

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of :

CHALLENGES TO THE FAIR SHARE :

DETERMINATIONS FOR THE FEE :

PERIOD JULY 1, 1987, THROUGH :

JUNE 30, 1988, :

of : Case 13

: No. 42293

: A-4445

AMERICAN FEDERATION OF STATE, :

COUNTY and MUNICIPAL EMPLOYEES, :

AFL-CIO; MILWAUKEE DISTRICT :

COUNCIL 48; and certain LOCAL :

UNIONS affiliated with :

MILWAUKEE DISTRICT COUNCIL 48 :

Appearances:

Mr. John H. Bowers, Lawton & Cates S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Milwaukee District Council 48, which is referred to below as Council 48, and on behalf of certain Local Unions affiliated with Council 48, which are collectively referred to below as the Locals.

Mr. Larry P. Weinberg, Kirschner, Weinberg & Dempsey, Attorneys at Law, 1615 L Street, N.W., Suite 1360, Washington, D.C. 20036, appearing on behalf of American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the International. The International, Council 48 and the Locals are collectively referred to below as the Union.

ARBITRATION AWARD

This proceeding arises under a written procedure (the Procedure) which is set forth below. In a letter filed with the Wisconsin Employment Relations Commission on May 5, 1989, and headed "Re: AFSCME, Milwaukee District Council 48, et al. Fair Share Notice to Nonmember Fair Share Payors For The Period July 1, 1987 to June 30, 1988", John H. Bowers, legal counsel for Council 48, stated:

Pursuant to the above entitled Notice, AFSCME, Milwaukee District Council 48 and its affiliated unions request the Commission to appoint an arbitrator to hear the challenges to the above Notice.

On June 23, 1989, the Commission assigned Richard B. McLaughlin, a member of its staff, to serve as Arbitrator. A pre-hearing conference was conducted in Milwaukee, Wisconsin, on November 28, 1989. Hearing was conducted in Milwaukee on January 30 and 31, 1990. Both the pre-hearing conference and the hearing were transcribed. The Union filed a brief on April 24, 1990.

The legality of the Procedure is being litigated. Because the Procedure is evolving, and is subject to legal challenge, the procedural background of this proceeding, from my assignment as Arbitrator to the completion of the briefing schedule, will be set forth in detail below.

ISSUE

The Union stated the issue for decision thus:

Is the calculation produced in the notice for the fee period July 1, 1987, through June 30, 1988, as to chargeable and non-chargeable expenses by the International, Council 48 and the Locals correct? 1/

THE PROCEDURE

AFSCME
Hudson Procedure

The following procedure is being implemented pursuant to Article IX, Section II of the International Constitution, as amended at the 27th International Convention of AFSCME, in order to comply with the

1/ See Transcript of the pre-hearing conference at 5, and Transcript of the arbitration hearing (Tr.) at 136.

requirements of the decisions of the United States Supreme Court in Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 275 U.S. 292, 106 S.Ct. 1066 (1986) and Communications Workers v. Beck, U.S. ___, 108 S.Ct. 2641 (1988). 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.

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 ("advanced reduction jurisdictions"), 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 . . .;

b. The weighted total percentage of chargeable expenses including the chargeable expense of the International, the Council and its affiliated locals . . .;

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 . . .

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. The Notice will state the amount of the fee payable by all fee payers in advance reduction jurisdictions or payable by objectors and challengers in jurisdictions permitting the collection of a fee equal to dues. The amount of the reduced fee will be expressed as a percentage of the dues paid by AFSCME members and as a dollar amount or percentage of base income where applicable;

f. In jurisdictions permitting the collection of agency fees equal to dues, a statement of the procedure pursuant to which nonmember fee payers can object to the expenditure of that portion of their fees 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, minus the advance rebate, 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 . . . 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 fee or fair share fee payers . . .

. . .

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 . . .

. . .

9. The Notice shall provide for a 30 day period in which to file objections and challenges. If notices are not distributed in time to permit a fee payer to object or challenge prior to the deduction of the fee all fees must be held in escrow until the expiration of the objection/challenge period. At the expiration of the objection/challenge period the union may disburse escrowed fees paid by nonchallenging employees. Objectors and challengers must be paid an advance rebate. The fees paid by the challenger, minus the advance rebate, must remain in escrow pending resolution of the challenge.

10. The Notice shall state that individuals wishing to file objections shall do so in writing . . .

11. In jurisdictions where 100% agency fees equal to dues can be charged . . . persons filing objections and challenges must be paid an advance rebate equal to the difference between the fee actually collected from the objector and challenger and that portion of the fee that the union has determined is chargeable . . .

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 . . . Challengers shall receive an advance rebate in the same amount and on the same basis as individuals filing objections. This fact shall be stated in the Notice.

. . .

14. The Council . . . shall establish a procedure for resolving challenges consistent with the constitutional requirements set forth in Hudson . . . 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 . . . shall establish an arbitration procedure for the prompt resolution of challenges by an impartial decision-maker.

. . .

16. The Council . . . shall establish an escrow account for fees collected from the challengers until the challenge is resolved . . .

17. If the Council . . . elects to adopt an arbitration procedure for the resolution of challenges such procedure shall contain the following elements:

a. Selection of a qualified impartial arbitrator either by the American Arbitration

Association, or similar impartial agency or organization;

b. Consolidation of all challenges within a given Council . . . into a single proceeding;

c. 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.

18. Upon receipt of the written challenge, the Council . . . or the American Arbitration Association 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 the American Arbitration Association will inform the challenger that copies of documents upon which the calculation was based and exhibits that the International, Council . . . intend to introduce into the record of the arbitration proceeding, except for rebuttal exhibits, will be made available for inspection and copying at a reasonable charge in advance of the arbitration hearing at the offices of the Council . . . during regular business hours.

19. After the selection of the arbitrator by the American Arbitration Association or similar impartial agency or organization, the arbitrator will contact the union and the challengers by mail with the date, time and place of a prehearing conference. The time and place of the conference will be selected by the arbitrator. The purpose of the prehearing conference is to, inter alia, establish the date(s) and place(s) of the hearings on the challenges and to establish procedures for the conduct of the hearings. If either the union or the challengers do not participate in the prehearing conference these matters will be resolved by the arbitrator in their absence.

20. After the completion of the prehearing conference the arbitrator will notify the union and the challengers by mail of the date, time and place of the first day of hearing. The notice will also state that if the challengers fail to participate in the hearing the arbitrator can close the record after the introduction of the union's evidence and issue a ruling on the basis of the record and the argument presented by the union.

21. 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 additional advance rebate for the balance of the certification year in accordance with the agency decision or arbitrator's award where appropriate. 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.

22. The provisions of this procedure shall be considered legally separable. Should any provision or portion thereof be held contrary to law by a court or administrative agency of competent jurisdiction, the remaining provisions or portions thereof shall continue to be legally effective and binding . . .

. . .

BACKGROUND

Procedural Background Prior To The Appointment Of An Arbitrator

Council 48 maintains a data base drawn from payroll records of employers which employ individuals represented by its affiliated locals. The data base can state a roster from which the subset of employes who pay fair share fees can be isolated. John Parr, the Executive Director of Council 48, used the data base to generate a list of fair share paying employes as of mid-February,

1989. The list included about 1,800 employes. Each of those employes was mailed the twenty-five page notice (the Notice), which is attached to this decision.

Pages 24 and 25 of the Notice state a **Procedure for Objecting to the Expenditure of Fairshare Non-Chargeable Activities**. That procedure affords non-members the opportunity to object to or to challenge the calculations made by the International, Council 48 and the Locals of that portion of dues spent on activities not legally chargeable to non-members.

The Notice requires objectors or challengers to file a "written objection" including their "name, address, social security number, job title, employer, and work location." The Notice does not require, and the objectors and challengers did not supply, a specific basis for their objection or challenge.

Prior to its May 5, 1989, request for the appointment of an arbitrator, the Union had requested the Commission to approve the Notice. That litigation was pending on June 23, 1989.

Procedural Background Following The Appointment Of An Arbitrator ,
Until The Pre-Hearing Conference

In a letter dated July 26, 1989, I informed Bowers that:

It is my understanding that you are going to send material stating the procedures governing the above-noted matter. I will await that material before taking any action to hear the matter.

On August 18, 1989, the Commission issued Decision 18408-M, in which the Commission stated:

ORDER

The Respondent Unions having, on March 27, 1989, submitted to the Commission their Notice To All Nonmember Fair-share Payors for the period July 1, 1987 through June 30, 1988; and the Complainants having, on April 27 and July 17, 1989, filed written argument in opposition to the approval of said Notice; and the Respondent Unions having, on June 30, 1989, submitted a sworn affidavit in support of their request that the Commission approve the Notice and on July 27, 1989, filed written argument in support of their motion; and the Commission having considered the Respondent Unions' Notice and request and the positions of the parties, and being satisfied that the Respondent Unions' Notice should be approved;

NOW, THEREFORE, it is

ORDERED

That the Respondent Unions' Notice To All Nonmember Fair-share Payors be, and same hereby is, approved.

In a letter filed with the Commission on August 24, 1989, Bowers supplied a list, headed APPENDIX A, with a cover letter which reads thus:

We are advised that you have been appointed by the WERC to serve as the 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 District Council 48 and affiliated local Unions, who are Respondents in the above arbitration matter.

The individuals whose names and addresses are contained in Appendix A attached hereto have filed timely challenges to the fair share fee. Pursuant to the Order of the Wisconsin Employment Relations Commission in the Browne and Johnson cases all Complainants in those two cases are considered continuing challengers to the fair share fees. The names of such persons are not included on the enclosed Appendix A, because they are represented by Attorneys Raymond LaJeunesse and Charles P. Stevens in the Browne and Johnson cases.

The basic issue in this proceeding is whether or not the calculation of AFSCME (AFL-CIO), District

Council 48 and its local unions, of the amount of money which is rebatable (not chargeable) on the basis that it falls within the category of nonchargeable expense under the decision of the Wisconsin Employment Relations Commission, is correct.

AFSCME and District Council 48 suggest that Milwaukee County, Wisconsin is an appropriate location for the hearing in this matter. Such location would appear to be most convenient for the majority of the persons who may be involved in the hearing process. All challenges are, pursuant to AFSCME procedure, consolidated in this single proceeding.

We request that you set a date for a pretrial conference to establish procedure for the hearing and to set a hearing date.

I have today sent a copy of this letter, without Appendix A, to all of the persons listed in Appendix A and to counsel of record in the Browne and Johnson cases as indicated below.

It is requested that any counsel of record listed at the bottom of this letter inform you and myself whether or not they will be participating in these proceedings.

The "counsel of record" listed at the close of that letter were: Raymond J. LaJeunesse, Jr.; Larry P. Weinberg; Charles P. Stevens; James P. Maloney; Robert G. Ott; and Stuart S. Mukamal. Appendix A contained the names of fifty-six individuals.

In a letter filed with the Commission on August 25, 1989, Bowers corrected the list of challengers supplied with the August 24, 1989, letter, by asking that Mathilda Korenic be dropped from the list because "(i)t is my understanding that she continues to be represented by Attorney Raymond LaJeunesse in a separate proceeding before the Commission." In a letter filed with the Commission on August 28, 1989, Patricia M. DeFrain, requested that she be dropped from the list of challengers, and be considered an objector. She also supplied pages 24 and 25 of the Notice with her letter.

In a letter filed with the Commission on September 1, 1989, James P. Maloney stated "I will not be participating in the proceedings for determination of the challenges to the fair share determinations of AFSCME."

In a letter to Bowers dated September 1, 1989, I stated:

I write in response to your letter dated August 22, 1989. I have no objection to conducting proceedings on this matter in Milwaukee.

I would appreciate it if you would send me a copy of the procedure governing this matter.

