Arbitration of MANITOWOC PUBLIC SCHOOL DISTRICT and MANITOWOC EDUCATION ASSOCIATION re WERC Case XVII, No. 22639; MED/ARB-46	ARBITRATION AWARD Decision No. 16227-A Arbitrator: James L. Stern

ISSUE

The sole issue to be arbitrated is "Fair Share." The Association proposes that the new Agreement contain the fair share provision described below. The Board proposes that no fair share provision be added to the Agreement and that the current voluntary dues checkoff arrangements be continued. Under Section 111.70(4)(cm)6.c. the arbitrator is required to select, without modification, either the final offer of the Association or the final offer of the Board.

INTRODUCTION & BACKGROUND

The Manitowoc Public School District, hereinafter identified as the Board, and the Manitowoc Education Association, hereinafter identified as the Association, filed a stipulation with the Wisconsin Employment Relations Commission (WERC) on February 10, 1978, requesting that it initiate the mediation-arbitration procedure under Section 111.70(4)(cm)6. of the Municipal Employment Relations Act (MERA) for the purpose of resolving an impasse about matters affecting the wages, hours and conditions of employment of employees represented by the Association. The Association and Board had exchanged proposals in an open meeting on October 10, 1977, and had met in negotiations on nine occasions prior to mediation meetings conducted by WERC staff member, Marshall L. Gratz on January 16, 23, and February 6, 1978.

As a result of the February 10, 1978 petition for mediation-arbitration, the above identified staff member conducted informal investigation meetings on February 22 and March 2, 1978. On March 3, 1978, the parties exchanged final offers and submitted these to the staff investigator along with a stipulation on matters agreed upon and the staff investigator, in turn, informed the parties in writing that the investigation was closed and informed the WERC that the parties remained at impasse.

The WERC then issued an order dated March 14, 1978 declaring that an impasse existed and supplied the parties with a panel of five names from which to select a mediator-arbitrator to resolve the dispute. Subsequently, the WERC was advised that the parties had selected the undersigned mediator-arbitrator and therefore issued an order dated March 22, 1978, appointing him mediator-arbitrator. Notice of the appointment was made known through a public notice and citizens were informed that pursuant to the provisions of Section 111.70(4)(cm)6.b. any five citizens of the jurisdiction could file a petition within ten days for a public hearing on the matters in dispute and at such hearing would have the opportunity to make their views known.

No petition for a public hearing being received by the WERC on or before April 3, 1978, the mediator-arbitrator proposed to the parties, in a letter dated April 4, 1978, that mediation be undertaken and that if settlement was not reached prior to noon on May 5, 1978, the matter would be submitted to arbitration with a hearing commencing at 1 p.m. on May 5, 1978. The parties were successful in resolving all remaining issues except fair share during the period prior to

May 5, 1978. On May 5th, some progress was made in resolving the fair share issue with the Association and the Board making the the following amended offers:

May 5, 1978

Mr. Jack DeMars
3811 Kohler Memorial Drive
Sheboygan, Wisconsin 53081

RE: Manitowoc Public Schools -
Manitowoc Education Association

Dear Jack:

We request consent to modify our final offer as follows and to add to the Collective Bargaining Agreement:

"The Board of Education will agree to a compulsory service fee of all non-members of the Association equal to local dues (this does not mean dues paid to NEAC, WEAC or UniServ Council).

Such fee would be deducted from the teacher's first pay check in September of each year or the teacher may make such payment directly.

Present members of the Association will continue to pay full dues and not have the option of selecting the service fee.

New employees to the District will have the option of paying a service fee or full dues."

Sincerely,

John M. Spindler

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May 5, 1978

PROPOSED AMENDMENT TO FINAL OFFER OF

MANITOWOC EDUCATION ASSOCIATION

1. The MEA proposes fair share language will be implemented upon the results of a referendum conducted by the WERC wherein a majority of the eligible bargaining unit members shall vote in favor of the fair share provision.

2. Such election as conducted by the WERC shall be held within thirty (30) days at multiple sites within the School District.

