

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

PHYLLIS ANN BROWNE, et al.,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 750-002
Decision No. 18408-H

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO, et al.,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 749-856
Decision No. 19545-H

ORDER DENYING MOTION FOR RELIEF PENDING APPEAL

The motion for relief pending appeal dated July 6, 1989, of petitioners, The American Federation of State, County and Municipal Employees, AFL-CIO, et al., having come before the Court for hearing on August 14, 1989, and

The petitioners appearing by Lawton & Cates, S. C., by John H. Bowers; the Wisconsin Employment Relations Commission, appearing by John D. Niemisto, Assistant Attorney General; and Phyllis Ann Browne, et al., appearing by Raymond J. LaJeunesse, Jr., and Lindner & Marsack, S.C., by Charles P. Stevens,

The Court having considered the matter upon the record and oral and written arguments of counsel, and having, on the 14th day of August, 1989, orally denied said motion,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for relief pending appeal be, and the same hereby is, denied without costs to any party.

/s/ William J. Haese

WILLIAM J. HAESE
Circuit Judge, Branch 22

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MOTION FOR RELIEF PENDING APPEAL

The petitioners, the American Federation of State, County, and Municipal Employees, AFL-CIO, et al. being all petitioning Unions, by and through their attorneys, Lawton & Cates, S.C., represented by John H. Bowers, and Kirschner, Weinberg & Dempsey, represented by, Larry P. Weinberg, move the Court pursuant to sec. 808.07, Stats., and Rule 809.12, for the following relief pending appeal:

Sec. 808.07(2)(a)(1) Stats.

- (2) AUTHORITY OF A COURT TO GRANT RELIEF PENDING APPEAL
- (a) During the pendency of an appeal, a trial court or an appellate court may:
 - (1) Stay execution or enforcement of a judgment or order.

The petitioners move to stay the order of the Wisconsin Employment Relations Commission (WERC) requiring the petitioners to place one hundred percent (100%) of all fair share fees from all fair share fee payers, from the relevant bargaining units, into an interest bearing escrow account, effective from March 4, 1986. The rate of interest is seven percent (7%) per annum until further order from the WERC.

In support of this motion, the petitioners state:

1. The financial impact of the order upon District Council 48, will have irreparable, severe, and adverse affects upon such union and will adversely affect its ability to maintain its obligations which fall within permissible categories of expenditures.

2. District Council 48 has calculated the amount of money that must be placed in escrow pursuant to the Commissions Order on behalf of the International, the Council and the Locals for the period March of 1986 through May of 1989 to be Five Hundred Twenty-nine Thousand Four Hundred Sixty-seven dollars (\$529,467.00).

3. In addition, the Order means that in the future the Locals,, District Council 48 (D.C. 48) and the International will be denied access to approximately Twenty-five Thousand dollars (\$25,000.00) each and every month of fair share payments. This represents nearly one fourth (1\4) or Twenty-four point Nine Eight percent (24.98%) of the average total monthly receipts of D.C. 48 for the fiscal year 1987.

4. Using pay periods Fifteen and Sixteen (15 and 16) August, 1987, D.C. 48 Executive Director, John P. Parr has calculated that the Commissions' Order for escrow will deprive the Unions of over Ninety-five percent (95%) of the funds to which they are "unquestionably entitled to retain."

5. In Chicago Teachers Union Local No. 1 v. Hudson, 106 Sup. Ct. 1066 (1986), The United States Supreme Court held, in part:

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. . On the record before us there is no reason to believe that anything approaching a 100% 'cushion' to cover the possibility of mathematical errors would be constitutionally required.

6. The Commission's order in this case has the very effect of depriving the unions of access to funds that they are "unquestionably entitled to retain."

7. In Gilpin v. American Federation of State, County. and Municipal Employees, AFL-CIO, et al., No. 88-2441, slip op. (7th Cir. May 24, 1989) the plaintiff non-union employees sought to recover, on a restitution theory, the money held in an escrow account. This account held 100% of the fair share fees paid to the unions. The Court of Appeals held:

What the plaintiffs call restitution we call punitive damages . . . Indeed, if we ordered the union to turn over the escrow account to the plaintiffs and other non-union employees, the union would, have a strong claim for restitution. For the union negotiated on behalf of these employees as it

was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things. (emphasis in original)

8. The Court of Appeals held in Gilpin at 7, that the unions derived no benefit from agency fees deposited in an escrow account.

