STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW BERLIN PUBLIC EMPLOYEES UNION
LOCAL 2676, DISTRICT COUNCIL 40
AFSCME, AFL-CIO

and

THE CITY OF NEW BERLIN

Case XXXVII
No. 23902 MED/ARB-282
Decision No. 16093-A
AWARD

I. FINAL AND BINDING FINAL OFFER ARBITRATION. This is a matter of final and binding final offer arbitration arising out of a petition of the New Berlin Public Employees Union, Local 2676, District Council 40, AFSCME, AFL-CIO before the Wisconsin Employment Relations Commission to initiate mediation-arbitration pursuant to Section 111.70 (4) cm (6) of the Municipal Employment Relations Act of Wisconsin. The Union filed a petition with the Commission to initiate mediation-arbitration on December 15, 1978, on the grounds that an impasse existed between itself and the City of New Berlin as the Employer over a collective bargaining agreement which expired on December 31, 1978. A representative of the Commission's staff, Mr. Donald B. Lee, investigated the matter and after investigation, notified the Commission that the parties remained at impasse. The Commission thereupon found that an impasse within the meaning of the law existed, certified that conditions precedent to the initiation of mediation-arbitration as required by the law were met, and ordered mediation-arbitration on May 9, 1979. The parties having selected Frank P. Zeidler, Milwaukee, Wisconsin as mediator-arbitrator, the Commission thereupon appointed him on May 29, 1979.

II. MEDIATION-ARBITRATION. A mediation session was held on July 12, 1979, beginning at 10 a.m. at the New Berlin City Hall, 16300 W. National Avenue, New Berlin, Wisconsin. The session resulted in certain stipulations between the parties which are stated hereafter. One issue was not settled.

A hearing in arbitration was held on July 19, 1979, at the New Berlin City Hall, beginning at 10 a.m. on the remaining issue. After the hearing, briefs were submitted.

III. APPEARANCES.

For the City:

TOM E. HAYES, Attorney, HAYES AND HAYES, 161 W. Wisconsin Avenue, Milwaukee, Wisconsin 53203

For the Union:

ROBERT W. LYONS, Executive Director, Council 40, AFSCME, 5 Odana Court, Madison, Wisconsin 53719

IV. THE FINAL OFFERS.

The City's Final Offer of March 14, 1979, is as follows:

"As its Final Offer to Local 2676, District Council 40, AFSCME, AFL-CIO, the City of New Berlin proposes to amend the agreement between the City and the Local for the years 1977 and 1978 and in addition to the changes already agreed to between the parties as reflected in the instrument delivered by the parties to the Mediator, in the following respects:

"1. To increase all wages and salaries in the amount of seven percent (7%) each year.

"2. To reclassify the Deputy Building Inspector from Range VI to Range VII, with the salary level to be at the beginning of Range VII with normal progression therefrom.

"All to relate to a two year collective bargaining agreement for a term extending over the two years from January 1, 1979 until December 31, 1980."

The Amended Final Offer of the Union of April 9, 1979, is as follows:

"The Union proposes that the 1977-78 contract between the parties be carried forward unchanged except for the tentative agreements initialled on March 8, 1979, and the following:

"1. Article XXV, Dues Check-off: Replace this Article with a new article entitled Fair Share Agreement - Dues Deduction, to read as follows:

"'25.01 Subject to the provisions of sub-section (g) below, a fair share agreement shall be implemented as hereinafter set forth:

"'A. Representation: The Union, as the exclusive representative of all of the employees in the bargaining unit, shall represent all such employees, both Union and non-Union, fairly and equally; and all employees in the bargaining unit shall be required to pay their proportionate share of the costs of such representation as set forth in this Article.

"'B. Membership: No employee shall be required to join the Union, but membership in the Union shall be made available to all employees who apply, consistent with the Constitution and By-Laws of the Union. No employee shall be denied Union membership on the basis of race, creed, color, sex, handicap, age or national origin.

"'C. Payroll Deduction: The Employer shall deduct from the first paycheck of each month an amount, certified by the Treasurer of Local 2676 as the uniform dues required of all Union members, from the pay of each employee in the bargaining unit. With respect to newly hired employees, such deduction shall commence on the month following the completion of the probationary period. Employees who become members of the Union prior to the completion of the probationary period may elect to have Union dues deducted from their paychecks upon submission to the City of an individually signed authorization on a form provided by the Union for such purpose.

"'D. Administration: The aggregate amount so deducted, along with an itemized list of the employees from whom such deductions were made, shall be forwarded to the Treasurer of Local 2676 within ten (10) days of the date such deductions were made. Any changes in the amount to be deducted shall be certified to the Employer by the Treasurer of Local 2676 at least thirty (30) days prior to the effective date of such change. The Employer shall not be required to submit any amounts to the Union under the provisions of this Article on behalf of employees otherwise covered who are on layoff, leave of absence, or other status in which they receive no pay for the pay period normally used by the Employer to make such deductions.

"'E. Inadvertence or Error: If, through inadvertence or error, the Employer fails or neglects to make a deduction which is properly due and owing from an employee's paycheck, such deduction shall be made from the next paycheck of the employee and submitted to the collective bargaining representative.

"'F. Indemnification and Hold Harmless Provision: The collective bargaining representative shall indemnify and save the Employer harmless against any and all claims, demands, suits, orders, judgments, or other forms of liability that shall arise out of, or by reason of, action taken or not taken by the Employer under this Section.