MANITOWOC EDUCATION ASSOCIATION

By /s/

Neither offer being acceptable to the other party, however, the parties returned, pursuant to the statute, to the final offer positions taken at the conclusion of the WERC staff member investigation. The final offer of the Board was:

NO FAIR SHARE

The final offer of the Association was:

(Delete Part II Sect. 5(A) IN PART, Replaces, II(5)(A) IN PART, ADDS FAIR SHARE PROVISION)

MANITOWOC EDUCATION ASSOCIATION PROPOSAL

FINAL OFFER

FAIR SHARE AND DUES DEDUCTION

A. The Association, as the exclusive representative of all of the employees in the bargaining unit will represent all such employees, members and non-members, fairly and equally, and all employees in the unit will be required to pay, as set forth in this section, their fair share of the costs of representation.

No employees shall be compelled to join the Association but membership in the Association shall be made available to all employees who apply, consistent with the Association Constitution and Bylaws.

B. The employer shall deduct from the wages of each employee, upon authorization by them, the dues of the United Teaching Profession (National, State, UniServ, and local association dues.) These dues shall be deducted in Five equal installments beginning with the October pay period and continuing through February. The sum so deducted shall be paid directly to the Treasurer of the Association within ten days after the preceding month in which the dues were deducted.

C. The employer shall provide the Association with the names of its employees who are members of the bargaining unit and other related information which will allow the Association to determine the amount of dues to be deducted from the wages of each employee.

D. In the event that certain bargaining unit employees choose not to become members of the Association, the employer shall be required to deduct from the wages of said non-members an amount equal to the dues of member employees as their fair share of the costs of representation. Deductions shall occur at the same time, and in the same manner as for those holding association membership.

The Association shall inform the Board by September 25th of each year of the amount of dues established by United Teaching Profession. In the event a teacher terminates before the total amount is deducted, the Board is under no obligation to the MEA for the balance owing.

Written authorizations for dues deductions shall be irrevocable for a period of one year or until the termination date of the present Agreement between the parties, whichever occurs sooner.

E. As individuals subject to this section leave or enter the employment of the district during the school term, the employer will provide the Association with a list of such changes as soon as practicable.

F. Bargaining unit members who are paying Fair Share shall be excused from any fees, assessments, or other charges required of members of the Association where such amounts are intended for use in national, state, UniServ, or local political campaign activities.

G. Nothing in the foregoing shall prevent Association members, or those subject to the fair share payments, from transmitting dues/payments directly to the Association Treasurer in a lump sum payment. In the event that the lump sum payment is made the Association will promptly inform the District.

H. The Association, and the Wisconsin Education Association Council do hereby indemnify and shall save the Board of Education harmless against any and all claims, demands, suits, or other forms of liability including court costs that shall arise out of or by reasons of action taken or not taken by the Board, which Board action or non-action is in compliance with this Agreement, and in reliance of any lists or certificates which have been furnished to the Board pursuant to this Article, provided that any such claims, demands, suits, or other forms of liability shall be under the exclusive control of the Wisconsin Education Association Council and its attorneys.

I. The Fair Share provisions of this Article shall take effect at the begining (sic) of the period of service for teachers for the 1978-1979 school year.

Before commencing the arbitration hearing, the mediator-arbitrator served written notice upon the parties of their opportunity to withdraw their final offers. Although the Board stated that it would be willing to withdraw its final offer, the Association stated that it would not. Therefore, since both offers were not withdrawn, the arbitration hearing got underway.

Public notice had been given ten days prior to May 5, 1978, that, if mediation efforts failed, the arbitration hearing would be held at 1 p.m. at the Manitowoc County Courthouse. Several members of the public and the media availed themselves of the opportunity to attend this meeting. The parties presented exhibits and written briefs and made oral arguments. Subsequent to the hearing, amendments to the briefs, reply briefs and rebuttals to the reply were filed with the arbitrator. These briefs totalled approximately 270 pages; exhibits were equally extensive.