You have suggested a pre-trial conference would be appropriate "to establish procedure for the hearing and to set a hearing date." I am uncertain of who will appear at the hearing, their addresses, or the nature of my authority to set a hearing. I do have September 12 and 29, 1989 available for a pre-trial conference. Please let me know if either date would be acceptable.

Finally, I enclose, for your records, a copy of a letter I received from Patricia M. DeFrain.

Bowers responded to my September 1, 1989, letter in a letter filed with the Commission on September 11, 1989, which states:

. . . please be advised that we suggest that the procedure provided by the American Arbitration Association be followed in this matter.

A pretrial conference should be able to deal with any unresolved matters relating to procedure. I am available for a pretrial conference on September 29, 1989. I assume that other counsel who wish to participate will advise you whether or not that date is acceptable.

I responded to this letter in a letter dated September 13, 1989, which states:

My letter of September 1, 1989, sought whatever source documents constitute your written procedure

governing challenges of fair share fees. Ms. DeFrain's letter contained two pages, numbered 24 and 25, headed "AFSCME Council 48 Procedure for Objecting to the Expenditure of Fairshare Non-Chargeable Activities." I do not know if this is the written procedure governing this matter, and would appreciate receiving a complete copy of that procedure from you. If you feel an AAA procedure is relevant, I would appreciate a copy of that procedure also. I assume whatever authority I can exercise flows from such written procedures, and need to have those procedures to act in this matter.

It is important to the conduct of a pre-hearing conference that appropriate notice be given. I do not know who the interested parties may be for such a conference, and would suggest that if a pre-hearing conference is to be set for September 29, 1989, that the Union formally notify any interested parties . . .

Bowers responded in a letter filed with the Commission on September 26, 1989, which states:

Enclosed herewith is a copy of the AFSCME Hudson Procedure which you requested . . . I also enclose a copy of the AAA procedure. I suggest that the prehearing conference be held on September 29, 1989. The time and place for such conference should be determined after you have heard from the attorneys for the challengers whether or not they intend to participate in these proceedings. Those challengers not represented by counsel are contained on the list designated Appendix A which was enclosed with my letter to you of August 22, 1989. By copy of this letter to those persons listed below, I ask that they advise you and me promptly whether or not they intend to participate in the pretrial or in any of these proceedings.

The Hudson Procedure referred to in this letter is that set forth above.

In a letter to DeFrain dated November 3, 1989, I informed her that she would not be regarded as a challenger. In a letter to Bowers of the same date, I stated:

I write to confirm my receipt, on November 1, 1989, of the addresses of advocates who may share an interest in the arbitration.

I also write to note for you my concerns regarding the timelines noted at Section 17c of the procedure. With the difficulties of obtaining the source documents and clearing my calendar, those timelines may have already been exhausted. Further problems in working this procedure through my own caseload and the Commission's guidelines for processing cases may pose further delay. Please advise me if you believe the processing of this matter is proving incompatible with the procedure.

In a letter dated November 6, 1989, and mailed to all of the individuals identified in Bowers' August 24, 1989, letter, I stated:

The Wisconsin Employment Relations Commission has assigned me to act as arbitrator under a procedure adopted by District Council 48, AFSCME, AFL-CIO, to hear challenges to its fair share determinations.

The procedure I have been supplied with requires me to set a time and place for a prehearing conference "to, inter alia, establish the date(s) and place(s) of the hearing on the challenges and to establish procedure for the conduct of hearings." That procedure also provides certain time limits governing the completion of the procedure.

While I do not wish to obstruct the operation of the time limits, I think it is vital that I afford each of you who would be interested in appearing at the pre-hearing conference the opportunity to prepare and to advise me of any undue hardship the scheduled date may pose.

Accordingly, I set the pre-hearing conference for Tuesday, November 28, 1989 at 10:00 a.m. in the

State Office Building, Room 40, 819 North 6th Street,
Milwaukee, Wisconsin.

If any of you wish a copy of any correspondence presently contained in the file on the matter or in any correspondence which may be sent or received by me, please advise me.

If you have any questions, please advise me. My mailing address is stated in the letterhead above, and my phone number is (608) 266-1050.

Among those individuals identified on Appendix A who was mailed a copy of this letter was Gary Casper. That letter was returned by the Post Office and marked "NO SUCH NUMBER".

Bowers responded to the November 6, 1989, letter in a letter filed with the Commission on November 10, 1989, which states:

. . . That date is agreeable to me. However, all counsel involved in this proceeding should be notified of that date. All correspondence to the parties respecting these matters should be copied to all of the counsel which have appeared on my letters to you and also to those persons not represented by counsel also contained in the list which I forwarded to you . . .

I responded in a letter dated November 13, 1989, which states:

. . . Section 19 of the procedure obligates me to notify "challengers by mail." I have, by mail, sent notices to each challenger noted on Appendix "A" except Patricia DeFrain who, by letter dated August 24, 1989, requested "not (to) be part of this hearing", and Mathilda Korenic, whose name I consider stricken from Appendix "A" in light of your letter of August 23, 1989.

. . .

In the November 6, 1989, letter I stated I would supply anyone who wished a copy of any correspondence in this matter to so advise me. Your letter indicates I should automatically copy any interested party on "(a)ll correspondence . . . respecting these matters . . ." Please advise me if this statement means I should supply a copy of the file in this matter to each person noted in the file, whether they request it or not. If these points are addressed in the procedure, please advise me of the basis in the procedure. I would also appreciate knowing if you believe the procedure addresses who shall absorb the cost attendant to the correspondence noted above.

If you fear any counsel may not have received my November 6, 1989, letter, I will mail the letter again by certified mail. Please let me know which, if any, persons should be so notified.

In a letter filed with the Commission on November 13, 1989, Robert G. Ott, stated: "Milwaukee County has maintained a passive position throughout all of this litigation . . . we do not intend to participate in your hearings relative to the challenge to the fair share determinations." In a letter filed with the Commission on November 13, 1989, Mary Pepke, an individual listed on Appendix A, noted that she thought she was an objector, not a challenger, and asked a series of questions concerning her rights. In a letter to Bowers dated November 13, 1989, I referred Pepke's questions to him, stating: "The letter poses questions about the procedure which, assuming I am empowered to answer, I do not believe I can answer outside of a formal hearing . . ."

Throughout November, 1989, various requests for file material and for information were received. One of the requests was filed with the Commission by Grant Rowold on November 17, 1989. I responded to Rowold's request in a letter dated November 20, 1989, which states:

I enclose a copy of all the correspondence generated in this matter through the date of this letter. If you wish a copy of further correspondence, please let me know.

. . .

I have not enclosed a bill for the copying costs

involved in assembling the enclosed documents, and I do not intend to bill you in the future. However, I should note that the extent of my authority to impose such costs on the Commission or on District Council 48 is not clear, and may become a disputed point.

Ultimately, the file contents were mailed to each interested individual named in the file, under a cover letter dated November 24, 1989, which states:

Mr. Bowers informed me by phone on November 22, 1989, that the file contents should be supplied to each interested individual named in the file on this matter.

I enclose that material, with this letter, to each individual named on Appendix A, with the exception of Ms. DeFrain, Ms. Korenic, and Mr. Casper.

I also enclose a copy of the file contents for Mr. Weinberg; Mr. LaJeunesse, Jr.; Mr. Stevens; Mr. Niemesto; Mr. Mukamal; and Ms. Davis Gordon. I will have the complete file available for inspection by any interested party at the November 28, 1989, pre-hearing conference.

I will note that Mr. Bowers has indicated that he will arrange, at the Union's expense, for a court reporter to transcribe the pre-hearing conference, and that the Union will assume the costs attendant to the mailings noted above . . .

Joan P. Jass and Corrine Honebein, individuals listed on Appendix A, each filed a letter with the Commission on November 28, 1989. Jass asked that she not be treated as a challenger, and Honebein stated, among other things, that she could not recall whether she had chosen to challenge the Union's calculation.

The Pre-Hearing Conference

A pre-hearing conference was conducted on November 28, 1989. Bowers appeared for the Union. Parr also appeared for Council 48. The conference was not started until after 10:30 a.m. to permit time for other interested parties to appear, but no non-member objectors, challengers or their counsel appeared.

At the pre-hearing conference, Bowers phrased the issue for decision in the arbitration thus: ". . . whether or not the calculation produced in the notice for the fee period July 1, 1987 through June 30, 1988 as to chargeable and non-chargeable expenses by AFSCME, District Council 48 and its affiliated locals is correct." Also at the pre-hearing conference, the relevant criteria governing the arbitration were stated to be the categories contained in the Notice and Dec. No. 18408 (WERC, 2/81). Bowers also stated that the unions would bear the cost of supplying all interested parties to the litigation with relevant correspondence. Those parties were determined to be LaJeunesse, Jr., Stevens, Mukamal, Davis-Gordon, John Niemesto, Weinberg, and all challengers listed on Appendix A who are not represented by LaJeunesse or Stevens. Bowers also indicated the unions would bear the cost of transcribing the arbitration hearing. After discussion of other matters, hearing dates were set and the pre-hearing conference was closed.

Procedural Background From the Pre-hearing Conference Until The Hearing

In a letter dated November 29, 1989, I confirmed that Jass' name had been removed from Appendix A. In a letter of the same date, I recounted the results of the pre-hearing conference thus:

I write to set forth the status of the above-entitled matter. A pre-hearing conference was held on November 28, 1989. The conference was transcribed. Any party interested in receiving a copy of the transcript should advise Mr. John H. Bowers, whose address appears at the bottom of this page.

At the pre-hearing conference the following dates for hearing were established: Tuesday, January 30; Wednesday, January 31; and Thursday, February 1, 1990. The hearing will start at 10:00 a.m. on January 30, 1990, at the Park East Hotel, 916 East State Street, Milwaukee, Wisconsin. Specific room arrangements are pending.

The Union will make available, for inspection and copying, those documents upon which the Union has based its calculation of what is chargeable, and which the Union intends to introduce at hearing. These documents will be available at the offices of the

District Council 48 at least thirty days prior to the hearing dates noted above.

I would ask each person who intends to participate in the hearing to notify me as soon as possible. I will also note that the Procedure provides that: ". . . if the challengers fail to participate in the hearing the arbitrator can close the record after the introduction of the Union's evidence and issue a ruling on the basis of the record and the argument presented by the Union."

If you have any questions, let me know.

Among those individuals mailed a copy of this letter was Dale Wagner. The envelope containing his letter was returned to the Commission on December 1, 1989, with a handwritten notation "DECEASED". On December 5, 1989, Jeffrey Simon, another individual listed on Appendix A, noted that he had filed as an objector, not a challenger, and questioned whether Appendix A listed both categories of complaining non-members.

In a letter to "All Interested Parties Listed in the File", and dated December 7, 1989, I confirmed the removal of Jass', Simon's and Wagner's names from the list of challengers, and referred Honebein's letter "to the Union for any response." I also updated the file contents by supplying interested parties with "copies of the most recent correspondence I have received".

The Arbitration Hearing

The arbitration hearing was conducted at a site in Milwaukee arranged by the Union. No challenger, objector or any counsel other than those listed in the "Appearances" section above appeared at either day of hearing.

The Evidence Submitted For Council 48 And For The Locals

Evidence for Council 48 and the Locals was submitted through a series of documents and Parr's testimony. Parr noted that Council 48 is the service arm for thirty-six affiliated locals, twenty of which are part of this proceeding. The Locals do not have paid staff, but utilize volunteers to fill positions such as treasurer and steward.

Council 48 is headed by a sixteen member Executive Board, the members of which are elected by the locals. Parr, as Executive Director, was hired by the Board and reports to the Board. At present the Board also employs an Associate Director. That position was not in place, however, for the time covered by the Notice. Beyond these positions, Council 48 is staffed by the positions of Executive Secretary; Bookkeeper; Research Analyst; Staff Representatives; Clerk/Typist and Secretary.

