concerns, i.e., "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." The Court, agreeing that retroactivity must be rethought, concluded that it must:

. . . examine the circumstances of this case to determine whether it presents a retroactivity question clearly controlled by past precedents, and if not, whether application of the Harlan approach would resolve the retroactivity issue presented in a principled and equitable manner.

At the outset, we must first ask whether respondent's case presents a retrospectivity problem clearly controlled by existing precedent. Re-examination of the post-Linkletter decisions convinces us that in three narrow categories of cases, the answer to the retroactivity question has been effectively determined, not by application of the Stovall factors, but rather, through application of a threshold test.

First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later cases applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

. . .

Conversely, where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," Desist v. United States, 394 U.S., at 248, it almost invariably has gone on to find such a newly minted principle nonretroactive. See United States v. Peltier, 422 U.S. 531, 547, n. 5 (1975) (BRENNAN, J., dissenting) (collecting cases). In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the "'new' constitutional interpretatio(n) . . . so change(s) the law that prospectivity is arguably the proper course," Williams v. United States, 401 U.S., at 659 (plurality opinion).

457 U.S. at 548-549.

The Court noted the difference between the civil cases and the criminal procedure cases:

Once the Court has found that the new rule was unanticipated, the second and third Stovall factors--reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule--have virtually compelled a finding of

nonretroactivity. See, e.g., Gosa v. Mayden, 413 U.S., at 672-673, 682-685 (plurality opinion); Michigan v. Payne, 412 U.S., at 55-57. 12/

. . .

12/ In the civil context, in contrast, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. See, e.g., Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971). Once it has been determined that a decision has "establish(ed) a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the Court has gone on to examine the history, purpose, and effect of the new rule, as well as the inequity that would be imposed by its retroactive application. Id., at 106-107. See also Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 499 (1968). 50/

457 U.S at 549-550 and n. 12. (Emphasis added)

In following Justice Harlan's views and holding that Payton was to be applied retroactively, the Court was careful to note that it was not changing the standards to be applied in civil cases:

By so holding, however, we leave undisturbed our precedents in other areas. First, our decision today does not affect those cases that would be clearly controlled by our existing retroactivity precedents. Second, because respondent's case arises on direct review, we need not address the retroactive reach of our Fourth Amendment decisions to those cases that still may raise Fourth Amendment issues on collateral attack. Cf. n. 10, supra. Third, we express no view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment. Finally, all questions of civil retroactivity continue to be governed by the standard enunciated in Chevron Oil Co. v. Huson, 404 U.S., at 106-107. See n. 12, supra.

457 U.S. at 562-563. (Emphasis added)

The Chevron criteria have been applied in civil cases in the Seventh Circuit in Landahl v. PPG Industries, Inc., 746 F.2d 1312, 1314 (1984), 577 F. Supp. 867 (1983); Unger v. Consolidated Foods Corp., 693 F.2d 703 (7th Cir. 1982); NLRB v. Lyon & Ryan Ford, 647 F.2d 745, 757 (1981); Kumrow v. Teamsters General Local No. 200, 579 F. Supp. 393 (1983). These were cases where the law changed after the cases were initiated, but before the trial court rendered its decision, unlike Fitzgerald, supra, and similar to the instant case.

It appears from the foregoing that the Chevron test is to be applied in determining whether Hudson is not to be applied retroactively, and that the threshold test is whether Hudson is a "clear break" from the past.

50/ Footnote 12 is cited in Unger v. Consolidated Foods Corp., as clearly establishing the "clear break" principle as the threshold test for determining whether a decision should be applied nonretroactively and that only if that test is satisfied are the other criteria considered. 693 F.2d at 707, n. 8.

Chevron Test

The Chevron test consists of three criteria to be considered and all three criteria must be satisfied in order to find that a decision should be applied nonretrospectively. 51/ The Chevron criteria may be stated as follows:

> 1. Whether the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
>
> 2. whether retrospective application will further or retard application of the new rule; and
>
> 3. whether retrospective application would result in substantial injustice to the parties.

First Chevron Criteria

The first criterion has been described as the "clear break" test, and in U.S. v. Johnson, supra, the Court noted that in the civil context it has been stated as the "threshold test." 457 U.S. at 550, n. 12. Unger, 693 F.2d at 707, n. 8. Only if that first criterion is satisfied, are the second and third considered. Id. The first criterion is whether a decision has "established a new principle law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Chevron 404 U.S. at 106.

Johnson also provides guidance as to what is to be considered a "clear break" with existing law:

> First, Payton v. New York did not simply apply settled precedent to a new set of facts. In Payton, the Court acknowledged that the "important constitutional question presented" there had been "expressly left open in a number of our prior opinions."
>
> . . .
>
> By the same token, however, Payton also did not announce an entirely new and unanticipated principle of law. In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law", unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one,". Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, see, e.g., Desist v. United States, 394 U.S. 244 (1969); Williams v. United States, 401 U.S. 646 (1971), or disapproves a practice this Court arguably has sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. See, e.g., Gosa v. Mayden, 413 U.S., at 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades").

51/ NLRB v. Lyon & Ryan Ford, 647 F.2d at 757:

> Since there is a presumption favoring retroactivity, all three Chevron factors must support prospective application in order to limit the retroactive effect of the decision. Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1289 (7th Cir.), cert. granted, ____ U.S.____, 101 S.Ct. 395, 66 L.Ed.2d 242 (1980); Schaefer v. First Nat'l Bank, 509 F.2d 1287, 1294 (7th Cir. 1975), cert. denied, 425 U.S. 943, 96 S.Ct. 1682, 48 L.Ed.2d (1976).

. . .

> Milton v. Wainwright, 407 U.S., at 381-182, n. 2 (Stewart, J., dissenting) ("sharp break" occurs when "decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon").
>
> Payton did none of these. Payton expressly overruled no clear past precedent of this Court on which litigants may have relied. Nor did Payton disapprove an established practice that the Court had previously sanctioned. To the extent that the Court earlier had spoken to the conduct engaged in by the police officers, in Payton, it had deemed it of doubtful constitutionality. The Court's own analysis in Payton makes it clear that its ruling rested on both long-recognized principle of Fourth Amendment law and the weight of historical authority as it had appeared to the Framers of the Fourth Amendment. Finally, Payton overturned no long-standing practice approved by a near-unanimous body of lower court authority. Payton therefore does not fall into that narrow class of decisions whose nonretroactivity is effectively preordained because they unmistakably signal "a clear break with the past," . . .

457 U.S. at 551-554.

In order to determine whether Hudson constitutes a "clear break" it is necessary to note what it is Hudson requires and to review what the existing case law was prior to Hudson. The issue presented in Hudson was:

> whether the procedure used by the Chicago Teachers Union and approved by the Chicago Board of Education adequately protects the basic distinction drawn in Abood. "(T)he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." Abood, 431 U.S. at 237.

106 S.Ct. at 1074. (Emphasis added) The Court held that:

> Procedural safeguards are necessary to achieve this objective for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. 11/ Second, the nonunion employee--the individual whose First Amendment rights are being affected--must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim. 12/
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> . . .

11/ "See Roberts v. United States Jaycees, supra, at 12 (Infringements of freedom of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); Elrod v. Burns, 427 U.S. 347, 363 (1976) (government means must be "least restrictive of freedom of belief and association"); Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973) ("even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty"); NAACP v. Button, 371 U.S. 415, 438 (1963) ("(p)recision of regulation must be the touchstone" in the First Amendment context).

12/ "(P)rocedural safeguards often have a special bite in the First amendment context." G. Gunther, Cases and Materials on Constitutional Law 1373 (10th ed. 1980). Commentators have discussed the importance of procedural safeguards in our analysis of obscenity, Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 520-524 (1970); overbreadth, L. Tribe, American Constitutional Law 734-736 (1978); vagueness. Gunther, supra, at 1373, n. 2, and 1185-1195; and public forum permits, Blasi, Prior Retraints on Demonstration, 68 Mich. L. Rev. 1481, 1534-1572 (1970). The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns. See generally, Monaghan, supra, at 551 ("The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures").

106 S.Ct. at 1074. (Emphasis added) The Court appears to have relied on existing First Amendment case law in holding that procedural safeguards are constitutionally necessary in this context.

The Court held that the union's procedure was inadequate because:

> . . . it failed to minimize the risk that nonunion employees' contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker.

106 S.Ct. at 1077. Regarding what is constitutionally required for a union to collect an agency fee the Court held:

> . . . the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

106 S.Ct. at 1078.

We must look at each of the above components of the Court's decision, what the Court relied on in holding that the First Amendment requires such procedures and what the law was as to each of those requirements prior to the Court's decision in Hudson.

First, in holding that the union must first establish a procedure that avoids the risk that objecting fee payors' funds will be used temporarily for improper purposes the Court stated:

> First, as in Ellis, a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose. "(T)he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." Abood, 431 U.S., at 244 (concurring opinion). The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of respondent's interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In Abood, we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of

forcing an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves." A forced exaction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections. 52/

106 S.Ct. at 1075. (Emphasis added)

The following is the portion of Ellis relied on by the Court in Hudson in holding that a rebate procedure is constitutionally inadequate and that the required procedural safeguards must be in place before a union may exact an agency fee:

> As the Court of Appeals pointed out, there is language in this Court's cases to support the validity of a rebate program. Street suggested "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." 367 U.S., at 775. See also Abood v. Detroit Board of Education, 431 U.S. 209, 238 (1977). On the other hand, we suggested a more precise advance reduction scheme in Railway Clerks v. Allen, 373 U.S. 113, 122 (1963), where we described a "practical decree" comprising a refund of exacted funds in the proportion that union political expenditures bore to total union expenditures and the reduction of future exactions by the same proportion. Those opinions did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies. 7/ Doing so now, we hold that the pure rebate approach is inadequate.
>
> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation.
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> . . .
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> 7/ The courts that have considered this question are divided. Compare Robinson v. New Jersey, 547 F.Supp. 1297 (N.J. 1982); School Committee v. Greenfield Education Assn., 385 Mass. 70, 431 N.E.2d 180 (1982); Threlkeld v. Robbinsdale Federation of Teachers, 307 Minn. 96, 239 N.W.2d 437, vacated and remanded, 429 U.S. 880 (1976) (all holding or suggesting that such a scheme does not adequately protect the rights of dissenting employees) with Seay v. McDonnell Douglas Corp. 533 F.2d 1126, 1131 (CA9 1976); Opinion of the Justices, 401 A.2d 135 (Me. 1979); Association of Capitol Powerhouse Engineers v. State, 89 Wash.2d 177, 570 P.2d 1042 (1977) (all upholding rebate programs). See generally Perry v. Local 2569, 708 F.2d 1258, 1261-1262 (CA7 1983).

52/ Citing the majority in Abood, at 234-235, n. 31.

104 S.Ct. at 1889-1890. (Emphasis added)

Previous references to what might constitute appropriate procedures are also noted at various places in the Court's opinion in Abood:

> In determining what remedy will be appropriate if the appellants prove their allegations, the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective bargaining activities. This task is simplified by the guidance to be had from prior decisions. In Street, supra, the plaintiffs had proved at trial that expenditures were being made for political purposes of various kinds, and the Court found those expenditures illegal under the Railway Labor Act. See pp. 9-10, supra. Moreover, in that case each plaintiff had "made known to the union representing his craft or class his dissent from the use of his money for political causes which he opposes." 367 U.S.at 750; see id., at 771. The Court found that "(i)n that circumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes." Ibid.
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> . . .
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> After noting that "dissent is not to be presumed" and that only employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief, the Court sketched two possible remedies: first, "an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget," and second, restitution of a fraction of union dues paid equal to the fraction total union expenditures that were made for political purposes opposed by the employee. 367 U.S., at 774-775. 38/
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> . . .

38/ In proposing a restitution remedy, the Street opinion made clear that "(t)here should be no necessity, however, for the employee to trace his money up to and including its expenditure; if the money goes into general funds and no separate accounts of receipts and expenditures of the funds of individual employees are maintained, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget." 367 U.S., at 775.

> . . .
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> The Court again considered the remedial question in Brotherhood of Railway & Steamship Clerks v. Allen, 373 U.S. 113, 53 LRRM 2128.
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> . . .
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> The Court indicated again the appropriateness of the two remedies sketched in Street; reversed the judgment affirming issuance of the injunction; and remanded for determination of which expenditures were properly to be characterized as political and what percentage of total union expenditures they constituted. 40/

The Court in Allen described a "practical decree" that could properly be entered, providing for (1) the refund of a portion of the exacted funds in the proportion that union political expenditures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion. Id., at 122. Recognizing the difficulties posed by judicial administration of such a remedy, the Court also suggested that it would be highly desirable for unions to adopt a "voluntary plan by which dissenter would be afforded an internal union remedy." Ibid. This last suggestion is particularly relevant to the case at bar, for the Union has adopted such a plan since the commencement of this litigation. 41/

. . .

40/ The Court in Allen went on to elaborate:

"(s)ince the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities." 373 U.S. at 122.

41/ Under the procedure adopted by the Union, as explained in the appellees brief, a dissenting employee may protest at the beginning of each school year the expenditure of any part of his agency-shop fee for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment." The employee is then entitled to a pro rata refund of his service charge in accordance with the calculation of the portion of total union expenses for the specified purposes. The calculation is made in the first instance by the Union, but is subject to review by an impartial board.

431 U.S. at 237-240. (Emphasis added)

The majority in Abood expressly left open the question of the constitutionality of the union's internal remedy, which was in effect a rebate procedure:

> The Court of Appeals thus erred in holding that the plaintiffs are entitled to no relief if they can prove the allegations contained in their complaints, and in depriving them of an opportunity to establish their right to appropriate relief, such, for example, as the kind of remedies described in Street and Allen. In view of the newly adopted union internal remedy, it may be appropriate under Michigan law, even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute. 45/
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> . . .

45/ We express no view as to the constitutional sufficiency of the internal remedy described by the appellees. If the appellants initially resort to that remedy and ultimately

conclude that it is constitutionally deficient in some respect, they would of course be entitled to judicial consideration of the adequacy of the remedy.

431 U.S. at 241-242. (Emphasis added)

This includes Justice Stevens in his concurring opinion in Abood:

> Mr. Justice STEVENS, concurring.
>
> By joining the opinion of the Court, including its discussion of possible remedies, I do not imply--nor do I understand the Court to imply--that the remedies described in Street and Allen would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining. Any final decision on the appropriate remedy must await the full development of the facts at trial.

431 U.S. at 244. (Emphasis added)

As can be seen, the Court relied on its prior decisions in Ellis and Abood in finding that a rebate procedure, without other safeguards, is not constitutionally adequate to protect dissenters' First Amendment rights. The Court expressly noted in Abood that it was not deciding the constitutionality of the union's rebate procedure. In Ellis the Court reiterated that it had not in its decisions in Abood and Allen judged the "statutory or constitutional adequacy of the suggested remedies." 104 S.Ct. at 1889. The Court also noted in Ellis that the courts that had considered that question "are divided," 104 S.Ct. 1890, n.7. Thus, prior to its decision in Ellis and Hudson the Court had expressly left open the question of the constitutional adequacy of a "pure rebate" procedure, as well as the question of what was constitutionally required, and the lower courts were divided on the question.

In its decision in Hudson the Court also required, and found the procedure flawed because it was lacking, "an adequate explanation of the basis for the fee," as a correlative of requiring the nonmember to object. Hudson, 106 Ct. at 1075, 1078. The Court relied on its prior decisions in Abood and Allen in requiring such explanation:

> Second, the "advance reduction of dues" was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share. In Abood, we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." Abood, 431 U.S., at 239-240, n. 40, quoting Railway Clerks v. Allen, 373 U.S. 113, 122 (1963). 16/ Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee--and requiring them to object in order to receive information--does not adequately protect the careful distinctions drawn in Abood. 17/
>
> In this case, the original information given to the nonunion employees was inadequate. Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members - and for which nonmembers as well as members can fairly be charged a fee--the Union identified the

amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%. 18/

. . .

16/ "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 affirmatively be 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.

17/ Although public sector unions are not subject to the disclosure requirements of the Labor Management Reporting and Disclosure Act, see 29 U. S. C. at 402(e), the fact that private sector unions have a duty of disclosure suggests that a limited notice requirement does not impose an undue burden on the union. This is not to suggest, of course, that the information required by that Act, see 29 U. S. C. at 431 (b); 29 CFR at 403.3 (1985), is either necessary or sufficient to satisfy the First Amendment concerns in this context.

18/ We continue to recognize that there are practical reasons why "(a)bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." Allen, 373 U.S., at 122, quoted in Abood. 431 U.S., at 239-240, n. 40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year . . .

106 S.Ct. at 1075-1076. (Emphasis added)

Again, the Court was relying on its prior decisions in this area and what it felt followed from those decisions based on "Basic considerations of fairness, as well as concern for the First Amendment rights at stake . . ." 106 S.Ct. at 1076.

Regarding its requirement that a "reasonably prompt decision by an impartial decisionmaker" must be provided by the procedure, the Court stated:

> Finally, the original Union procedure was also defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker. Although we have not so specified in the past, we now conclude that such a requirement is necessary. The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner. 19/
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> . . .

19/ Our prior opinions have merely suggested the desirability of an internal union remedy. See Abood, supra, at 240, and n. 41: Allen, supra, at 122.

106 S.Ct. at 1076. (Emphasis added)

While the Court expressly held for the first time in Hudson that a reasonably prompt decision by an impartial decision-maker is required as part of the union's procedure, it overruled no past decision of the Court, and what is required in a union's internal rebate procedure and whether a rebate procedure is constitutionally adequate has been addressed by a number of lower courts reaching a variety of conclusions. A summary of various decisions is noted in Perry v. Machinists Local Lodge 2569:

> The Union maintains, however, that because a refund procedure exists whereby the plaintiff can receive a rebate of her fees spent on political causes, the First Amendment does not prohibit the Union from collecting the whole fee (i.e. both political and non-political components).
>
> The merits of the Union's argument were clearly left open by the Supreme Court in Abood. See 431 U.S. at 242 n. 45; 431 U.S. at 244 (Stevens, J., concurring); see also Robinson v. State of New Jersey, 547 F.Supp. 1297, 1318, 112 LRRM 2308 (D.N.J. 1982). Since then courts have split on the issue whether a refund procedure cures the First Amendment problems created when a union spends agency fees on political causes. Some courts have found rebate procedures sufficient to protect an employee's rights. See, e.g., Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 685 F.2d 1065, 1070, 111 LRRM 2173 (9th Cir. 1982), cert. granted, 51 LW 3746 (April 18, 1983). Other courts have held that an agency fee system requiring continual payments and subsequent refunds to claimants does not satisfy the requirements of the First Amendment. See, e.g., Robinson v. State of New Jersey, 547 F.Supp. 1297, 1321, 112 LRRM 2308 (D.N.J. 1982) School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180, 189, 109 LRRM 2420 (1982); see general Galda v. Bloustein, 686 F.2d 159, 168 (3rd Cir. 1982). We need not presently select the better position, however, because all courts have agreed that, at least, a rebate system must be fair, administered in good faith, and not cumbersome. See, e.g., Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 685 F.2d 1065, 1070, 111, LRRM 2173 (9th Clr. 1982) cert. granted, 51 LW 3746 (April 8, 1983); Robinson v. State of New Jersey, 547 F.Supp. 1297, 1321, 112 LRRM 2308 (D.N.J. 1982). This agreement stems from the principle that when First Amendment interests are at stake, the least restrictive means of effectuating government interests must be employed, see Kuspers v. Pontikes, 414 U.S. 51, 58-59 (1973).

