BEFORE THE ARBITRATOR

In the Matter of the Arbitration of	
CHALLENGES TO THE FAIR SHARE DETERMINATIONS FOR THE FEE PERIOD JULY 1, 1988 THROUGH JUNE 30, 1989	Case 14 No. 43508 A-4580
of	
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:
Lawton & Cates, S.C., Attorneys at Law, by Mr. John H. Bowers, 214 West Miffli
Mr. Larry P. Weinberg, General Counsel, and Mr. Robert D. Lenhard, Associate Ge
Municipal Employees, AFL-CIO.

ARBITRATION AWARD

This proceeding arises under a written procedure of AFSCME, set forth at pages 2 through 5 of Exhibit A attached. On January 4, 1990, John H. Bowers, Legal Counsel for Council 48, requested that the Wisconsin Employment Relations Commission appoint an arbitrator "to hear the arbitration of the Union's calculation of its fair share fees" for the period July 1, 1988 through June 30, 1989. On March 5, 1990 the Commission appointed Christopher Honeyman, a member of its staff, to serve as Arbitrator in this matter. A pre-hearing conference was conducted in Milwaukee, Wisconsin on April 11, 1990, and a hearing was conducted in Milwaukee on May 23, 1990. The pre-hearing conference was taped, and the hearing itself was transcribed.

On July 24, 1991, prior to the briefing date established at the hearing, Council 48 filed a request to reopen the record in light of the May 30, 1991 decision in Lehnert vs. Ferris Faculty Association 1/ by the United States Supreme Court. No objection was received to an inquiry of all interested parties as to whether the hearing should be reopened, and the motion was granted. Separately, Attorney Weinberg filed on July 27, 1991 a motion to reopen the record in light of Arbitrator Richard McLaughlin's Award covering the preceding years fair share fees, which had issued on June 21, 1991. That motion was similarly granted.

The Unions proceeded to review the record in the light of Lehnert and also of Arbitrator McLaughlin's Award, at some length. On August 8, 1991, Mr. H. F. Schweikart, one of the challengers in this matter, filed a motion requesting that the record be closed and the decision issued. The Unions were allowed an opportunity to reply, following which on September 18, 1991 I determined that under the unusual circumstances pertaining to a case of this kind, I was not prepared to find that the Unions had acted in so untimely a fashion that their requests to present additional evidence should now be denied. I also held, however, that this conclusion should not be read as pre-empting the right of any party to argue that the remedy should be modified as a result of the Unions' conduct of the case.

1/ 59 L.W. 4544.

A second day of hearing was held in Milwaukee on November 1, 1991. This hearing was also transcribed, and the record was held open to permit later filing of an audited recalculation of the percentages requested by the various Unions in the light of the Lehnert decision. The record was closed with the receipt of the Unions' brief on February 3, 1992.

ISSUES:

1. Is AFSCME's calculation of chargeable expenses to objecting and challenging non-member fair share fee payors of 63.604% as their pro rata share of the costs of collective bargaining, contract administration and activities concerning matters affecting wages, hours and employment, correct?

If such calculation is not correct, then what percentage of the expenses of AFSCME is properly chargeable to fair share fee payors?

2. Is District Council 48's calculation of chargeable expenses to objecting and challenging non-member fair share fee payors of 95.81 percent as their pro rata share of the cost of collective bargaining, contract administration and activities concerning matters affecting wages, hours and conditions of employment, correct?

If such calculation is not correct, then what percentage of the expenses of District Council 48 is properly chargeable to fair share fee payors?

3. Are D.C. 48's separate calculations of its affiliated locals' total expenditures 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?

If such calculations are not correct, then what percentage of the expenses of such D.C. 48's affiliated locals is properly chargeable to fair share fee payors?

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 affiliated locals involved in the proceeding for the time period November 1, 1988 through October 31, 1989, 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?

If the calculation is not correct, then what percentage is correct?

BACKGROUND:

This case arises as one more stage in a complex series of iterations of the underlying question of how much money a union may justifiably exact as a service fee from non-members. The constitutional issues posed by this class of cases are numerous and complex - so much so that few types of proceeding in labor relations have progressed at so stately a pace overall. 2/ One consequence is that most if not all of the factual background and reasoning incorporated in Arbitrator Richard McLaughlin's June 21, 1991 Award in the preceding case to this one is fully relevant to this proceeding. The background can therefore most economically be incorporated by reference to that Award, and it is therefore incorporated herein as Exhibit A.