"'G. Referendum: The fair share agreement as set forth in this Article shall become effective on the first day of the month which falls at least fifteen (15) calendar days from the date that the results of a successful referendum have been certified by the Wisconsin Employment Relations Commission. The parties hereto shall jointly petition the W.E.R.C. to conduct such a referendum among all employees in the bargaining unit, except those employees who quit or are discharged for cause prior to the date of such referendum. Unless a majority of the employees voting in such referendum approve the implementation of the fair share agreement, the provisions of Sections 25.01 (A-F) above shall be null and void during the term of this Agreement.

"'25.02 Dues Deduction: In the event that the fair share agreement as set forth above does not become effective, or becomes invalid, the Employer agrees to deduct once each month, dues from those employees who individually authorize in writing that such deductions be made. The amounts to be deducted shall be certified to the Employer by the Treasurer of the Union, and the aggregate deductions from all employees shall be forwarded to the Treasurer of Local 2676. Any changes in the amount to be deducted shall be certified to the Employer by the Treasurer of the Union at least thirty (30) days prior to the effective date of such change.'

"2. Appendix B, Job Classifications Within Pay Ranges: Reallocate the position of Deputy Building Inspector from Range VI to Range VII, with the incumbent employee to be placed at the top step (1 year) of Range VII.

"3. Appendix A, Wage Schedule:

"A. Effective January 1, 1979: Increase all wage rates by either seven percent (7%) or twenty-eight cents (28¢) per hour, whichever is greater, across-the-board.

"B. Effective January 1, 1980: Increase all wage rates by seven percent (7%) across-the-board."

The parties reached the following stipulation on July 12, 1979:

"STIPULATION

"WHEREAS, the parties have been at impasse on three issues, to wit, a Fair Share Provision, the status of the Deputy Building Inspector within Range VII of the salary schedule and the minimum hourly wage increase to be granted in 1979, and

"WHEREAS, the parties are now in agreement as to two of the three above stated issues,

"NOW THEREFORE, it is agreed that the minimum wage increase to be granted for 1979 is 28¢ per hour and that the incumbent in the Deputy Building Inspector classification is to be in the middle step of Range VII from January 1, 1979 and top step from January 1, 1980 so that the remaining issue for determination is whether a Fair Share Provision should be included in the collective bargaining agreement.

"Dated at New Berlin, Wisconsin this 12th day of July, 1979.

"For the Union ROBERT W. LYONS /s/

"For the City TOM E. HAYES /s/"

Thus the remaining issue is an issue of "Fair Share".

V. FACTORS CONSIDERED. Section 111.70 (4) cm 7. is as follows:

"7. 'Factors Considered.' In making any decision under the arbitration procedures authorized by this subsection, the mediator-arbitrator shall **give** weight to the following factors;

"a. The lawful authority of the municipal employer.

"b. Stipulations of the parties.

"c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

"d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.

"e. The average consumer prices for goods and services, commonly known as the cost-of-living.

"f. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

"g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

"h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties in the public service or in private employment."

VI. FACTORS NOT INVOLVED. There is no issue here of wages, total compensation, cost-of-living, or changes during the pendency of the proceedings. The stipulations of the parties have been noted, and all other matters in the proposed agreement are resolved.

VII. FAIR SHARE. As is to be noted, the Union is proposing a full Fair Share clause dependent on a referendum. The Union supplied eight exhibits in support of its position. The essence of these exhibits are as follows:

Union Exhibit 1. This is an agreement between the City and its highway department, represented by Teamsters "General" Local Union No. 200 of the I. B. of T.C.W. & H of A. Article III, FAIR SHARE, provides that the Union represent all employees of the bargaining unit and members and non-members shall pay their proportionate share of the cost of the collective bargaining process and contract administration by paying an amount to the Union equivalent to the uniform dues required of members of the Union.

Union Exhibit 2. This exhibit listed 203 Fair Share agreements with bargaining units affiliated with Wisconsin Council 40, AFSCME, AFL-CIO exclusive of such agreements in Waukesha County.

Union Exhibit 3. This listed the following employers in Waukesha County where one or more Fair Share agreements obtained:

Waukesha County	Modified Fair Share
City of Brookfield	
City of New Berlin	Fair Share with Local 200 Teamsters, covering Highway, Water, and Sewer Departments
City of Muskego	
City of Oconomowoc	

Fair Share agreements were not present in the City of Waukesha or the Village of Menomonee Falls.

Union Exhibit 4. This exhibit listed 12 school districts in Waukesha, with 9 having one or more employee bargaining units covered by Fair Share. 3 districts did not have Fair Share. There was also a Fair Share agreement present at the Waukesha County Area Vocational, Technical & Adult Education District School.

Union Exhibit 5. This exhibit listed 17 governmental units in Milwaukee County, all but one of which had one or more Fair Share agreements with employees.

Union Exhibit 6. This exhibit listed 19 school jurisdictions in Milwaukee County, of whom 13 had one or more Fair Share agreements.

Union Exhibit 7. This exhibit was a portion of the International Constitution of the American Federation of State, County and Municipal Employees, as amended on June 26-30, 1978. The portion dealt with the subject of rebates to persons dissenting from the expenditure of dues paid under agency shop provisions for political or ideological purposes. The dissenting employee has a right to appeal between April 1 and April 16 of each year in writing by registered or certified mail to the International Secretary-Treasurer who in turn is to transmit the objection to the subordinate union body involved. An employee can object on the grounds that the proportionate allocation does not accurately reflect expenditures of the union. Such appeal is to be filed with a Judicial Panel fifteen days from the time a rebate receipt is received. If the non-member is dissatisfied with the Judicial Panel, he can appeal to a Review Panel within fifteen days of receipt of the decision of the Judicial Panel. The Review Panel is a body of prominent citizens, not a part of the union, who are appointed by the President and confirmed by the Executive Committee.