9. The Court also held in Gilpin at 10, that the benefits of the unions contract negotiation and administration that the non-members received were:

... rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law, and the conferral of the benefits on the plaintiffs would therefore give rise under conventional principles of restitution to a valid claim by the union for restitution if the union were forced to turn over the escrow account to the plaintiffs and others similarly situated to them.

10. The WERC has, in effect, imposed punitive damages on the petitioners by requiring that the petitioners place one hundred percent (100%) of all fair share fees, from all fair share fee payers of the relevant local unions, in an interest bearing escrow account. This order is punitive in two ways. First, it denies the unions of the fair share revenues of the non-objector/challengers and second, it denies the unions of the objector/challengers' fair share revenues that "no dissenter could reasonably challenge." Hudson at 1078.

11. This order has deprived the unions of the compensation they are entitled to for the services rendered while negotiating and administering the union members' and non-members' contract for the relevant collective bargaining units. This order fails to promote stable labor relations.

12. The Court should order a stay of the WERC order because it deprives the petitioners of access to some escrowed funds that it is "unquestionably entitled to retain" and effectively imposes punitive damages on the petitioners.

WHEREFORE, Petitioning Unions pray the order of this court staying enforcement of the Commissions order requiring the Unions to escrow all fair share fees for all fair share fee payors, other than Complainants and challengers, pending the Unions appeal, and for such other and further relief as may be just and appropriate. An escrow of ten percent (10%) of fair share fees would provide more than adequate "cushion" to cover the possibility of mathematical errors.

Dated at Madison, Wisconsin this 6th day of July 1989.

/s/ John H. Bowers

John H. Bowers

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Case No. 749-856

AFFIDAVIT OF JOHN PARR, DIRECTOR, DISTRICT COUNCIL 48 IN SUPPORT OF MOTION
FOR RELIEF PENDING APPEAL

STATE OF WISCONSIN) Secs.
COUNTY OF MILWAUKEE)

John Parr, being first duly sworn on Oath deposes and says:

He is the Executive Director of District Council 48, AFSCME, and makes this Affidavit in support of
Petitioner Unions' Motion for Relief Pending Appeal staying the Commission's Order to escrow and
rebathe the non-member fair share fee payments.

1. The impact on District Council 48 of the Commission's order for 100% escrow, will have
adverse financial effects upon District Council 48, and will adversely affect its ability to Maintain its
commitments and statutory obligations of representation of bargaining unit employees regarding wages,
hours and conditions of employment.

2. Affiant has calculated the amount of money that has to be escrowed pursuant to the
Commissions order for the period March 4, 1986 through May 31, 1989 for the International, the District
Council and the Locals to be Five Hundred Twenty-nine Thousand Four Hundred Sixty-seven
dollars (\$529,467.00).

3. Of the total amount of escrow referred to in paragraph five, the AFSCME portion is One
Hundred Fifty Thousand Three Hundred Eighty-seven dollars (\$150,387.00), District Council 48 is Two
Hundred Seventy-four Thousand Three Hundred Ninety-one dollars (\$274,391.00) and the Locals is One

Hundred Four Thousand Six Hundred Eighty-nine dollars (\$104,689.00). In terms of percentage, D.C. 48's total is 51.824%.

4. For the future the order will require the Unions to escrow, in the aggregate, some Twenty-five Thousand dollars (\$25,000.00) each month, or every two, two-week pay period. This represents nearly one fourth (1/4) or Twenty-four point Nine Eight percent (24.98%) of the average' total monthly receipts of D.C. 48 for the fiscal year 1987.

5. Affiant has calculated the percentages of fair share fees of the relevant bargaining units which are attributable to objector/challengers, post the Union's 1987 Hudson "Notice" to all fair share payors. The Unions identified 61 objector/ challengers following the 1987 "Notice".

6. Exact, precise calculation of the percentage of nonmember fair share dollars attributable to the objectors/ challengers category compared to the non-objectors/challengers category is not possible as a result of the continuing fluctuation of the numbers of member and non-member categories and to seasonal changes, new hire, changes in status of individuals and the like.