Beyond the discussion of background and procedure laid out by Arbitrator McLaughlin, two developments are relevant. The first is the issuance of Arbitrator McLaughlin's Award itself, because that caused the Unions in the present proceeding to realize that a test applied by Arbitrator McLaughlin had been failed in certain respects in the present record. Their motion to augment the record was granted, and the discussion below will address the proof offered. The second development which caused some variance from Arbitrator McLaughlin's findings was the issuance of the Lehnert decision cited above. The consequence of that decision was that for purposes of the present proceeding, the Unions elected to recalculate their expenditures in such a way as to eliminate entirely any attempt to make chargeable to fair share payors any part of the expenses of those departments discussed in Lehnert. The Unions' motivation for doing so was largely practicality, since a full recalculation of the amounts chargeable under Lehnert would have been onerous. But the consequence also has a material impact on the equities involved in the delay objected to by Challenger Schweikart. In my ruling on Mr. Schweikart's motion, as noted above, I explicitly allowed any challenging party to present an argument that the remedy should be affected by the Unions' delays. No such argument was received from any challenger. Nevertheless, the Unions in effect have voluntarily reduced their claim by substantial amounts as an indirect result of the delay.

THE ARBITRATION HEARING:

The hearing was held on two days at two sites in Milwaukee arranged by the Unions. No challenger, or objector, or any counsel other than those listed in the "appearances" section above appeared at either day of hearing.

THE EVIDENCE SUBMITTED:

As previously noted, the Award by Arbitrator McLaughlin extensively sets forth the basic procedures used by the Unions involved here. Since that Award is incorporated as an Exhibit in the present one, it is unnecessary to repeat in full that discussion, which will be found at pages 12 to 18 of the McLaughlin Award. The following will describe only that evidence which materially alters or augments the basic structure described by Arbitrator McLaughlin.

Of particular relevance is a discussion by Arbitrator McLaughlin of the degree of proof generally expected in arbitration, and the degree of proof offered in these proceedings. It is an ancient principle of an adversary system that a form or degree of proof which might be subject to challenge as conclusionary or less than thorough will nevertheless be accepted, if it

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2/ The underlying litigation in Browne et. al. vs. Milwaukee Board of School Directors was initially filed in 1973, and some aspects of it are still pending in the Courts.

constitutes prima facie evidence of the actions argued and nothing is offered to rebut it. It is also a well accepted principle in arbitration that where a prior arbitrator has given substantial consideration to an issue and has ruled upon it, a subsequent arbitrator presented with the same issue should trade warily in considering whether any different result is warranted: stability has value in labor relations. In his Award, Arbitrator McLaughlin stated inter alia that:

> The absence of a specific challenge makes 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 that the arbitrator must serve as the challengers' advocate.

I fully agree with Arbitrator McLaughlin's reasoning. Not only did the challengers make no appearance at the hearing, or any other form of specific challenge to any element of the evidence offered by the Unions, but they did not file any form of objection to the above conclusion by Arbitrator McLaughlin. In this instance, the exceptional thoroughness of Arbitrator McLaughlin's treatment of the issues provides an additional reason why his Award and its discussion should be treated as controlling (except insofar as the annual updating of numbers, and the special circumstances arising as a result of the Unions' attempt to meet the standard of proof required by Arbitrator McLaughlin and by Lehnert, require alterations). Despite lingering doubts as to the conclusionary and hearsay nature of much of the evidence, the record therefore contains no reason to refuse to accept that evidence, and nothing to rebut it.

The International has responded in part to Arbitrator McLaughlin's critique of some of its evidence by presenting specific evidence at the second day of hearing with respect to certain items in which Arbitrator McLaughlin found that the International had failed to make a prima facie case. This evidence, for obvious reasons, goes beyond that received by Arbitrator McLaughlin, and justifies separate discussion, which follows.

FUNCTIONS AND EXPENDITURES OF CERTAIN DEPARTMENTS OF THE INTERNATIONAL:

The Field Services Department provides services to locals and councils as well as individual members of AFSCME's affiliates, particularly in the form of assisting affiliates in collective bargaining and representing members and fee payors in obtaining expert assistance from other departments of the International, and in organizing. The Lehnert decision did not discuss the Field Services department's activities, and the Unions' calculations were that of a total of $15,343,325, $15,142,665 were chargeable.