During the period between the arbitration hearing and June 30, 1978, while the parties were filing post-hearing briefs, approximately a dozen members of the public wrote to the mediator-arbitrator expressing an opinion in support of the Board position. The arbitrator forwarded these letters to the WERC for possible response and informed the parties that he had received them. These letters carry no weight in this proceeding since they were not submitted in timely fashion. In order to have standing, such views of independent citizens should have been presented at a formal hearing held pursuant to Section 111.70(4)(cm)6.b. at the outset of the mediation-arbitration procedure.

DISCUSSION

The Board argued that the arbitrator should not award fair share on three grounds -- legality, comparability and ideology. On just these same grounds, the Union argued that the arbitrator should award fair share. The Board stated explicitly that the primary consideration should be ideology, that is, that the real issue is whether it is morally wrong to force an individual to pay a fee to support services which he does not favor. In the Board's opinion, the other factors are important but subserviant to the principle of individual rights.

The Association implicitly agrees with the Board that the basic issue is one of principle. In this connection it argues that it is morally right for the majority to force individuals in the minority to pay a proportionate share of the costs of representation and bargaining. In addition to its free rider argument, the Association argues that fair share is justified legally and on the basis of comparability. In the following discussion, the arbitrator will deal first with the questions of legality and comparability before turning to what the parties regard as the fundamental normative question -- is fair share morally sound or unsound, and by what standards does an arbitrator reach a legally binding judgment of that question?

The Legal Issue: At about the same time as the parties were explaining their positions in Manitowoc in May, 1978, the Supreme Court of Wisconsin issued its decision in Browne v. Milwaukee Board of School Directors (Wisconsin Supreme Court No. 77-318 filed May 2, 1978). Portions of that decision were quoted by the Board and the Association in their post-hearing briefs. According to the parties, the Wisconsin Supreme Court upheld the trial court interpretation of Section 111.70(2) to the effect that this portion of the statute forbids the use of fair share funds for purposes other than collective bargaining or contract administration (Association Amendment to Memorandum and Brief, p. 2 & Board Reply Brief, p. 1).

The Board argues in its reply brief that some portion of the proposed fair share fee to be paid by non-member teachers in Manitowoc would be used for purposes unrelated to contract administration or collective bargaining if the arbitrator selects the Association proposal. Therefore, given the Supreme Court decision finding that the fair share fee cannot be used for these other purposes, the arbitrator would be ordering the Board to violate the law if he selects the Association offer.

The Association argues that the Supreme Court decision upheld the trial court finding in the Milwaukee case ordering the WERC to determine the portion of the fair share fee which is being used for purposes unrelated to contract administration or collective bargaining and that the arbitrator in the Manitowoc dispute should not invade the jurisdiction of the WERC. Furthermore, the Association argues that selection of its final offer by the arbitrator would be legal because the constitutionality of fair share was upheld in the Wisconsin Supreme Court decision. Since the decision did not set aside fair share but only required that it be limited in amount to cover the cost of contract administration and collective bargaining as determined by the WERC, the Association argues that there is no legal prohibition to the selection of the Association offer by the arbitrator, unless and until the WERC has ruled that the integrated dues structure of the National Education Association (NEA) as applicable to employees represented by the Association violates Section 111.70(2).

For several reasons, it seems to this arbitrator that the Association arguments are stronger than those of the Board. If ad-hoc arbitrators are faced with the same question in different disputes and provided with different supporting data, they well may reach different conclusions. In grievance arbitration, a variety of answers causes no great problem because individual contracts differ and what is correct under one may be incorrect under another. But what is being asked in connection with this and other disputes concerning fair share in many school districts around the State in which an NEA affiliate is the bargaining agent, is whether, under State law, the fair share fee may be set at the level of dues less three dollars for political action, or whether it should be set at some lesser figure.

If individual arbitrators make this decision and decide the proportion of NEA dues which meets the test of legality under the criterion of Section 111.70(4)(cm)7.a., the definition of related to collective bargaining and contract administration may vary from jurisdiction to jurisdiction. Furthermore, the amount of time and effort required of each arbitrator to make a thorough investigation and determination of just which NEA activities are not related to collective bargaining and contract administration is probably far greater than the amount of time and effort that arbitrators are able to devote to this task.