The Calculation herein, however, provides a reliable basis for determining the percentages and dollars attributable to each category; non-members objectors/challengers, compared to nonmembers non-objectors/challengers.

7. Appendix A is incorporated herein in full by reference and made a part hereof of this affidavit.

8. Affiant has computed for each Local, the relevant percentages and dollars attributable to the categories: non-members objectors/challengers; non-members non-objectors/challengers as follows:

a. Selecting the figures from pay periods 15 and 16 of the month of August, 1987, yields the following computation:

i. The Unions (in the aggregate) received Payment of fair share fees from Two Thousand Thirty-five, (2,035) nonmember fair share fee payors or Twenty-seven Thousand One Hundred Thirty-one dollars and Sixty-seven cents (\$27,131.67). Appendix B is incorporated herein in full by reference and made a part hereof of this affidavit.

ii. Of the Two Thousand Thirty-five (2,035) non-member fair share payors, 61 were objectors/challengers, representing Eight Hundred Eleven dollars and Eleven cents (\$811.11) escrow and a total of Nine Hundred Seventy-one dollars and Twelve cents (\$971.12) escrow/rebate of fair share fees (Escrow Rebate).

iii. The total percentage of fair share fees to which objection/challenge has been made by non-members in the period set forth above, therefore, is 3.579 percent of the total of such fair share fees paid in the period, leaving 96.421% of such fair share fees not objected to/challenged.

iv. The result of the Commissions' escrow order is that 96.421% of the Five Hundred Twenty-nine Thousand Four Hundred Sixty-seven dollars (\$529,467.00), (Escrow March 1986 May 31, 1989), or Five Hundred Ten Thousand Five Hundred Seventeen dollars and Thirty-eight cents (\$510,517.38)

of fair share fees NOT OBJECTED TO/CHALLENGED is required to be escrowed. The i assumption is that while estimates of the amounts involved are@ substantial, they would be manageable. But the Commissions order requiring the Unions to escrow 100% of all fair share fees requires the unions to hold nearly 27 times the amount of money necessary to protect the legal and constitutional rights of the objector/challengers.

The dollars needed for escrow/rebate for the category "objectors/challengers" for the period (June, 1987 - July, 1988) is only Nine Thousand Four Hundred Eighty-nine dollars and Eighty-eight cents (\$9,489.88).

9. The Commissions order requiring a one Hundred percent (100%) escrow of all fair share fees for all relevant bargaining unit employees from March 1986 until the further order of the Commission is not required to protect the non-member fair share fee payors legal interests and imposes an undue, 'punitive' burden upon the Unions, denying them of access to funds to which they are "unquestionably entitled".

Dated at Milwaukee, Wisconsin this 6th day of July 1989.

/s/ John P. Parr
JOHN P. PARR

Subscribed and sworn to before me this 6th day of July 1989.

Notary Public

My Commission expires Sept 8, 1989

Appendix A

LOCAL 526

1 Challenger \$0.00
 Total \$0.00 X .82916% = \$0.00

LOCAL 594

2 Challengers \$31.44
6 Johnson \$115.02
 Total \$146.46 X .78992% = \$115.69

LOCAL 882

3 Challengers \$ 46.46
1 Johnson \$ 17.18
 Total \$ 63.64 X .8651% = \$55.05

LOCAL 1053

5 Challengers \$ 48.28
 13 Browne \$222.56
 Total \$270.80 X .85134% = \$230.54

LOCAL 1055

12 Challengers \$186.89
3 Johnson \$ 48.12
 Total \$235.01 X .8441% = \$198.37

LOCAL 1616

1 Challenger \$14.00
 Total \$14.00 X .80095% = \$11.21

LOCAL 1654

9 Challengers \$131.92
2 Johnson \$ 30.72
 Total \$162.64 X .83312% = \$135.50

LOCAL 1656

3 Challengers \$ 78.57
 Total \$ 78.57 X .82413% = \$64.75

GRAND TOTALS

\$971.12 \$811.11

Appendix B

Fairshare August 1987

Local	# of Units	Dollars
526	6	94.97
594	79	1238.74
645	6	102.00
882	1194	14602.39
1053	111	950.16
1055	372	5918.76
1616	29	413.00
1654	204	3141.12
1656	34	670.47
Grand Totals	2035	27131.61