Union Exhibit 8. This was a copy of a decision of the Wisconsin Employment Relations Commission in the petition of Debbie Mielke, a dispatcher with the City of New Berlin Police Department. The petitioner sought to have an election among dispatchers and clerk dispatchers in the Police Department to determine whether employees desired to sever themselves from the bargaining unit. The petition was dismissed on the ground that it was filed after the Union gave timely notice to the City that it wanted to re-open negotiations, and therefore the petition of the grievant was untimely presented.

The City also supplied exhibits.

City Exhibits 1 A and 1 B. These were the same lists of employees covered by the Union contract. There were 26 full-time employees listed, of whom 18 were on dues check off. 8 part-time employees were listed, of whom 3 were on dues check off.

City Exhibit 2. This was a copy of the agreement between the City and the New Berlin Professional Policemen's Association, Inc. in which there is no Fair Share agreement.

City Exhibit 3. This exhibit was as follows:

"HISTORY RE THREE BARGAINING UNITS

"Highway Department

"First executed contract - May 14, 1968 thru December 31, 1968

"First mention of 'Fair Share' listed in contract - January 1, 1972.

The Union also says that though the arbitrator in the instant matter has expressed a preference for a voting requirement somewhat in excess of a simple majority, yet other arbitrators have accepted the concept of a simple majority when the employer offers no Fair Share. In the instant matter Fair Share is a far more reasonable alternative than the Employer's final offer which denies Fair Share under any arrangement.

As to the legality of Fair Share, the Union says that the Wisconsin Legislature has recognized that Fair Share is a method of promoting stability, peace, and responsibility in employer-employee relationships and has authorized such agreements in the statutes. The United States Supreme Court has affirmed the constitutionality of Fair Share and so has the Wisconsin Supreme Court. The Wisconsin Court in the matter of Browne et. al. vs. Milwaukee Board of School Directors, et. al. (83 Wis. 2d 316 1978) states that Fair Share deductions are intended to cover the costs of the collective bargaining process and contract administration, and it remanded the question of what amounts were being expended for other than statutorily permissive purposes to the WERC. The WERC has not handed down a decision, but in the absence of any rulings to the contrary, the Union offer which places the Fair Share fee at the uniform dues required of all members must be presumed to be legal.

The Union notes that its own constitution provides relief for employees who object to the expenditure of Fair Share monies for partisan political or ideological purposes. There is a procedure by which the employee objecting to the amount required can get a rebate. Further with respect to the legality of Fair Share, mediator-arbitrators, including the mediator-arbitrator in the instant case, have upheld the legality of this type of Fair Share proposal. The Union further notes that the Employer is held harmless from future litigation, and there is a separability clause which places the parties back into negotiations if any provisions of the agreement are found in violation of any law. The Union therefore has not exceeded the lawful authority of the Employer with its proposal.

With respect to comparability of the offer with other units of government, the Union notes that the Employer submitted no evidence on comparability. It also notes that 260 separate units in the state, as shown in its exhibits, have Fair Share agreements. While some of the units listed may have only limited value in comparability, yet the total shows the extent of such agreements.

The Union notes that four municipalities above 10,000 population in Waukesha County, including the City itself, have Fair Share agreements, and Waukesha County itself will have a modified Fair Share agreement in a master contract when local unions are able to demonstrate 605 memberships among unit employees. 14 of the 15 units in Milwaukee County with a population of 10,000 or more have Fair Share agreements. Three of these are contiguous to the City of New Berlin. There is an overwhelming acceptance of Fair Share agreement among municipalities in the Milwaukee metropolitan area of which New Berlin is a part.

"Police Department

"First executed contract - December 22, 1969 thru December 31, 1970

"Dues Deductions mentioned - March 14, 1972.

"AFSCME

"First executed contract - March 1, 1975 thru December 31, 1976

"Dues Check Off - same as above.

"List of present employees who had originally signed payroll deductions slip and subsequently revoked them - (explain)

"Florence Pirt - ?

"Cancelled 12-31-77 (signed up with original group)

"Ellamay Bajanen - letter of notification

"Cancelled 12-31-78 (originally signed up October 1977)"

City Exhibit 4. This exhibit was a sheaf of correspondence involving a request by Kathy Krueger and Debbie Mielke who wanted to be dropped from the Union contract during the fall of 1978. They reported that four people never joined the Union, and they were the only two who belonged to it and wished no longer to belong, and spoke of belonging to the Police Union or a Union which had interest arbitration.

City Exhibit 5. This exhibit was the award of Arbitrator Dennis P. McGilligan in the matter of a dispute between City of New Berlin and New Berlin Public Employees Union Local 2676, on the issue of:

"1. Did the City of New Berlin violate the provisions of Article XVI of the collective bargaining agreement when it refused to pay accumulated sick leave to employes who failed to report to work, and called in sick on May 16 and May 17, 1977?

"2. If so, what is the appropriate remedy."