In addition, the arbitrator is not persuaded that the intent of the statute under which he gains his authority is such that he should make the determination. Section 111.70(4)(cm)6.g. of the statute, dealing with the scope of bargaining and declaratory rulings by the WERC illustrates the way in which the legislation preserves to the WERC the right to make policy rather than to permit individual arbitrators to determine the scope of bargaining as, arguably, can be done under the earlier statute providing for municipal interest arbitration of police and firefighter disputes.

It should be noted also that a determination of this question in a dispute involving an NEA affiliate may not resolve the question for other unions such as AFSCME and Teamster affiliates holding bargaining rights under the MERA. Since the dues structures of different unions differ, this question is made even more

complex and possibly means that extensive litigation may ensue. The arbitrator notes that the State of Hawaii has experienced some difficulty in resolving this question (See "The Mandatory Agency Shop in Hawaii's Public Sector" by Joyce M. Najita, INDUSTRIAL AND LABOR RELATIONS REVIEW, April, 1974, pp. 432-445).

The other aspect of the legality question is whether deferral by the arbitrator to the WERC places the Board in the position in which it is being ordered to violate Section 111.70(4)(cm)7.a. if the arbitrator selects a final offer containing an allegedly illegal proposal. This arbitrator rejects that argument because, at this point in time, it is not known whether the Association proposal is illegal. After the WERC has examined the NEA dues structure and issued its ruling, it is hoped that arbitrators will have the benefit of guidelines on this question.

Possibly the WERC ruling will require that disagreements about the legality of specific fair share proposals be directed to the WERC before a dispute is certified to a mediator/arbitrator and, failing an employer allegation of illegality prior to impasse, will rule that arbitrators should assume that the fair share clause in question is legal if such claim has not been raised previously. In any event, the arbitrator in this dispute rejects the presumption of illegality and leaves this determination to other forums. Therefore, his decision in this dispute will be based on other grounds to which attention is now directed.

Comparability: The Board argues that, if the arbitrator bases his decision on the criterion of what other employees have (Section 111.70(4)(cm)7.d.), the decision should go in its favor. In the brief submitted at the hearing, the Board indicates that 130 of the 436 school districts in Wisconsin have fair share. In its reply brief, the Board lists 63 districts in northeastern Wisconsin including the Manitowoc area and shows that only 20 of these districts have fair share. It argues also in its hearing brief that only three of the eleven comparable Fox River Valley cities and one of the six districts in Manitowoc County have granted fair share. If the number of districts is to be the critical factor, it would appear that the Board argument would prevail.

The Association argument in rebuttal to this Board claim is twofold. First, it cites the number of teachers rather than the number of districts. In terms of the comparability argument within Manitowoc County, the Association notes that Two Rivers will have either a modified fair share or full fair share in its 1978-1979 agreement depending on which offer is chosen by the arbitrator. When one adds the number of teachers in the Two Rivers district to those in Kiel who have fair share and compares them with the total in Mishicot, Reedsville and Valders (and there is a disagreement about whether Valders does or does not have fair share), it may be found that a majority of the teachers in the County are covered by fair share. Also, given the size of the Manitowoc District relative to the others, it is clear that the predominant pattern in the County will be fair share if Manitowoc has fair share and will be the reverse if the Board position is upheld.

The Association also draws slightly different boundaries than does the Board and points out that, in the UniServ district in which Manitowoc falls, a majority of the teachers are covered by fair share. The inclusion of the 600 teacher Sheboygan unit in this UniServ district accounts in part for this statistic. The Association also listed 43 districts, employing 6,077 teachers in the WEAC Northeastern Region of Wisconsin, which have fair share. It was brought out also that, of the eight Fox River Valley cities cited by the Board as not having fair share, the issue is being arbitrated in at least three districts including Manitowoc. It appears that, so far as the Fox River Valley comparable school district scoreboard is concerned, the standings are --- three fair-share, five no-fair-share and three still in doubt.