Each Local sets the dues which finance the International, Council 48 and the Locals. The International sets a minimum dues structure, but the amount of dues charged beyond that minimum is within the discretion of each Local. Dues are paid directly to each Local, or are paid to the Local through a trust account administered by Council 48. The Locals are required to pay a prescribed per capita tax to the International, Council 48, the Milwaukee County Labor Council and the Wisconsin AFL-CIO. The balance is retained by the Local for its own use.

The accounting procedures which track the income received and the expenses paid by the Locals and by Council 48 have evolved since the issuance of the Commission's decision in Browne, Dec. No. 18408 (WERC, 2/81). Following the issuance of that decision, Parr computerized the accounting and payroll systems used by Council 48.

The systems ultimately developed by Council 48 are based on the twenty-five categories of chargeable, and thirteen categories of non-chargeable expenses stated by the Commission in Browne, and set forth at pages 1-3 of the Notice. Parr distilled those categories into the "Activity Codes" set forth at pages 10-12 of the Notice. Parr then developed a system of forms to channel payroll and accounting data into those codes, which ultimately forms a data base which can be manipulated by software developed for Council 48 by Parr with the assistance of a consulting firm.

The "R", "NR" and "A" Activity Codes relate to the time records maintained by Council 48 employees who perform the functions of a collective bargaining representative. The "MNR" and "MR" Activity Codes relate to the financial records maintained by Council 48 for all money spent by the organization.

Non-clerical staff, including Parr and Staff Representatives, account for their time on a multi-paged form developed by Parr. The cover page is a summary sheet which contains separate columns for the Activity Codes and for the total hours devoted to each activity. The balance of the form consists of

the pages necessary to detail the activities summarized on the cover page. Each of those pages contain separate columns headed: DATE; ACTIVITY DESCRIPTION; ACTIVITY CODE; Hours In Each Activity Code; and Total Hours For That Date. The form is designed to require the input of data on a bi-weekly basis, based on a twenty-four hour per day, seven day week. This form requires each Staff Representative to complete the "ACTIVITY CODE" column by using one of the "R", "NR" or "A" codes detailed in the Notice. Staff Representatives are also required to complete a separate Monthly Mileage Report Form; a Bi-Weekly Per Diem Report Form; and a Reimbursable Expense Report Form.

All invoices paid by Council 48 have attached to them a form developed by Parr. That form requires Parr to enter an account code for each payment he approves, and a "**Non-Rebatable or Rebatable Code(s)**" entry for expenses which can be directly allocated to a chargeable or non-chargeable category.

The system developed by Parr uses a 999 code to account for any expenditure of time or money which can not be directly assigned to a chargeable or non-chargeable category. That code is not explained in the Notice. All the work performed by the clerical staff of Council 48 is assigned to the 999 code, as are such expenses as payroll, and overhead costs attributable to the operation of the office of Council 48. Parr codes any invoice he is not sure can be fully assigned to either a chargeable or a non-chargeable category to the 999 code.

The computer program developed by Council 48 is designed to cumulate the data developed through these forms and to isolate, for a given time period, the total amount of time or money attributed to the chargeable and to the non-chargeable codes. With this as a basis, the software will compute, for a given time period, the percentage of time spent by Council 48 staff in chargeable activities, or the percentage of money spent by Council 48 on chargeable items.

The data generated by the payroll and accounting forms noted above is also manipulated by the computer system of Council 48 to produce the operating statements and operating statement details which are presented to the Executive Board of Council 48 for approval each month. Those Statements and Details are ultimately used by the auditors who audit Council 48 each fiscal year.

That part of the Notice concerned with Council 48 reflects the data generated by the program and the final calculations based on that data for the fiscal year running from November 1, 1985, through October 31, 1986. Page 4 of the Notice states the final calculations. The top section of that page states that for the fiscal year, Council 48 incurred \$1,091,585.68 in "TOTAL EXPENDITURES". Of that total, the expenses directly assigned to a chargeable or non-chargeable category are listed under the "ALLOCATED BY EXPENDITURE CATEGORY" heading. Parr testified that the 999 code expenses are listed under the "ALLOCATED BY TIME SPENT ON ACTIVITY" heading. Those expenses, according to Parr, have been indirectly assigned to the "CHARGEABLE" or "NON-CHARGEABLE" lines by the program's using the "**Total . . . Percent Chargeable**" entry from the bottom right of page 4 (rounded in the Notice to 96.7%), and applying that to the total expenses under the "ALLOCATED BY TIME SPENT ON ACTIVITY" heading, to establish the chargeable and non-chargeable components of the 999 category.

None of the twenty Locals subject to this proceeding uses the same fiscal year as Council 48. Most of the Locals use the calendar year as their fiscal year. Parr testified he assigned each Local's expenses to a chargeable or non-chargeable code by examining each Local's monthly operating statement to determine which of the Chargeable/Non-Chargeable Codes a particular expense should be assigned to. None of the Locals are computerized as Council 48 is. Parr stated he then totalled the assigned expenses, and compared the total chargeable expenses to the total local expenses to yield the various percentages stated on the Notice.

The Evidence Submitted For The International

The International submitted its evidence through a series of documents and the testimony of Sandra L. Bloomfield and Thomas Bowman. Bloomfield is employed by the International as its Area Director for Wisconsin. Bowman is employed by the International as a member of its Audit Staff.

The International represents approximately 1.2 million workers, grouped into roughly 3,300 local unions. There are roughly 57 councils servicing those locals which have elected to affiliate with a council. As the councils serve as a service arm of affiliated locals, the International serves as a service arm to both locals and councils. The International maintains a headquarters in Washington, D.C., which employs about 275 employes, but provides direct services to councils and locals through approximately 33 Field Offices located throughout the United States. The International is based on a departmental structure.

Bowman testified on the background to the "**Calculation of Chargeable Expense**" stated at page 3 of the Notice. The basis of that calculation was documented in a 95 page summary. Bowman testified to clarify the methodology used by the International in making the calculation, and utilized three

departments to establish that methodology. Bowman prefaced his testimony by noting that the figures underlying the calculations are audited figures, and by noting that the International has recognized affiliation fees paid to the AFL-CIO as non-chargeable in Wisconsin.

The International considers Political Action & People; Legislative; Public Affairs; International Relations; Education; Women's Rights/Community Action; Field Services; Assistance to Affiliates; Retiree; Research; and 50th Anniversary as Operating Departments, and calculates Chargeable and Non-Chargeable expenses differently for those departments than for the remaining departments.

To illustrate the calculation for Operating Departments, Bowman used Political Action & People, Field Services and Public Affairs. Starting with the Political Action & People Department, Bowman noted that the International separately analyzes contribution and participation expenses attributable to that department, and also allocates to the department certain indirect general operating expenses, which are also separately analyzed. Bowman testified that due to the nature of the Political Action & People Department, the International assumes an expense is non-chargeable unless it can be proven otherwise. This is graphically noted in Schedule B-3A which lists "Chargeable Expense" for twelve employees. Expenses which are "close-calls" are viewed as non-chargeable, according to Bowman. He noted that the decision to characterize a given expense as chargeable or as non-chargeable is made by two Departmental Assistant Directors, in consultation with the General Counsel's Office, and the Business Office. Bowman plays no role in that decision-making process. The documents underlying the decisions are the expense reports of each field employee.

Field Services is the International's largest department. As with Political Action & People, the International separately analyzes contribution and participation expenses, and allocates to the department certain indirect general operating expenses attributable to its operation, which are also separately analyzed. Unlike Political Action & People, the International regards Field Services Department expenses as chargeable unless it can be proven otherwise. This is based, according to Bowman, on the less ideological nature of the Field Services Department's mission. This is reflected in Schedule H-3 which documents the "Non-Chargeable Activity" of Field Service employees.

Bowman then focused on the Public Affairs Department as an example of an Operating Department which does not primarily base its calculation of chargeable/non-chargeable expenses on man-hours of work. Here too, contribution and indirect expenses were separately analyzed. The International publishes a "Public Employee" magazine as well as a "Leaders" newsletter. The office of the General Counsel analyzes each publication by total column inches and divides that total into chargeable and non-chargeable column inches. Dividing the "Non-Chargeable Inches" by the "Total Column Inches" yields a percentage for each publication. This percentage of non-chargeable expenses is then applied against the payroll, printing and distribution costs to yield the total amount of non-chargeable expenses attributable to the publication aspect of the department.

The expenses of the Operating Departments are summed to yield sub-totals for "Total Expenses"; "Non-Chargeable Expenses" and "Chargeable Expenses". These sub-totals play a role in the calculation of six of the remaining departments, which are referred to as Administrative Departments.

The Administrative Departments are: Convention; Legal Services; President's Office; Secretary-Treasurer's Office; Business Office; and Personnel. To obtain the Non-Chargeable component for the Administrative Departments, the International calculates the separate sub-totals noted above for the Operating Departments. The "Sub-Total Non-Chargeable Expense" for the Operating Departments (\$5,519,947) is then divided by the "Adjusted Total Exp(ense)" for non-Administrative Departments (\$35,858,126). The "Adjusted Total Exp(ense)" for non-Administrative Departments is calculated by subtracting from the Total 1986 International Expense (\$50,901,061) the sum of the expenses attributable to the Administrative Departments listed above (\$9,974,336), together with the expenses attributed by the International to the "Affiliation Fees Dept." (\$5,068,599). The percentage yielded by dividing the "Sub-Total Non-Chargeable Expense" by the "Adjusted Total Exp." is then multiplied against the Total Expense for each of the Administrative Departments to yield a total Non-Chargeable Expense for each Administrative Department.

The International summarized these calculations in Schedule A, which states the expenses of the Administrative Departments as well as the following: Affil. Fees & Pymt."; "Public Policy"; "Affil. Dept. Misc. Exp."; and "Executive Board, Judicial Panel, General Operating, Building Services & Meeting/Travel".

Procedural Background Following The Arbitration Hearing

On March 12, 1990, Raymond J. LaJeunesse, Jr. filed the following letter with the Commission:

Because the validity of the procedure under which you were appointed as arbitrator is presently being challenged by the complainants in Browne v. Milwaukee Board of School Directors, Case 99 No. 23535 MP-892, and Johnson v. Milwaukee County, Case 161 No. 29581 MP-1322, on appeal in the Wisconsin Court of Appeals (Ct. App. Case No. 89-1094), neither I nor Charles P. Stevens, Esq., have participated in the above matter on behalf of said complainants. However, I appreciate your courtesy in sending me copies of the correspondence, notices, and decisions which you send or receive. I apologize for my failure to notify you formally to this effect before now.

The Union's Position

As preface to its view of the issues posed, the Union notes that the Commission has already established categories of chargeable and non-chargeable expenses, and that the Commission has "made a determination approving the Union's Notice." From this the Union concludes:

(T)he only matter at issue before the Arbitrator . . . is whether the Union's calculation of the amount of time and expenses that are chargeable and non-chargeable to the challenger non-member fair share fee payors is correct.

Beyond this, the Union contends that the validity of the procedure underlying this matter "is not at issue in this Arbitration", since "(t)hat matter is presently at issue before the Wisconsin Supreme Court".

With this as preface, the Union states the issues posed here thus:

1. Is AFSCME's calculation of chargeable expenses to objecting and challenging non-member fair share fee payors, correct?

. . .

2. Is District Council 48's calculation of chargeable expenses to objecting and challenging non-member fair share fee payors of 95.33 percent as their pro-rate share of the cost of collective bargaining, contract administration and activities concerning matters affecting wages, hours and conditions of employment, correct?

. . .

3. Are D.C. 48's separate calculations of its affiliated locals' total expenditures (only those local unions which have non-member fair share payors are included in the calculations involved in this proceeding) of chargeable expenses to objecting and challenging non-member fair share fee payors as their pro-rata share of the cost of the collective bargaining process, contract administration and activities concerning matters affecting wages, hours and conditions of employment correct?