This issue was framed by the arbitrator after the parties did not stipulate to the issues. The matter involved a rejection by the City of various documents supplied by seven employes as to the reasons for their absence from work due to claimed illness on May 16 and 17, 1977. On those days 29 of 30 employes represented by the bargaining unit failed to report for work for the City. This absence occurred at a time when there had been nine negotiation sessions between the Union and the City on the terms of a new contract to succeed one which had expired on December 31, 1976. There was concern and tension among the employes over the lack of progress in reaching an agreement. Many employes did call in, but the City did not keep accurate records as to the number and nature of the excuse. The Common Council of the City then directed that the employes would not be paid unless their absence was substantiated by an acceptable proof of illness. Eight employees provided documents as evidence of illness. Only one was accepted, and the others rejected. The Union

grieved the rejections, and the arbitrator concluded, based on the evidence, that the employes were not sick or ill and that the Employer did not act in an arbitrary, discriminatory or unreasonable manner when it rejected the evidence of illness.

City Exhibit 6. This was a photocopy of a "Special Statement of Expense by Principal" submitted to the Lobbying Regulation Section, Office of the Secretary of State, covering the period from January 3, 1977 through December 31, 1978, in which the Wisconsin Council of County and Municipal Employees, AFSCME, reported spending $5,814.00 for lobbying.

VIII. THE UNION'S POSITION ON FAIR SHARE. The Union holds that Fair Share is not unique nor revolutionary. The Union has a statutory obligation to represent all of the employees who fall within a certified bargaining unit. The Union's activity in collective bargaining and contract administration directly benefits all employees in the unit. As a quid pro quo for providing fair representation, the Union proposes that all employees therefore pay a proportionate share of the cost as a simple matter of equity. The concept of the "free rider" has been philosophically opposed by labor organizations. The "free rider" represents an economic threat which is particularly significant where there is a small number of members in the bargaining unit. This is even more significant when there is a proceeding such as this one. The final offer of the Employer provides no form of Union security beyond the present dues checkoff provision.

As to the language of the proposal, the Union says that the Employer would respond "no" every time the Union broached the subject of Fair Share, so that any problems with the specific language might have been ironed out before hand. Now the City can take potshots at the proposed language without having discussed it. This refusal of the Employer to discuss the proposal should not prejudice the Union here.

The contract language is standard, according to the Union. The language holds harmless the Employer and indemnifies the Employer against any possible liability as a result of implementing the Fair Share agreement. The language used here is similar to many provisions found in other agreements throughout the State.

Also the implementation of the agreement depends on a vote in a referendum to be conducted by the WERC among the employees. Thus the ultimate decision is in the hands of those who ought to make the decision - namely the bargaining unit employees.

The Union says that the interests of some individuals in the minority are compromised to some degree if a majority vote is favorable to Fair Share. However, it cites awards made by Arbitrator Stern in Manitowoc Public School District, Case XVII, No. 22639, MED/ARB-46 and Arbitrator Flaten in Fond du Lac School District, Case XVII, No. 22816, MED/ARB-72 to the effect that in collective bargaining individual rights are given up in order to make gains through collective action. Further, the Union notes that the legislature has provided a mechanism under which Fair Share can be discontinued by a majority vote of eligible employees in a referendum (Section 111.70 (2), Stats.). The Union asserts that mediator-arbitrators consistently come down on the side of the employee organizations in these cases on Fair Share.

The Union says that the extent of Fair Share agreements among school districts also supports its offer both in Waukesha and Milwaukee Counties. In Milwaukee County three small school districts and two large districts do not have Fair Share, but 12 school districts do have, and one has a referendum pending.

The Union says that the most telling comparison of all is the one internal to the City of New Berlin itself. The City has entered into a Fair Share agreement with its Highway, Sewer and Water Department employees who are in one unit. The Union notes that the police do not have Fair Share, and it never was an issue in negotiations. However, the fact that the City did enter into a Fair Share agreement is critical in this case. Any and all arguments that the City might advance against it on philosophical, moral or legal grounds are nullified thereby.

The Union says that the City's argument that the local Union should be denied the Fair Share agreement, because it is irresponsible, is totally without merit. The Union says that a union action deemed "irresponsible" by an employer might be considered perfectly responsible not only by members of the union but by neutral parties, regulatory agencies, or the courts. The Union's primary purpose is to aggressively promote, advance, and defend the interests of the employees it represents, and legitimate methods toward that end may be considered irresponsible by the Employer.

The Union says that the City is relying primarily on an arbitration award issued in February 1979 (City Exhibit 5) in which sick leave benefits were denied some employees. The Union says that the City is now contending that the circumstances around this case constituted an illegal work stoppage. However, if the City believed this to be the case, it took absolutely no action under the statutory procedures available to remedy such a situation. Its lack of action shows that its argument in this case is not serious.

The Union also says that the facts argue against a City contention that there is a lack of Union support among members of the bargaining unit. The Union says that Employer Exhibit 3 shows that two employees have terminated their membership in the Union since the original certification was issued in January, 1975. This must be weighed against the total number of employees who have maintained membership over four and one half years.

The Union also comments on City Exhibit 4 about members of the police dispatchers group who sought to establish a separate bargaining unit. This action was motivated in part, according to the Union, by what it calls a mistaken impression, namely that affiliation with some other labor organization would get interest arbitration for the petitioners. The principal petitioner, however, is now a member of the Union.

The Union notes that of 34 employees in the unit 21, or 62%, are members of the Local. Of 13 non-members, five have had less than one year of service, and at the date of the hearing, three were still on probation. Thus approximately two thirds of the eligible employees do not believe that the Union is irresponsible, and further, every employee will get a chance to express his or her opinion on Fair Share through a referendum.