The Education Department trains AFSCME affiliates' staff primarily in negotiation, mediation, grievance handling and arbitration, in sessions at the home office and around the country. The Lehnert decision did not address these activities, and the International calculates that $1,229,379 of a total expenditure of $1,359,875, was chargeable.

The Womens' Rights/Community Action Department has two different

functions. The Womens' Rights portion focuses on workplace issues particularly relevant to the half of the Unions' membership which is female, including pay equity, comparable worth and child care. The Community Action half of that department attempts to increase awareness within communities of the role public employes play, which helps build support for the Unions' collective bargaining attempts. Lehnert did not address either. The International calculates that total departmental expenses of $881,889 includes chargeable expenses of $829,490.

The Research Department provides expert assistance to AFSCME affiliates in researching collective bargaining agreements, as an aid in negotiations, and includes experts in economics, budget analysis, health and safety, collective bargaining laws, pensions, and so forth. Lehnert did not address the functions of this department, and of a total expense of $1,721,388, the International calculates that $1,700,344 was chargeable.

The Legislation Department represents AFSCME before Congress and before various administrative agencies of the federal government, as well as providing expert assistance to AFSCME affiliates in dealing with state and local legislative matters. Originally, the Union calculated that 96% of the total expenses of $753,103 was chargeable to fair share payors. Lehnert, however, limited the chargeability of lobbying activities unrelated to the ratification or implementation of a collective bargaining agreement. As part of its conservative approach to the difficulty of recalculating in detail the amounts chargeable in view of that limitation, the Union deleted entirely any chargeability of legislative department functions. The final version of the calculations received from the International's auditor after the hearing also corrected an error with respect to this Department, having the effect that the overhead of this department was applied as a negative factor in the overall calculations.

The Political Action/PEOPLE Department incorporates two departments, beneath the accounting convenience of a single name. The Political Action Department coordinates AFSCME's and the affiliates' programs in connection with federal, state and local elections. The PEOPLE Department is responsible for raising voluntary contributions for AFSCME's political action committee. The total expenses of these Departments were $4,502,330, all of which the Union has treated as non-chargeable in its Lehnert recalculation. The final version of the recalculation also applied a negative overhead calculation to this Department, for the same reasons as in the legislative department.

The Retiree Department coordinates the activities of organizations of retired public employes affiliated with AFSCME, and supports current employes by virtue of the retirees' local support for current employes' collective bargaining positions. The total expenses of the Department were $452,629, and Lehnert left unchanged the Unions' calculation that the chargeable portion was $433,065.

The Public Affairs Department has two functions, one providing information to individuals inside AFSCME, and one communicating AFSCME's position in collective bargaining matters to individuals outside the Union. The internal part publishes two periodicals, and the Union has calculated the chargeability of costs incurred according to a measurement of column inches depending on the subject matter there addressed, as required by Hudson. Lehnert did not alter this standard, and the Union maintained that percentage in its recalculation. The other functions of this Department, however, were affected by Lehnert because the court there found that the cost of public relations in support of the teaching profession generally were not "sufficiently related to the Union's duties as a bargaining representative" to justify charging them to objecting fee payors. While other external expenses were sufficiently related to the Unions' duties as a collective bargaining

representative, in view of the difficulty of recalculation on a detailed level, the Union maintained its "conservative" strategy identified above. This resulted in treating as non-chargeable for this year all of the $6,400,105 in expenses for external communications. This also applied to the costs of certain internally-used video tapes and publications on safety and health, collective bargaining developments, etc., which were not broken out in the original calculation and which the Union has therefore forgone in the recalculation.

The Public Policy Department provides expert assistance on economic forecasting, tax policy, budget analysis and health care, all data used by the Union in setting wage and other demands during collective bargaining. The Department also generates data used in the Unions' attempts to improve health and safety in the workplace, maintaining jobs in certain sectors, and attempting to improve working conditions of certain kinds of workers. The Union notes that Arbitrator McLaughlin found that the Public Policy Department's budget was non-chargeable because AFSCME had failed in that year to prove to what degree the Department engaged in activities related to consumer affairs or consumer protection issues, items found non-chargeable in prior litigation. In the present proceeding the Union offered testimony that the Department's director had worked with Ralph Nader earlier in his career, but that neither he nor the department engaged in such non-chargeable activities during the budget year under discussion. Lehnert did not address the Public Policy Department's functions, and the Union maintains that $825,543 of total expenses of $828,481, is chargeable.