708 F.2d at 1261-1262. (Emphasis added) It is noted that the Seventh Circuit found the union's procedures inadequate in Perry because they took too long (were not "reasonably prompt") and were not fair in that the dissenter bore the burden of proof and the final decision was made by the union's executive council (not an impartial decisionmaker). 708 F.2d at 1262.

In the initial decision in Hudson the federal district court also noted the diversity of rulings on the adquacy of a rebate system:

> Some courts have found rebate procedures sufficient to protect an employee's rights. See, e.g., Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 685 F.2d 1065, 1070 (9th Cir. 1982); Browne v. Milwaukee Board of School Directors, (1977-78 PBC 36,299) 83 Wis.2d 316, (1978); White Cloud Educational Ass'n v. Board of Education, (1979-81 PBC 37,187) 101 Mich.App.309, (1980). Other courts have held that an agency fee system requiring continual payments and subsequent refunds to claimants does not satisfy the requirements of the First Amendment. See, e.g., Robinson v. State of New Jersey, (1981-83 PBC 37,624) 547 F.Supp. 1297, 1321 (D.N.J. 1982); Schools Committee of Greenfield v. Greenfield Education Association, (1981-83 PBC 37,431) 385 Mass. 70, (1982).

573 F.Supp. 1505, 1515 (1983).

Thus, it appears there was no solid body of lower court precedent upon which the Respondent Unions could have justifiably relied and there were numerous decisions indicating the need for a reasonably prompt decision by an impartial decisionmaker, e.g. Robinson; Perry; Tierney v. City of Toledo, 116 LRRM 3475 (N.D. Ohio 1984), Greenfield Education Ass'n, 385 Mass. at 82; Central Michigan Faculty Ass'n v. Stengren, et al, Mich. Ct. App., Case No. 76097 (May 6, 1985).

Hudson also requires escrowing of the amount reasonably in dispute while challenges are pending. As was the case with the above, the courts have taken various approaches as to whether escrowing may be required. However, the Supreme Court had indicated in Street and Allen that broad injunctive relief that would deprive the unions of the funds was inappropriate. Allen, 373 U.S. at 120; Street 367 U.S. at 771-772. See also, Browne, 83 Wis.2d at 340; Champion v. Deukmejian, 738 F.2d 1082 (9th Cir. 1984). In Ellis the Court altered its direction somewhat and required escrow of the fees or advanced reduction and that decision was preceded by various lower court decisions that had required or recognized the need for escrowing of the fees while a challenge was pending. Robinson v. State of New Jersey, 547 F.Supp. 1297 (1982); reversed and remanded, 741 F.2d 598 (3rd Cir. 1984) (the Court of Appeals noting the union's procedure now provided for escrow of the contested portion of the fee); School Committee v. Greenfield Education Association, supra; Perry, supra, Tierney, supra.

To a major extent the question of what would constitute a constitutionally adequate internal union procedure was left unanswered by the Court, expressly or otherwise, until its decisions in Ellis and Hudson. That is similar to the case in Johnson, supra, where the Court noted that prior to its decision in Payton, the "'important constitutional question presented' there has been 'expressly left open in a number of our prior opinions.'" 457 U.S. at 551. The Court then concluded that Payton also did not announce "an entirely new and unanticipated principle of law" since that decision did not overrule clear past precedent or overturn a practice arguably sanctioned in prior cases or overturn a longstanding and widespread practice. 457 U.S. at 551-54. Similarly, Hudson also did not overrule a clear past precedent of the Court in this area and while the requirements in Hudson had been addressed in lower court decisions in this area and in prior decisions on the First Amendment, there was no "near unanimous body of lower court authority" in the area of union fees expressly approving as adequate the internal union rebate procedure found to be inadequate in Hudson. At most, such a rebate system had arguably been sanctioned by the Court in Street, but as of the Court's decision in Abood, it was clear that the Court did not consider the question to have been answered, nor did the Court answer it in that case. 431 U.S. at 242.

The Respondent Unions' argument that the Supreme Court's dismissals of the appeals in Kempner and White Cloud were "clear past precedents" upon which they could rely is not persuasive. The issue in both of those cases was whether the dissenting fee payors should be permitted to pay the entire fee they were being asked to pay into an escrow account pending the outcome of the litigation on the appropriate fee amount. Such requested interim relief was the relevant procedural aspect decided in those cases and appealed; and the other procedural safeguards that had been addressed in lower court decisions, and held to be constitutionally required in Hudson, were not addressed in those decisions. Further, while such summary dispositions are "precedent," the dismissals contain no rationale and have "considerably less precedential value than an opinion on the merits." Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173, 180-181 (1979). They are to be given "appropriate, but not necessarily conclusive weight." Mandel v. Bradley, 432 U.S. 173, 180 (1977) (J. Brennan, concurring). Hence, the Supreme Court's dismissals of the appeals in Kempner and White Cloud did not constitute clear past precedent upon which unions were entitled to rely as establishing that a simple rebate procedure was constitutionally adequate.

Although the Court had not, prior to its decision in Hudson, specified the procedural safeguards a union must establish in order to lawfully collect an agency fee, it had previously held in Ellis that a "pure rebate" procedure was inadequate and offered escrow of the fee or advanced rebate as possible alternatives to avoid the possibility that dissenters' funds be committed to improper uses even temporarily. Ellis, 104 S.Ct. at 1890. Thus, the principle that a union's compulsory dues procedure must be such as to avoid the risk that dissenters' funds will be used even temporarily for impermissible purposes was articulated in the Court's decision in Ellis, relying in part on its decision in Abood. In applying that principle in Hudson the Court was not deciding an issue of first impression. Further, the specific procedural safeguards found to be required in Hudson were foreshadowed to a considerable extent by precedents in this area in the lower federal courts, by the application of the Court's prior decisions in the area of the First Amendment, and by "basic considerations of fairness." Contrary to the Respondent Unions' claims, Kempner and White Cloud involved only the escrow aspect of the procedural safeguards and were not broad

decisions on the constitutionality of the unions' procedures in those cases. Also contrary to the Respondent Unions' arguments, the Court of Appeals' decision in Hudson 53/ held that the union's procedure must provide for a prompt decision by an impartial decisionmaker (albeit an administrative agency or the courts), 54/ and strongly suggested that to meet constitutional minimums the procedure provide for "fair notice" 55/ and a "proper escrow arrangement." 56/ Therefore, we conclude that the Court in Hudson did not establish a new principle of law by deciding "an issue of first impression whose resolution was not clearly foreshadowed."

On the basis of the foregoing we conclude that the decision in Hudson does not constitute a "clear break" such as is required to meet the first criterion, i.e., the threshold, of the Chevron test. That being so, it would not be necessary to address the second and third Chevron criteria. However, for the sake of answering all of the questions raised, we will do so.

The second criterion of the Chevron test is whether retroactive application will further or retard application of the rule in question. The "rule" to be served is that the First Amendment requires that certain procedural safeguards must be established before a union may exact a fair-share fee in order to minimize the infringement on the non-member's constitutional rights. As Complainants point out, there may be some deterrence value to applying Hudson retroactively as unions will be more likely to observe constitutional procedural requirements, if relief is granted for their failure to do so in the past. Conversely, there would be little incentive for unions to err on the side of clearly constitutional behavior in this area, if the only consequence of their failure to do so would be that they would have to establish and follow constitutional procedures in the future. Johnson, 457 U.S. at 561.

The third criterion under the Chevron test is whether retrospective application would result in substantial injustice to the parties. This factor requires a balancing of the interests of the parties and the impact retroactive application of the rule would have on those interests. Complainants have their First Amendment right, as well as their rights under MERA, not to be required over their objection to subsidize the union's activities that are not sufficiently related to collective bargaining and contract administration. The Respondent Unions' recognized interest is having every employe it represents contribute his/her proportionate share toward the costs of collective bargaining and contract administration. There is also the government's interest in labor peace, and while that interest is strong enough to justify permitting a fair-share agreement and its infringement on non-members' constitutional rights, the First Amendment requires that the interests of the unions and the government be achieved by the least restrictive means, i.e., that the unions' fair-share procedures "be carefully tailored to minimize the infringement." Hudson, 106 S.Ct. at 1074 and n. 11, 12.

It is evident from the admissions in the pleadings and the responses of the Respondent Unions that their internal rebate procedures prior to Hudson did not meet the requirements set forth in Hudson for a union to lawfully exact a fair-share fee. Both Complainants and the Respondent Unions apparently assume that such being the case, if Hudson is found to apply retroactively, then the Respondent Unions must forfeit all the fees they collected from Complainants, and they argue the equities of retroactive application of Hudson from that standpoint. However, as we discuss more fully in the next section, it is not necessarily a case of "all or nothing" with regard to remedy. It is possible to fashion a remedy that takes into consideration the valid interests of both the non-member fair-share payors and the unions without imposing undue hardship upon the unions. To the extent the retroactive application of Hudson does impose some additional burdens upon the Respondent Unions, weighing the interest of Complainants in protecting their First Amendment rights against the interest of

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53/ 743 F.2d 1187 (1984).

54/ Ibid., at 1195.

55/ Ibid., at 1196.

56/ Ibid., at 1197.

the Respondent Unions in having everyone they represent pay their "fair-share" of the costs of collective bargaining, we conclude that the need to vindicate the Complainants' constitutional rights outweighs the additional financial burden imposed on the Respondent Unions under our remedial order by applying Hudson retroactively.

On the basis of the foregoing, we conclude that Hudson is to be applied retroactively. This appears to also have been the result at least implicitly reached in those cases where Hudson has been applied as the basis for granting relief for periods predating the Supreme Court's decision in Hudson. Ellis v. Western Airlines, Inc., and Air Transport Employes, Civil No. 86-1041-E (S.D. Cal. 1986); Gilpin v. AFSCME, 643 F.Supp. 733 (C.D. Ill. 1986); Lehnert v. Ferris Faculty Ass'n, MEA-NEA, 643 F.Supp. 1306 (W.D. Mich. 1986); McGlumphy, supra.

The fair-share provisions of MERA having been held to be constitutional on their face, the retroactive application of Hudson inescapably leads to the conclusion that the Respondent Unions violated MERA by collecting and spending fair-share fees equivalent to full dues in the admitted absence of the procedural safeguards held in Hudson to be constitutionally required in order for a union to lawfully exact a fair-share fee. Specifically, Complainants have alleged that by requiring them to pay a fair-share fee equivalent to full dues, the Respondent Unions and Respondents Board and County have committed prohibited practices within the meaning of MERA.

MERA provides in relevant part that:

> **111.70 Municipal employment.** (1) DEFINITIONS. As used in this subchapter:
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> . . .
>
> (f) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.
>
> . . .
>
> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refran from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. . .
>
> . . .
>
> (3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).
>
> . . .
>
> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

. . .

6. To deduct labor organization dues from an employe's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefor, signed by the municipal employe personally, and terminable by at least the end of any year of its life or earlier by the municipal employe giving at least 30 days' written notice of such termination to the municipal employer and to the representative organization, except where there is a fair-share agreement in effect.

. . .

(b) It is a prohibited practice for a municipal employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2).

2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub.(2), or to engage in any practice with regard to its employes which would constitute a prohibited practice if undertaken by him on his own initiative.

. . .

(c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

The Respondent Unions, pursuant to the fair-share provisions contained in the respective collective bargaining agreements they have had with the Respondent Board and Respondent County, have required the Complainants, as fair-share fee payors in bargaining units represented by the Respondent Locals, to pay a fee equal to the dues the Respondent Unions require of their members, and thereby, have required Complainants to pay more than their proportionate share of the cost of collective bargaining and contract administration. By doing so in the absence of the procedural safeguards held in Hudson to be constitutionally required in order for a union to lawfully exact a fair-share fee, the Respondent Unions violated not only the Complainants' First Amendment rights, but also Complainants' right under MERA, (Sec. 111.70(2), Stats.) to refrain from taking part in the activites set forth in that section. This is true of the Respondent Unions' conduct in this regard both before and after Complainants made their dissent known to the Respondent Unions, since the requirement that fair-share fee payors make their dissent known is premised on their having received adequate notice from the union as to how the appropriate amount of the fee was computed by the union. Hudson, 106 S.Ct. at 1075-1076. We have therefore concluded that by exacting fair-share fees from Complainants equal to full dues in the absence of the constitutionally required procedural safeguards set forth in Hudson, the Respondent Unions, and their officers and agents, have committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats.

Complainants have also alleged that Respondents Board and County have committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 6, Stats. However, there is no evidence or argument that the Respondent Board and the Respondent County have taken any action other than to comply with the terms of a provision of their respective collective bargaining agreements 57/ with the locals unions, as required by law, by acting as a conduit for the Respondent

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57/ Inasmuch as no party has raised an issue regarding the legality of the language of the fair-share agreements themselves, we make no finding and reach no conclusion on that point.

Unions. Therefore, we have not found that the Respondent Board and the Respondent County have committed a prohibited practice within the meaning of MERA. 58/

IV. Remedy

Relief Requested 59/

In each case the Complainants seek the following as a remedy:

> That the Respondent Unions be required to return to all Complainants, with interest at the rate of seven percent (7%) per annum from the date of commencement to the date of return, all fair-share fees received by Respondent AFSCME from the Complainants that have not already been returned and seventy-five percent (75%) of all fair-share fees received by Respondents District Council 48 and the Local Unions from Complainants that have not already returned, from the commencement of the deductions through December 31, 1982, and all fees received from the Complainants thereafter, and that the Respondent Unions be required to pay the Complainants interest at the rate of seven percent (7%) per annum on all monies previously returned to Complainants from the date of deduction till the date of refund.
>
> That the Respondents Board and County cease and desist from deducting fair-share fees from the earnings of all nonunion employes in the bargaining units involved that are in excess of a proportionate share of the costs of collective bargaining and contract administration, and that Respondent Unions cease and desist from inducing them to do so.

As prospective relief Complainants request that:

> The Respondents Board and County cease and desist from making any fair-share deductions from the earnings of all nonunion employes in the bargaining unit involved until the Commission has determined, after hearing upon any Respondent's request, that the Respondents have provided for: "an adequate advance explanation to all nonunion employees of the basis for the fair-share fee, verified by an independent certified public accountant; a reasonably prompt opportunity for employees to challenge the amount of the fee before an

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58/ We note that although in its decision in Browne the Wisconsin Supreme Court cited Sec. 111.70(3)(a)1, Stats., as the prohibited practice in question, the Court referred to the union's use of the fee, stating:

> The plaintiffs are claiming that their fair-share dues have been used for political purposes, in contravention of the statute. That use of the fair-share funds interferes with their statutory rights and is a prohibited practice over which W.E.R.C. has jurisdiction.

83 Wis.2d at 334.

59/ As noted previously, in their respective amended complaints filed with the Commission Complainants in these cases originally sought as part of their request for relief an order suspending for one year Respondent Unions' privilege of entering into and enforcing fair-share agreements in the affected bargaining units and a concomitant cease and desist order as to the Respondent Board and Respondent County. A request for such relief was not included in Complainants' respective requests for final findings of fact, conclusions of law and order filed with the Commission in April of 1986. However, to the extent, if any, the request for such relief remains before the Commission, we note that the relief sought would be primarily punitive in nature, rather than remedial, and for that reason we would find it inappropriate to grant such relief.

impartial decisionmaker; and an escrow, for at least the amounts determined by the impartial decisionmaker reasonably to be subject to dispute, while such challenges are pending."

Complainants

Complainants contend that the appropriate relief in this case should include full restitution with interest and a cease and desist order. They also contend that the appropriate prospective relief is to order the cessation of the fair-share deductions in the covered bargaining units until the Commission determines, after hearing, that the Respondent Unions have established the procedures required by the U.S. Supreme Court's decision in Hudson.

It is contended by Complainants that the Commission has the authority and the duty to utilize substantive remedies, as well as the procedures of Sec. 111.07(4), Stats., in complaint proceedings under MERA, WERC v. Evansville, 69 Wis.2d 140, 158 (1975); Board of Education v. WERC, 52 Wis.2d 625, 635 (1971), and one such remedy is to award damages. General Drivers, Local 622 v. WERB, 21 Wis.2d 242, 249 (1963); WERB v. Algoma Plywood & Veneer Co., 252 Wis. 549, 560-61, aff'd 336 U.S. 301 (1949). Restitution has also been approved as a remedy in agency-fee cases. Ellis, 466 U.S. at 440, 457 n. 1; Abood, 431 U.S. at 238, 240.

Complainants note that in Hudson the Court remanded the case to the lower court for the determination of the appropriate remedy, and that the Court warned that "the judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." 106 S.Ct. at 1077, n. 22. The Court cited National Society of Professional Engineers v. U.S., 435 U.S. 679, 697-98 (1978); Swann v. Charlotte-Mucklenburg Board of Education, 402 U.S. 1, 15-16 (1971), cases that emphasized the broad authority of courts to fashion equitable relief "both to avoid a recurrence of the violation and to eliminate its consequences," . . . "and to remedy past wrongs." The discretion a court has to fashion an equitable remedy does not permit it to deny an effective relief once the constitutional violation has been found; finding of a constitutional violation imposes a duty on the court to grant appropriate relief. Hill v. Gautreaux, 425 U.S. 284, 297 (1976); North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971); and Davis v. School Commissioners 402 U.S. 33, 37 (1971).

Complainants contend that in a prohibited practice proceeding the Commission acts in the place of a court of equity, having the authority and duty "to order the remedy most consistent with the public interest." Citing, Appleton Chair Corp. v. Carpenters Local 1748, 239 Wis. 337, 343 (1941). Also cited is the Commission's statement in its Orders to Show Cause that the Wisconsin Supreme Court made it clear that MERA is to be interpreted so as to be consistent with the requirements of the First Amendment, and it is asserted that it is in the public interest that the Commission exercise its "substantial remedial powers" so as to give the Complainants the greatest possible degree of relief from the prohibited practices.