IX. THE CITY'S POSITION ON FAIR SHARE. The City believes that its final offer which does not call for "Fair Share" should be selected in that "Fair Share" should not be imposed. It holds that the language of the proposed "Fair Share" provision is unlawful, that "Fair Share" is undeserved, and that it is unsupported. The City cites the following applicable statutes:

"Applicable Statutes

"1. Section 111.70 (1) (h), Wis. Stats. (1979):

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

"2. Section 111.70(2), Wis. Stats. (1979):

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

(Emphasis in Employer's submission.)

The City also cites particularly Section 111.70 (4) cm 7 a. and c. of the Statutes which have been cited earlier here. These deal with the lawful authority of the municipal employer, and the interest and welfare of the public. The City says that the proposed Fair Share provision violates Section 111.70 (1) (h) of the Wisconsin Statutes. The proposed Fair Share clause fails to meet the requirements imposed by Sections 111.70 (1) (h) and 111.70 (2) Stats., pursuant to the decision of Browne v. Milwaukee Board of School Directors, cited above. The Fair Share clause

violates the terms of the Statutes and is beyond the lawful authority of the municipal employer. The clause is further contrary to the interests and welfare of the public, because it violates the Constitutional rights of freedom of speech and association guaranteed by the First Amendment of the U. S. Constitution and Articles 1 and 3 of the Wisconsin Constitution to all non-union employees.

The City says that Section 111.70 (1) (h) Stats., prohibits any assessments not strictly and necessarily related to defrayal of costs of collective bargaining or contract administration, and it prohibits the use of any assessments for any other purposes. In Browne, the challenge arose from the compulsory assessment and union use of compulsory union dues for financing political campaigns and for other political purposes. The City says that the Supreme Court narrowly construed the statutes to prohibit the following: (1) assessments of any sums which are not strictly necessary to defray only the costs of collective bargaining and contract administration; (2) assessments which would require "....a municipal employee to pay for anything more than their proportionate share of the cost of collective bargaining and contract administration"; and (3), the use of any Fair Share assessments for any purpose other than defrayal of the necessary costs of bargaining and administration of the contract.

The City says that the trial court and the Supreme Court put the burden on proving the validity of a Fair Share agreement upon the proponent of the agreement. This is necessary to preserve the Fair Share scheme in the face of a strong and meritorious challenge to its constitutionality. If a Fair Share proposal does not satisfy each of these requirements, then it violates the statutes and constitutional rights of non-union employees. The City says that a proponent of a Fair Share agreement must meet the following tests under Browne to prove its validity:

"1. The terms of the agreement itself must not require any municipal employee to pay for anything more than (his) proportionate share of the cost of collective bargaining and contract administration.

"2. The terms of the agreement itself must insure that compulsory union dues are used only to pay for the necessary costs of collective bargaining and contract administration.

"3. The terms of the agreement itself must contain a mechanism to apprise a non-union employee of how the fair-share funds were used and it must provide a mechanism to reimburse the employee '...for any of his dues which are not strictly related to the collective bargaining process or contract administration.'"

The City says that the Union does not preclude an employee from paying "anything more" than his proportionate share of the cost of collective bargaining and contract administration. Under Browne it is an unfair labor practice to require an employee to pay for anything more than the above named items. The Court approved a lower court ruling that the costs of bargaining and administration determine the largest amount due from the non-union employees. The City says that the rulings in Browne require the terms of the Fair Share agreement to define the computation of Fair Share assessments in such a way as to insure that the non-union

employee cannot pay "anything more" than his proportionate share. The City says that on its face, the Union proposed method of computing does not meet this standard: the rate of payment is the uniform dues required of all Union members.

The City says that the Union proposal does not even purport to confine the assessments to only those sums strictly necessary for bargaining and administration. The contract fails to define the costs of bargaining and the administration, and further it is obvious that assessments will vary according to the number of pay periods in a month and the number of eligible employees in the Union. Even if the eligible employees remained constant, the pay periods are certain to vary between months. The Union offer fails to meet the burden of both points.

The City says that the Union proposal on its face does not insure that compulsory Union dues are used only to pay for the necessary costs of collective bargaining and contract administration. To use compulsory Union dues for any purpose other than a defrayal of the bargaining and administration is a prohibited practice under Section 111.70 (3) (a) (1) Stats. In Browne, the Court required a strict accounting procedure to insure reimbursement to non-union members for dues not strictly related to bargaining or administration.

The City asserts that the ruling requires the terms of the Fair Share agreement to prevent future abuses by creating an express trust for the benefit of all contributing non-union employees having such terms and conditions as necessary to insure that all Fair Share funds, or any portion thereof, could not be used for any purpose other than paying the strictly necessary costs of bargaining and administration. The terms of the agreement also must prevent the commingling of Fair Share funds with other Union assets. They should have a separate trust account for each contributing employee, and provide for full reimbursement for each individual employee of any of his funds which were not actually necessary for defraying the authorized expenses. The City also says that the trust accounts must be interest bearing, and the trustees must be bonded, and this must be set forth in the Union proposal.

The City also holds that it is necessary that the Fair Share agreement create an express trust for the benefit of non-union assessees because Article IX of the International Constitution of AFSCME, (Union Exh. No. 7) expressly authorized an illegal use of compulsory Union dues and then attempts to avoid this illegality by providing for a cumbersome and expensive refund procedure. This refund procedure puts "the monkey on the back" of the individual employee. The procedure is replete with traps and pitfalls for the employee who objects to any use of compulsory Union dues. The person who fails to object to the proper person at the proper place by certified or registered mail within the prescribed time, is deemed to have waived a right to a refund. Such a "waiver" can occur even though the Union's application of compulsory Union dues for political or ideological purposes is both a violation of fundamental freedoms of the Federal and State Constitutions and an unfair labor practice in Wisconsin.