The International Relations Department, not so much a formal department as an expenditure category for accounting purposes, was treated entirely as non-chargeable in this case, a total of $382,681.

Certain disbursements characterized as assistance to affiliates, which constitute financial grants for employes engaged in difficult collective bargaining situations or other immediate needs not fundable from the affiliates own revenue, were calculated separately. The Union concluded that $1,611,281 of the $2,185,381 total was chargeable.

The International has various non-operational departments, including the International Convention, legal services, the president's office, the secretary/ treasurer's office, the business office, the International executive board and the personnel department. The Union presented testimony to support its contention that each of these Departments relates to the operation of the International Union as a whole, and following Lehnert continued to charge fair share payors in the same percentage for most of these departments as the overall calculation of the operating departments to which these relate. However, the Lehnert decision raised questions as to which aspects of the Unions' litigation and other legal expenses were chargeable, for complex reasons which need not be addressed in detail here. The Union elected, because of the difficulty of distinguishing these expenses from chargeable expenses at this late date, to exclude all expenses of the legal department. The consequence was that of a total of $15,688,415, after excluding the various percentages and amounts identified above, a chargeable total of $10,054,236 remained.

The judicial panel, an internal judicial system to hear complaints by members over union affairs, also hears complaints where a member has charged another member or union officer with violating the Union's constitution. The Union presented testimony that this panel has no relationship to the non-chargeable activities of the International Union, and consequently treated its functions as entirely chargeable.

Various contributions and participations were individually analyzed to

find any which individually rebutted a presumption of non-chargeability. The Union calculates that $402,780 of a total of $1,167,681, represented chargeable expenses.

The International Union makes affiliation fees and payments to the National AFL-CIO and its public employe department, in the year in question totalling $4,372,633. Pursuant to a prior decision by Arbitrator June Weisberger involving Council 48, the entire amount was treated as non-chargeable.

There was an additional calculation as to overhead for general operating and building expenses. This was calculated as a function of the percentage of all of the departments allocations for overhead, so that the overhead allocable to each department was treated as chargeable at the same rate as that Department's other expenses.

COUNCIL 48'S AND THE LOCALS' EXPENSES:

The procedure used by Council 48 to calculate its own and the Locals' expenses has not changed materially since the prior year, and the evidence in the record represents a mere updating of the evidence discussed at pages 28 through 30 of Arbitrator McLaughlin's Award.

CONCLUSIONS:

I find that in each instance where the International has augmented its presentation of evidence in the second day of hearing to answer the lack of evidence cited for a particular department in the McLaughlin Award, the Union has presented sufficient evidence to meet the "prima facie" test. I further conclude that Council 48's and the Locals' calculations continue to show the relatively high degree of reliability cited by Arbitrator McLaughlin, and therefore also meet the prima facie test. In addition, I note that the conservative strategy adopted by the Union in its Lehnert recalculation results in an unusual margin of safety from the point of view of the challengers. Finally, as noted above, there is nothing whatsoever in the record to rebut any of the evidence presented by the Unions. The Unions' final recalculations are therefore accepted.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. The International's final recalculation of the percentage of its expenses chargeable to challenging non-member fair share fee payors of 63.604% is correct.

2. Council 48's final recalculation of the percentage of its expenses chargeable to challenging non-member fair share fee payors of 95.81% is correct.

3. The Unions' final calculation of the percentages of local expenses chargeable to challenging non-member fair share fee payors is correct, as follows:

For Local 33, 80.294%;
For Local 40, 60.082%;
For Local 47, 81.671%;
For Local 305, 77.709%;
For Local 426, 74.908%;
For Local 428, 73.181%;
For Local 526, 82.277%;
For Local 550, 68.226%;
For Local 587, 77.992%;
For Local 594, 75.084%;
For Local 645, 78.698%;
For Local 882, 81.029%;
For Local 952, 60.343%;
For Local 1053, 83.732%;
For Local 1055, 78.034%;
For Local 1091, 79.865%;
For Local 1238, 80.468%;
For Local 1616, 79.135%;
For Local 1654, 80.192%;
For Local 1656, 78.376%.

Dated at Madison, Wisconsin this 4th day of May, 1992.

By _____
Christopher Honeyman, Arbitrator