. . .

4. Applying the criteria of chargeable, non-chargeable and mixed expenditures established by Browne to the activities and expenses of AFSCME and Council 48 and its located affiliated locals involved in this proceeding for the time period November 1, 1985 through October 31, 1986, are the percentages of the total expenses of AFSCME, District Council 48 and its affiliated locals chargeable to objecting non-member fair share fee payors correct?

. . .

The Union contends that if a finding is made that any of these calculations is incorrect, a separate finding of the correct percentage must be made. As the final prefatory point to its argument, the Union notes that it bears the burden of proving "the accuracy of the calculation" but contends that the Supreme Court has established that "absolute precision" in the calculation of the fee can neither be expected nor required.

The Union argues initially that the evidence sustains the International's calculation of its chargeable activities and expenses. The Union notes that

the International calculates its percentage "in a manner somewhat different from that followed by Council 48, due to differences in the size, structure and function of the two organizations."

The Union notes that the International separately schedules and individually examines departmental contributions and participations, and presumes such expenditures are nonchargeable "unless the nature of the organization to whom the money is given is such that its activities are chargeable under the Browne criteria." The chargeability of an employee's activities is determined initially by "the director of that employee's department." This determination is then reviewed by the General Counsel's office, which also reviews the department's periodic reports. Once this determination is made, the Business Office determines "all costs attendant" to the nonchargeable, or in the case of the Political Action Department, chargeable, activities. When the "total expenditures and total chargeable expenditures for each of the operating departments has been determined, those sums are totalled to produce the percentage of the total expenditures which is chargeable", which is ultimately applied to "the expenditures of each of the nonoperating departments" The final calculation combines the figures yielded from the process sketched above, according to the Union, and produces the total expenditures and total chargeable expenditures for the International for the year being examined.

After this review of the general methodology used by the International to calculate the chargeable and non-chargeable aspects of its expenditures, the Union focuses on a department-by department review of those expenditures. The Field Services Department, the Union avers, is primarily concerned with "organizing, assisting affiliates in collective bargaining and otherwise in representing members, and acting as liaison between the affiliates and the International Union", and spent \$13,606,766 on chargeable activities. The Education Department is divided into headquarters and field staff, and performed services concerned with training and publications "on matters related to collective bargaining, contract administration and grievance adjustment", which resulted, according to the Union, in a total chargeable expense of \$1,376,120. The Women's Rights/Community Affairs Department focuses on womens' issues and on activities designed to enhance the Union's community standing, and spent \$727,315 in chargeable expenditures during the time at issue here, according to the Union. The Research Department, the Union contends, is primarily concerned with providing "expert assistance to AFSCME's affiliates in negotiating collective bargaining agreements and otherwise representing employees with regard to matters concerning wages, hours and working conditions", and incurred \$1,482,026 of chargeable expenses. The Legislation Department, according to the Union, "is responsible for representing AFSCME before the Congress of the United States and before various administrative agencies and departments of the Federal Government", and incurred \$681,793 of chargeable expenses. The Union then asserts that the Political Action/PEOPLE Department consists of two separate entities, which, with the exception of "time lobbying at the state and local level on matters affecting the wages, hours and working conditions of public employees", incurred nonchargeable expenses. Those expenses, the Union asserts, totalled \$38,083. The Retirees Department "focuses primarily on issues of concern to retired public employees" and incurred, according to the Union, \$348,733 of chargeable expense. The Public Affairs Department is divided into public affairs and publications components, and incurred, the Union contends, \$4,704,258 of chargeable expenses. Noting that the International Relations Department is not really a department, but is "a category into which certain expenditures are put for accounting purposes", the Union concludes that this "department" incurred no chargeable expenses. The 50th Anniversary Department reflects that the International celebrated its fiftieth anniversary in 1986. The Union asserts that the expenses of that convention were "treated as chargeable with the exception of certain expenses having to do with a members only scholarship program established by AFSCME for the children" of members, and that such chargeable expenses totalled \$754,169. Noting that Contributions and Participations "are presumed to be nonchargeable and are analyzed individually to identify any which appear to be chargeable based on the nature of the organization to which money is given", the Union concludes the chargeable expense for this category totalled \$296,259. Affiliation Fees and Payments have, according to the Union, been treated consistently with the Weisberger award.

Non-Operational Departments include, the Union notes, "the International Convention, the union's costs for legal services . . . the President's Office, the Secretary-Treasurer's Office, the Business Office and the Personnel Department." The Union argues that each of these departments "relates to the operation of the International Union as a whole", and that as a result, "they are treated as being chargeable in the same percentage as are the operating departments to which they relate." The chargeable expenses incurred for these departments, according to the Union, totalled \$7,810,109.

Beyond this, the Union contends that "a certain amount was allocated to each department for overhead, based upon that department's salaries, as a percentage of total salaries." Once this allocation was determined, the amount treated as chargeable was "treated as chargeable at the same rate as was that department."

After a review of the International's total calculation, the Union concludes that "the calculation . . . fairly represents that portion of the International Union's expenditures for 1986 which is chargeable to fair share fee payers . . . under . . . the criteria established by the Browne decision."

The Union's next major line of argument is that Council 48 and the Locals have met their burden of persuasion that the calculation of chargeable and non-chargeable activities are accurate and constitutional. After a review of the relationship between Council 48 and the Locals, and after a review of the administrative structure of the Locals, the Union concludes that "(t)he evidence sustains District Council 48's calculation of chargeable activities and expenses." A thorough review of the record will demonstrate, according to the Union, that "(t)he accuracy and integrity of the record keeping system developed by John Parr for District Council 48 and its locals . . . meets or exceeds the requirements of Hudson." The system developed by Parr consists, the Union avers, of a human and an information component. The system is, according to the Union, the sole and complete repository of all of financial transactions of Council 48 and the Locals: "There exists no other checkbook or any other system for issuing checks or making expenditures that does not flow through the system." Beyond this, the Union argues that the accounting system is sufficiently complete to permit adjustments every two weeks concerning employees who enter or leave employment, and to make corresponding adjustments to the advance rebate/escrow system every three months.

The Union asserts that "(t)he chargeable and non-chargeable time and expense of the Local Unions involved in this proceeding have been correctly calculated." Council 48 has fully complied with the Weisberger award by making a separate calculation for each Local and by considering dues paid to the Milwaukee County Labor Council and the Wisconsin AFL-CIO as non-chargeable. More specifically, the Union contends that the chargeable percentage for each Local was calculated by the same five-step process:

The first step . . . is to go through each local's monthly operating statements for the local's fiscal year covered in the notice.

. . .

The second step in the process is to total all categories for each local for each month and add all the monthly totals for each category to get a total for the year.

. . .

The third step in the process is to add the yearly totals for all chargeable categories . . . and all non-chargeable categories.

. . .

The fourth step in the process is to add the yearly total chargeable expenses to the yearly total non-chargeable expenses to reach the total local expenses.

. . .

The fifth and final step in the process is to divide the yearly total chargeable expenses by the total local expenses.

The Union summarizes the procedure by which the chargeable percentages calculated by the International and by Council 48 are incorporated with that calculated by the Locals thus:

(T)aking the total number of members and fair share fee payors for each local and multiplying that number by the amount of the per-capita checkoff . . . These amounts are then multiplied by the chargeable percentages for AFSCME International . . . and chargeable percentages for District Council 48 . . . These amounts are then combined with the local's calculation of its chargeable amounts. The three groups are combined by totaling the total expenses and total chargeable expenses. The final percentage is determined by dividing the total chargeable expenses by the total expenses . . .

This calculation, according to the Union, meets or exceeds the Hudson requirements, which, demand something less than "absolute precision". It follows, the Union concludes, that each level of its calculation, from the Locals through the International, "should be sustained."

DISCUSSION

The threshold issues posed involve who has challenged the Union's calculations and what is within the scope of that challenge.

The Union initially identified the challengers as "(t)he individuals "whose names and addresses are contained in Appendix A" and "all Complainants . . . in the Browne and Johnson cases". Appendix A listed 56 names. Parr testified, and Exhibits 5 and 6 confirm, that there are thirteen challengers other than the Complainants noted above. The responses to the pre-hearing correspondence confirm that Appendix A includes objectors.

The exact number of challengers is not an arbitration issue, since the Procedure requires only a general challenge to the accuracy of the Union's calculations. Thus, the number of challenges is, apart from remedial issues, irrelevant since each challenge poses the same issue.

The next threshold issue is whether the Procedure's legality is at issue. I can see no persuasive reason to conclude it is. Both the Court and the Commission have indicated that the legality of Hudson procedures does not fall within the anticipated scope of the arbitration. The Hudson Court noted:

We hold today that the constitutional requirements for the Union's collection of agency fees include . . . a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker. . . 2/

A challenge to "the amount of the fee" does not envision a review of the legality of the process. The Commission has adopted a similar position. In denying the propriety of a notice issued by the Union in the arbitration proceeding which preceded this one, the Commission noted:

(I)t is the Union's, rather than the arbitrator's, responsibility to see that the notice and procedures are adequate. 3/

Beyond this, the Commission reserved judgement on whether the Union's arbitration procedure "as applied, meets the requirements of Hudson." 4/ The Commission has, then, directed arbitrators to apply the procedure, not to question its application.

More pragmatically, it is difficult to see what useful purpose is served by an arbitral foray into the Procedure's legality given the pending litigation on the point.

More significantly here, the Procedure which authorizes me to act does not contemplate an arbitrator's opinion on its legality. Paragraph 22 addresses the effect of a successful legal challenge of the Procedure, and refers to "a court or administrative agency of competent jurisdiction" only. Thus, the Procedure's legality will not be considered here.

Since the Procedure's legality must be defended in other fora by the Union, its statement of the issue for decision has been adopted above. The implementing Procedure, as specified at page 25 of the Notice, places "the burden of proof" on the Union. The Union has stated that the burden does not require "(a)bsolute precision" on its part.

With this as background, the difficulty of defining how to evaluate the accuracy of the calculations remains. The difficulty lies not in defining generally what must be decided, but in defining how that general definition can be applied to this record. Broadly speaking, to assess the accuracy of the calculations, three points should be addressed: (1) isolate the specific item or class of items of expenditure in issue; (2) contrast the positions of the challengers and of the Union; and (3) evaluate the propriety of the specific item or class of items of expenditure in light of the Browne categories.

Applying this general definition of the elements determining the accuracy of the Union's calculations is difficult here since the Procedure requires no specificity on the part of challengers and since no challengers have appeared to advocate their position. As a result, there has been no honing of the issues, and applying the first and second elements has been rendered difficult.

2/ Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, et. al. v. Hudson, 275 U.S. 292, 121 LRRM 2793, 2800 (1986).

3/ Browne et. al. and Johnson et. al., Dec. No. 18408-G; 19545-G (WERC, 4/87) at 92, footnote 72/.

4/ Ibid., at 50.

It is unpersuasive to conclude that the lack of specificity requires arbitral review of each step of the process by which the total expenditures were audited and then broken down into chargeable and non-chargeable components. Bowman estimated that the data reflected in the International's summation of its calculation of these components (Exhibit 28) required the expenditure of one full-time employe work year of time. An arbitral attempt to reconstruct and review each step of that process would be wasteful and futile.

The propriety of the breakdown of those figures into chargeable and non-chargeable components has, however, been delegated by the Court to the arbitration process. An essential part of that process is its quasi-adversarial nature, which minimizes the possibility that an arbitrator will act as an advocate, by structuring the decision-making process as closely as possible to the selection between positions advocated by interested and adverse parties. To meaningfully apply the general elements necessary to the review of the calculations, it is necessary to accommodate the absence of the challengers, without a futile attempt to review each step of the process by which the calculations were generated.