The City also says that the Union's proposal allows for the illegal commingling of funds and fails to provide for any accounting to employees. There is no accounting expressly required for each individual employee under the Union agreement in that the aggregate amount deducted shall be forwarded to the Treasurer of the Union. There is no way to insure that no employee pays anything more than his proportionate share of the authorized costs. The Fair Share funds can be loaded with revenues used for any number of purposes which are outside of bargaining and administration. Further the Union offer does not purport to indemnify the employees against losses, costs or expenses in attempting to gain a refund of funds. Once the funds are in the possession of the Union, it would be a struggle for the individual employee to get funds returned which were improperly applied to illegal purposes. The Union proposal burdens the employee.

The City also says that the Union does not deserve a Fair Share arrangement, because it has been irresponsible and lacks support even among its members. There is uncontroverted evidence that the dispatchers and clerk dispatchers of the City of New Berlin petitioned the WERC to decertify the District Council 40 as their bargaining representative. There is no dispute that on May 16 and 17, 1977, more than 95% of the Union employees walked off the job without sufficient reason and then failed in the demand that the City pay sick leave. Further it is undisputed that the Union used $5,814 of Union dues to pay for lobbying. If the Union can pay $5,814 for lobbying, it does not need any money to defray the costs of bargaining and administration. Further it is not fair to demand the non-union employees to contribute to an organization which lacks the loyalty and support of its members. Also, it is particularly unfair to compel non-union employees to finance an organization whose members are willing to engage in unfair labor practices to get their demands. Thus the Union does not deserve a Fair Share agreement even if it had an appropriate proposal.

The City further says that the Union's evidence of the existence of Fair Share agreements in other bargaining units is incompetent. The evidence merely states that a Fair Share agreement covers "one or more employee bargaining units" in a described community. The units are not described, and there is no evidence from which any economic or sociological similarities between these communities and New Berlin may be inferred. Of the three public employee unions operating in New Berlin, only the Teamsters have a Fair Share contract. Thus there is a critical foundation absent for the Union's evidence. This evidence is also immaterial in terms of the violations of the statutes and constitutions in the Union proposals.

X. EXCHANGE OF LETTER BRIEFS. The Union in a letter brief takes issue with the contention of the Employer that the Union's final offer contains a fluctuating schedule, because the payroll periods may vary during each month. The Union states that the language proposed by the Union is such that only one deduction would be made each month, from the first paycheck of the month. The monthly Fair Share fees will not vary from month to month, but will be equal to the amount of Union dues uniformly required of Union members. The dues remain constant from month to month subject to change only by vote of the Union membership. It is not the policy of the Union to charge some sort of a "flat rate" for service provided to the members of the bargaining unit which would cause the monthly rate to fluctuate, depending on the total number of the employees in the Union.

Though the membership would raise, say from 35 to 40 members, the amount collected from each individual employee would remain constant. The City has been making payroll deductions under this system for the past four years.

The City in response to this brief notes again the following points:

- a compulsory dues scheme will violate the U. S. and Wisconsin Constitutions and be an unfair labor practice if it requires a municipal employee to pay anything more than the proportionate share of the cost of collective bargaining or contract administration, and if the plan permits the use of Fair Share funds for purposes unrelated to collective bargaining or contract administration.

- the burden is on the proponent to prove that the proposed plan does not produce these results.

It is apparent that the Union method for computing compulsory dues does not insure that an employee will not pay anthing more than his proportionate share. Under the Union proposal the proportionate share of the non-union employee will have a fraction with a denominator which varies from month to month according to the number of pay periods. The numerator will not be shown to have any relationship with the "costs of bargaining and administration".

The City emphasizes that it considers the Union not to have introduced any evidence establishing the impact of increased revenue assessed from non-members upon the actual allowable costs of bargaining and administration, and yet this is critical in determining what is a "proportionate share". The City is not contending that the amount deducted will fluctuate but rather that the amounts to be deducted have not been established as being in any way related to allowable costs.

The City also contends that the Union's proposal in no way assures that the Fair Share assessments will not be used for any purpose unrelated to the costs of bargaining and administration, such as lobbying. This is another essential condition not met. Further the City has no duty in developing a proposal for the Union. The City says it is clear that the Union proposal fails to satisfy the law and should not be imposed on the City.

XI. THE LAWFUL AUTHORITY OF THE EMPLOYER. A discussion of the factors now follows.

A major issue on the Fair Share offer that the Union presented is raised by the City and has been recited in some detail above. This issue was again developed in the letter brief of the City. A principal argument of the City is that the text of the Union offer on Fair Share is unconstitutional and does not meet the statutory requirements, because it uses the sentence in a proposed Section 25.01 C, "The Employer shall deduct from the first paycheck of each month an amount, certified by the Treasurer of Local 2676 as the uniform dues required of all Union members, from the pay of each employee in the bargaining unit." The City holds

that this sentence on its face commands the Employer to engage in an illegal act, since under the court ruling in Browne, cited above, the amount which can be deducted in Fair Share is only that which is for defraying the costs of "collective bargaining and contract administration". Further, the City holds that it is patent that uniform dues cover the costs of lobbying as shown in City Exhibit 6, and therefore, the amount equal to uniform dues clearly includes an illegal collection on the part of the Union which the Employer is supposed to make.