It is contended by Complainants that there are two proven prohibited practices that would be constitutional violations if not prohibited by the Wisconsin statutes. First, the Respondent Unions concede, and the Commission has found, that from the inception of the fair-share agreements fees have been collected from the Complainants and spent for purposes which constitutionally may not be charged to them. Further, the Respondent Unions have conceded that prior to January 1, 1983 they did not keep sufficient records to permit a determination of the portion of fair-share fees spent for chargeable purposes. 60/ The Respondent Unions have the burden of proof, and by having made it impossible to meet that burden, they were not entitled to collect any fee from Complainants for the period from the start of fair-share deductions, or the date of objection if the Commission rules an objection is required, at least through 1982, and must refund those monies "to the extent previously stipulated by the parties."

60/ Citing the following letters to the Commission from the Respondent Unions' counsel: Sobol's letter of November 30, 1981; Bowers' letter of December 21, 1981; and Kraft's letter of November 1, 1982.

Requiring such reimbursement does not constitute a "windfall" but merely places the burden of undoing the wrong on the wrongdoer. Citing, Lyon and Ryan Ford, 647 F.2d at 757. 61/

That the Respondent Unions have refunded, or agreed to refund, stipulated percentages of Complainants' fees for the pre-1983 period does not moot their claims for that period, since "damages for an illegal rebate program would necessarily (be) in the form of interest on money illegally held for period of time. That claim for damages remains in the case." Ellis, 466 U.S. at 442. The stipulations specifically reserve Complainants' right to claim interest on the refunded monies. Further, the Commission has held that make whole relief in these cases includes pre and post-decision interest, and Complainants are due interest on monies already refunded and any others that will be ordered refunded.

The Respondent Unions' collection and spending of fair-share fees for improper purposes after January 1, 1983 also entitles Complainants to relief under Abood and Browne, even if the Commission holds that Hudson is not retroactive and that the new union procedures satisfy Hudson. This is so because "it is clear that 'voluntary cessation of allegedly illegal conduct does not moot a case.'" Further, "it is well settled that the mere discontinuance of unfair labor practices does not dissipate their effect, nor does it obviate the need for a remedial order." Iron Workers Local 444, 174 NLRB 1108, 1110, n. 13 (1969); Watkins v. Department of Industry, Labor and Human Relations, 69 Wis.2d 782, 794-95 (1975). Where compliance with the law is very brief relative to the record of past violation, and the illegal conduct was discontinued in the face of litigation, "injunctive relief is mandatory absent clear and convincing proof that there is no reasonable probability of further non-compliance with the law." NAACP v. City of Evergreen, 693 F.2d., 1367, 1370 (11th Cir., 1983); U.S. v. Electrical Workers Local 38, 428 F.2d 144, 151 (6th Cir.), cert. denied, 400 U.S. 943 (1970). Those conditions exist here. These cases began in 1973 and the filing of the actions was sufficient to put the Respondent Unions on notice of the Complainants' objections to the use of their fees for impermissible purposes. Abood in 1977 and Browne in 1978, made it clear that Complainants have a constitutional and statutory right not to pay fees for improper purposes, yet the Respondent Unions continued to collect and spend fees equal to full dues and did not adopt a procedure "which even offered the possibility of a fee reduction until May 23, 1986." Further, testimony at hearing shows that Respondent District Council 48's procedures have not been fully implemented yet and are subject to change by the governing bodies of the Council and Respondent AFSCME or in negotiations with employers. (Tr. 43-47, 63-66, 92-94; Glass Affidavit.)

Hence, even if it is found that the new procedures are adequate and that Hudson is prospective only, Complainants are still entitled to a cease and desist order prohibiting future deduction of fair-share fees in excess of the proportionate share of chargeable costs and requiring the Respondent Unions to implement the new procedures. Also, because those procedures cannot apply retroactively, Complainants would still be entitled to discovery and a determination by the Commission of the amount of refund they are due for the period 1983 through March 4, 1986.

Complainants also assert that a second prohibited practice has been committed, both before and after Hudson, by collecting fair-share fees in the absence of procedural safeguards required by the First Amendment. Since the

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61/ Complainants note that if it is determined that an objection is a prerequisite to finding a prohibited practice in this case, then additional hearing will be necessary to determine the objection dates of certain Complainants. Citing the respective stipulations "Re Past-Years' Fair-Share Deductions and Protest Dates."

Complainants also assert that the claims of the twelve unopposed additional Complainants in Johnson extend beyond one year prior to the date of the motion to add complainants, as the motion to amend the complaint to add them relates back to the date of the original pleading. Korkow v. General Casualty Co., 117 Wis. 2d 187 (1984). The four opposed complainants should also be added according to Complainants, as an objection is not necessary to have a valid constitutional claim in the absence of adequate procedural protections.

second prohibited practice does not depend on the uses to which the fees are put or upon objection, no further factual questions need be decided by the Commission to issue a final order for relief. As the prohibited practice is the collection of any fee at all in the absence of the constitutionally required safeguards, the remedy should be the same as for any unlawful taking i.e., restitution of the unlawfully taken property. Such relief is particularly appropriate here, since the taking not only was without due process of law, but also infringed on the non-members' First Amendement rights. Hudson 106 S.Ct. at 1074 and n.13. The Court made it clear in Hudson that the remedy must be designed to "both avoid a recurrence of the violation and to eliminate its consequences." National Society of Professional Engineers v. U.S., 435 U.S. 679, 697 (1978), cited in Hudson 106 S.Ct. at 1077, n. 22. Complainants cite Hudson and Elrod v. Burns, 427 U.S. at 373, for the proposition that although restitution cannot wholly repair the irreparable harm done when First Amendment rights are involved, it does more to remedy the injury than would lesser relief. While the Respondent Unions might have been entitled to collect some amount of a fair-share fee from Complainants and other non-member employes if they had provided the required procedures and met their burden of proving the lawfully chargeable fee amount, they did neither and cannot now complain that full restitution is inequitable. Hudson, 106 S.Ct. at 1077, n. 22.

Complainants note they do not ask to be relieved from the stipulations as to the percentages for the years 1982 back to the start of the fair-share, but they do assert relief should date back to the start of the fair-share, as no objection is required to find a constitutional violation in the absence of constitutionally required procedures. For that reason also, the Motion to Add Complainants in Johnson should be granted as to all sixteen individuals, regardless of whether they objected before they left the employ of Respondent County. Further, as the years following 1982 are not covered by the parties' stipulations and the procedures required by Hudson were not present, full restitution should be ordered for that period.

Complainants cite the Supreme Court's decision in Ellis and Wisconsin case law in support of their claim for interest on the money ordered refunded to them. It is also alleged that the Respondent Unions present no argument against restitution as a remedy for their past collection of fees without providing the required safeguards, other than their erroneous contention that Hudson should not be retroactive. As noted previously, the Respondent Unions cited Carey v. Piphus, a case concerning whether damages may be awarded for deprivation of due process unaccompanied by actual injury. In that case there was no evidence that the failure to provide due process itself resulted in injury. Conversely, here it is proven that the failure to afford the constitutionally required procedures caused concrete injury in two respects: (1) The Respondent Unions were able to spend a portion of Complainants' fair-share fees for improper purposes; and (2) the procedures required in Hudson are a prerequisite to the collection of any compulsory fee and Complainants were unconstitutionally deprived of use of the entire amount of their fees. Citing District 65 UAW; and Browne, Dec. No. 18408-E at 6-8. Even restitution of all monies taken unlawfully, with interest, cannot wholly repair the irreparable harm done to Complainants' First Amendment rights, but it is the "best possible approximation of damage done." Citing, Memphis Community School District v. Stachura, 54 U.S.L.W. 4771 (June 25, 1986); Huffman v. Springfield Education Association, (C.D. Illinois, June 16, 1986); Gibney; and District 65 UAW.

Complainants have also requested an order that fair-share deductions in their bargaining units be ceased until the Respondent Unions establish that the constitutionally required procedures have been implemented. While the Court in Hudson remanded the case to the district court for a determination of the appropriate remedy, it also affirmed the judgement of the Court of Appeals, which had indicated in its decision that plaintiffs were entitled to injunctive relief. 743 F.2d 1187, 1197. It is asserted that such injunctive relief is consistent with dicta in Ellis, 466 U.S. at 454 and Abood, 431 U.S. at 237-42. It is clear after Hudson that the collecting of any fee in the absence of the constitutionally required procedural safeguards is a violation of First Amendment rights, regardless of the use to which they are put. Further, Hudson expressly rejected as inadequate the collection and escrowing of the full fee pending determination of the appropriate amount in the absence of the other required procedures. 106 S.Ct. at 1077-78. The only effective remedy is to entirely stop the collecting of the fair-share fee until the required procedures are established. Complainants cite similar relief granted in Galda v. Rutgers, 772

F.2d 1060 (3rd Cir. 1985) cert. denied 54 U.S. L.W. (1986), Gibney v. Toledo Federation of Teachers No. 83-2280, slip op. 1 at 3-5; District 65 UAW, slip op. N.J. PERC. Acknowledging that the Commission cannot issue an injunction, Complainants assert the Commission can issue a cease and desist order under Sec. 111.07(4), Stats., and can petition Milwaukee County Circuit Court for an injunction if its order is not obeyed. Also, the order can be made subject to future modification upon the Respondent Unions demonstrating to the Commission that they have established the required procedures. Thereafter the Respondent Unions would only be required to cease and desist from taking fair-share deductions in excess of the proportionate share of collective bargaining and contract administration. Such a remedy would be a "reasonable method of eliminating the consequences of the illegal conduct" National Society of Professional Engineers, 435 U.S. at 698, and properly places the burden "upon the proved transgressor(s) 'to bring any proper claims for relief to the (Commission's) attention,'" Id. at 698-99, and the Respondent Unions' legitimate interests are adequately protected by the opportunity of doing so.

Respondent Unions

The Respondent Unions assert that the record in this show cause proceeding indicates they have put into effect "comprehensive procedures" in response to Hudson. Those procedures address each of the requirements of Hudson and constitute a "good faith effort" to comply with those requirements. Noting that the Commission is reviewing the adequacy of the Respondent Unions' procedures with regard to the requirements of Hudson, the Respondent Unions contend that "the Commission should not pass judgement on the AFSCME procedure and impose punitive sanctions, such as the suspension of all fair share fee collections . . for technical violations of Hudson's requirements, even if any exist. Rather, the Commission should identify the defect, if any, . . . and give the Respondent Unions a reasonable opportunity to cure the defect under the Commission's continuing jurisdiction." Citing, McGlumphy v. Fraternal Order of Police. 633 F.Supp. 1074, 1084 (N.O. Ohio 1986). They assert that such a remedy would not only be consistent with the Commission's role under MERA, it would also "further stable labor relations," the latter being the public policy interest identified by the Supreme Court in Hudson and its preceding decisions upholding such agency shop and union shop arrangements against constitutional attacks.

As to requiring full refunding of past fair-share fees collected from Complainants, the Respondent Unions have contended in their arguments regarding the third Chevron criterion that they acted in reliance upon prior law, that a retroactive application of Hudson would serve no valid constitutional or public purpose, and would impose unwarranted punitive sanctions on unions which had relied on prior law and would unjustly enrich complainants who had reaped the benefits of the unions' representation.

Discussion

Retrospective Relief

The Complainants' request for a full refund of all fair-share fees collected from them since they became subject to fair-share deductions to the present is premised on the Court's holding in Hudson that before a union may lawfully exact a fair-share fee from the non-members it represents, it must first establish the procedural safeguards the Court held are required by the First Amendment. They assert it follows that since, as we have found herein, the Respondent Unions' objection and rebate procedures, both pre- and post-Hudson, did not and do not meet the requirements of Hudson, the entire fees collected from Complainants have been taken unlawfully. While Complainants correctly note that a usual remedy for an unlawful taking is restitution, we must also remain cognizant of the government's legitimate interest in maintaining stable and peaceful labor relations by permitting fair-share agreements in order to avoid the "free-rider" problem. Further, the Respondent Unions have been required under MERA to represent Complainants during those years in their capacity as the exclusive bargaining representatives of the collective bargaining units to which Complainants belong. Although neither the complete refunding of all fees collected, nor the retroactive application of the Hudson procedures, will completely cure the violation of Complainants' First Amendment rights, to now require the Respondent Unions to refund all of the fees collected from Complainants would result in a "windfall" to Complainants and would be the equivalent of awarding "punitive damages" against the Respondent Unions. Such relief would, in our view, be inconsistent with the remedial nature of Chapter

III.70. Furthermore, it is inconsistent with the "make whole" relief ordinarily ordered where we have found that under MERA such relief was required to cure a prohibited practice.

We find that the relief set forth in our orders in these cases would be most consistent with the purposes and policies underlying MERA and would also adequately serve the purposes of the rule set forth in Hudson. To remedy the violations found herein retrospectively for the period prior to the date of the Hudson decision, we are requiring the Respondent Unions to immediately properly escrow, in an interest-bearing account, an amount equal to all of the fair-share fees collected from Complainants since January 1, 1983 62/ to the date of the decision in Hudson, plus interest at the rate of seven percent (7%) per annum from the date they were taken to the date the funds are placed in escrow in conformity with our order. 63/ The Complainants will be deemed to challenge the amount of the fees for each of those years, and any amounts determined by the Commission or other impartial decisionmaker 64/ to be in excess of the appropriate fees for those years are to be refunded to Complainants with the appropriate share of the interest discussed above and the interest earned during the escrow at the bank rate. 65/

As to those years prior to 1983, the parties in both Browne and Johnson executed stipulations "Re Past Years' Fair-Share Deductions and Protest Dates." 66/ In Browne it was agreed that:

> 1. In lieu of litigation regarding that portion of complainants' fair-share fees paid during the period January 1, 1980, to December 31, 1981, and spent for activities not chargeable to complainants under the Commission's February 3, 1981, Order in this case, respondent American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "AFSCME International"), agrees to refund 100% of the per capita taxes received by AFSCME International from the fair-share fees paid by all complainants and class members from the appropriate beginning date through December 31, 1981.
>
> 2. In lieu of litigation regarding that portion of complainants' fair-share fees paid during the period January 1, 1980, to December 31, 1981, and spent for

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62/ As to Koch, it will be in 1985.

63/ With regard to the pre-decision and post-decision interest we have ordered, as noted in our orders to show cause, we do not see any basis for deviating from our decision in Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) to grant pre-decision and post-decision interest at the rate set forth in Sec. 814.04(4) Stats., at the time the complaints were filed. In Wilmot we concluded the Wisconsin Supreme Court's decision in Anderson v. State of Wisconsin, Labor and Industry Review Commission, 111 Wis.2d 245 (1983) and the Court of Appeals decision in Madison Teachers Incorporated et. al. v. WERC, 115 Wis.2d 623 (Ct. App. IV 1983), requires administrative agencies such as this Commission to grant pre-judgment interest as part of make whole relief regardless of when the complaint was filed and regardless of whether such relief was expressly requested. Wilmot, at 8, 10. The rate set forth in the Sec. 814.04(4), Stats., would have been 7 percent per annum, regardless of whether the date measuring was the filing of the actions in circuit court or the dates the cases were referred to the Commission. In addition to this interest, there will be the interest generated in the escrow account, which need not be at the rate of 7 percent.

64/ In this instance the impartial decisionmaker will be the Commission in Stage II, unless the Complainants and Respondent Unions mutually agree to submit the issue to an ad hoc arbitrator, and the determinations will be for 1983 to the date of the Supreme Court's decision in Hudson.

65/ Similar relief was granted in Mc Glumphy, 633 F.Supp. at 1084.

66/ There is also a stipulation covering 1982 in Browne.

activities not chargeable to complainants under the Commission's February 3, 1981, Order in this case, respondents District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "District Council 48"), and Local 1053, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "Local 1053"), agree to jointly and severally refund 75% of the monies received by District Council 48 and Local 1053 from the fair-share fees paid by all complainants and class members from the appropriate beginning date through December 31, 1981.

3. The complainants contend that the appropriate beginning date is the date on which fair-share deductions commenced. Respondent unions contend that the appropriate beginning date is the date on which the complainants and class members each first notified respondent unions of their objections to the payment of fair-share fees. All parties agree to the submission of this issue of law to the Commission for decision.

. . .

(Stipulation in Browne, para. 1-3. See "Appendix B.")

We note that although paragraphs 1 and 2 of the stipulation in Browne refer to refunds to be made at certain percentages in lieu of litigating that portion of Complainants' fees paid "during the period January 1, 1980, to December 31, 1981," and spent for purposes not chargeable to Complainants, the parties applied those percentages and agreed to refunds for those years prior to 1980 as well. The portion of the fees stipulated to be immediately refunded were those paid during the period from December 31, 1981 back to the dates the parties agreed the individual Complainants made their objections known to the Respondent Unions and those dates all precede 1980. The parties left the issue of the "appropriate beginning date," from which it is stipulated the refunds will ultimately be due, for the Commission to decide. They also executed a similar stipulation regarding refunds in lieu of litigation covering all of 1982.

Similarly, Complainants and Respondent Unions stipulated in Johnson that:

1. In lieu of discovery and litigation regarding that portion of fair-share fees paid during the period prior to December 31, 1982, and spent for activities not chargeable to complainants and other objecting employees under Section 111.70, Wis. Stats., respondent American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "AFSCME International"), agrees to refund 100% of the per capita taxes received by AFSCME International from the fair-share fees paid by the complainants and other objecting employees whom complainants have moved to add as co-complainants from the appropriate beginning date through December 31, 1982.

2. In lieu of discovery and litigation regarding that portion of fair-share fees paid during the period prior to December 31, 1982, and spent for activities not chargeable to complainants and other objecting employees under Section 111.70, Wis. Stats., respondents District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "District Council 48"), and Locals 594, 645, 882, 1055, 1654, and 1656, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "the Locals"), agree to jointly and severally refund 75% of the monies received by District Council 48 and the Locals from the fair-share fees paid by the complainants and other objecting employees whom complainants have moved to add as co-complainants from the appropriate beginning date through December 31, 1982.

3. Complainants contend that the appropriate beginning date is the date on which fair-share deductions commenced. Respondent unions contend that the appropriate beginning date is the date on which the complainants and other objecting employees each first notified respondent unions of their objection to the payment of fair-share fees. All parties agree that the determination of this issue of law in Browne v. Milwaukee Board of School Directors, Case XCIX, No. 23535 MP-892 (WERC, filed Sept. 18, 1978), will apply to this case.