This accomodation will be effected here by reviewing the evidence by which the International, Council 48 and the Locals documented the methodology of their calculations. Each presented its own methodology, bringing in what each deemed sufficient specific documentation. Accordingly, the focus here will be on that methodology to determine if, as applied, it stands without rebuttal. If so, then the expenditures accounted for by the documentation of that methodology will be treated as chargeable. If not, those expenditures will be treated as non-chargeable. This accommodates the unspecified challenges of the challengers by presuming their objection to the Union's methodology at each level, without requiring me to act as their advocate by presuming a specific challenge to each and every item of Union expenditure, whether documented or not. It is now necessary to apply these general considerations to the cases litigated by each level of the Union.

The Accuracy Of The International's Calculation

The contrast between the International's method of reporting the basis of its calculation and that of Council 48 and the Locals is apparent on the face of the Notice. Page 3 of the Notice states that the International's calculation is based on audited departmental expenses from calendar year 1986. The more conclusory approach of the International is apparent, but can not be questioned here, since the Commission has approved the Notice. The discussion here must focus on the methodology employed by the International to generate the figures summarily listed on the Notice.

The International, prior to its departmental analysis, separately scheduled and individually analyzed all contributions and participations, presuming those expenditures are non-chargeable unless "the nature of the organization to whom the money is given is such that its activities are chargeable under the Browne criteria." The result of this process is listed at Schedules M and Q. Schedule M reflects \$1,708,106 of total expenses, \$296,259 of which was chargeable. Schedules M-1 and M-2 detail the chargeable aspects of this category by listing the organizations which were paid "Chargeable Contributions" (Schedule M-1), or "Chargeable Participations" (Schedule M-2). The organizations run from the "Economic Policy Institute", which received \$100,000 in chargeable contributions, to "Trade Typographers - Emp. Assist. Society", which received \$33 through a chargeable participation. Schedule Q reflects "Other Miscellaneous Expenses", totalling \$42,448, attributable to this category. The chargeable totals of these two schedules, when combined, yield the "Total Chargeable Expense" for the "Inter-Union Affiliations Dept." at Page 3 of the Notice.

The International's documentation of this category meets the bare minimum of what I view as necessary to establish the chargeability of the expenses. Other than a general reference to the Browne criteria, the International has not specified which chargeable category established in Browne would cover these expenses. Paragraphs (p) and (q) of the chargeable categories and Paragraphs (f) and (g) of the non-chargeable categories created in that decision establish that the support of other labor organizations or the funding of entities which assist in a lobbying effort may, based on the activity at issue, be chargeable if related to the representational interest. Whether the particular expenses in fact fall within these, or other, chargeable categories is a difficult issue. I am, however, satisfied that the chargeability of the expenses stands without rebuttal. The specification of the organizations involved makes the calculation sufficiently transparent that a challenger could have voiced specific objection to a particular contribution or participation. None have chosen to do so.

The absence of a specific challenge makes it unpersuasive to hold the paucity of supportive data against the International. The Procedure directs an arbitrator to consider "the record and the argument presented". To require further documentation in the absence of a particular challenge would make the arbitrator's function that of advocate for the challengers, and would initiate a fruitless attempt to review the unwieldy mass of supportive data underlying the schedules. Such an attempt would not be fruitless if a reason existed to

question that data. In the absence of a specific challenge, no such reason exists, unless it is assumed the arbitrator must serve as the challengers' advocate. The International's method for recording these expenses stands without rebuttal, and the expenses must be considered chargeable.

The International exemplified its departmental analysis by focusing on the expenses of three of its Operating Departments: Political Action & People; Field Services; and Public Affairs.

The International noted that the Political Action & People Department had an audited total expense for the year in question here of \$5,002,422. Of that total, the International removed \$866,686 of non-chargeable Contributions and Participations to leave a total of \$4,135,736 requiring breakdown into chargeable and non-chargeable components. The only expenses recognized by the International as chargeable in this department were those attributable to the lobbying efforts of field staff. The cost of those efforts is detailed at Schedule B-3A. The International, in that schedule, details twelve staff members involved in such lobbying, and generates a "% Of Time Lobbying" by dividing the "Total Lobbying Days" by the "Total Work Days". This percentage is then multiplied against the total cost of each staff member's salary, benefits and travel. The total of the twelve members' chargeable lobbying expense was \$183,553.24. This amount was reduced by \$145,470 of indirect costs attributed by the International to this department to yield a total chargeable expense of \$38,083.

Neither Schedule B3-A nor any of the attached schedules detailing the Political Action and People Department specifies any of the lobbying activities undertaken by the International's staff. Paragraph (p) of the chargeable and Paragraph (f) of the non-chargeable categories created in Browne establish that lobbying on legislation or regulations "affecting wages, hours and working conditions" are chargeable while lobbying which is "not related to the representational interest in the collective bargaining process and contract administration" or "not related generally to wages, hours and conditions of employment" is not.

The International's failure to specify any of the lobbying activities performed by its staff makes it impossible to conclude the expenses stand without rebuttal. Unlike the specification of the organizations receiving contributions or participations, neither a challenger nor an arbitrator can know anything about the particular lobbying expenses involved here by reviewing the schedules, which merely recite the total figures involved in the categories noted above. Nor does this conclusion risk a fruitless search through an unwieldy mass of supportive data. If it would be too cumbersome to list the total items of legislation or regulation involved, then the work of any lobbyist(s) which would typify the workload of the class of lobbyists could be supplied. Without the transparency of such a specification of the work involved, the documentation merely puts the International's assertions into numerical form. To sustain this absence of specification would make the arbitral function that of advocate for the International. Since the International's method for reporting the breakdown of the expenses of this department into chargeable and non-chargeable components does not stand without rebuttal, none of the expenses can be considered chargeable.

The International reported the expenses of the Field Services Department by assuming they were chargeable unless proven otherwise. The audited total expenses of the Field Services Department was \$13,738,425. From that, the International subtracted \$15,000 of non-chargeable contributions, which left \$13,723,425 of expenses to be identified as chargeable or non-chargeable. On Schedules H-1 through H-5 the International detailed \$116,659 of non-chargeable expenses. Schedule H-3 specifies the non-chargeable activities of Field Staff members by name, specific activity and hours spent in the activity. For example, the schedule specifies that in the week ending September 27, 1986, Paul Gonzales spent one hour working on a Democratic Party fundraiser. Schedule H-5 states, without explanation, that the International incurred \$111,960.31 of non-chargeable expense on the "Canal Zone Panama Area Office".

Bloomfield stated the function of the Field Services Department thus:

(The department) does provide services to the field to all of our affiliates, our members, the workers out in the field and this is on a lot of different levels. It can be services in fact of organizing new members, organizing internally within locals where we already have representation. It also serves as the conduit for obtaining all of the other services from the other departments for those members. 5/

This description, if general, does support the International's assertion that the department is devoted to chargeable activities.

The International's method of reporting the non-chargeable expenses of this department stands without rebuttal. The specification of the non-chargeable expenses details a series of activities falling within Paragraphs (a) and (b) of the non-chargeable categories created in Browne. In the absence of a specific challenge, it is impossible to hold the paucity of supporting documentation against the International. The documentation of the department's expenses is sufficiently transparent to permit a challenger to see the type of expenditures deemed non-chargeable, and to provide a basis for further inquiry. Presumably, if further documentation of the chargeable activities was desired, it could start with a request of the records for the weeks in which the employees listed on Schedule H-3 performed non-chargeable activities.

The Public Affairs Department is the final Operating Department used by the International to illustrate its methodology. Bowman and Bloomfield testified that the department consists of two divisions, one devoted to public relations and the other devoted to issuing two publications: The Public Employee magazine and the Leader newsletter. The former publication consisted of eight issues in the period at issue here, while the latter consisted of forty-five issues. The Public Employee is sent to all employees represented by the Union and the Leader newsletter is sent only to Union members. The entire department incurred \$5,118,370 in audited total expenses in 1986, \$3,033,320 of which the International attributed to the publications division. The International determined that \$413,612 of the Public Affairs Department's total expenses was non-chargeable, and that \$371,366 of that non-chargeable component was attributable to the publications division.

The International determined the non-chargeable expenses of the publications division by allocating its total publication and distribution costs to each publication. The total for the magazine was then multiplied by 11.6%, while the total for the newsletter was multiplied by 13.6% to yield the total non-chargeable portion of the costs of each publication. The International generated these percentages by totalling the "Non-Chargeable Inches" and the "Total Column Inches" for each issue of each publication, and by then dividing the annual total "Non-Chargeable Inches" by the annual "Total Column Inches". The determination whether an issue contained chargeable or non-chargeable expenses was made by the General Counsel's office. The balance of the non-chargeable expenses for the Public Affairs department is detailed on Schedules D-7 through D-9, which state direct costs and an allocation of indirect costs for staff time spent on non-chargeable activities, as well as a statement of the direct costs of non-chargeable productions such as mailings or radio spots.

The International's documentation of the calculations underlying the determination of the non-chargeable component of the expenses of the Public Affairs Department is sufficiently specific to stand without rebuttal. The International did not supply any issues of the Public Employee or the Leader, but detailed its calculation of the total column inches and non-chargeable inches for each issue. The schedules detailing this calculation state a basis from which any challenger could have identified a particular article or statement falling outside the scope of Paragraph (u) of the chargeable categories created in Browne. Beyond this, the International separately stated, by name and activity, the time spent by non-publications staff in non-chargeable activities. In addition, the International separately listed, by activity and expense, those costs relating to a series of public relations activities. To require further documentation would turn the arbitral function into an advocacy function. To conclude the International should have supplied the publications for my independent review assumes that I should read each publication, determine what aspects of the publication I would challenge if I was a challenger, and then rule on the propriety of my own "challenge." While the arbitral role can incorporate certain aspects of advocacy, to assume the role sketched above eliminates anything but an advocacy role.

This completes the examination of the departments used by the International to demonstrate the methodology for determining the chargeable/non-chargeable components of its Operating Departments' expenditures. The considerations stated above apply, with limited exceptions, to the remaining Operating Departments.

The limited exceptions concern the expenditures of the International Affairs and the Convention/50th Anniversary Departments. The former department is less a department than an accounting category. Since none of its expenses have been treated as chargeable, the "department" requires no discussion here.

The Convention/50th Anniversary Department presents more troublesome points, the non-Convention aspect of which must be dealt with here. The International has separated the ongoing expenditures of the Convention division from the one time expenditures of the 50th Anniversary. The latter expenditures were treated as an Operating Department. Schedule L details that those expenses were deemed chargeable with the exception of expenses dealing with a members-only scholarship program.

The documentation of the 50th Anniversary celebration parallels the documentation of departmental expenses affirmed above, and must also be affirmed. Affirming this aspect of the International's case requires, however, some comment. The International's calculation of chargeable and non-chargeable

departmental expenses represents a snapshot view of that aspect of the International's operations. The adequacy of some of those views has been affirmed because it would be unpersuasive to hold the lack of detail in the view against the International where requiring further detail in the presence of an unspecified challenge would risk a fruitless inquiry into an unwieldy amount of underlying data. Where the International's snapshot view is sufficiently detailed to permit the conclusion that the accuracy of the view stands without rebuttal, that view has been affirmed. Regarding this department, the underlying data could consist of as little as the agenda for the celebration of June 1986. Such an agenda could have provided both the challengers and the arbitrator the opportunity to evaluate the accuracy of the International's calculation in light of Paragraphs (r) and (s) of the chargeable, and Paragraph (h) of the non-chargeable categories of Browne. However, Schedule L is the only evidence presented here, and in the absence of any rebuttal evidence, the International's calculation must be affirmed. The comment added here is to underscore that the International's documentation of this department meets the bare minimum necessary to establish the validity of the expenses.