If comparability is extended to the private sector, the Board data in its reply brief indicate that since membership in unions is less than 20 percent (a statistic which may overstate the situation), the percent of the labor force covered by fair share is even less. The Association, in turn, in its brief, notes that union shops are found in more than 80 percent of the major union contracts.

A further dimension of this argument is found in the Board claim that, since teachers are professionals, they should not be compared with blue collar workers and should be treated differently in so far as compulsory fee arrangements are concerned. The Association challenges this argument and indicates that even if professionals are different, some professionals believe in compulsory fee arrangements. In support of its claim, the Association cites the closed bar of Wisconsin. Counsel for the Board, in rebuttal, argues that the closed bar performs a distinctly different function than a bargaining organization and denies the validity of the comparison.

The arbitrator has examined these comparisons and reviewed the arguments of the parties in so far as comparability is concerned. It seems to him that the prevailing pattern is one in which the largest school districts in Wisconsin have adopted fair share and that it is spreading to medium sized districts and eventually will cover most districts. As of the present, fair share may cover a majority of the teachers in the state while no-fair-share covers a majority of the districts. The arbitrator made no calculations on this precise point because he is willing to abide by the opinion of the parties that the important question is whether or not a compulsory fee arrangement is sound in principle under Wisconsin statutes and not whether X percent of the teachers or Y percent of the districts have fair share.

Perhaps, in other disputes and in subsequent years, arbitrators may decide that the issue has been resolved and that comparability is the basis on which the issue can be decided in the remaining districts. But, as the parties pointed out to the arbitrator, they believe that this is the first case in which fair share has been the sole issue before the mediator-arbitrator. The extensive briefs and careful presentations by the parties lend further support to the contention that the arbitrator should treat the issue as a matter of contending principles under the Statute and not take refuge in either legal technicalities or the rubric of numbers.

Ideology: The Board argument about the sanctity of individual rights is one which deserves careful consideration. As a matter of tradition and culture, Americans have valued highly the belief that individuals should have the freedom to speak and act freely without restraint unless by their speech or actions they injure others. Fair share fees clearly violate the freedom of the individual to fully oppose his legally selected bargaining agent. Both the unwillingly represented employee and the one who has eagerly sought collective bargaining must contribute to the cost of representation for bargaining purposes.

Under Wisconsin law, the employee within a bargaining unit may undertake efforts to decertify the union and return to individual bargaining, or to aid a rival organization in its efforts to become the bargaining representative. Even during such efforts, however, this individual, who opposes the incumbent union, will be forced to continue payment of his fair share fee to this union he dislikes if such union has negotiated a fair share argument. (See, for example, the previously cited article about the situation in Hawaii.)

In effect, in this dispute, Board members are saying we oppose fair share as do a minority of the teachers and no arbitrator should impose this arrangement on us and on them. The Board believes that individuals in the bargaining unit who do not wish to belong to the Association or pay a fee for its services should not be forced to do so. Imposing this obligation on them forces them to contribute to the financial welfare of an organization which may espouse causes with which they are in fundamental disagreement — such as the degree of federal control over education.

The Board argument is an appealing one but in this arbitrator's opinion is only indirectly relevant. The arbitrator believes that the Board and others who believe in the sanctity of individual rights are in actuality defending a system of individual bargaining. When the idea of a representation election was adopted, with a legally certified bargaining unit and bargaining representative, the principle of individual rights was made subserviant to the principle of majority rule. In the private sector, under the Wagner Act (1935), the Taft-Hartley Act (1947) and the Landrum-Griffin Act (1959) the Congress of the United States made clear that it favors collective bargaining as a means of resolving problems between employers and employees and has provided means of regulating the labor relations policies of employers and organizations representing employees. In municipal employment in Wisconsin, the state legislature has followed a similar pattern since 1959.