. . .

(Stipulation in Johnson, para. 1-3. See "Appendix D.")

By the terms of their respective stipulations, the parties have left the issue of the "appropriate beginning date," from which refunds are due the respective Complainants, to be decided by the Commission. We have concluded that the appropriate beginning dates, i.e., the dates from which relief is to be granted, are the dates the respective Complainants first became subject to fair-share deductions, 67/ rather than the dates they made their dissent known to the Respondent Unions. This is based upon our conclusion that Hudson is to be applied retroactively and the holding in Hudson that a union cannot lawfully exact a fair-share fee before it has established certain procedural safeguards, including the adequate prior notice to all fee payors upon which the requirement that dissent be made known to the union in order to be entitled to relief is premised.

We have ordered the Respondent Unions to refund the fees collected from Complainants for those years from the start of fair-share deductions from Complainants through December 31, 1982 and not already returned, at the percentages specified in the stipulations, plus interest at the rate of seven percent (7%) per annum on those amounts from the date the fees were taken to the dates they are refunded rather than requiring that determinations be made as to those years. This is ordered on the basis that the parties, by the terms of their stipulations, have agreed to apply certain specified percentages if relief is ordered for those prior years, in lieu of litigating the amounts not chargeable to Complainants for those years, and that is what Complainants have requested in that regard.

We have also ordered the Respondent Unions to pay to Complainants interest, at the rate of seven percent (7%) per annum, on the amounts already refunded to Complainants from the dates such fees were collected to the dates they were refunded.

Regarding those individuals whose addition as complainants was moved on November 16, 1983 in Johnson, we have granted that motion, effective the date of filing, as to those twelve individuals to whom the Respondent Unions have not objected. As to the four individuals whose addition the Respondent Unions objected to, Karpowitz, Noffz, Patzke and Winter, we have concluded that their addition is barred by the operation of Sec. 111.07(14), Stats., because they had left the Respondent County's employ and had no fair-share deductions taken from their pay for more than one year prior to the filing of the motion to add them as complainants. Complainants have cited the Wisconsin Supreme Court's decision in Korkow as permitting the addition of complainants by amendment after the statute of limitations has run and relating that amendment back to the original date of filing of the complaint, as long as a new cause of action has not being pleaded. The Court's decision in that case was based on its interpretation of Sec. 802.09(3), Stats., which is a part of Wisconsin's rules of civil procedures pertaining to the relating back of amendments of complaints. As noted in our earlier decision in Johnson, judicial procedures do not ordinarily apply to administrative agencies and proceedings. 68/ Section 111.07(2), Stats., and

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67/ This relief is subject to the one year statute of limitations of Sec. 111.07(14), Stats., as to the Complainants permitted to be added in Johnson and as to Koch in Browne. See footnote 14 and accompanying text of Order.

68/ Dec. No. 19545-D (WERC, 3/85) at 17-18. See also State ex rel. Thompson v. Nash, 27 Wis. 2d 183, 189-190 (1964).

ERB 12.02, Wis. Adm. Code, permits the addition of complainants by amendement of the complaint, however, we view the underlying purpose of that rule to be the efficiency gained by not requiring two separate proceedings on the same cause of action and involving essentially the same facts, rather than the granting of substantive rights which would permit parties to avoid the operation of the statute of limitations. For the same reasons we have also concluded that the retrospective relief available under our Order to those twelve individuals added in Johnson, and to Complainant Koch in Browne, is limited to one year prior to the dates they were added as Complainants. 69/ We also note that this in no way affects the rights of those Complainants who were a part of these cases in court or who were added as members of the class in Browne pursuant to order of the Circuit Court. To conclude otherwise than we have could result in our having to allow a multitude to join these actions at the last minute and to obtain relief for years beyond what would be available and considered appropriate under Sec. 111.07(14), Stats., as it applies to MERA. Further, it would circumvent the Circuit Court's order in Browne which permitted similarly situated employes in the bargaining unit to opt into the class action by December 31, 1977, after which the class was closed. 70/

Prospective Relief

The Supreme Court held in Hudson that a union must establish certain procedural safeguards before it may exact a fair-share fee from the non-members it represents. While Complainants assert this requires that the Respondent be orderd to cease and desist from deducting any fair-share fees in the bargaining units involved, we do not agree that such an order is necessary to adequately protect Complainants' First Amendment rights. The Respondent Unions have made a substantial and good faith effort to satisfy the requirements of Hudson after that decision was published. Although we have found certain aspects of the Respondent Unions' notice and procedures deficient, they are not so deficient as to justify a cease and desist order. We have concluded that Complainants' interests, and the interests of all the fee payors, will be adequately protected by requiring the Respondent Unions to escrow all fair share monies the Unions have received, plus interest, and are receiving from all employes in the instant bargaining units, including Complainants, (net of advance rebates which are to be continued) since the date of the Hudson decision, and to continue such escrowing and advance reduction arrangements until the proper disbursement of that escrow can be determined for the entire period involved by application of the Respondent Unions' revised and approved procedures.

More specifically, we are requiring the Respondent Unions to continue the advance rebates and to place the full amounts deducted since the U.S. Supreme Court's decision in Hudson on March 4, 1986, and currently being deducted from all fair-share fee payors, including Complainants, and not advance rebated, 71/ plus interest at the rate of seven percent (7%) per annum on the fees collected from the date they were collected until the date they are placed in escrow, in an interest-bearing escrow account outside the control of Respondent Unions, such as we have held to be required. Said escrowing of the fees will continue until the Commission has determined after hearing (unless Complainants agree a hearing is not necessary) that the Respondent Unions are prepared to provide adequate notice and the procedural safeguards required by Hudson have been established, and after said approved notice has been given and the time for filing an "objection" or "challenge" has run, whereupon: (1) the fees collected from fair-share fee payors who have not filed a "challenge," and the appropriate interest, will be disbursed in accordance with the approved procedures, (2) the fair-share fees thereafter collected will be disbursed or escrowed in accordance with the approved procedures, and (3) the fees of "challengers," including Complainants, will remain escrowed until a decision on the proper fee amount has

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69/ This is one year prior to November 16, 1983 for those added in Johnson and December 15, 1986 as to Koch in Browne.

70/ Order of Milwaukee County Circuit Court, October 19, 1977.

71/ The advance reduction for objectors/challengers, including Complainants, will continue.

been rendered by an impartial decisionmaker 72/ covering the period from and after the date of the U.S. Supreme Court's decision in Hudson, at which time the monies in escrow will be disbursed in accord with said decision.

Dated at Madison, Wisconsin this 24th day of April, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner
(Dissenting in part)

Danae Davis Gordon
Danae Davis Gordon, Commissioner

72/ We note that a new dissent period and a new arbitration will be required and their application will date back to date of the decision in Hudson. This action should in no way be taken to reflect on the integrity of Arbitrator Weisberger, as it is the union's, rather than the arbitrator's, responsibility to see that the notice and procedures are adequate.

Partial Dissent of Commissioner Torosian

I disagree with my colleagues' conclusion that Respondent District Council 48's Notice is not sufficiently clear as to the consequences of not filing a "challenge," as opposed to an "objection." The Notice, in relevant part, provides the following:

> **AFSCME Council 48 Procedure for Challenging Its Calculation of Chargeable vs. Non-Chargeable Expenses**
>
> AFSCME Council 48 has established the following procedures for individual non-members who pay Fairshare fees and who wish to challenge the Council 48 calculation of chargeable versus non-chargeable expenses. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THIS PROCEDURE IN ORDER TO CHALLENGE THE AFSCME COUNCIL 48 CALCULATION OF CHARGEABLE VERSUS NON-CHARGEABLE EXPENSES.

Not only does the Notice explain that a person wishing to challenge the Respondent Unions' calculations must follow the challenge procedure, its restates the explanation in the form of a warning and in bold print capital letters. Any person reading the above notice, along with the challenge procedure, would reasonably conclude that he/she had to follow the union's challenge procedure in order to challenge the union's calculation of the amount of the fair-share to be charged to him/her. While it might be possible to state the notice more clearly, we are concerned with whether the notice meets at least the minimum requirements, and not whether it is the best that can be done.

Dated at Madison, Wisconsin this 24th day of April, 1987.

By _____
Herman Torosian, Commissioner

AFSCME®
American Federation of State County Municipal Employees
MILWAUKEE DISTRICT COUNCIL 48
3427 West St. Paul Avenue
Milwaukee, Wisconsin 53208
Telephone (414) 344-6868

JOHN PARR
Executive Director
DANIEL M. O'DONNELL
President

AFSCME COUNCIL 48
NOTICE TO ALL NONMEMBER FAIRSHARE PAYORS

This Notice is being provided to all nonmembers who pay Fairshare Fees to Council 48 of the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME Council 48") under collective bargaining agreements between AFSCME Council 48 and various public employers in the County of Milwaukee, Wisconsin.

Such Notice is required by the decision of the United States Supreme Court in **Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, et al. v. Hudson, et al.**

PLEASE READ THIS NOTICE CAREFULLY. IT CONTAINS IMPORTANT INFORMATION AND PROCEDURES CONCERNING YOUR LEGAL RIGHTS.

THE AFSCME COUNCIL 48 FAIRSHARE FEE

As a nonmember represented by AFSCME Council 48 you are being charged a Fairshare fee which is equal to the regular dues paid by AFSCME Council 48 members. This Fairshare Fee is in accordance with the provisions of the Wisconsin Statutes 111.70.

The AFSCME International ("AFSCME") and AFSCME Council 48 and its affiliated locals spend a portion of all fees collected from nonmembers on the following activities. AFSCME Council 48 has determined that a pro rata portion of the expenses associated with these activities are chargeable to all nonmembers paying Fairshare Fees to AFSCME Council 48.

(a) Gathering information in preparation for the negotiation of collective bargaining agreements;

(b) Gathering information from employees concerning collective bargaining positions;

(c) Negotiating collective bargaining agreements;

(d) Adjusting grievances pursuant to the provisions of collective bargaining agreements;

(e) Administration of ballot procedures on the ratification of negotiated agreements;

(f) The public advertising of positions on the negotiation of, or provisions in, collective bargaining agreements, as well as on matters relating to the representational interest in the collective bargaining process and contract administration;

(g) Purchasing books, reports, and advance sheets used in matters relating to the representational interest in the collective bargaining process and contract administration;

(h) Paying technicians in labor law, economics and other subjects for services used in matters relating to the representational interest in the collective bargaining process and contract administration;

(i) Organizing within the bargaining unit in which Complainants are employed;

(j) Organizing bargaining units in which Complainants are not employed;

in the public service

APPENDIX A

(k) Seeking to gain representation rights in units not represented by Respondent Unions, including units where there is an existing designated representative.

(l) Defending Respondent Unions against efforts by other unions or organizing committees to gain representation rights in units represented by Respondent Unions;

(m) Proceedings regarding jurisdictional controversies under the AFL-CIO constitution;

(n) Seeking recognition as the exclusive representative of bargaining units in which Complainants are not employed;

(o) Serving as exclusive representative of bargaining units in which Complainants are not employed;

(p) Lobbying for collective bargaining legislation or regulations or to effect changes therein, or lobbying for legislation or regulations affecting wages, hours and working conditions of employees generally before Congress, state legislatures, and state and federal agencies;

(q) Supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing Complainants' employment, to the extent that such support and fees relate to the representational interest of unions in the collective bargaining process and contract administration;

(r) Membership meetings and conventions held, in part, to determine the positions of employees in Complainants' bargaining units on provisions of collective bargaining agreements covering their employment or on grievance administration pursuant to the provisions thereof;

(s) Membership meetings and conventions held, in part, for the purposes relating to the representational interest in the collective bargaining process and contract administration;

(t) Publishing newspapers and newsletters which, in part, concern provisions of the collective bargaining agreement covering Complainants' employment, or grievance administration pursuant to its provisions;

(u) Publishing newspapers and newsletters which, in part, relate to activities which have been determined herein to constitute proper expenditures of fair-share deductions;

(v) Lawful impasse procedures to resolve disputes arising in collective bargaining and in the enforcement of collective bargaining agreements;

(w) The prosecution or defense of litigation or charges to enforce rights relating to concerted activity and collective bargaining, as well as collective bargaining agreements;

(x) Social and recreational activities, as well as payment for insurance, medical care, retirement, disability, death and related benefit plans for persons who receive same in compensation for services rendered in carrying out the representational interest in the collective bargaining process and contract administration; and

(y) Administrative activities allocable to each of the categories described in categories (a) through (x) above.

AFSCME and AFSCME Council 48 and its affiliated locals spend a portion of all fees collected from members and nonmembers on the following activities. AFSCME Council 48 has determined that none of the expenses associated with these activities are chargeable to objecting nonmember Fairshare Fee payors.

(a) Training in voter registration, get-out-the-vote, and campaign techniques;

(b) Supporting and contributing to charitable organizations, political organizations and candidates for public office, ideological causes and international affairs;

(c) The public advertising on matters not related to the representational interest in the collective bargaining process and contract administration;

(d) Purchasing books, reports, and advance sheets utilized in matters not related to the representational interest in the collective bargaining process or contract administration;

(e) Paying technicians for services in matters not related to the representational interest in the collective bargaining process an contract administration;

(f) Lobbying for legislation or regulations, or to effect changes therein, 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, before Congress, state legislatures and federal and state agencies;

(g) Supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing the employment of the Complainants to the extent that such support and fees do not relate to the representational interest of Respondent Unions in collective bargaining and contract administration involving Complainants, or for activities of such other labor organizations which do not relate to matters involving otherwise proper expenditures of fair-share deductions;

(h) Membership meetings and conventions held, in part, with respect to matters which do not relate to activities which have been determined herein to relate to proper expenditures of fair-share deductions;

(i) Publishing newspapers and newsletters which, in part, do not relate to activities which have been determined herein to constitute proper expenditures of fair-share deductions;

(j) Unlawful strike activity and concomitants thereof, and the prosecution or defense of such activity, or on matters related thereto, and the prosecution or defense of activity not related to the representational interest in collective bargaining or contract administration;

(k) Social and recreational activities for members where such activities are not related to the representational interest in the collective bargaining process and contract administration;

(l) Payments for insurance, medical care, retirement, disability, death and related benefits to persons who do not receive same as compensation for services rendered in carrying out the representational interest in the collective bargaining process and contract administration; and

(m) Administrative activities allocable to each of the categories described in categories (a) through (l) immediately above;

Applying these criteria to the activities and expenses of AFSCME and AFSCME Council 48 and its affiliated locals for the time period November 1, 1984 through October 31, 1985, AFSCME Council 48 has determined that 92.123% of the total combined expenses are chargeable to objecting nonmember Fairshare Fee payors. This percentage is based on the weighted average of the total expenses of AFSCME Council 48's affiliated locals that are chargeable to objecting nonmember Fairshare Fee payors. This is based on the following:

AFSCME	$ 557,855.45 × 86.111% =	$ 480,374.90
AFSCME Council 48	970,574.15 × 94.26 % =	914,863.19
Affiliated Locals	598,761.47 × 94.26 % =	564,392.56
Totals	$2,127,191.07	$1,959,630.65

$$\frac{1,959,630.65}{2,127,191.07} = 92.123\%$$

This calculation will be effective from the date of this Notice until June 30, 1987. Prior to June 30, 1987 you will receive a new Notice containing a new calculation of chargeable versus nonchargeable expenses based on financial information for fiscal year 1986.

The AFSCME Council 48 calculation of expenses for which objecting nonmember Fairshare Fee payors can be charged a pro rata share is based on the following audited financial information. This financial information sets forth the expenditures of AFSCME and AFSCME Council 48 in major categories of expenditures, audited by an independent accountant, and states the amounts of expenditures which are chargeable to objecting nonmember Fairshare Fee payors pursuant to the criteria set forth above.