The final aspect of the International's calculation of its Operating Departments' non-chargeable expenses is its calculation of overhead costs to be attributed to non-chargeable activities. The International calculated the non-chargeable aspect of those costs by multiplying the total overhead costs to be allocated to those Operating Departments which have such costs by a percentage generated for each such Operating Department. The International generated the percentage by dividing a department's total headquarters staff salary costs by the International's total headquarters staff salary costs. Having allocated the total overhead expenses of an Operating Department, the International calculated the chargeable component of that total by multiplying the total by a percentage generated by dividing the non-chargeable component of the department's salary costs by its total salary costs.

No evidence or argument, other than the International's, has been submitted, and the methodology employed by the International stands without rebuttal. The only Operating Department where the application of this methodology in fact could be considered in issue would be the Political Action & People Department, which I have determined can include no chargeable expenses. However, since no chargeable component of these indirect costs is apparent, no further discussion of this point is necessary. 6/

The balance of the International's evidence concerned the expenses of other than Operating Departments. The first to be viewed here is the Public Policy Department, the expenditures for which are detailed on Schedules O and O-1. Those schedules note that with the exception of \$5,500 of non-chargeable contributions attributed to the department, all of the department's expenses have been treated by the International as chargeable. The only other evidence submitted regarding this department was Bloomfield's testimony. She described the department thus:

The Public Policy Department again is really a think tank of expertise and the actual assignments fluctuate with the times. There are economists that are full time staff that are also able to give us some insight into bargaining, but there are also experts in the health care field, experts in consumer advocacy . . .
7/

I can find no basis in the chargeable categories of Browne which would make time spent in consumer advocacy issues chargeable. The Commission, in determining the chargeable/non-chargeable nature of the Browne categories, focused on the "representational interest" of unions, and articulated that interest thus:

We deem that a union, which is the collective bargaining representative of employees in a collective bargaining unit, is pursuing its representative interest by expending sums of money, either directly,

6/ Bowman testified that the \$145,470 figure listed on Schedule B-1 carried forward only "the non-chargeable part . . . and it's not the total allocation of expenses" (Tr. at 131). It would, however, seem to be the total allocation, which has been considered entirely non-chargeable, in light of the International's brief, and when Schedule B-1 is compared to comparable schedules such as C-1 and F-1. Each schedule carries forward the total "Amount" to be allocated from Schedule R. Unlike Schedules C-1 and F-1, however, Schedule B-1 leaves this total figure intact without reducing it by the departmental non-chargeable percentage summarized in the text above. Presumably, this reflects the large proportion of non-chargeable expenses attributed by the International to this department.

7/ Tr. at 100.

or by payments to others, for activities . . . relating to improving the wages, hours and working conditions of the employes in the bargaining unit involved, as well as the wages, hours and working conditions of other employes represented by said union and its affiliates . . . 8/

Consumer advocacy issues would not appear to fall within this general definition. Thus, the International's evidence on this department poses the difficulty of how to treat the expenses of a department, known to engage in non-chargeable activities, which has reported no non-chargeable expenses.

Because the International's documentation of the expenses of the Public Policy Department is internally inconsistent, it does not stand without rebuttal. Schedules O and O-1 simply state the expenses of the department, without any specification of what activities were supported by those expenses. The lack of detail in the supportive data in this instance must be held against the International, for there is no persuasive factual basis in the record to attempt an apportionment of those expenses. Such an attempt would constitute advocacy for the International.

Similar considerations govern the chargeability of the category listed on Schedule A as "Executive Board, Judicial Panel, General Operating, Building Services & Meeting/Travel". This category subsumes a number of departments separately listed at Page 3 of the Notice. Specifically, the category appears to include the Executive Board, Judicial Panel and a portion of the Finance & General Operating Department from the Notice. 9/ Schedule A lists \$3,873,767 of total expenses for this category, all of which the International considered chargeable.

This "department" again poses the problem of a category with known non-chargeable components which states no non-chargeable expenses. The existence of non-chargeable expenses can be inferred from the presence of the Executive Board in this category. Bloomfield noted the Executive Board sets policy for the Union. It is apparent on the face of the International's exhibits that the policy set for the International over the period of time at issue here effected non-chargeable expenditures. It follows that some part of the Executive Board's time must have been spent on non-chargeable matters. It can be noted that the Notice states a separate entry for the Executive Board and the Judicial Panel. However, the record is silent on why these separate entries were listed collectively on Schedule A and grouped with certain expenses of the Finance & General Operating Department. In addition, there are no supporting schedules at all for this group of expenses, and thus no way to know what specific services the expenses in this category effected. The International grouped these expenses in their justification of the chargeable component of those expenses, and the record offers no persuasive factual basis to "ungroup" them. Thus, the expenses for this category do not stand without rebuttal and must be considered non-chargeable.

The final non-Operating Department requiring discussion here is the "Inter-Union Affiliations Dept." listed at Page 3 of the Notice, and detailed in Schedule N through N-2 of the International's supporting documentation. Those schedules note that \$2,898,956 of the expenses of that category are chargeable, but the International has, in this case, treated all of those expenses as non-chargeable, based on its reading of the Weisberger award. The chargeable expenses noted on Page 3 of the Notice for this department have been affirmed above in discussing chargeable participations and contributions listed on Schedules M and Q. The International's reading of the Weisberger award, and its treatment of the affiliation fees of Schedule N as non-chargeable, can not be faulted.

The final area to be examined is the International's Administrative Departments, which are detailed at Schedules P through P-6. The International generated the non-chargeable component of the six Administrative Departments by multiplying the Total Expenses for each department by a figure, touched upon above, which will be referred to below as the Multiplier. The Multiplier used by the International is 15.4%, and the method by which the International generated it has been set forth above. It can be noted that the International, to generate the fraction which yielded the multiplier, included "Affiliation Fees Dept." expenses in its calculation of the total expenses of the Administrative Departments. These expenses are non-chargeable except for the

8/ Dec. No. 18408 at 23.

9/ Schedule A attributes \$3,873,767 to the category "Executive Board, Judicial Panel, General Operating, Building Services & Meeting/Travel". Subtracting the \$789,333 attributed by the Notice to the Executive Board and the \$435,255 attributed by the Notice to the Judicial Panel leaves a total expense for the Schedule A category of \$2,649,179. This total, added to the amount of total expenses attributed by Schedule A to the "Business Office" yields the \$6,497,769 total for the "Finance & General Operating" Department listed in the Notice.

chargeable contributions, participations and miscellaneous expenses discussed above and detailed in Schedules M and Q. Bowman noted that the inclusion of the Affiliation Fees Department expenses inflated the denominator of the fraction which yielded the Multiplier, thus providing an "over allocation" 10/ of non-chargeable expenses.

The validity of this approach has, in part, been discussed. Specifically, the accuracy of the numerator of the fraction which yielded the 15.4% has been discussed by addressing the validity of the calculation of the non-chargeable expenses of the Operating Departments. The \$38,083 of Political Action & People expense wrongly considered chargeable by the International changes the total non-chargeable expense of the Operating Departments to \$5,558,030. This changes the 15.4% Multiplier calculated by the International to 15.5%.

The more significant question posed here, however, is not on the components of the Multiplier, but the propriety of the International's use of the Multiplier to account for the non-chargeable expenses of the six Administrative Departments. That the International separately documents its Operating and Administrative Departments raises both accounting and arbitration issues. I am not an accountant, and in the absence of persuasive argument to the contrary, can see no reason why the International's separate accounting for its Operating and its Administrative Departments should be found, standing alone, to be improper. Viewed as an arbitration issue, however, the distinction poses significant issues. The significance of those issues flows from the fact that the International's use of the Multiplier takes the place of any supporting documentation for the Administrative Departments. In the place of the type of documentation offered for the Operating Departments, then, the International asserts the validity of its assumption that the Administrative Departments reflect the overall non-chargeable percentage of the Operating Departments. The validity of this assumption must stand without rebuttal to be affirmed here. To assess the validity of the assumption, it is necessary to isolate the International's rationale for the assumption and to view the persuasiveness of the rationale in light of the evidence.

Bowman described the reasoning underlying the assumption thus:

(E)ssentially we are saying the President's Office, the Secretary-Treasurer's office, the Legal Counsel has expenses that should be allocated in the same ratio as what these people that are actually down doing the business. 11/

In its brief, the International stated the reasoning underlying the assumption thus:

Each of these departments relates to the operation of the International Union as a whole. For this reason, for purposes of the calculation, they are treated as being chargeable in the same percentage as are the operating departments to which they relate.

The validity of this rationale for the assumption must now be assessed.

The assumption's validity must be assessed on the record developed by the International. It should be stressed that the reflection, by the Administrative Departments, of the non-chargeable ratio of the Operating Departments, need not be perfect to be valid. Because that ratio is used in place of specific documentation of the chargeable or non-chargeable activities, however, there must be some showing that the ratio can reasonably be expected to afford a sufficiently accurate portrayal of the non-chargeable aspects of the Administrative Departments that specific documentation for each department is unnecessary.

The validity of the assumption as applied to the Secretary-Treasurer's Office, Business Office and Personnel Department stands without rebuttal. Each of the Operating Departments would have underlying funding, business and personnel needs, and there is no apparent reason why these Administrative Departments would be more likely to engage in non-chargeable activities than the Operating Departments they service.

The validity of the assumption as applied to the Convention, Legal Services and President's Office raises more troublesome points, because none of them perform the bedrock administrative functions touched upon above. This fact, coupled with difficulties in the rationale articulated by the International, make it unpersuasive to affirm the application of the Multiplier to these departments.

10/ Tr. at 130.

11/ Tr. at 129.

The International's application of its rationale to the Convention Department is internally inconsistent and cannot stand without rebuttal. The International treated the 50th Anniversary Celebration, unlike the Convention Department, as an Operating Department. However, the International noted, in its brief, that: "Most of the expenditures (of the 50th Anniversary Celebration) were incurred in connection with the AFSCME International Convention held during June 1986." The difference between these functions can not persuasively be accounted for by the assertion that the Convention Department relates to the other departments while the 50th Anniversary Celebration did not, or by the assertion that the 50th Anniversary Celebration constitutes a direct business service while the Convention does not. No apparent reason exists to distinguish between these two functions, yet the International specified the non-chargeable aspect of the 50th Anniversary Celebration, and summarily applied the Multiplier to the Convention Department.

The Legal Services Department and the President's Office pose similar difficulties rooted in a flaw in the International's rationale. Paragraphs (h) and (y) of the chargeable, and Paragraphs (e) and (m) of the non-chargeable Browne categories govern the chargeability of the expenses of these departments. Each category focuses on whether the services provided by these two departments can be viewed as "relating to the representational interest." The International ignores the content of the services provided by the departments and narrowly focuses on how these departments theoretically relate to other departments. This does not address the Browne categories at all. The theoretical rationale has enough validity as applied to the Business, Personnel and Secretary-Treasurer's Offices to stand without rebuttal, since any department, to function at all, must be supplied, staffed and funded.

A review of the record will not, however, support the application of this theoretical justification to the Legal Services Department. Unlike the Personnel, Business and Secretary-Treasurer's Office, it cannot be inferred, based on Bloomfield's testimony describing the missions of each department, that each Operating Department requires the function provided by Legal Services. This makes dubious any inference that departmental demand for legal services is in any sense proportional. To exemplify the significance of this point, if ninety percent of the demand for legal services is generated by the activities of the Political Action & People Department, then the Multiplier grossly overstates the chargeable component of those services. If, however, ninety percent of the demand for legal services is generated by the activities of the Field Services Department, then the Multiplier grossly understates the chargeable component of those services. Beyond this, it is not apparent that non-Operating Departments such as Public Policy, the President's Office, Convention or the Executive Board do not use Legal Services. The Multiplier does not, however, address such expenses.