The arbitrator has encountered a similar situation in the matter of Northwest United Educators v. Cooperative Educational Service Agency #4, WERC Case X No. 22608 MED/ARB-36 (Dec. September 21, 1978), in which the CESA District held that the arbitrator would be acting illegally if an award were made to the Association if it deducted from the monthly earnings of the employees in the bargaining unit "an amount of money equivalent to the monthly dues certified by the NUE as the current dues uniformly required of all members...."

The arbitrator in this case said,

"The arbitrator is of the opinion that the amount of dues which would be required under the NUE offer is not certain, and that it has not been definitively determined that the NUE offer is illegal. The matter of Fair Share is before the WERC, and beyond this the courts stand ready to pass judgment on WERC decisions. The arbitrator, noting that the Fair Share provision has a basis in law and is a permissible arrangement between the parties, therefore believes that he is not acting beyond his authority in making an award of either of the offers on Fair Share. It is also possible that either offer could be litigated, although more likely the Union offer than the Board offer."

The arbitrator here believes that until the WERC decides what comes under the principle of charging for costs only for collective bargaining and contract administration, he is not in a position to rule that the Union request for deductions equal to uniform dues is illegal on its face.

The contention of the City that the Union offer fails to place the funds of the non-union employees in escrow and provide individual accounting also needs to be considered. On the matter of escrowing all Fair Share dues, the arbitrator notes the following in Browne at 340a:

"Returning finally to the initial question: Did the trial court abuse its discretion by refusing to escrow all Fair Share dues? In denying the motion the trial court stated,

"'.....it would be pure speculation on the part of this Court to determine without any factual basis upon which to make such a conclusion what percentage of funds have in fact been spent by union of objecting employes outside of the confines of the statute. I could only guess that it runs anywhere from 0 to 100%'

"The court's rationale is not entirely clear, but the statement at least demonstrates an exercise of discretion because if the court does not know what portion of the dues are spent for political purposes, it cannot very well find the required danger of irreparable injury...."

This arbitrator does not know the extent to which uniform dues include expenditures for which a non-union member is not required to pay under the statute and court decision. While the evidence that the Union pays for lobbying is quite plain, this arbitrator is reluctant to use that evidence to dispose of the Union position pending the WERC decision as to what is to be included in the costs of collective bargaining and contract administration and what not. The arbitrator believes it would be an act of presumption on his part to so rule, since the matter is before a higher tribunal. Therefore the arbitrator is expressing the opinion that he does not believe that the Union offer on Fair Share can be ruled illegal on its face on these counts absent a WERC ruling.

The arbitrator does not support the Union idea that non-members have a fully adequate remedy for excessive charges in the Union Constitution. Although the remedy lying in the Constitution is of great importance, yet the arbitrator agrees with the City contention that the proceeding is so cumbrous as to make it very difficult for an employee to secure a rebate. The remedy for overcharge must lie with the WERC and courts in this State in definitive rulings as to what may be charged.

The arbitrator further does not concur with the Union argument that because the City has one agreement with a Fair Share clause, its arguments against including another clause in another contract are completely invalid if it objects on grounds of illegality or immorality or unconstitutionality. The arbitrator believes that the Employer has a right to raise an objection on the grounds it did especially if it has developed a new view on how it regards Fair Share in light of law.

XII. STIPULATIONS OF THE PARTIES. Stipulations of the parties have been given above.

XIII. THE INTERESTS AND WELFARE OF THE PUBLIC AND THE ABILITY OF THE PUBLIC TO PAY. There is no issue here on the ability of the public to pay. There is an issue on the interests and welfare of the public. The City raises three matters with respect to the latter, similar to the issues raised on its authority to act. One is the constitutionality of the Fair Share clause and principle of Fair Share in itself; another is that the Union does not deserve the Fair Share clause, and the third is that the demand is not supported by enough employees.

On the matter of Fair Share being constitutional and not a matter of forcing a person to associate with those whom he or she does not want, the arbitrator also encountered this issue in Northwest United Educators vs. CESA #4. This is not a light argument. In Northwest United Educators, the Board argues that Fair Share was "legalized extortion". As in the instant case, the Union relied on the discussion of Arbitrator Stern in Manitowoc School District (WERC Case VXII, No. 22629, MED/ARB-46). The arbitrator in the former matter took a position which is stated in two quotations:

"This arbitrator concludes that the Wisconsin legislature has made the fundamental judgment that an agreement between the parties requiring all persons in a bargaining unit to pay something toward the operation of the legally certified bargaining unit is not immoral, but rather in the public interest as tending to promote labor peace."

And, "In view of the fact that the legislature has authorized Fair Share, this arbitrator will not reject it on the grounds of its immorality, but believes that the arguments presented by the Board and individuals opposed to it can well be presented before the appropriate legislative body for its further review."

In view of the foregoing comments, the arbitrator holds that the issue of Fair Share cannot be ruled as opposed to the public interest at this time in view of its legislative sanction.

As to whether the Union is undeserving because of its past actions, the arbitrator does not know where this criterion has been employed in the past. It may very well have been that the members of the Union engaged in a concerted move to be absent on certain days. There are remedies which the Employer can apply when such absences occur under a contract; but even if the Employer did not apply them in this case, it is no indication that such a concerted action did not occur. Assuming for argument's sake it did, nevertheless this arbitrator knows of no criterion by which such an action can be used to bar a demand in final and binding arbitration under Section 111.70.