AFSCME International Financial Information
Expenses for the Fourth Quarter of 1985

Category of Expenses	Total 4th Quarter Audited Expenses	Total Expenses Chargeable to Objecting Fee Payors
Field Services	$ 5,247,795	$ 5,231,228
Education and Training	201,361	200,160
Women's Rights/Community Action	176,656	146,951
Research and Collective Bargaining	323,605	323,605
Legislation	156,406	143,779
Political Action/People	783,136	(36,070)

Expenses for the Fourth Quarter of 1985 (Continued)

Category of Expenses	Total 4th Quarter Audited Expenses	Total Expenses Chargeable to Objecting Fee Payors
Public Policy	162,422	162,422
Public Affairs	988,292	934,321
President's Office	599,654	451,183
Convention	408,322	359,323
Inter-Union Affiliations	1,184,856	740,426
International Affairs	77,363	—0—
Legal Services	466,743	410,734
Executive Board	297,139	297,139
Personnel	41,988	36,949
Judicial Panel	99,818	99,818
Secretary-Treasurer's Office	158,830	139,520
Financial & General Operating	1,709,116	1,624,828
Totals	$13,083,502	$11,266,316
Total Chargeable International Expenses	**$11,266,316**	= **86.111%**
Total International Expenses	**$13,083,502**	

AFSCME MILWAUKEE DISTRICT COUNCIL 48 AFL-CIO

SUMMARY FOR PERIOD 11/01/84 - 10/31/85 BASED UPON ACTIVITY REPORTS AND ACCOUNTING SUMMARIES OF 20 May 1986*

TOTAL EXPENDITURES	$994,126.72
ALLOCATED BY EXPENDITURE CATEGORY	
NON-CHARGEABLE	$ 42,530.83
CHARGEABLE	$123,614.18
ALLOCATED BY TIME SPENT ON ACTIVITY	
NON-CHARGEABLE	$ 14,489.68
CHARGEABLE	$813,492.03
TOTAL CHARGEABLE	$937,106.21
CHARGEABLE PERCENTAGE	94.26%

** This Period has been audited by Holman, Butal, Fine.*

AFSCME MILWAUKEE DISTRICT COUNCIL 48 AFL-CIO

SUMMARY FOR PERIOD 11/01/84 - 10/31/85 BASED UPON ACTIVITY REPORTS AS OF 20 MAY 1986

Activity Code	Employee Code 0001	0002	0003	0004	0005	0006	0007	0008	0009	Other	Total
A1	48.0	48.0	8.0	96.0	80.0	44.0	77.0	88.0	120.0	96.0	705.0
A2	152.0	128.0	56.0	56.0	104.0	32.0	211.0	128.0	184.0	120.0	1171.0
A3	0.0	40.0	72.0	28.0	16.0	0.0	20.0	84.0	8.0	48.0	316.0
A4	48.0	40.0	0.0	32.0	0.0	40.0	48.0	40.0	0.0	40.0	288.0
A5	0.0	64.0	0.0	0.0	16.0	0.0	0.0	24.0	0.0	0.0	14.0
MR7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	14.0	0.0	0.0	14.0
NR1	2035.0	1599.5	1998.0	1881.5	1680.5	1221.0	1530.5	1527.0	1775.0	1337.0	16585.0
NR2	0.0	0.0	137.0	0.0	3.0	0.0	22.0	0.0	0.0	50.0	212.0
NR3	0.0	0.0	0.0	3.0	0.0	11.0	2.5	11.0	0.0	17.5	45.0
NR4	0.0	0.0	0.0	0.0	0.0	0.0	0.0	4.0	0.0	0.0	4.0
NR5	0.0	39.0	3.0	0.0	26.0	30.0	40.0	74.0	0.0	32.0	244.0
NR6	0.0	8.0	17.0	141.0	334.0	32.0	18.5	8.0	0.0	310.5	869.0
NR7	154.5	201.0	586.0	156.0	823.0	348.0	479.5	158.5	241.0	127.5	3275.0
NR8	14.0	33.5	31.0	34.0	102.5	22.0	44.5	13.5	17.0	34.0	346.0
NR9	0.0	2.5	6.0	0.0	18.0	19.0	29.0	0.0	0.0	78.5	153.0
NR10	0.0	0.0	20.0	0.0	0.0	52.0	2.5	0.0	0.0	5.0	79.5

SUMMARY FOR PERIOD 11/01/84 - 10/31/85 BASED UPON ACTIVITY REPORTS AS OF 20 MAY 1986 (Continued)

Activity Code	Employee Code 0001	0002	0003	0004	0005	0006	0007	0008	0009	Other	Total
R1	0.0	0.0	0.0	0.0	0.0	0.0	20.0	0.0	0.0	0.0	20.0
R3	0.0	4.0	0.0	0.0	5.0	0.0	9.5	0.0	0.0	3.5	22.0
R5	0.0	0.0	0.0	0.0	55.0	5.0	1.5	0.0	0.0	9.0	70.5
R6	8.5	0.0	0.0	0.0	8.0	0.0	1.5	0.0	0.0	0.0	16.0
R7	9.5	0.0	0.0	12.5	130.0	11.0	15.5	1.0	0.0	12.0	191.5
R10	0.0	35.5	0.0	0.0	14.0	0.0	19.0	0.0	0.0	0.0	68.5
Total	2467.5	2243.0	2934.0	2440.0	3415.0	1867.0	2592.0	2175.0	2345.0	2320.5	24799.0
Total Hours Worked	2219.5	1923.0	2798.0	2228.0	3199.0	1751.0	2236.0	1797.0	2033.0	2016.5	22201.0
Total Hours Chargeable	2203.5	1883.5	2798.0	2215.5	2987.0	1735.0	2169.0	1796.0	2033.0	1992.0	21812.5
Percent Chargeable	99.3%	97.9%	100.0%	99.4%	93.4%	99.1%	97.0%	99.9%	100.0%	98.8%	98.3%

Money Spent During 11/01/84 - 10/31/85 Allocated by Activity Code Processed 08:25:59 20 May 1986

Account Code	Chargeable Code NMR 1	NMR 2	NMR 3	NMR 4	NMR 5	NMR 6	NMR 7	NMR 8	NMR 9	NMR 10	Other	Total
501.000	0	0	0	0	150	708	28	0	0	0	0	886
525.000	0	0	0	0	0	100	835	0	0	0	0	935
526.000	0	0	0	0	0	0	884	0	0	0	0	884
527.000	0	0	0	0	0	127	2223	0	0	0	0	2350
528.000	35	0	0	0	0	1327	2227	35	0	0	0	3624
529.000	0	0	0	0	0	0	158	0	0	0	0	158
542.000	0	0	0	0	0	40	250	0	0	0	0	290
543.000	0	0	0	0	51	2	345	0	0	0	0	398
544.000	0	0	0	0	130	45	330	0	0	0	0	505
545.000	0	0	0	0	36	306	222	0	0	0	0	564
546.000	0	0	0	0	144	43	2	0	0	0	0	190
557.000	0	0	0	0	0	0	61	0	0	0	0	61
558.009	0	0	0	0	2	2	0	0	0	0	0	4
558.016	103	0	0	0	0	0	0	0	0	0	0	103
558.018	2772	1214	0	0	798	1328	0	0	0	0	0	6112
559.001	11	255	0	0	42	488	23	119	0	0	0	938
560.000	65	0	0	0	0	0	0	0	0	0	0	65
560.004	472	0	0	0	0	0	0	0	0	0	0	472
560.005	(71)	0	0	0	0	0	0	0	0	0	0	(71)
560.006	15	0	0	0	0	0	0	0	0	0	0	15
560.007	165	0	0	0	0	0	0	0	0	0	0	165
560.008	204	0	0	0	0	0	0	0	0	0	0	204
560.011	6	0	0	0	0	0	0	0	0	0	0	6
560.014	11	0	0	0	0	0	0	0	0	0	0	11
560.016	100	0	0	0	0	0	0	0	0	0	0	100
560.017	162	0	0	0	0	0	0	0	0	0	0	162
560.018	57	0	0	0	0	0	0	0	0	0	0	57
560.020	0	0	0	0	0	421	0	0	0	0	0	421
560.021	250	0	0	0	0	0	0	0	0	0	0	250
561.000	132	0	0	0	852	1251	3534	0	0	0	0	5770
562.000	0	0	0	0	0	0	0	0	26663	0	0	26663
563.000	0	0	0	0	0	0	0	0	(869)	0	0	(869)
563.001	0	0	0	0	0	0	0	0	656	0	0	656
563.002	0	0	0	0	0	0	0	0	229	0	0	229
563.003	0	0	0	0	0	0	528	0	2030	0	0	2558
564.001	0	0	0	0	0	9000	0	0	0	0	0	9000
564.002	0	0	0	0	0	729	0	0	0	0	0	729
564.003	0	0	0	0	0	2230	0	0	0	0	0	2230

Money Spent During 11/01/84 - 10/31/85 Allocated by Activity Code (Continued) Processed 08:25:59 20 May 1986

Account Code	Chargeable Code NMR 1	NMR 2	NMR 3	NMR 4	NMR 5	NMR 6	NMR 7	NMR 8	NMR 9	NMR 10	Other	Total
564.004	0	0	0	0	0	5527	0	0	0	0	0	5527
564.005	0	0	0	0	0	25	0	0	0	0	0	25
571.002	0	0	0	0	0	0	210	0	0	0	0	210
571.003	0	0	0	0	25	0	0	0	0	0	0	25
571.004	0	0	0	0	5	0	0	0	0	0	0	5
571.007	180	0	0	0	0	0	0	0	0	0	0	180
572.001	0	0	0	0	0	0	0	10444	0	0	0	10444
572.002	0	0	0	0	0	0	0	2279	0	0	0	2279
572.003	0	0	0	0	0	0	0	8546	0	0	0	8546
572.004	0	0	0	0	0	0	0	17100	0	0	0	17100
574.000	0	0	0	0	0	40	779	0	25	0	0	844
578.001	0	115	0	0	354	0	0	0	0	0	0	469
578.002	0	0	0	0	75	0	0	0	0	0	0	75
578.003	0	0	0	0	1000	0	0	0	0	0	0	1000
578.008	0	0	0	0	0	266	0	0	0	0	0	266
578.009	0	0	0	0	0	0	250	0	0	0	0	250
579.000	0	0	0	0	0	0	0	0	0	0	0	0
579.001	7055	0	0	0	0	0	0	0	0	0	0	7055
582.001	0	0	0	0	0	0	0	0	2490	0	0	2490
Total	11723	1584	0	0	3664	24005	12890	38524	31223	0	0	123614

Money Spent During 11/01/84 - 10/31/85 Allocated by Activity Code Processed 08:25:07 20 May 1986

Account Code	Non-Chargeable Code MR 1	MR 2	MR 3	MR 4	MR 5	MR 6	MR 7	MR 8	MR 9	MR 10	Other	Total
501.000	0	0	0	0	0	81	3615	0	0	0	0	3696
516.001	0	0	0	0	0	0	304	0	0	0	0	304
516.004	0	0	0	0	0	0	32	0	0	0	0	32
525.000	0	0	0	0	0	30	0	0	0	0	0	30
528.000	0	0	0	0	0	68	0	0	0	0	0	68
542.000	0	0	0	0	0	100	0	0	0	0	0	100
543.000	0	0	0	0	9	0	0	0	0	0	0	9
545.000	0	0	0	0	0	114	48	0	0	0	0	162
546.000	0	0	0	0	14	0	300	0	0	0	0	314
552.001	0	0	0	0	0	0	4717	0	0	0	0	4717
552.004	0	0	0	0	0	0	170	0	0	0	0	170
552.007	0	0	0	0	0	0	774	0	0	0	0	774
552.008	0	0	0	0	0	0	1617	0	0	0	0	1617
552.009	0	0	0	0	0	0	5	0	0	0	0	5
552.010	0	0	0	0	0	0	186	0	0	0	0	186
552.012	0	0	0	0	0	0	245	0	0	0	0	245
552.013	0	0	0	0	0	0	39	0	0	0	0	39
558.018	0	0	0	0	0	0	2055	0	0	0	0	2055
559.001	0	0	0	0	0	0	998	0	0	0	0	998
561.000	0	0	0	0	0	15	809	0	0	0	0	824
571.001	0	0	0	0	0	0	5247	0	0	0	0	5247
572.001	0	0	0	0	0	0	0	505	0	0	0	505
572.002	0	0	0	0	0	0	0	108	0	0	0	108
572.003	0	0	0	0	0	0	0	394	0	0	0	394
572.004	0	0	0	0	0	0	0	910	0	0	0	910
574.000	0	0	0	0	0	0	17005	0	0	0	0	17005
578.001	0	635	0	0	0	0	660	0	0	0	0	1295
578.006	0	0	0	0	0	70	0	0	0	0	0	70
578.009	0	0	0	0	0	0	200	0	0	0	0	200
579.001	0	0	0	0	0	0	450	0	0	0	0	450
Total	0	635	0	0	23	479	39477	1917	0	0	0	42531

ACTIVITIES CATEGORIES AND CODES

ACTIVITY CODE	CHARGEABLE CATEGORIES
NR 1	Time spent in preparing for and participating in collective bargaining negotiations, contract ratification, lawful impasse procedures, and grievance handling.
NR 2	Time spent in preparation of public advertising giving the Union's position(s) on the negotiation of, or provisions in, collective bargaining agreements, as well as on matters relating to the representational interest in the collective bargaining process and contract administration.
NR 3	Time spent in organizing new members.
NR 4	Time spent in defending against efforts by other unions or organizing committees to gain representation rights in units represented by District Council 48.
NR 5	Time spent in supporting other labor organizations (AFSCME International Milwaukee County Labor Council, State AFL-CIO, other unions) when such support relates to the representational interest of our union in the collective bargaining process and contract administration.
NR 6	Time spent in lobbying for legislation or regulations affecting collective bargaining and wages, hours, and working conditions of employees District Council 48 represents.
NR 7	Time spent at conventions; conferences; seminars; training programs; regular or special membership, executive board or committee meetings relating to collective bargaining processes or contract administration.
NR 8	Time spent at staff meetings.
NR 9	Time spent in preparing newspapers and newsletters which concern provisions of the collective bargaining agreements or grievance administration.
NR 10	Time spent in the prosecution or defense of litigation or charges to enforce rights relating to concerted activity and collective bargaining, as well as collective bargaining agreements.

ACTIVITY CODE	NON-CHARGEABLE CATEGORIES
R 1	Time spent at training in voter registration, get-out-the-vote, and campaign techniques.
R 2	Time spent in preparing public advertising on matters not related to the representational interest in the collective bargaining process or contract administration.
R 3	Time spent in supporting other labor organizations (AFSCME International, Milwaukee County Labor Council, State AFL-CIO, other unions) when such support does not relate to the representational interest of our union in the collective bargaining process and contract administration.
R 4	Time spent in lobbying for legislation or regulations not affecting collective bargaining and wages, hours, and working conditions of employees District Council 48 represents.
R 5	Time spent at conventions; conferences; regular or special membership, executive board or committee meetings not held to determine the positions of employees on provisions of collective bargaining agreements covering their employment or on grievance administration pursuant to the provisions of collective bargaining agreements.
R 6	Time spent at seminars, training programs, or conferences not relating to collective bargaining processes or contract administration.
R 7	Time spent in supporting charitable organizations, political organizations, candidates for public offices, or idealogical causes and international affairs.
R 8	Time spent in preparing newspapers and newsletters which do not relate to activities which have been determined herein to constitute proper expenditures of fair-share deductions.
R 9	Time spent in activities that are in direct aid of strikes ultimately determined to be unlawful by the WERC or a Wisconsin court, and litigation related to such activities.
R 10	Time spent in social and recreational activities for members where such activities are not related to the representational interest in the collective bargaining process and contract administration.

ACTIVITY CODE	OTHER CATEGORIES
A 1	Holiday.
A 2	Vacation.
A 3	Sick Leave.
A 4	Personal Day.
A 5	Leave of Absence with Pay.

ACTIVITY CATEGORIES AND CODES

ACTIVITY CODE	CHARGEABLE CATEGORIES
MNR 1	Money spent in preparing for and participating in collective bargaining negotiations, contract ratification, lawful impasse procedures, and grievance handling.
MNR 2	Money spent in preparation of public advertising giving the Union's position(s) on the negotiation of, or provisions in, collective bargaining agreements, as well as on matters relating to the representational interest in the collective bargaining process and contract administration.
MNR 3	Money spent in organizing new members.
MNR 4	Money spent in defending against efforts by other unions or organizing committees to gain representation rights in units represented by District Council 48.
MNR 5	Money spent in supporting other labor organizations (AFSCME International, Milwaukee County Labor Council, State AFL-CIO, other unions) when such support relates to the representational interest of our union in the collective bargaining process and contract administration.
MNR 6	Money spent in lobbying for legislation or regulations affecting collective bargaining and wages, hours, and working conditions of employees District Council 48 represents.
MNR 7	Money spent for conventions; conferences; seminars; training programs; regular or special membership, executive board or committee meetings relating to collective bargaining processes or contract administration.
MNR 8	Money spent in preparing newspapers and newsletters which concern provisions of the collective bargaining agreements or grievance administration.
MNR 9	Money spent in the prosecution or defense of litigation or charges to enforce rights relating to concerted activity and collective bargaining, as well as collective bargaining agreements.

ACTIVITY CODE	NON-CHARGEABLE CATEGORIES
MR 1	Money spent on training in voter registration, get-out-the-vote, and campaign techniques.
MR 2	Money spent on preparing public advertising on matters not related to the representational interest in the collective bargaining process or contract administration.
MR 3	Money spent in supporting other labor organizations (AFSCME International, Milwaukee County Labor Council, State AFL-CIO, other unions) when such support does not relate to the representational interest of our union in the collective bargaining process and contract administration.
MR 4	Money spent in lobbying for legislation or regulations not affecting collective bargaining and wages, hours, and working conditions of employees District Council 48 represents.
MR 5	Money spent on conventions; conferences; regular or special membership, executive board or committee meetings not held to determine the positions of employees on provisions of collective bargaining agreements covering their employment or on grievance administration pursuant to the provisions of collective bargaining agreements.

ACTIVITY CODE	NON-CHARGEABLE CATEGORIES (Continued)
MR 6	Money spent on seminars, training programs, or conferences not relating to collective bargaining processes or contract administration.
MR 7	Money spent in supporting charitable organizations, political organizations, candidates for public offices, or ideological causes and international affairs.
MR 8	Money in preparing newspapers and newsletters which do not relate to activities which have been determined herein to constitute proper expenditures of fair-share deductions.
MR 9	Money spent in activities that are in direct aid of strikes ultimately determined to be unlawful by the WERC or a Wisconsin court, and litigation related to such activities.
MR 10	Money spent in social and recreational activities for members where such activities are not related to the representational interest in the collective bargaining process and contract administration.