Nor will the record support the application of the International's theoretical justification to the President's Office. That office, according to Bloomfield, was responsible for the direction of all the International's departments, and for providing a spokesperson for the International. It can be assumed that the President's Office, like the Business, Personnel and Secretary-Treasurer's Offices, performs a function used by all departments. The nature of that function is, however, quite different. Specifically, the President's Office directs the departments and serves as their spokesperson. Both functions presume the exercise of discretion over which departments require the greatest expenditure, and which issues will be spoken to. The International's analysis ignores this element of discretion, and asserts that the same Multiplier which can account for the operation of departments without such discretion can account for the President's Office. This assumption may be valid in fact, if the President's Office allocates its time among the Operating Departments in such a fashion that the non-chargeable ratio of the expenses of those departments accurately reflects the activities of the President's Office. There is no proof on this point, however, and the absence of such proof must be held against the International.

In sum, the Multiplier used by the International can not be dismissed as an accounting measure. Its validity as an evidentiary measure in meeting the International's burden of proof is, however, more difficult because the Multiplier is used by the International in place of the specific documentation affirmed above regarding the expenses of the Operating Departments. The justification offered by the International for the Multiplier is that the Administrative Departments "relate to the operation of the International Union as a whole." This justification has sufficient meaning applied to the Business, Personnel and Secretary-Treasurer's Offices to stand without rebuttal. The justification does not, however, apply to the remaining three Administrative Departments without further proof indicating that the Multiplier in fact serves to afford a view of the non-chargeable expenses of those departments which is sufficiently accurate that specific documentation is unnecessary. Such proof would not necessarily have required further data. Persuasive testimony from someone knowledgeable with the operations and the accounting of Legal Services and President's Office indicating why the Multiplier can be expected to yield a reasonably accurate view of the non-chargeable activities of those departments would have sufficed. In the absence of such testimony, the chargeable/non-chargeable expenses of those departments require the type of documentation affirmed above for the Operating Departments

to stand without rebuttal.

Since the use of the Multiplier, as amended by the change in the non-chargeable expenses of the Operating Departments discussed above, for the Business, Personnel and Secretary-Treasurer's Offices stands without rebuttal, the non-chargeable expenses of those departments are:

Business Office	\$3,848,590 x .155 = \$596,531
Personnel	\$ 212,718 x .155 = \$ 32,971
Secretary-Treasurer	\$ 596,778 x .155 = \$ 92,501

Since the use of the Multiplier does not stand without rebuttal for Convention expenses, Legal Services Department and President's Office, and since there is no supporting documentation for the chargeable/non-chargeable component of those departments, none of their expenses can be considered chargeable. Because the distinction between Operating and Administrative Departments can not be considered invalid standing alone, the expenses of the latter three Administrative Departments have been left in the calculation of the total expenses of the Administrative Departments. This ultimately affects the calculation of the denominator of the fraction which yielded the Multiplier. Arguably, rejecting the validity of the Multiplier as applied to Convention, Legal Services and President's Office expenses could be remedied by treating those expenses as Operating Department expenses, thus impacting both the numerator and the denominator of the fraction which yields the Multiplier. The conclusion that the International has not proven the validity of the Multiplier as applied to those departments does not, however, dictate the conclusion that it cannot do so. In the absence of proof that the Multiplier cannot be proven to afford a reasonably accurate view of the non-chargeable expenses of those departments, the determination whether a given department is Operating or Administrative must be considered the International's, not the Arbitrator's.

The Accuracy of Council 48's Calculation

That Council 48 has specified its chargeable/non-chargeable expenses in greater detail than the International is as apparent in the evidence submitted at hearing as on the face of the Notice. The greater detail, and the quality of the evidence submitted by Council 48 pose fewer problems than were posed by the International's evidence.

Initially, it can be noted that Parr's accounting system has reduced the twenty-five chargeable and thirteen non-chargeable categories established in Browne to ten chargeable categories for time spent; nine chargeable categories for money spent; ten non-chargeable categories for time spent and ten non-chargeable categories for money spent. This categorization is stated and explained on the face of the notice approved by the Commission, and cannot be considered at issue here.

The system designed by Parr to account for the expenditures of time by non-clerical Council 48 staff documents, on a bi-weekly basis, the specific activities of non-clerical staff, the time spent on each activity and the chargeable or non-chargeable category that activity has been assigned. Thus, for example, it can be seen that Parr spent two hours on January 2, 1986, at a "WAC Press Conf" which was assigned to non-chargeable category R 7. Similar entries are stated on Staff Representative Molter's time records. For example, on February 1, 1986, Molter spent four hours at a "P.E.O.P.L.E.'s Bowling Tournament" assigned to non-chargeable category R 10, and, on the preceding day, four hours at a negotiating committee meeting for Local 133 which was assigned to chargeable category NR 1. These examples typify a type of documentation which states a fully transparent recording of the activities of Council 48 non-clerical staff. Parr testified that Molter's records were typical of, if neater than, those maintained by all staff. The time-records of the remaining staff members would have only added further bulk to the record, and those time-records afford an accounting of the time spent by those staff members which stands without rebuttal.

That Council 48 did not separately account for the time of its clerical staff, but calculated the non-chargeable component of their activities as a function of the 999 code also stands without rebuttal. Parr explained the reasoning underlying this assumption thus:

Well, the clerical staff do work based on what the staff does. In other words, the work flows from the staff. The typing is done based on what the staff is doing. So, it was -- a decision was made that said that basically the clerical staff should mirror what the professional staff was doing since they got their work assignments from them. 12/

The validity of this assumption stands without rebuttal. Presumably, the clerical staff is utilized by all of the staff of Council 48, and does not

exercise great discretion over which assigned tasks will be performed. Thus, no difficulties of the type posed by the International's Multiplier are posed here. There is, in the absence of rebuttal evidence, no reason to believe the clerical staff of Council 48 spends any more time on non-chargeable activities than does the non-clerical staff.

The system developed by Parr to record the money spent by Council 48 is as fully transparent as is the system which records expenditures of time. Parr fills out, for each bill, a form which states the account code and the chargeable/non-chargeable category code for each expenditure. The system's validity stands without rebuttal.

Council 48, like the International, bases the chargeable/non-chargeable calculation of its publication expenses on the percentage of its chargeable content. Like the International, Council 48 stated its analysis of the non-chargeable content, in inches, of each issue published. Unlike the International, Council 48 is one of several entities which participate in producing the publication involved, and unlike the International, Council 48 submitted copies of the publication. The submission of the newspapers does not add any issues not addressed above, and this component of Council 48's calculation stands without rebuttal.

The 999 code has been summarized above, and is used by Council 48 to account for any expenditure, including overhead expenses, which can not directly be assigned as chargeable or non-chargeable. Parr testified that the computer program determines the non-chargeable component of this category by applying the chargeable percentage of staff time, for the period in question, to the 999 code. This method stands without rebuttal. That the 999 code is not explained on the Notice poses no issue here, since the Commission has approved it.

In sum, Council 48 has met its burden of proof regarding the calculation of chargeable/non-chargeable expenses.

The Accuracy Of The Locals' Calculations

Although the validity of the Weisberger award is doubtful in light of the Commission decision cited at footnote 3/, her reasoning is persuasive, and has been addressed by the Union. More specifically, Council 48 has responded to the award by considering Local payments to the Milwaukee County Labor Council and to the Wisconsin AFL-CIO non-chargeable, and by calculating a chargeable percentage for each Local.

The methodology used by Parr to assign the expenses of each Local to a chargeable or non-chargeable category is based on the Local's operating statements. Because the Locals do not employ salaried staff, all expenditures are assigned to an MR or MNR category. Each operating statement submitted into the record separately lists the expenses of the Local under the heading "Disbursements", "Expen(s)es", or "Expenditures". The entries under these general headings are specific, ranging from affiliation fees to the Wisconsin AFL-CIO to beer, snacks and door prizes for Local meetings. Parr reviewed these entries to assign them to a chargeable/non-chargeable category, and his handwritten notation of the category appears next to many of the entries. His calculation of the chargeable percentage for each Local is made on a work sheet which states an annual total based on the data from the Local's operating statements. The statements submitted in the record and the statement used by Parr in testimony to explain his methodology were offered as typical of the process for the Locals.

The operating statements submitted in the record express the expenses for the Locals in a sufficiently transparent fashion to stand without rebuttal. Parr's assignment of those expenses to a chargeable/non-chargeable category appears sound, and also stands without rebuttal. It can be noted that those individual disbursements which he has specifically assigned to an MR or MNR code on the operating statement represent the best form of documentation, since in the absence of these notations, the aggregate year-end figures must be broken down without this guidance. However, the absence of such specific documentation for each operating statement cannot, standing alone, serve as a basis for disallowing the chargeability of a given disbursement.

In sum, the Locals have met their burden of proof to establish the accuracy of the individual calculations of their chargeable/non-chargeable expenses.

Conclusion

The issue stated by the Union requires a determination of the correct chargeable percentage for each level of the Union's calculation. The only component of that percentage which has been modified in this decision is the International's. Changing this component alters the calculations at Page 3 of the Notice and at Pages 20-24, which reflect the first and fourth issues posed in the Union's brief.

The changes to the International's chargeable percentage can be

summarized, using Schedule A as the basis for the summary, thus:

<u>Expense Category</u>	<u>Total Expense</u>	<u>Non Chargeable Expense</u>	<u>Chargeable Expense</u>
Political Action & People	\$ 4,135,736	\$ 4,135,736	\$ -0-
Legislative	701,003	19,210	681,793
Public Affairs	5,117,870	413,612	4,704,258
International Relations	329,168	329,168	-0-
Education	1,381,810	5,690	1,376,120
Women's Rights/Comm. Action	744,920	17,605	727,315
Field Services	13,723,425	116,659	13,606,766
Assistance to Affiliates	1,487,538	424,000	1,063,538
Retiree	388,565	39,832	348,733
Research	1,483,632	1,606	1,482,026
50th Anniversary	809,081	54,912	754,169
SUB-TOTAL	<u>\$ 30,302,748</u>	<u>\$ 5,558,030</u>	<u>\$ 24,744,718</u>

Contributions & Participations	1,708,106	1,411,847	296,259
Affil. Fees & Payment Convention	4,214,890	4,214,890	-0-
Legal Services	1,661,112	1,661,112	-0-
President's Office	2,173,745	2,173,745	-0-
Secretary-Treasurer's Office	1,481,393	1,481,393	-0-
Business Office	596,778	92,501	504,277
Personnel	3,848,590	596,531	3,252,059
Public Policy	212,718	32,971	179,747
Affil. Dept. Misc. Exp.	784,766	784,766	-0-
Executive Board, Judicial Panel, General Operating, Building Services & Meeting/Travel	42,448	-0-	42,448
	<u>3,873,767</u>	<u>3,873,767</u>	<u>-0-</u>
TOTAL International Expense	<u>\$50,901,061</u>	<u>\$21,881,553</u>	<u>\$29,019,508</u>

The correct percentage, using the method stated at Page 3 of the Notice is:

Total Chargeable Expense	29,019,508	=	57.01%
<u>Total International Expense</u>	<u>50,901,061</u>		

The correct total chargeable expense percentage for each Local, using Pages 20-24 of the Notice as the basis of the summary, is:

AFSCME Local 33

AFSCME	\$ 49,355	X	57.01%=	\$ 28,137
AFSCME Council 48	88,954	X	95.33%=	84,800
Local 33	49,727	X	68.28%=	33,953
TOTALS	<u>\$188,036</u>			<u>\$146,890</u>
Total Chargeable Expenses	=	\$146,890	=	78.12%
<u>Total Expenses</u>	=	<u>\$188,036</u>		

AFSCME Local 40

AFSCME	\$ 1,638	X	57.01%=	\$ 934
AFSCME Council 48	2,953	X	95.33%=	2,815
Local 40	2,461	X	42.10%=	1,036
TOTALS	<u>\$ 7,052</u>			<u>\$ 4,785</u>
Total Chargeable Expenses	=	\$4,785	=	67.85%
<u>Total Expenses</u>	=	<u>\$7,052</u>		