A more significant argument is made by the Employer that there is not sufficient support to justify the Union demand for Fair Share. A review of City Exhibit 1 B shows that 18 full-time employees out of 26 were under voluntary dues deduction, but only 3 out of 8 part-time employees were under such deduction. At the time of the hearing in 1979, three of the full-time employees were probably under probation. Two of the five part-time employees were probably still on probation. (The arbitrator does not know the classifications to be able to determine precisely the end of probation.)

The arbitrator believes that from these data, there is sufficient support to justify a request for Fair Share, particularly when it is tied to a referendum before going into effect. It should be noted that the request for a Fair Share clause is dependent on a majority voting in a referendum, not necessarily a majority in the bargaining unit. The arbitrator expressed in Wilmot Union High School District vs. Wilmot Teachers Association, (WERC Case III, No. 22473, MED/ARB-9, Oct. 3, 1978), that he did not regard a 60% request for referendum approval as unreasonable if such a counteroffer was made by the Board. In this case, the provision is that only a majority of those voting rather than a majority in the bargaining unit. The arbitrator believes that this provision is a weakness in the Union offer, but not sufficient to defeat the offer by itself.

XIV. COMPARABILITY. Only the Union offered exhibits on comparability. These exhibits were challenged by the City on the grounds that they were not competent in that they were not specific enough about how many contracts in the areas of comparison had Fair Share clauses. The Union exhibits used the phrase, "....agreements covering one or more bargaining units...." The City contended that this did not show preponderance of contracts with such clauses. The arbitrator believes that there is some validity to the City's contention, but not sufficient to totally ignore the argument of the Union that at least in the City's location as part of eastern Waukesha County and the greater Milwaukee area there is a substantial number of contracts with Fair Share clauses.

The arbitrator notes that Fair Share clauses are present in Waukesha County (though possibly not yet in effect) and in the municipalities of Brookfield, New Berlin itself, Muskego and Oconomowoc. He cannot tell from this information how many other contracts without such clauses exist among municipal employers. Thus Union Exhibit 5 which gives this information is not as persuasive as it might be. However, the arbitrator notes that in Union Exhibit 5 there are 16 local governments in Milwaukee County with Fair Share agreements, including some adjacent to New Berlin. These include Hales Corners, Greenfield, West Allis and Wauwatosa. Also it is to be noted that Brookfield City in Waukesha County, adjacent to New Berlin, has a contract with Fair Share. The arbitrator concludes that for municipal workers of the type representative in the Union there is a prevailing pattern of Fair Share in contracts in the municipalities most comparable in regional location to the City of New Berlin.

The arbitrator finds of lesser value in comparability the listing of school districts which have one or more Fair Share agreements. Again one does not know if these are for clerical workers or for professional employees. There is some weight to be attached to the fact that they are in existence.

The arbitrator finds of least value the listing of Fair Share agreements in governmental units around the State. There is no listing of how many contracts have such clauses as compared to how many do not have such clauses.

As to internal comparability within the City itself, there are three contracts, two of which do not have Fair Share. However, one of these is the petitioning Union. Taking this unit out leaves one unit with Fair Share and one without Fair Share, a situation in which one finds the factors balancing each other out. The use of the region therefore as a principal factor of comparability is more significant here.

On the basis of the foregoing discussion the arbitrator finds that as for comparability, the Union offer more nearly meets the prevailing conditions.

XV. OTHER FACTORS. The City says that considering the Constitutional

The arbitrator has previously discussed both contentions. He believes that the proposal of the Union at present cannot be ruled unconstitutional or statutorily deficient absent a definitive ruling from the WERC. As to the unfair labor practices referred to, namely wnat the Employer believes was a concerted work stoppage, the arbitrator repeats that he knows of no criterion which can bar a final offer in final and binding arbitration for previous conduct of this type on the part of the employee organization.

XVI. SUMMARY.

1. The arbitrator holds that the final offer of the Union is not unlawful on its face absent a ruling from the WERC as to precisely what Union expenses are not allowed to be covered by Fair Share payments which are equal to dues uniformly required of members by the employee organization.

2. The Union demand for Fair Share is held to be not against the interests and welfare of the public on the grounds that the legislature has sanctioned the principle of Fair Share, and a test of what a union may require of non-union members under Fair Share is under consideration by the WERC.

3. The Union is not ruled as undeserving of Fair Share because of past actions which may have been unfair labor practices, in view of the fact that such a criterion has not been set for an arbitrator to weigh in final and binding final offer arbitration.

4. The arbitrator believes that there is a sufficient ground of employee interest to support a referendum as contained in the Union offer for Fair Share. However, he is of the opinion that the text of the wording of the referendum provision which allows a majority of those voting rather than a majority of the bargaining unit to decide as a weakness in the Union offer.

5. The arbitrator does not find the internal comparisons used within the City of New Berlin as a compelling factor for deciding that the Union's offer is more comparable than the Employer's offer.

6. The arbitrator finds that the Union's offer for a Fair Share clause is comparable to clauses existing in other contracts among municipalities in the southwestern Milwaukee metropolitan area of which the City of New Berlin is a part.

7. The arbitrator does not find other factors, especially the claim of cumulative disadvantages of the Union's offer on Fair Share, as persuasive enough to rule out the offer for consideration.

As a conclusion, the arbitrator finds that the factor of comparability in the southwestern Milwaukee metropolitan area of which the City of New Berlin is a part is the most weighty factor between the offers, and therefore the Union offer should be included in the contract between the parties.

XVII. AWARD. The final offer of New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, should be included in the agreement for 1979 and 1980 between itself and the City of New Berlin as meeting more closely the statutory guideline of comparability.