MILWAUKEE DISTRICT COUNCIL 48 ACCOUNTING CODES

100	ASSETS
101.000	Cash in Bank
102.000	Accounts Receivable
110.000	Prepaid Expenses
115.000	Furniture and Office Equipment
116.000	Accumulated Depreciation on Furniture and Office Equipment
120.000	Land
121.000	Building
122.000	Accumulated Depreciation on Building
125.000	Computer & Printers
126.000	Accumulated Depreciation — Computers & Printers
127.000	Computer Software
128.000	Accumulated Depreciation — Computer Software
151.000	Fund Raiser
153.000	County Umpire
154.000	T-Shirts
155.000	City Contract Printing
157.000	City Negotiations
158.000	County Negotiations
195.000	Accounts Prepaid
196.000	Per Capita Receivable
200	LIABILITIES
200.000	Accounts Payable
201.000	Loans Payable — New Xerox
205.000	Social Security Payroll Deduction
206.000	Federal Withholding Tax Payroll Deduction
207.000	Wisconsin Withholding Tax Payroll Deduction
209.000	Allen-Bradley Credit Union
210.000	Brewery Workers Credit Union Payroll Deduction
211.000	Municipal Credit Union Payroll Deduction
212.000	Union Dues Payroll Deduction
213.000	National People Committee Payroll Deduction
214.000	Vote Deduction
215.000	Accrued Payroll
216.000	Accrued Vacation & Sick Payments

MILWAUKEE DISTRICT COUNCIL 48 ACCOUNTING CODES
(Continued)

100	ASSETS
101.000	Cash in Bank
217.000	Unearned Income
218.000	Accrued Payroll Taxes
219.000	Accrued Expense
220.000	Mortgage Payable Midland National Bank
221.000	Pension — Payroll Deductions
222.000	401K Payroll Deductions
251.000	Fund Raiser
252.000	City Local — Pension
253.000	County Umpire
254.000	T-Shirts
255.000	City Contract Printing
256.000	Christmas Food Basket Fund
257.000	City Negotiations
258.000	County Negotiations
296.000	Per Capita Paid in Advance
298.000	Accounts Payable
300	NET WORTH
300.000	Net Worth
400	INCOME
400.000	Per Capita Tax
401.000	Miscellaneous Income
500	STAFF SALARIES
500.00	Payroll Expenses
500.000	Staff Salaries
501.000	Other Salaries
511.00	Employee Benefits
511.000	Social Security
512.000	Wisconsin Unemployment Compensation
513.000	Federal Unemployment Compensation
514.000	Pension
515.000	Life Insurance
516.000	Health - Dental Insurance
516.001	Blue Cross-Blue Shield Health
516.002	Compcare
516.003	Family Health Plan
516.004	Blue Cross-Blue Shield Dental
516.005	Dentacare
516.006	Health Insurance Corp. Eyecare
517.000	Workers Compensation
521.00	Staff Allowances
521.000	Auto Allowances
522.000	Per Diem (In Town)
525.00	Staff Expense Reimbursements
525.000	Per Diem (Out-of-Town)
526.000	Public Transportation (Conferences and Conventions)

MILWAUKEE DISTRICT COUNCIL 48 ACCOUNTING CODES
(Continued)

527.000	Lodging (Out-of-Town)
528.000	Mileage (Out-of-Town)
529.000	Other Reimbursable Expenses
530.000	Auto Insurance
541.00	Other Expense Reimbursements
541.000	Per Diem (Officers Expense)
542.000	Per Diem (Out-of-Town)
543.000	Public Transportation (Conferences and Conventions)
544.000	Lodging
545.000	Mileage
546.000	Miscellaneous
547.000	Lost Time Reimbursements
551.00	Office & Building Costs
551.000	Utilities (Gas, Light, Water)
551.001	Wisconsin Gas Co.
551.002	Wisconsin Electric
551.003	Milwaukee Water Works
552.000	Telephone & Telegrams
552.001	Service and Equipment Cost 344-6868, 344-1274
552.002	Local Usage Charges 344-6868
552.003	Directory Advertising 344-6868
552.004	Long Distant Charges 344-6868
552.005	Federal Tax 344-6868, 344-1274
552.006	State Tax 344-6868, 344-1274
552.007	Phone Bank Service & Equipment 344-7577
552.008	Phone Bank Local Usage 344-7577
552.009	Phone Bank Long Distance 344-7577
552.010	Phone Bank State & Federal Taxes 344-7577
552.011	Pay Phone 344-9627
552.012	AT&T Charges 344-6868
552.013	Phone Bank AT&T Charges 344-7577
553.000	Janitorial Services
554.000	Building Maintenance and Remodeling
554.001	Parking Space Rental
554.002	Cleaning Beer Taps
554.003	Beer Taps Carbonic Gas
554.004	Solid Waste Collection
554.005	Heating & Air Cond. Maint. & Repair
554.006	Beer Refrigerator Repairs
554.007	Locksmith
554.008	Miscellaneous
554.009	Lighting & Electrical
554.010	Annual Fire Inspection Fee
554.011	Plumbing
554.013	Roofing
554.014	Milw. Real Estate Taxes
554.015	Window Repair
554.016	Security
554.017	Building and Remodeling Fund
555.000	Building Insurance
556.000	Building Mortgage
557.000	Lot Maintenance and Acquisition
557.001	Snow Plowing
557.002	Vacant Lot Purchase

558.000	Office Supplies
558.001	Xerox Usage Charge
558.002	Xerox Accessories Charges
558.003	Xerox Paper Regular
558.004	Xerox Paper Legal
558.005	Xerox Toner
558.006	Xerox Fuser Agent
558.007	Computer Labels
558.008	Computer Ribbons
558.009	Pens, Pencils, Paper, etc.
558.010	Xerox Stables
558.011	Coffee Machine Supplies
558.012	Staff Beepers
558.013	Meeting Notice Cards
558.014	Xerox Cartridges
558.015	Computer Mag Tapes
558.016	Office Forms Printing
558.017	Stationery and Envelopes
558.018	General Printing
558.019	Duplicating Fluid
558.020	Xerox Sales Taxes
558.021	Computer Paper
558.022	Post Rite Checks
559.000	Postage and Freight
559.001	Postage Meter
559.002	Postage Meter Rental
559.003	Business Reply Mail Annual Fee
559.004	Bulk Mail Permit
560.000	Subscriptions and Publications
560.001	CCH-Labor Law Journal
560.002	Milwaukee Sentinel
560.003	Newsweek
560.004	BNA-Govt. Employee Relations Report
560.005	Wis. Stat. Anno.
560.006	City of Milw. C. C. Comm. Agendas
560.007	WERC Decisions Digest
560.008	Pub. Pers. Adm. Labor Mgmt. Report
560.009	BNA-Collec. Barg. Nego. Contr.
560.010	BNA-Union Labor Report
560.011	Voice Journal Subscription
560.012	Reminder Enterprise Subscriptions
560.013	Village Life Subscription
560.014	Milw. Co. Ordinances Update Service
560.015	Muni Yearbook
560.016	Community Newspapers, Inc.
560.017	Miscellaneous
560.018	WERC Decisions/Rulings
560.019	CCH-Labor Arbitration Awards
560.020	State Proposed Legislative Bills
560.021	West WI Leg. Ser.
560.022	West Allis Star
560.023	Wall Street Journal
560.024	New York Times
561.000	Meetings, Conferences, and Conventions

MILWAUKEE DISTRICT COUNCIL 48 ACCOUNTING CODES
(Continued)

562.000	Legal Retainer (Podell, Ugent, Cross)
563.000	Legal Fees (Special Cases)
563.001	Lawton & Cates Browne Case (Fairshare)
563.002	Lawton & Cates Johnson Case (Fairshare)
563.003	Podell, Ugent, Cross Council Fees Non-Retainer
564.000	Legislation
564.001	Lawton & Cates Monthly Lobby Fee
564.002	Lawton & Cates Lobbying Expenses
564.003	1/3 Share of Roy Kubista's Salary for Lobby Work
564.004	1/3 Share of Mindy Taranto's Salary for Lobby Work
564.005	Late Lobby Report Forfeiture
571.00	Other Expenses
571.000	Affiliation Fees
571.001	Wis. People
571.002	IRRA
571.003	Wis. State AFL-CIO
571.004	AFSCME International
571.005	Wisconsin Action Coalition
571.006	Jobs With Peace
571.007	Wisconsin Taxpayers Alliance
572.000	Wisconsin AFSCME Newspeper
572.001	Printing
572.002	Addressing
572.003	Postage
572.004	Editor Costs
573.000	Annual Audit
574.000	Education and Organizing
575.000	Strike Assistance Fund
576.000	Equipment Maintenance and Repairs
577.000	Good and Welfare
577.001	Flowers
578.000	Contributions and Participations
578.001	Ads
578.002	Dinners
578.003	Labor Day Parade
578.004	State AFL-CIO Leg. Cont.
578.005	Wisconsin Women's Network
578.006	Woman To Woman Conference
578.007	Concerts
578.008	Legislative Rallies
578.009	Miscellaneous
579.000	Asset Purchases
579.001	Computer Programing Costs
579.002	Xerox 8200
579.003	Anti-Stat. Mats
579.004	Xerox Old Machine
579.005	IBM Correcting Selectric II
579.006	Printer (Printonix)
579.007	Telephones
579.008	Checkwriter
579.009	Office Equipment
579.010	Computer Hardware
581.000	Equipment Maintenance Agreements
581.001	Xerox 8200

581.002	Computer & Terminals
581.003	Postage Scale
581.004	Postage Meter Machine
581.005	Adding Machine
581.006	Typewriters
581.007	Computer Printer
581.008	Mailing Machine Model 5600
581.009	Folding Machine Model 1831
581.010	Mail Scale Model S-120
582.000	Fairshare Reimbursements
582.001	Browne Case
582.002	Johnson Case
582.003	Individual Requests
583.000	Surety Bond
584.000	Depreciation Expense
585.000	Interest—Other
951.000	Fund Raiser
952.000	City Local—Pension
953.000	County Umpire
954.000	T-Shirts
955.000	City Contract Printing
956.000	Christmas Food Basket Fund
957.000	City Negotiations
958.000	County Negotiations

AFSCME Council 48 Affiliated Locals Financial Information
Expenses for November 1, 1984 to October 31, 1985

AFSCME Council 48 has 35 affiliated local unions. During the period November, 1984 to October 31, 1985 these local unions had total expenses of $598,761.47. In accordance with decisions of the federal courts on the question of how local union expenditures may be allocated for the purpose of determining a fair share fee, Council 48 has determined that the percentage of chargeable activities of these local unions is at least as great as the percentage of chargeable activities of Council 48. As calculated above, the percentage of Council 48's local expenses which are chargeable to fair share fee payors is 94.26%. Applying this percentage to the total expenses for Council 48's affiliated Locals [$598,761.47 x 96.24%] results in a total chargeable expense for the affiliated locals of $564,392.56.

AFSCME Council 48 Procedure for Objecting to the Expenditure of Fairshare Non-Chargeable Activities

AFSCME Council 48 has established the following procedure for non-members who object to the expenditure of a portion of their Fairshare fees on activities that AFSCME Council 48 has determined are non-chargeable and who want an advance rebate of that portion of their dues or fees spent on those activities. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THESE PROCEDURES IN ORDER TO REGISTER AN OBJECTION AND RECEIVE AN ADVANCE REBATE.

A. Objections

Non-members who pay Fairshare fees to AFSCME Council 48 who wish to object to the expenditure of a portion of their fees on those activities and expenses that AFSCME Council 48 has determined are non-chargeable must so inform AFSCME Council 48 in writing by certified mail. The written objection must include the objecting non-member's name, address, social security number, job title, employer, and work location.

The written objection must be sent to AFSCME Council 48 at the following address, by certified mail and post-marked no later than June 27, 1986.

AFSCME Council 48
3427 W. St. Paul Ave.
Milwaukee, WI 53208

B. Advance Rebate

Upon receipt of the written objection AFSCME Council 48 will pay to the objecting non-member an advance rebate equal to the difference between the fees collected from the objecting non-member and that portion of the dues or fees found chargeable by AFSCME Council 48 in accordance with the calculation set forth in this Notice. This advance rebate will be paid from the date of this Notice until June 30, 1987. The advance rebate will be paid on a monthly basis.

AFSCME Council 48 Procedure for Challenging Its Calculation of Chargeable vs. Non-Chargeable Expenses

AFSCME Council 48 has established the following procedures for individual non-members who pay Fairshare fees and who wish to challenge the Council 48 calculation of chargeable versus non-chargeable expenses. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THIS PROCEDURE IN ORDER TO CHALLENGE THE AFSCME COUNCIL 48 CALCULATION OF CHARGEABLE VERSUS NON-CHARGEABLE EXPENSES.

A. Challenges

Individual non-member Fairshare fee payors who wish to challenge the AFSCME Council 48 calculation of chargeable versus non-chargeable expenses must inform AFSCME Council 48 of their challenge in writing by certified mail. The written challenge must include the challenging Fairshare payor's ("Challenger's") name, address, social security number, job title, employer, and work location. The written challenge must be accompanied by a check or money order in the amount of $5.00 payable to AFSCME Council 48 to cover a portion of the costs of the arbitration process (i.e. the Arbitrator's fee).

The written challenge must be sent to AFSCME Council 48 by certified mail at the following address and post-marked no later than June 27, 1986.

AFSCME Council 48
3427 W. St. Paul Ave.
Milwaukee, WI 53208

B. Procedure for challenging the AFSCME Council 48 calculation of chargeable versus nonchargeable expenses.

The Wisconsin Employment Relations Commission may assert jurisdiction over challenges to fairshare fee calculations. In the event that the Commission does assume jurisdiction over such challenges the challenger should file a charge with the Commission at the following address:

Wisconsin Employment Relations Commission
Post Office Box 7870
Madison, WI 53707
608-266-1381

Upon receipt of the charge and during pendancy of the challenge before the Commission, AFSCME Council 48 will escrow the fairshare fees collected from the challenger.

In the event that the Commission does not assert jurisdiction over fairshare challenges, AFSCME Council 48 has adopted the following procedure for resolving challenges to its calculation of chargeable versus nonchargeable expenses. This procedure will result in an expeditious decision on the challenge by an impartial arbitrator selected by the American Arbitration Association.

Procedure Under the AFSCME Council 48 Arbitration

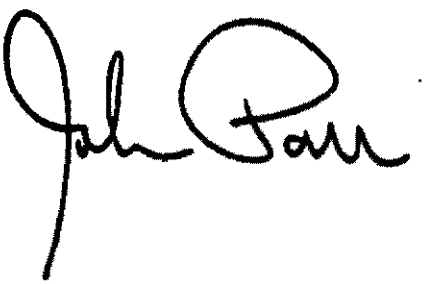
All challenges to the AFSCME Council 48 calculation will be consolidated into a single proceeding. The impartial arbitrator will hold hearings in which challengers can participate personally or through a representative. In these hearings AFSCME and AFSCME Council 48 will have the burden of proof regarding the accuracy of the calculation of chargeable versus non-chargeable expenses. The challengers will be given the opportunity to present their own evidence and to present written arguments in support of their position. The arbitrator will issue a decision and award on the basis of the evidence and argument presented.

Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

C. Escrow of Fairshare Fees

Upon receipt of a written challenge AFSCME Council 48 shall place an amount equal to the Challenger's Fairshare fees in an interest bearing escrow account. In addition, AFSCME Council 48 shall escrow an amount equal to all Fairshare fees paid by a Challenger from March 4, 1986. As required by the United States Supreme Court, the escrowed figures will be independently verified. The Fairshare fees shall remain in escrow until the arbitration award issues and shall be distributed to AFSCME Council 48 and the Challenger pursuant to the arbitrator's ruling.

Very truly yours,



John Parr
Executive Director
AFSCME District Council 48

3427 W. St. Paul Ave.
Milwaukee, WI 53208

AFSCME
Hudson Procedure

The following procedure is being implemented pursuant to an action of the International Executive Board on April 30, 1986 in order to comply with the requirements of the decision of the United States Supreme Court in Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, ___ U.S. ___, 106 S.Ct. 1066 (1986). The procedure will apply to the International and all Councils, and Unaffiliated Locals that collect agency fees or fair share fees from nonmembers or are parties to union shop agreements covering public employees.

1. The International, Councils and Unaffiliated Locals will have audited financial statements prepared for their respective fiscal years.

2. Based on the audited financial statements, the International, Councils and Unaffiliated Locals will each prepare a calculation identifying the portion of their expenses that are chargeable under the criteria set forth in Appendix A.

3. With respect to the expenses of locals that are affiliated with Councils, the Council will have the option of preparing a calculation of the chargeable expenses of the affiliated locals based upon the locals' financial statements and reports or of applying the Council's percentage of chargeable expenses to the total expenses of all its affiliated locals.

4. In jurisdictions where contracts or applicable laws limit the amount of the agency fee or fair share fee that can be charged, the weighted total percentage of chargeable expenses of

the International, Council and its affiliated locals or the Unaffiliated Local will be used to establish the amount of the agency or fair share fee for the coming year, i.e., the certification year.

5. When the calculation of chargeable expenses is made a notice will be prepared which will set forth the following information.

A) the percentage of chargeable expenses of the International, the Council and its affiliated locals or the Unaffiliated Local.

B) The weighted total percentage of chargeable expenses including the chargeable expense of the International, the Council and its affiliated locals or the Unaffiliated Local.

C) The audited financial information and calculation of chargeable expenses in the major categories of expenses that served as the basis of the calculation of chargeable expenses for the International, the Council and its affiliated locals or the Unaffiliated Local.

D) A statement indicating the period of time, i.e., the certification year, for which the calculation, or, where applicable, the reduced agency fee, will be effective.

E) In jurisdictions requiring a reduced agency fee, the amount of the reduced agency fee expressed as a percentage of regular dues.

F) In jurisdictions permitting the collection of agency fees equal to dues, a statement of the procedure by which a nonmember fee payer can object to the expenditure of that portion of their

fee on expenses that the union has determined are nonchargeable and how the objecting fee payer can receive an advance rebate of the nonchargeable amount of the fee.

G) A statement of the procedure by which a nonmember fee payer can file a challenge to the union's calculation of chargeable versus nonchargeable expenses.

H) A description of the procedure for resolving challenges to the union's calculation.

I) A statement that 100% of the challenger's fee will be placed in an interest-bearing escrow account pending resolution of the challenges and that the amount of the escrow will be independently verified. The Council or Unaffiliated Local may escrow less than 100% of the fee collected from the challenger, but only if it can provide detailed justification for the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.

6. The Notice must be sent to all agency fee or fair share fee payers and all employees covered by a union shop arrangement.

7. The Notice shall be distributed by the Council or Unaffiliated Local by direct mail or by publication in the Council or Unaffiliated Local newspaper. In either case, the Council or Unaffiliated Local must ensure that the Notice is sent to all fee payers and all union shop employees. The Council and Unaffiliated Local shall take all necessary steps to ensure that they have current names and addresses of fee payers and union shop employees. If, after exhausting all reasonable efforts, the Council or Unaffiliated Local is still unable to secure an

accurate list of fee payers and unions shop members with home addresses, the Council or Unaffiliated Local shall post and distribute copies of the Notice in a manner reasonably calculated to reach all fee payers and union shop members.

8. The Notice shall be distributed in advance of the certification year in order to permit individuals to file their objection or challenge prior to the start of the certification year. Since the initial Notice must be sent out as soon as possible, the initial Notice shall state that objections and challenges will be effective from the date of receipt by the union.

9. The Notice shall provide for a 30 day period in which to file objections and challenges.

10. The Notice shall state that individuals wishing to file objections shall do so in writing. The written objection should include certain identifying information such as name, address, social security number, work location, employer and/or employing agency and local affiliation if known. In order to minimize the possibility of fraud, the Notice shall require that the written objection shall be sent to the Council or Unaffiliated Local by certified mail.

11. In jurisdictions where 100% agency fees can be charged, or where union shop arrangements are in effect, persons filing objections must be paid an advance rebate equal to the difference between the fee actually collected from the objector and that portion of the fee that the union has determined is chargeable. This advance rebate can be paid on an annual, monthly, or bi-

weekly or other periodic basis at the option of the Council or Unaffiliated Local. For the initial Notice, the objector should be paid an advance rebate from the date of the Notice until the end of the certification year. In subsequent years, when Notice is sent out prior to the start of the certification year and the employee can submit an objection prior to the start of the certification year, an advance rebate will be paid only for the certification year.

12. The Notice should state that individuals who wish to challenge the union's calculation of chargeable versus nonchargeable activities, or, where applicable, the amount of the reduced agency or fair share fee, shall do so in writing. The written challenge should include certain identifying information, such as name, address, social security number, work location, employer and/or employing agency and local affiliation if known. In order to minimize the possibility of fraud, the Notice shall require that the written challenge shall be sent to the Council or Unaffiliated Local by certified mail.