In effect, an employee organization, such as the Association, is treated as if it is a public utility. The government regulates it in many ways establishing who can bargain for whom and what the bargaining agent can bargain about. Government regulates the conflict between employers and employee organizations by listing prohibited practices and establishes an agency to ensure that violations of these practices can be stopped. No longer is the union a voluntary association of individuals united together to improve their own welfare, now it is an entity charged under law to provide representation and fair treatment for all individuals within the government certified unit.

The Board argues that the individuals have not had a choice between being represented by the Association or bargaining individually while the Association represents those who wish to be represented by it. This is true, but the freedom to follow this course of action has been denied by the legislature in Wisconsin and legislative bodies elsewhere when they adopted the public policy of establishing bargaining units and exclusive representation by the certified bargaining agent. IT IS THE ADOPTION OF THAT PRINCIPLE, THE PRINCIPLE OF AN EXCLUSIVE BARGAINING AGENT NEGOTIATING A CONTRACT FOR ALL EMPLOYEES WITHIN A BARGAINING UNIT, WHICH HAS DEPRIVED EMPLOYEES OF RIGHTS WHICH FORMERLY THEY POSSESSED SINGULARLY AS INDIVIDUALS BUT WHICH NOW ARE POSSESSED COLLECTIVELY BY THE BARGAINING AGENT ON THE BEHALF OF ALL INDIVIDUALS IN THE BARGAINING UNIT.

Payment of a fee under the contract is only one of the many restrictions in the Agreement which affect individual employees, the Board and the Association. Wages, fringes and other specific benefits and plans to handle contingencies such as layoffs and other matters are contained in the Agreement. Surely, these represent more significant intrusions into the rights of individuals than mandatory payment of fees. For example, the question of whether a particular teacher should have been laid off can not be processed to arbitration by a teacher, member or non-member, unless the Association decides that the dispute is a bona fide grievance representing, in its opinion, a violation of the contract. Surely the right to arbitrate the loss of one's job through layoff is as important as the imposition of a fair share fee. Yet this right has passed from the individual to the bargaining agent under a system of collective bargaining.

The freedom of the individual in a bargaining unit has been restricted from the moment that the unit was certified, and payment of a fair share fee is just one more manifestation of the various restrictions contained in labor agreements. It is argued by some that the payment of the fee stands alone as a more noxious condition of employment than other requirements of a labor agreement. The arbitrator does not find that this argument has substantial support. The arbitrator believes that the underlying reason for the opposition to fair share is the understandable belief of some individuals within a bargaining unit that their union has too much power, too much money and too much influence over their lives and their society generally. Those people who have such opinions usually support "right-to-work" legislation.

Such legislation, while preserving the concept of an exclusive bargaining agent, would permit individuals to opt out of paying for services. Although the arbitrator can understand how such arrangements may limit the power of unions, he cannot see why the freedom not to pay a fee stands alone as an individual right worth protecting while the other rights specified in a labor agreement, which in total are far greater than the right to withhold a fee, are taken from individuals. The arbitrator believes that the argument against fair share which is advanced on the ground of protecting individual rights to refrain from some activity is -- within the context of collective bargaining as it operates today in this society -- actually one that rests on the notion that unrestrained power is bad and that it should be curtailed. Individual freedom seems to be used as the rallying cry in this effort to restrain the power of unions.

Unions also have a rallying cry behind which they muster their efforts. The Association advances the "free rider" principle in support of its argument that it is just and fair for individuals, who must be provided under the law with bargaining services equal to those of members, to pay their fair share of the cost of these services. This argument, like the individual freedom argument, appeals to the sense of fairness and equity which is a part of the American culture and tradition. Yet

this argument is also suspect as a shield for the basic proposition that without compulsion unions would not be able to muster their power effectively.

If union members generally were faced with a situation in which many employees in the bargaining unit were receiving services without paying dues, wouldn't many of them ask why they should continue voluntarily to pay dues? Faced with the opportunity of getting services free, wouldn't some members find excuses to discontinue their payments and join the ranks of the non-payers? Union leaders would have to devote time and energy to building the union and maintaining its strength internally. Financial resources of the union would be smaller and less secure. Union power in negotiations with an employer may well be substantially reduced if many employees in the bargaining unit need constant urging to pay their dues. From the point of view of the union leader, fair share must seem as a necessary foundation for the building of a powerful union.