AFSCME Local 47

AFSCME	\$ 4,562	X	57.01%=	\$ 2,601
AFSCME Council 48	8,223	X	95.33%=	7,839
Local 47	5,664	X	75.12%=	4,255
TOTALS	<u>\$ 18,449</u>			<u>\$ 14,695</u>
Total Chargeable Expenses	=	\$14,695	=	79.65%
<u>Total Expenses</u>	=	<u>\$18,449</u>		

AFSCME Local 305

AFSCME	\$ 7,405	X	57.01%=	\$ 4,222
AFSCME Council 48	13,346	X	95.33%=	12,722
Local 305	4,201	X	57.57%=	2,315
TOTALS	<u>\$ 24,772</u>			<u>\$ 19,259</u>
Total Chargeable Expenses	=	\$19,259	=	77.75%
<u>Total Expenses</u>	=	<u>\$24,772</u>		

AFSCME Local 426

AFSCME	\$ 17,841	X	57.01%=	\$ 10,171
AFSCME Council 48	32,155	X	95.33%=	30,653
Local 426	20,672	X	43.72%=	9,037
TOTALS	<u>\$ 70,668</u>			<u>\$ 49,861</u>
Total Chargeable Expenses	=		\$49,861	= 70.56%
Total Expenses	=		<u>\$70,668</u>	

AFSCME Local 428

AFSCME	\$ 12,582	X	57.01%=	\$ 7,173
AFSCME Council 48	22,676	X	95.33%=	21,618
Local 428	9,898	X	59.69%=	5,908
TOTALS	<u>\$ 45,156</u>			<u>\$ 34,699</u>
Total Chargeable Expenses	=		\$34,699	= 76.84%
Total Expenses	=		<u>\$45,156</u>	

AFSCME Local 526

AFSCME	\$ 5,685	X	57.01%=	\$ 3,241
AFSCME Council 48	10,246	X	95.33%=	9,767
Local 526	4,837	X	65.58%=	3,172
TOTALS	<u>\$ 20,768</u>			<u>\$ 16,180</u>
Total Chargeable Expenses	=		\$16,180	= 77.91%
Total Expenses	=		<u>\$20,768</u>	

AFSCME Local 550

AFSCME	\$ 11,838	X	57.01%=	\$ 6,749
AFSCME Council 48	21,336	X	95.33%=	20,339
Local 550	9,975	X	71.01%=	7,085
TOTALS	<u>\$ 43,149</u>			<u>\$ 34,173</u>
Total Chargeable Expenses	=		\$34,173	= 79.20%
Total Expenses	=		<u>\$43,149</u>	

AFSCME Local 587

AFSCME	\$ 19,062	X	57.01%=	\$ 10,867
AFSCME Council 48	34,401	X	95.33%=	32,794
Local 587	18,915	X	75.24%=	14,232
TOTALS	<u>\$ 72,378</u>			<u>\$ 57,893</u>
Total Chargeable Expenses	=		\$57,893	= 79.99%
Total Expenses	=		<u>\$72,378</u>	

AFSCME Local 594

AFSCME	\$ 49,334	X	57.01%=	\$ 28,125
AFSCME Council 48	88,916	X	95.33%=	84,763
Local 594	61,324	X	58.27%=	35,732
TOTALS	<u>\$199,574</u>	X		<u>\$148,620</u>
Total Chargeable Expenses	=		\$148,620	= 74.47%
Total Expenses	=		<u>\$199,574</u>	

AFSCME Local 645

AFSCME	\$ 5,818	X	57.01%=	\$ 3,317
AFSCME Council 48	10,486	X	95.33%=	9,996
Local 645	7,299	X	66.04%=	4,820
TOTALS	<u>\$ 23,603</u>			<u>\$ 18,133</u>
Total Chargeable Expenses	=	\$18,133	=	76.82%
Total Expenses	=	<u>\$23,603</u>		

AFSCME Local 882

AFSCME	\$ 75,007	X	57.01%=	\$ 42,761
AFSCME Council 48	135,398	X	95.33%=	129,075
Local 882	78,193	X	81.97%=	64,093
TOTALS	<u>\$288,598</u>			<u>\$235,929</u>
Total Chargeable Expenses	=	\$235,929	=	81.75%
Total Expenses	=	<u>\$288,598</u>		

AFSCME Local 952

AFSCME	\$ 5,865	X	57.01%=	\$ 3,344
AFSCME Council 48	10,571	X	95.33%=	10,077
Local 952	6,819	X	58.75%=	4,006
TOTALS	<u>\$ 23,255</u>			<u>\$ 17,427</u>
Total Chargeable Expenses	=	\$17,427	=	74.94%
Total Expenses	=	<u>\$23,255</u>		

AFSCME Local 1053

AFSCME	\$ 28,208	X	57.01%=	\$ 16,081
AFSCME Council 48	50,840	X	95.33%=	48,466
Local 1053	30,027	X	77.10%=	23,151
TOTALS	<u>\$109,075</u>			<u>\$ 87,698</u>
Total Chargeable Expenses	=	\$87,698	=	80.40%
Total Expenses	=	<u>\$109,075</u>		

AFSCME Local 1055

AFSCME	\$ 97,135	X	57.01%=	\$ 55,377
AFSCME Council 48	178,898	X	95.33%=	170,545
Local 1055	178,645	X	78.42%=	140,092
TOTALS	<u>\$454,678</u>			<u>\$366,014</u>
Total Chargeable Expenses	=	\$366,014	=	80.50%
Total Expenses	=	<u>\$454,678</u>		

AFSCME Local 1091

AFSCME	\$ 11,403	X	57.01%=	\$ 6,501
AFSCME Council 48	20,585	X	95.33%=	19,624
Local 1091	13,402	X	73.59%=	9,863
TOTALS	<u>\$ 45,390</u>			<u>\$ 35,988</u>
Total Chargeable Expenses	=	\$35,988	=	79.29%
Total Expenses	=	<u>\$45,390</u>		

AFSCME Local 1238

AFSCME	\$ 8,905	X	57.01%=	\$ 5,077
AFSCME Council 48	16,050	X	95.33%=	15,301
Local 1238	9,842	X	67.40%=	6,633
TOTALS	<u>\$ 34,797</u>			<u>\$ 27,011</u>
Total Chargeable Expenses	=	\$27,011	=	77.62%
Total Expenses	=	<u>\$34,797</u>		

AFSCME Local 1616

AFSCME	\$ 11,339	X	57.01%=	\$ 6,464
AFSCME Council 48	20,437	X	95.33%=	19,482
Local 1616	11,630	X	58.00%=	6,745
TOTALS	<u>\$ 43,406</u>			<u>\$ 32,691</u>
Total Chargeable Expenses	=	\$32,691	=	75.31%
Total Expenses	=	<u>\$43,406</u>		

AFSCME Local 1654

AFSCME	\$ 58,476	X	57.01%=	\$ 33,337
AFSCME Council 48	105,392	X	95.33%=	100,470
Local 1654	46,916	X	66.29%=	31,102
TOTALS	<u>\$210,784</u>			<u>\$164,909</u>
Total Chargeable Expenses	=	\$164,909	=	78.24%
Total Expenses	=	<u>\$210,784</u>		

AFSCME Local 1656

AFSCME	\$ 9,744	X	57.01%=	\$ 5,555
AFSCME Council 48	17,562	X	95.33%=	16,741
Local 1656	21,174	X	74.97%=	15,875
TOTALS	<u>\$ 48,480</u>			<u>\$ 38,171</u>
Total Chargeable Expenses	=	\$38,171	=	78.74%
Total Expenses	=	<u>\$48,480</u>		

Before closing, further comment is necessary on why the expenses of departments which undoubtedly perform some chargeable services have been considered entirely non-chargeable. The reasons touched upon above focus on the International's more limited and conclusory documentation than that of Council 48 and the Locals. In the absence of an evidentiary basis to apportion the expenses, no apportionment can be made. The flaws pointed to, however, are not traceable to the International alone, and cannot necessarily be cured by adding more reams of data.

The flaws pointed to are, in no small part, a function of the process itself. The Court and the Commission have not detailed what a Hudson arbitration should consist of. Rather, challengers, unions and arbitrators have been turned loose to experiment on a case by case basis, with errors to be addressed after they have been made. These concluding remarks will address why the flaws focused on above must be addressed, at least in my opinion, to clarify the process.

Presumably, the Hudson Court believed the arbitration process offered something an independent audit could not. That something must focus less on any expertise possessed by an arbitrator than on the procedural safeguards built into the arbitration process itself. Grievance arbitration, for example, flows from mutual agreement, by which bargaining parties create the contractual "law" to be applied by a neutral. Disputes on the interpretation of that "law" or on its application to specific facts are submitted to the adversarial process. By its nature, a grievance procedure assures that interested parties focus on an individual dispute which, once processed to arbitration, has structured the decision-making process to a neutral's selection between defined positions advocated by interested and adverse parties. Distinctions with the fair share challenge process are apparent. While the potential of an adversary process exists, the governing procedure has been created unilaterally, and applied, in this case, ex parte. The area of dispute in this fair share

process is virtually undefined. To exemplify these distinctions, the present challenges, if viewed as grievances under a collective bargaining agreement with the Union as the employer, involve an unspecified allegation that the employer's course of conduct, over a one year period, has violated the collective bargaining agreement. What is lacking in this example is consensually defined "law" governing a defined dispute of positions advocated by interested parties. As absurd as the example may seem as a matter of grievance arbitration, it exists as a matter of the fair share challenge process.

The Court and the Commission will, eventually, state the law in this area. Until this is done, the arbitration process must, in my opinion, seek to provide the advocacy of interested and adverse parties which is present in traditional grievance arbitration, but lacking in this process. The conclusions reached above seek to assure sufficiently detailed documentation to permit a meaningful and specific challenge to be made, which can then be addressed by applying the three elements noted above. The records of Council 48 have been affirmed because they are sufficiently detailed that a challenger can object either to Parr's categorization of an expenditure or to the factual validity of the specific activities logged by Council 48 staff. The International's documentation, as noted above, is lacking in this regard.

If the courts or the Commission envision a Hudson arbitration not as an adversarial process, but as an ex parte, step by step arbitral review of the underlying documentation of the Union's records, the process would seem better suited to an audit than an arbitration. The conclusions stated above seek to create a basis on which an adversarial process can be created.

AWARD

The calculation produced in the notice for the fee period July 1, 1987, through June 30, 1988, as to chargeable and non-chargeable expenses by the International, Council 48 and the Locals is not correct.

The International's calculation of the percentage of its expenses chargeable to challenging non-member fair share fee payors of 75.308%, as stated at Page 3 of the Notice, is incorrect.

Council 48's calculation of the percentage of its expenses chargeable to challenging non-member fair share fee payors of 95.33%, as stated at Page 4 of the Notice, is correct.

Council 48's calculation of the percentage of Local expenses chargeable to challenging non-member fair share fee payors of 68.28% for Local 33; 42.10% for Local 40; 75.12% for Local 47; 57.57% for Local 305; 43.72% for Local 426; 59.69% for Local 428; 65.58% for Local 526; 71.01% for Local 550; 75.24% for Local 587; 58.27% for Local 594; 66.04% for Local 645; 81.97% for Local 882; 58.75% for Local 952; 77.10% for Local 1053; 78.42% for Local 1055; 73.59% for Local 1091; 67.40% for Local 1238; 58.00% for Local 1616; 66.29% for Local 1654; and 74.97% for Local 1656, as stated at Pages 13-19 of the Notice, is correct.

The correct total chargeable expense percentage for each Local is stated in the Conclusion section above.

Dated at Madison, Wisconsin, this 21st day of June, 1990.

By _____
Richard B. McLaughlin, Arbitrator