13. Individuals hired after the close of the objection and challenge period set forth in the Notice or who are employed in bargaining units that initially become subject to fair share fee, agency fee or union shop arrangements after the close of the objection and challenge period shall be provided with a copy of the Notice within 30 days of the employer's notifying the union of the employee's name and address. These employees will be informed by the union that they can object to the union's expenditure of their fee on nonchargeable activities, and receive

an advance rebate, where appropriate, by filing their objection in writing within 30 days of their receipt of the Notice. Objecting employees will receive an appropriate advance rebate covering the period from their initial payment of the fee to the end of the certification year. These employees will also be informed that they can file a challenge to the union's calculation of chargeable expenses contained in the Notice for the subsequent certification year during the next regular challenge period.

14. The Council or Unaffiliated Local shall establish a procedure for resolving challenges consistent with the constitutional requirements set forth in Hudson. If the Council or Unaffiliated Local represents employees in a jurisdiction where a state or local administrative agency has adopted procedures that will result in a "reasonably prompt" decision on the challenges, the Council or Unaffiliated Local can establish a procedure which refers challengers to the administrative agency. In jurisdictions where there is no administrative agency with jurisdiction over agency fee challenges, or where the agency has not adopted procedures that will result in a prompt decision on the challenges as required by Hudson, the Council or Unaffiliated Local shall establish an arbitration procedure for the prompt resolution of challenges by an impartial decision-maker.

15. In jurisdictions that adopt an impartial arbitration procedure for resolving challenges, the Notice shall state that, along with the written challenge, the challenger shall submit a

check or money order payable to the Council or Unaffiliated Local in the amount of $5.00 to help defray a portion of the expenses associated with the arbitration.

16. Upon receipt of the written challenge and the $5.00 fee, the Council or Unaffiliated Local will contact the challenger by mail and provide the challenger with a copy of the AAA Rules concerning the arbitration of agency fee challenges or other rules applicable to the arbitration procedure. In addition, the Council or Unaffiliated Local will inform the challenger that copies of documents upon which the calculation was based and exhibits that the International, Council and Unaffiliated Local intend to introduce into the record of the arbitration proceeding, except for rebuttal exhibits, will be made available for inspection in advance of the arbitration hearing at the offices of the Council or Unaffiliated Local during regular business hours. The challengers will also be informed that if they wish to receive a set of these documents, the documents can be obtained for the cost of duplication and mailing.

17. In states where administrative agencies have taken jurisdiction over challenges to the union's calculation of chargeable expenses and/or the amount of the fair share or agency fee, the Notice will provide information as to how and where complaints or charges can be filed with the agency.

18. The Council or Unaffiliated Local shall establish an escrow account for fees collected from the challengers until the challenge is resolved. The escrow account shall be a separate interest bearing account and the amounts of challenged fees

deposited in the account shall be independently verified. In the case of challenges received in response to the initial Notice, fees collected from the challenger, from the date of receipt of the challenge to the resolution of the challenge, must be deposited in the escrow account. Following subsequent Notices fees collected from the challenger from the start of the certification year to the resolution of the challenge will be escrowed.

19. If the Council or Unaffiliated Local elects to adopt an arbitration procedure for the resolution of challenges such procedure shall contain the following elements.

a. $5.00 filing fee for challengers to cover a portion of the cost of arbitration process.

b. Selection of a qualified impartial arbitrator either by the American Arbitration Association, or similar impartial agency or organization.

c. Consolidation of all challenges within a given Council or Unaffiliated Local into a single proceeding.

d. A requirement that arbitration begin within 30 days after the close of the challenge period and that the arbitrator's award issue no later than 120 days after the close of the challenge period.

20. When a decision on the challenges issues, the funds in the escrow account shall be distributed in accordance with the administrative agency decision or arbitrator's award. In addition, the challengers shall receive an advance rebate for the balance of the certification year in accordance with the agency

decision or arbitrator's award. If the administrative agency or arbitrator determines that the chargeable percentage, or the proper agency fee or fair share fee, is less than that initially calculated by the union, a supplemental advance rebate shall be paid to objectors to the extent required by applicable law.

APPENDIX A

Expenses associated with the following activities are totally chargeable:

1. Gathering information in preparation for the negotiation of collective bargaining agreements.

2. Gathering information from employees concerning collective bargaining positions.

3. Negotiating collective bargaining agreements.

4. Adjusting grievances pursuant to the provisions of collective bargaining agreements, as well as representing employees in proceedings under civil service laws or regulations.

5. Administration of ballot procedures on the ratification of negotiated agreements.

6. The public advertising of AFSCME's positions on the negotations of, or provisions in, collective bargaining agreements.

7. Purchasing books, reports, and advance sheets used in (a) negotiating and administering collective bargaining agreements, (b) processing grievances.

8. Paying technicians in labor law, economics and other subjects for services used (a) in negotiating and administering collective bargaining agreements, (b) in processing grievances.

9. Organizing within the bargaining unit in which fair share fee payors are employed.

10. Organizing other bargaining units.

11. Seeking to gain representation rights in units not represented by AFSCME, including units where there is an existing designated representative.

12. Defending AFSCME against efforts by other unions or organizing committees to gain representation rights in units represented by AFSCME.

13. Proceedings regarding jurisdictional controversies under the AFL-CIO constitution.

14. Seeking recognition as exclusive representative of bargaining units in which fair share fee payors are not employed.

15. Serving as exclusive representative of bargaining units in which fair share fee payors are not employed.

16. Membership meetings and conventions held, in part, to determine the positions of employees in fair share fee payor's bargaining unit on provisions of collective bargaining agreements covering fair share fee payor's employment or on grievance administration pursuant to the provisions those collective bargaining agreements.

17. Publishing newspapers and newsletters which, in part, concern provisions of the collective bargaining agreements covering fair share fee payor's employment, or grievance administration pursuant to its provisions.

18. Impasse procedures, including factfinding, mediation, arbitration, strikes, slow-downs, and work stoppages, over provisions of collective bargaining agreements.

19. The prosecution or defense of litigation or chargee to obtain ratification, intepretation, or enforcement of collective bargaining agreements.

Expenses associated with the following activities are chargeable in part depending upon whether they are related to the collective bargaining process, contract administration or pursuing matters affecting the wages, hours or working conditions of public employees.

20. The public advertising of AFSCME's position on subjects other than the negotiation of collective bargaining agreements.

21. Purchasing books, reports, and advance sheets used in activities or for purposes other than negotiating collective bargaining agreements and processing grievances.

22. Paying technicians in labor law, economics and other subjects for services used in activities other than negotiating collective bargaining agreements and processing grievances.

23. Lobbying for legislative or regulations or to effect changes in legislation or regulations before Congress, state legislatures, and state or federal agencies.

24. Supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing the fair share fee payor's employment.

25. Membership meetings and conventions held, in part, for purposes other than to determine the positions of employees on collective bargaining agreements or on contractual grievance administration.

26. Publishing newspapers and newsletters which, in part, concern subjects other than the fair share fee payor's collective bargaining agreement or on grievances arising under that agreement.

27. Prosecution or defense of litigation or charges on matters other than the ratification, interpretation, or enforcement of collective bargaining agreements.

28. Social and recreational activities.

29. Payments for insurance, medical care, retirement, disability, death, and related benefit plans for union employees, staff and officers.

30. Administrative activities and expenses allocable to AFSCME's activities and expenses for which fair share fee payors are charged.

Expenses associated with the following activities are not chargeable:

31. Training in voter registration, get-out-the vote, and political campaign techniques.

32. Supporting and contributing to charitable organizations.

33. Supporting and contributing to political organizations and candidates for public office.

34. Supporting and contributing to ideological causes.

35. Supporting and contributing to international affairs.

DEC 14 1982

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHYLLIS ANN BROWNE, BEVERLY ENGELLAND, ELEANORE PELISKA, BETTY C. BASSETT, YETTA DEITCH, VIRGINIA LEMBERGER, DONNA SCHLAEFER, KATHERINE L. HANNA, LORRAINE TESKE, ESTHER PALSGROVE, JUDITH D. BERNS, NINETTE SUNN, MARY MARTINETTO, and CHARLOTTE M. SCHMIDT, Complainants, vs. THE MILWAUKEE BOARD OF SCHOOL DIRECTORS; 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, as 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 XCIX No. 23535 MP-892

STIPULATION RE PAST-YEARS' FAIR-SHARE DEDUCTIONS AND PROTEST DATES

It is hereby stipulated by and between the parties to this proceeding, by their respective attorneys, as follows:

1. In lieu of litigation regarding that portion of complainants' fair-share fees paid during the period January 1, 1980, to December 31, 1981, and spent for activities not chargeable to complainants under the Commission's February 3, 1981, Order in this case, respondent American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "AFSCME International"), agrees to refund 100% of the per capita taxes received by AFSCME International from the fair-share fees paid by all complainants and class members from the appropriate beginning date through December 31, 1981.

2. In lieu of litigation regarding that portion of complainants' fair-share fees paid during the period January 1, 1980, to December 31, 1981, and spent for activities not chargeable to complainants under the Commission's February 3, 1981, Order in this case, respondents District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "District Council 48"), and Local 1053, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "Local 1053"), agree to jointly and severally refund 75% of the monies received by District Council 48 and Local 1053 from the fair-share fees paid by all complainants and class members from the appropriate beginning date through December 31, 1981.

3. The complainants contend that the appropriate beginning date is the date on which fair-share deductions commenced. Respondent unions contend that the appropriate beginning date is the date on which the complainants and class members each first notified respondent unions of their objection to the payment of fair-share fees. All parties agree to the submission of this issue of law to the Commission for decision.

4. The following are the total amounts of fair-share fees deducted from the earnings of the complainants and the class members from the commencement of fair-share deductions in February 1972 through December 31, 1981, and the total amounts of per capita taxes received by AFSCME International from those fees; in each case the difference between the two amounts listed was received by District Council 48 and Local 1053:

Name	Total Fair Share	Total Per Capita
Ackerman, Dorothy	$872.50	$291.50
Alexander, Oreba	345.50	120.60
Bassett, Betty C.	954.50	300.11
Beck, Joanne	27.50	9.10
Behling, JoAnn M.	600.50	212.03
Bennett, Jeanette A.	123.50	42.05

Name	Total Fair Share	Total Per Capita
Bootz, Nancy L.	$736.50	$250.66
Browne, Phyllis A.	922.50	304.66
Buenger, Ruth	371.75	117.88
Burba, Ruth	216.50	71.55
Bureta, Ivona M.	499.50	180.10
Burger, Therese	133.50	49.51
Campeau, Judith	65.00	24.50
Cheronne, Rosalie J.	802.25	260.18
Cieszynski, Margaret	922.50	304.66
Dietch, Yetta	552.50	193.45
Dugan, LaVerne	239.00	88.35
Engelland, Beverly	917.50	303.16
Fetzer, Sheri L.	75.50	30.90
Flood, Katherine J.	266.50	97.09
Gaus, Dorothy H.	10.00	3.00
Gohlke, Doris A.	912.50	301.66
Goss (Berns), Judith D.	534.50	187.65
Gray, Beverly A.	631.25	216.93
Gross, Corinne T.	877.50	291.16
Hanna, Katherine L.	407.00	146.50
Hanson, Mary J.	570.00	182.21
Herriges, Nora R.	584.25	184.97
Holstein, Donna J.	283.50	89.00
Hudson, Mildred L.	19.00	6.75
Jacobi, Noreen M.	145.00	52.80
Kiles, Inez L.	649.75	242.34
Knippel, Joyce	136.00	47.55
Koebert, Linda	5.00	1.50
Krueger, Marie B.	- 0 -	- 0 -
Kunda, Hermine A.	95.00	28.50
Lamboy, June J.	- 0 -	- 0 -
Lemberger, Virginia	654.00	226.14
Leshin, Shirley R.	- 0 -	- 0 -
Markowski, Evelyn E.	146.00	52.50
Markwiese, Florence	899.50	296.86
Martinetto, Mary	678.50	234.77
Marx, Helen	916.00	303.26
McLaughlin, Gail W.	- 0 -	- 0 -
Morbeck, Barbara A.	916.00	302.26
Musial, Christine M.	45.50	18.85
Nault, Christine R.	143.10	43.48
Palsgrove, Esther	90.00	27.00
Paulson, Catherine E.	- 0 -	- 0 -
Peliska, Eleanor	212.00	62.35
Perszyk, Margaret J.	- 0 -	- 0 -
Pohl, Faye M.	633.25	209.33
Pon, Josephine	10.00	3.00
Richardson, Lorraine	565.00	205.22
Riley, Annie L.	80.00	24.00
Schmidt, Charlotte M.	924.00	305.56
Schueller, Sandra	65.00	19.50
Schueneman, Esther L.	236.50	75.30
Schwerm, Virginia A.	538.25	166.97
Schwertfeger, Rosemarie	339.50	113.57
Strauss, Dorothy	258.25	81.86
Strelecki, Deborah J.	13.00	4.80
Sunn, Ninette	75.00	22.50
Teske, Lorraine	917.50	303.16
Vinson, Cassandra	- 0 -	- 0 -

Name	Total Fair Share	Total Per Capita
Voelz, Grace G.	$400.00	$141.08
Wagner, Irene B.	917.50	303.16
Wickert, Audrey A.	652.75	219.25
Wilkes, Dorothy E.	616.75	217.56
Witters (Schlaefer), Donna J.	834.75	276.33

5. The following complainants and class members each first notified the respondent unions of their objection to the payment of fair-share on the dates listed:

Name	Protest Date
Alexander, Oreba	October 11, 1974
Beck, Joanne	November 29, 1977
Behling, JoAnn M.	May 13, 1976
Bennett, Jeanette A.	May 13, 1976
Bootz, Nancy L.	November 28, 1977
Browne, Phyllis A.	May 29, 1973
Buenger, Ruth	November 30, 1977
Burba, Ruth	December 5, 1977
Bureta, Ivona M.	December 1, 1977
Burger, Therese	December 2, 1977
Campeau, Judith	December 22, 1977
Cheronne, Rosalie J.	October 11, 1974
Dugan, LaVerne	December 16, 1977
Fetzer, Sheri L.	November 29, 1977
Flood, Katherine J.	December 12, 1977
Gaus, Dorothy H.	December 1, 1977
Gohlke, Doris A.	October 11, 1974
Gray, Beverly A.	November 30, 1977
Gross, Corinne T.	October 11, 1974
Hanna, Katherine L.	May 29, 1973
Hanson, Mary J.	November 30, 1977
Herriges, Nora R.	November 30, 1977
Holstein, Donna J.	October 11, 1974
Hudson, Mildred L.	November 28, 1977
Jacobi, Noreen M.	December 5, 1977
Kiles, Inez L.	October 11, 1974
Knippel, Joyce	December 2, 1977
Koebert, Linda	December 2, 1977
Krueger, Marie B.	May 13, 1976
Kunda, Hermine A.	May 13, 1976
Lamboy, June J.	November 28, 1977
Leshin, Shirley R.	December 15, 1977
Markowski, Evelyn E.	November 29, 1977
Markwiese, Florence	May 13, 1976
Martinetto, Mary	May 29, 1973
McLaughlin, Gail W.	December 12, 1977
Morbeck, Barbara A.	May 13, 1976
Musial, Christine M.	November 29, 1977
Nault, Christine R.	December 1, 1977
Palsgrove, Esther	May 29, 1973
Paulson, Catherine E.	December 30, 1977
Peliska, Eleanor	May 29, 1973
Perszyk, Margaret J.	October 11, 1974

Name	Protest Date
Pohl, Faye M.	December 5, 1977
Pon, Josephine	December 13, 1977
Richardson, Lorraine	November 30, 1977
Riley, Annie L.	May 13, 1976
Schmidt, Charlotte M.	May 29, 1973
Schueller, Sandra	December 29, 1977
Schwerm, Virginia A.	December 1, 1977
Schwertfeger, Rosemarie	December 27, 1977
Strauss, Dorothy	December 20, 1977
Strelecki, Deborah J.	December 2, 1977
Sunn, Ninette	May 29, 1973
Teske, Lorraine	May 29, 1973
Vinson, Cassandra	May 13, 1976
Voelz, Grace G.	December 5, 1977
Wagner, Irene B.	October 11, 1974
Wickert, Audrey A.	November 28, 1977
Wilkes, Dorothy E.	May 13, 1976
Witters (Schlaefer), Donna J.	May 29, 1973

6. The following are the amounts of fair-share fees deducted from the earnings of the complainants and class members listed in paragraph 5 from the date each first notified the respondent unions of their objection to the payment of fair share through December 31, 1981, and the amounts of per capita taxes received by AFSCME International from those fees; in each case the difference between the two amounts listed was received by District Council 48 and Local 1053:

Name	Fair Share After Protest	Per Capita After Protest
Alexander, Oreba	$263.50	$ 94.70
Beck, Joanne	- 0 -	- 0 -
Behling, JoAnn M.	346.50	129.03
Bennett, Jeanette A.	123.50	42.05
Bootz, Nancy L.	521.00	161.91
Browne, Phyllis A.	847.50	282.16
Buenger, Ruth	269.75	82.08
Burba, Ruth	10.50	4.35
Bureta, Ivona M.	274.00	87.50
Burger, Therese	130.00	41.16
Campeau, Judith	- 0 -	- 0 -
Cheronne, Rosalie J.	660.25	217.88
Dugan, LaVerne	- 0 -	- 0 -
Fetzer, Sheri L.	- 0 -	- 0 -
Flood, Katherine J.	149.00	50.84
Gaus, Dorothy H.	- 0 -	- 0 -
Gohlke, Doris A.	759.50	258.46
Gray, Beverly A.	458.25	142.28
Gross, Corinne T.	759.50	258.46

Name	Fair Share After Protest	Per Capita After Protest
Hanna, Katherine L.	$332.00	$124.00
Hanson, Mary J.	517.50	160.46
Herriges, Nora R.	445.75	139.38
Holstein, Donna J.	120.50	42.80
Hudson, Mildred L.	9.00	2.90
Jacobi, Noreen M.	- 0 -	- 0 -
Kiles, Inez L.	572.25	219.84
Knippel, Joyce	4.50	2.90
Koebert, Linda	- 0 -	- 0 -
Krueger, Marie B.	- 0 -	- 0 -
Kunda, Hermine A.	- 0 -	- 0 -
Lamboy, June J.	- 0 -	- 0 -
Leshin, Shirley R.	- 0 -	- 0 -
Markowski, Evelyn E.	64.50	21.75
Markwiese, Florence	632.50	215.91
Martinetto, Mary	603.50	212.27
McLaughlin, Gail W.	- 0 -	- 0 -
Morbeck, Barbara A.	632.50	215.91
Musial, Christine M.	14.00	5.80
Nault, Christine R.	107.00	28.98
Palsgrove, Esther	15.00	4.50
Paulson, Catherine E.	- 0 -	- 0 -
Peliska, Eleanor	132.00	38.35
Perszyk, Margaret J.	- 0 -	- 0 -
Pohl, Faye M.	458.25	142.28
Pon, Josephine	- 0 -	- 0 -
Richardson, Lorraine	346.00	115.02
Riley, Annie L.	- 0 -	- 0 -
Schmidt, Charlotte M.	849.00	283.06
Schueller, Sandra	- 0 -	- 0 -
Schwerm, Virginia A.	498.75	155.57
Schwertfeger, Rosemarie	325.50	107.77
Strauss, Dorothy	244.75	76.81
Strelecki, Deborah J.	- 0 -	- 0 -
Sunn, Ninette	- 0 -	- 0 -
Teske, Lorraine	842.50	280.66
Vinson, Cassandra	- 0 -	- 0 -
Voelz, Grace G.	215.50	71.13
Wagner, Irene B.	759.75	258.46
Wickert, Audrey A.	473.75	149.05
Wilkes, Dorothy E.	345.50	123.60
Witters (Schlaefer), Donna J.	754.75	252.33

7. The complainants and the respondent unions have been unable to reach agreement as to the dates on which nine complainants and class members first notified the unions of their objection to the payment of fair share. If the Commission holds that the expenditures of fair-share fees for impermissible purposes is a prohibited practice only where done over the prior objection of a fair-share employee, the Commission will have to

determine the factual question of when these nine employees made their protests. The following subparagraphs list the amounts of fair-share fees deducted from the earnings of the nine from the disputed protest dates through December 31, 1981, and the amounts of per capita taxes received by AFSCME International from those fees; in each case the difference between the two amounts listed was received by District Council 48 and Local 1053.