The arbitrator believes that the dispute about fair share, although cloaked in highly moralistic terms is basically a dispute over power. In the private sector, it is usually settled by negotiation, possibly after a strike, but more frequently has been agreed upon as the relationship between the management and the union matures and the management accepts as permanent some sharing with the bargaining agent of its power over employees. It is argued by the Board, however, that arrangements covering blue collar workers in the private sector are not appropriate for application to professional public sector employees such as teachers.

The arbitrator grants that there are differences between professionals and non-professionals but does not believe that these differences justify a different treatment in so far as fair share is concerned. If teachers, as professionals, value individual rights so much more highly than others in society who have given them up in favor of collective action, then teachers should not engage in collective bargaining. As the arbitrator has already stated, he believes that under collective bargaining as practiced today in the United States, it is logical to expect compulsory payment of dues or a fee in lieu of dues to prevail eventually.

In the public sector, the collective bargaining rules for the establishment of fair share arrangements have differed from those in the private sector in the past although that difference seems to be decreasing. In the 1960's, under the Wisconsin statute then in effect, fair share was prohibited. Under the amendment to the MERA passed in 1972, this prohibition was lifted. The political strength of public sector unions, with the support of private sector unions and other groups and individuals in society, was sufficient to change the rules. Fair share was made a bargainable issue.

It is this arbitrator's understanding that the referendum procedure for determining whether fair share would be initiated for State of Wisconsin Employees was not adopted also for municipal employees because of the belief of some municipal employers that this matter should not be settled by a vote of employees but was a matter which could be settled best by negotiations between the employer and the organization representing the employees. Under this philosophy, management could negotiate something in return for granting fair share and, furthermore, under the then existing impasse resolution procedure ending in non-binding factfinding recommendations, it could refuse to grant fair share if it did not wish to do so. Now that arbitration has been substituted for factfinding, fair share can be forced upon employers by arbitrators.

This arbitrator would far prefer to have the parties settle the matter by themselves, or have the legislature decide the matter as it did in Hawaii by granting a mandatory fair share to the bargaining agent, or have the employees decide by vote as is the situation today of Wisconsin state employees under existing Wisconsin legislation. But, since the arbitrator must make the decision, this arbitrator would far prefer "conventional" arbitration which permits him to fashion his own award rather than be forced to pick between fair share and no fair share. In some situations an employee vote may be more appropriate; in others this arbitrator might favor a grandfather arrangement under which present non-members are exempt from payment of a fair share fee while new employees must pay the fee or join the union. It should be noted that in the private sector, many arrangements moved gradually through a spectrum of arrangements from no union security to maintenance of membership to modified union shop to full union shop.

In this dispute, however, since the arbitrator was unsuccessful as a mediator and since he is precluded by statute from fashioning his own compromise award, he must choose one of the two final offers -- fair share or no fair share. This arbitrator will choose fair share primarily because he believes it is one of the attributes of collective bargaining as it is practiced today in the United States and that it represents no greater infringement on personal rights than many other attributes of this collective bargaining system. As stated previously, the concept of an exclusive bargaining agent for a certified bargaining unit carries with it the subordination of individual rights to collective rights. The theory supporting this arrangement has been set forth many times over the years. Workers give up individual rights in order through collective action to gain objectives which they cannot achieve by individual action. Whether the gains made collectively outweigh the loss of freedom of individuals is something that the employees themselves must decide. A majority of the labor force has not opted for collective bargaining. Once a group adopts the collective route, however, it is clear that a consequence of that decision is the imposition eventually of the obligation of all individuals within the group to pay their fair share of the costs associated with that decision.

AWARD

With full consideration of the exhibits and arguments of the parties and the criteria listed in the statute, the arbitrator hereby selects the final offer of the Association.

James L. Stern /s/
James L. Stern
Mediator/Arbitrator

8/2/78
August 2, 1978