(a) Ackerman, Dorothy -- complainants contend that her first protest was made on February 1, 1972, or, alternatively, on November 24, 1976; respondent unions contend that she protested no earlier than December 1, 1977:

Date	Fair Share After Date	Per Capita After Date
2/1/72	$872.50	$291.50
11/24/76	543.50	186.07
12/1/77	467.50	147.42

(b) Bassett, Betty C. -- complainants contend that her first protest was made on February 1, 1972; respondent unions contend that she protested no earlier than May 29, 1973:

Date	Fair Share After Date	Per Capita After Date
2/1/72	$954.50	$300.11
5/29/73	880.00	277.61

(c) Cieszynski, Margaret -- complainants contend that her first protest was made on February 1, 1972, or, alternatively, on November 24, 1976; respondent unions contend that she protested no earlier than December 9, 1977:

Date	Fair Share After Date	Per Capita After Date
2/1/72	$922.50	$304.66
11/24/76	593.50	199.11
12/9/77	517.50	160.46

(d) Dietch, Yetta -- complainants contend that her first protest was made on February 1, 1972; respondent unions contend that she protested no earlier than May 29, 1973:

Date	Fair Share After Date	Per Capita After Date
2/1/72	$552.50	$193.45
5/29/73	477.50	170.95

(e) Engelland, Beverly -- complainants contend that her first protest was made on February 1, 1972; respondent unions contend that she protested no earlier than May 29, 1973:

Date	Fair Share After Date	Per Capita After Date
2/1/72	$917.50	$303.16
5/29/73	842.50	280.66

(f) Goss (Berns), Judith D. -- complainants contend that her first protest was made on February 1, 1972; respondent unions contend that she protested no earlier than May 29, 1973:

Date	Fair Share After Date	Per Capita After Date
2/1/72	$534.50	$187.65
5/29/73	459.50	165.15

(g) Lemberger, Virginia -- complainants contend that her first protest was made on April 5, 1972; respondent unions contend that she protested no earlier than May 29, 1973:

Date	Fair Share After Date	Per Capita After Date
4/5/72	$644.00	$223.14
5/29/73	589.00	206.64

(h) Marx, Helen -- complainants contend that her first protest was made on February 1, 1972; respondent unions contend that she protested no earlier than October 11, 1974:

Date	Fair Share After Date	Per Capita After Date
2/1/72	$916.00	$303.26
10/11/74	753.00	257.06

(i) Schueneman, Esther L. -- complainants contend that her first protest was made on February 1, 1972, or, alternatively, on November 24, 1976; respondent unions contend that she protested no earlier than December 29, 1977:

Date	Fair Share After Date	Per Capita After Date
2/1/72	$236.50	$75.30
11/24/76	- 0 -	- 0 -
12/29/77	- 0 -	- 0 -

8. The complainants and class members do not by this stipulation waive any rights they may have to remedies (including but not limited to an award of interest) in addition to a refund of fair-share monies collected from them impermissibly in past years, and the respondents do not hereby agree that any additional remedies are appropriate.

Dated this 9th day of Dec, 1982.

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ATTORNEY FOR DISTRICT COUNCIL 48 & LOCAL 1053

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHYLLIS ANN BROWNE, BEVERLY ENGELLAND, ELEANORE PELISKA, BETTY C. BASSETT, YETTA DEITCH, VIRGINIA LEMBERGER, DONNA SCHLAEFER, KATHERINE L. HANNA, LORRAINE TESKE, ESTHER PALSGROVE, JUDITH D. BERNS, NINETTE SUNN, MARY MARTINETTO, and CHARLOTTE M. SCHMIDT, Complainants, v. THE MILWAUKEE BOARD OF SCHOOL DIRECTORS; 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, as 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 XCIX No. 23535 MP-892

STIPULATION RE 1982 FAIR-SHARE DEDUCTIONS

It is hereby stipulated by and between the parties to this proceeding, by their respective attorneys, as follows:

1. In lieu of litigation regarding that portion of complainants' fair-share fees paid during the period January 1, 1982, to December 31, 1982 and spent for activities not chargeable to complainants under the Commission's February 3, 1981 Order in this case, respondent American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "AFSCME International"), agrees to refund 100% of the per capita taxes received by AFSCME International from the fair-share fees paid by all complainants and class members during that period.

APPENDIX D

2. In lieu of litigation regarding that portion of complainants' fair-share fees paid during the period January 1, 1982, to December 31, 1982 and spent for activities not chargeable to complainants under the Commission's February 3, 1981, Order in this case, respondents District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "District Council 48"), and Local 1053, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "Local 1053"), agree to jointly and severally refund 75% of the monies received by District Council 48 and Local 1053 from the fair-share fees paid by all complainants and class members from January 1, 1982 through December 31, 1982.

3. The following are the total amounts of fair-share fees deducted from the earnings of the complainants and the class members for the period January 1, 1982 through December 31, 1982, and the total amounts of per capita taxes received by AFSCME International from those fees; in each case the difference between the two amounts listed was received by District council 48 and Local 1053:

Name	Total Fair Share in 1982	Total International Per Capita
Ackerman, Dorothy	- 0 -	-0 -
Alexander, Oreba	- 0 -	- 0 -
Bassett, Betty C.	182.25	45.50
Beck, Joanne	- 0 -	- 0 -
Behling, JoAnn M.	- 0 -	- 0 -
Bennett, Jeanette A.	- 0 -	- 0 -
Boolz, Nancy L.	182.25	45.50
Browne, Phyllis A.	182.25	45.50
Buenger, Ruth	74.25 ~~67.50~~*	17.50
Burba, Ruth	- 0 -	- 0 -
Bureta, Ivona M.	- 0 -	- 0 -
Burger, Therese	- 0 -	- 0 -
Compeau, Judith	- 0 -	- 0 -
Cheronne, Rosalie, J.	162.00	42.00
Cieszynski, Margaret	87.75	24.50

* For concurrence with this correction by Counsel for respondent unions, see Exhibit "A" attached hereto.

Name	Total Fair Share in 1982	Total International Per Capita
Dietch, Yetta	- 0 -	- 0 -
Dugan, LaVerne	- 0 -	- 0 -
Engelland, Beverly	182.50	45.50
Fetzer, Sheri L.	- 0 -	- 0 -
Flood, Katherine J.	- 0 -	- 0 -
Gaus, Dorothy H.	- 0 -	- 0 -
Gohlke, Doris A.	182.25	45.50
Goss (Berns), Judith D.	- 0 -	- 0 -
Gray, Beverly A.	162.00	42.00
Gross, Corinne T.	182.25	45.50
Hanna, Katherine L.	- 0 -	- 0 -
Hanson, Mary J.	182.25	45.50
Herriges, Nora R.	13.50	3.50
Holstein, Donna J.	- 0 -	- 0 -
Hudson, Mildred L.	- 0 -	- 0 -
Jacobi, Noren M.	- 0 -	- 0 -
Kiles, Inez L.	27.00	7.00
Knippel, Joyce	- 0 -	- 0 -
Koebert, Linda	- 0 -	- 0 -
Krueger, Marie B.	- 0 -	- 0 -
Kunda, Hermine A.	- 0 -	- 0 -
Lamboy, June J.	- 0 -	- 0 -
Lemberger, Virginia	- 0 -	- 0 -
Leshin, Shirley R.	- 0 -	- 0 -
Markowski, Evelyn E.	- 0 -	- 0 -
Markwiese, Florence	114.75	31.50
Martinetto, Mary	- 0 -	- 0 -
Marx, Helen	182.25	45.50
McLaughlin, Gail W.	- 0 -	- 0 -
Morbeck, Barbara A.	182.25	45.50
Musial, Christine M.	- 0 -	- 0 -
Nault,Christine R.	27.00	7.00
Palsgrove, Esther	- 0 -	- 0 -
Paulson, Catherine E.	- 0 -	- 0 -
Peliska, Eleanore	- 0 -	- 0 -
Perszyk, Margaret J.	- 0 -	- 0 -
Pohl, Faye M.	162.00	42.00
Pon, Josephine	- 0 -	- 0 -
Richardson, Lorraine	- 0 -	- 0 -
Riley, Annie L.	- 0 -	- 0 -
Schmidt, Charlotte M.	182.25	45.50
Schueller, Sandra	- 0 -	- 0 -
Schueneman, Esther L.	- 0 -	- 0 -
Schwerm, Virginia A.	162.00	42.00
Schwertfeger, Rosemarie	- 0 -	- 0 -
Strauss, Dorothy	40.50	10.50
Strelecki, Deborah J.	- 0 -	- 0 -
Sunn, Ninette	- 0 -	- 0 -
Teske, Lorraine	182.50	45.50
Vinson, Cassandra	- 0 -	- 0 -
Voelz, Grace G.	- 0 -	- 0 -
Wagner, Irene B.	13.50	3.50
Wickert, Audrey A.	- 0 -	- 0 -
Wilkes, Dorothy E.	- 0 -	- 0 -
Witters (Schlaefer), Donna J.	162.00	42.00

4. The complainants and class members do not by this stipulation waive any rights they may have to remedies (including

but not limited to an award of interest) in addition to a refund of fair-share monies collected from them impermissibly in past years, and the respondents do not hereby agree that any additional remedies are appropriate

Dated this 13th day of June, 1983.

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BARBARA KRAFT
MICHAEL WOLF
MARTHA WALFOORT*
LEE W. JACKSON
STUART W. DAVIDSON*
CRAIG BECKER

*NOT ADMITTED IN DISTRICT OF COLUMBIA
†ALSO ADMITTED IN NEW JERSEY

July 5, 1983

Raymond J. LaJeunesse, Jr., Esquire
National Right to Work Legal Defense
Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160

Re: Browne Complainant Ruth Buenger

Dear Mr. LaJeunesse:

We will accept for purposes of our stipulation to 1982 refunds Ms. Buenger's figure of $74.25, representing total 1982 deductions, rather than my original figure of $67.50.

You may change the stipulation to reflect this correction or return it to me and I will revise it.

Sincerely yours,

Barbara Kraft

Barbara Kraft

BK:mlg
cc: John Bowers

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

WALTER J. JOHNSON, et al., Complainants, v. COUNTY OF MILWAUKEE, a body Corporate; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO, et al., Respondents.	Case CLXI No. 29581 MP-1322 Milwaukee County Circuit Court Case No. 411-578

STIPULATION RE PAST-YEARS' FAIR-SHARE DEDUCTIONS AND PROTEST DATES

It is hereby stipulated by and between the parties to this proceeding, by their respective attorneys, as follows:

1. In lieu of discovery and litigation regarding that portion of fair-share fees paid during the period prior to December 31, 1982, and spent for activities not chargeable to complainants and other objecting employees under Section 111.70, Wis. Stats., respondent American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "AFSCME International"), agrees to refund 100% of the per capita taxes received by AFSCME International from the fair-share fees paid by the complainants and other objecting employees whom complainants have moved to add as co-complainants from the appropriate beginning date through December 31, 1982.

APPENDIX E

2. In lieu of discovery and litigation regarding that portion of fair-share fees paid during the period prior to December 31, 1982, and spent for activities not chargeable to complainants and other objecting employees under Section 111.70, Wis. Stats., respondents District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "District Council 48"), and Locals 594, 645, 882, 1055, 1654, and 1656, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "the Locals"), agree to jointly and severally refund 75% of the monies received by District Council 48 and the Locals from the fair-share fees paid by the complainants and other objecting employees whom complainants have moved to add as co-complainants from the appropriate beginning date through December 31, 1982.

3. Complainants contend that the appropriate beginning date is the date on which fair-share deductions commenced. Respondent unions contend that the appropriate beginning date is the date on which the complainants and other objecting employees each first notified respondent unions of their objection to the payment of fair-share fees. All parties agree that the determination of this issue of law in Browne v. Milwaukee Board of School Directors, Case XCIX, No. 23535 MP-892 (WERC, filed Sept. 18, 1978), will apply to this case.

4. The following are the total amounts of fair-share fees deducted from the earnings of the complainants from the commencement of this action on July 10, 1973, through December 31, 1982, and the total amounts of per capita taxes received by AFSCME

International from those fees; in each case the difference between the two amounts listed was received by District Council 48 and the appropriate Local(s):

Name	Total Fair-Share	Total Per Capita
Edward L. Barlow	$ 413.63	$108.40
Erna Byrne	476.50	163.50
Walter J. Johnson	1,099.38	256.50
Lynn M. Kozlowski	919.55	288.75
Cherry Ann (Le Noir) Lackey	151.60	52.10
Gerald Leranth	1,076.68	298.50
Irving E. Nicolai	1,129.81	298.50
Doris M. Piper	944.25	298.50
Christina Pitts	655.00	218.85
Mildred Pizzino	1,031.51	298.50
Helen Ryznar	-0-	-0-
Marshall M. Scott	1,250.58	298.50
John P. Skocir	485.50	166.40
Anne C. Tebo	458.50	140.30
Oliver T. Waldschmidt	1,304.56	298.50
Annabelle Wolter	994.92	298.50

5. Respondent unions agree that certain of the other objecting employees whom complainants have moved to add as co-complainants notified respondent unions of their objection to the payment of fair-share fees on dates prior to December 31, 1982. The following are the dates of those objections, the total amounts of fair-share fees deducted from the earnings of those employees from said dates through December 31, 1982, and the

total amounts of per capita taxes received by AFSCME International from those fees; in each case the difference between the two amounts listed was received by District Council 48 and the appropriate Locals:

Name	Protest Date	Total Fair Share	Total Per Capita
Barbara Barrish	05/03/82	$157.95	$24.50
Terese G. Fabian	07/27/82	75.24	17.50
Kathleen S. Fleury	04/19/82	119.13	31.50
Mary E. Jaeger	05/26/82	100.32	28.00
Carolyn Kossert	04/26/82	119.13	31.50
Carol S. Peters	05/18/82	127.20	24.50
Ruth Cheryl Thompson	05/19/82	127.20	24.50
Ione Trachsel	04/19/82	119.13	31.50

6. Respondent unions shall make the agreed refunds of 100% and 75% calculated from the amounts specified in paragraphs 4 and 5 supra upon execution of this stipulation by counsel for all parties.

7. Complainants contend that certain of them and of the other objecting employees whom they have moved to add as co-complainants herein gave notice of their objection to payment of fair-share fees on dates earlier than those acknowledged by respondent unions. If the Commission holds that the expenditure of fair-share fees for impermissible purposes is a prohibited practice only where done over the prior objection of a fair-share employee, the Commission will have to determine whether such alleged earlier objections were made in fact and whether they were effective as a matter of law.

8. Respondent unions do not by this stipulation waive their opposition to the addition of Regina S. Karpowitz, Mildred Noffz, Teresa Patzke, and Dolores V. Winters as complainants in this proceeding.

9. Complainants do not by this stipulation waive any rights they and other objecting employees may have to remedies (including but not limited to an award of interest) in addition to a refund of fair-share monies collected from them impermissibly in past years, and respondents do not hereby agree that any additional remedies are appropriate.

Dated this 30th day of January, 1986.

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COUNCIL 48 AND LOCALS

Browne v. Milwaukee Board of School Directors, Case 99 No. 23535 MP-892
Johnson v. County of Milwaukee, Case 161 No. 29581 MP-1322

CORRECTIONS IN TRANSCRIPT OF HEARING
MAY 30, 1986

Page A, Line 24 should read: "Letter from Bowers to WERC, dated 12-21-81, relating to Browne"

Page A, Line 25 should read: "Letter from Barbara Kraft to WERC, dated 11-1-82, and enclosed Affidavits, etc."

Page B, Line 6 should read: "Letter dated 5-20-83 in Johnson, from Kraft to Honeyman"

Page B, Line 8 should read: "Letter relating to Johnson from Kraft to Honeyman, dated 12-12-83"

Page 12, Line 11 should read: "In Browne, a letter from Bowers to the WERC dated 12-21-81."

Page 12, Lines 12-13 should read: "A letter from Kraft to the WERC of 11-1-82, also regarding Browne, and enclosed Affidavits"

Page 12, Lines 21-22: change "Craft" to "Kraft"

Page 15, Line 13: change "hold" to "whole"

Page 22, Line 17: change "percentages" to "persons"

Page 47, Lines 13-14 should read: "by the resolution passed by the AFSCME International Executive Board on April 30, correct?"

Page 58, Line 12: change "to" to "two"

Page 67, Line 15: change "dispute" to "distribute"

Page 102, Line 10: change "prudent" to "proven"

Page 102, Line 23: change "be a part" to "depart"

Page 104, Line 17 should read: "1981 from Mr. Bowers responding to discovery the Union"

APPENDIX F

Page 105, Lines 13-14: change "nonobjectors" to "objectors"

Page 105, Line 18: change "loan" to "loans"

Page 105, Line 19: change "prescribed" to "proscribed"

Page 105, Line 24 should read: "should not be required to submit additional objections"

Page 107, Lines 14 & 18: change "and including" to "include"