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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATION'S COMMISSION

In the Matter of the Petition of
TWO RIVERS EDUCATION ASSOCIATION
Initiating Mediation-Arbitration
Between Said Petitioner and
TWO RIVERS PUBLIC SCHOOL DISTRICT

Case XIII
No. 22779 MED/ARB-68
Decision No. 16357-A

I. MEDIATION. A mediation session dealing with the above entitled matter was commenced on June 29, 1978, at 10 a.m. at Two Rivers High School, Two Rivers, Wisconsin. After an exchange of counter offers between the parties, which counter offers were not accepted, the parties asked to go to arbitration. The mediator-arbitrator thereupon served the parties with a written notice that he had concluded that the parties were at an impasse and deadlock after a reasonable period of mediation, and stated that he intended to resolve the deadlock by final and binding arbitration, beginning at 1 p.m., on June 29, 1978, at the High School.

II. ARBITRATION. A hearing in final and binding arbitration on the above entitled matter was held beginning at 1 p.m. on June 29, 1978, at the Two Rivers High School, Two Rivers, Wisconsin.

III. APPEARANCES.

For the Association:

JOHN A. DE MARS, Executive Director, Kettle Moraine UniServ. Council, 3811 Kohler Memorial Drive, Sheboygan, Wisconsin 53081

For the District:

MULCAHY & WHERRY, S.C. by DENNIS W. RADER, Attorney, 414 East Walnut Street, Green Bay, Wisconsin 54301

IV. BACKGROUND. The Two Rivers Education and the Two Rivers Public School District had an Agreement covering all regular certified employees, which included classroom teachers, librarians and others, but excluding administrators, supervisors, aides, para-professionals, clerical and maintenance and custodial employees. The Agreement was to expire on December 31, 1977, but the parties extended it by mutual consent. The parties exchanged initial proposals on October 17, 1977, and were unable to reach a complete agreement on all items. The Association filed a petition with the Commission requesting mediation-arbitration under Section 111.70 4 (cm) of the Municipal Employment Relations Act. A Commission staff member, Mr. Robert M. McCormick, conducted an investigation from April 17, 1978, to April 24, 1978, and as a result concluded there was

an impasse and so reported to the Commission. On May 10, 1978, the Commission concluded there was an impasse under the meaning of the law, certified that conditions precedent to initiation of mediation-arbitration as required by Section 111.70 4 (cm) 6 were met, and ordered final and binding arbitration.

On May 24, 1978, the Commission sent an order to Frank P. Zeidler, Milwaukee, Wisconsin, appointing him as mediator-arbitrator.

At the hearing noted above, the parties presented evidence and argument. Briefs were exchanged through the arbitrator on August 3, 1978.

V. THE OFFERS. This is arbitration about a single issue: the type of "Fair Share" clause which should be included in the Agreement. The parties settled all other items.

The District's offer is as follows:

FAIR SHARE AGREEMENT

A. Membership Not Required: Membership in any employee organization is not compulsory. Employees have the right to join, not join, maintain or drop their membership in an employee organization as they see fit.

B. Effective Date and Employees Covered: Effective at the beginning of the 1978-1979 school year and unless otherwise terminated as hereinafter provided, the District shall, once each month, deduct from the regular earnings of all employees specified herein an amount equal to such employees proportionate share of the cost of the collective bargaining process and contract administration as certified by the Association and measured by the amount of dues uniformly required of all members, and shall pay such amount in a lump sum to the treasurer of the bargaining representative on or before the end of the month following the month in which such deduction was made.

1. Present Employees: As to all unit employees employed on April 17, 1978 such deduction shall be made and forwarded to the treasurer of the bargaining representative only from the monthly earnings of those employees who are members of the employee organization on April 17, 1978. Unit employees who are not members of the employee organization on April 17, 1978 shall not be covered by this article. However, the aforementioned employees not covered by this article may opt to join the employee organization and thus become covered by this article at any time by written request.

2. New Employees: Such deductions shall be made and forwarded to the treasurer of the bargaining representative from the earnings of all new employees.

C. Names: 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. Amount of Dues: The Association shall inform the Board of Education of the amount of dues established by the Association prior to the first pay period of the school year.

E. Changes: 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. Fair Share Members: 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, UniServe or local political campaign activities.

G. Lump Sum Payments: Nothing in the foregoing shall prevent Association members or those subject to the Fair Share payments, from transmitting dues/payments to the Association Treasurer in a lump sum payment. In the event that the lump sum payment is arranged, the Association will promptly inform the District prior to the first pay period of the school year.

H. Responsibilities of the District and the Collective Bargaining Representative:

1. If an error is discovered with respect to deductions under this provision, the District shall correct said error by appropriate adjustments in the next paycheck of the employee or the next submission of funds to the collective bargaining representative. The District shall not be liable to the collective bargaining representative, officer or any party by reason of the requirements of this Article of the Agreement for the remittance or payment of any sum other than that constituting actual deductions made from employees wages earned.

2. Indemnification and Hold Harmless Provision: The collective bargaining representative shall indemnify and save the District harmless against any and all claims, demands, suits, orders, judgments, or other forms of liability that shall arise out of, or by reasons of, actions taken or not taken by the District under this section, including, but not limited to, indemnification in the following instances:

   a. Damages and Costs: In the event the provisions of this Fair Share Agreement are successfully challenged in a court or other administrative body, and it is determined that the District must pay such sums as have been deducted from earnings in accordance with the provisions hereof or any other damages, the collective bargaining representative agrees to indemnify the District in full, including any and all costs or interest which may be a part of such order or judgment, for all sums which the District has been determined to be liable.

   b. Reasonable Attorney Fees: In the event an action is brought by any party (other than the District) challenging the validity of the provisions of this Fair Share Agreement or any deductions from earnings made pursuant thereto, in which the employer is named as the defendant, the collective bargaining representative agrees that it will indemnify the District in full for reasonable attorney fees necessary to defend the interests of the District as a defendant in such action.

The Association offer is as follows:

(KMUC 031078)

TWO RIVERS EDUCATION ASSOCIATION FAIR SHARE AND DUES DEDUCTION PROPOSAL

A. The Association, as the exclusive representative of all of the employees of 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 By-Laws.

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 _____ equal installments beginning with the _____ pay period and continuing through the _____ pay period. The sum so deducted shall be paid in a lump sum to the Treasurer of the Two Rivers Education Association and the latter shall make distribution to the proper organizations.

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.

E. The Association shall inform the Board of Education of the amount of dues established by the United Teaching Profession prior to the time when deductions are to be made from the wages of its employees.

F. 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.

G. 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.

H. Nothing in the foregoing shall prevent Association members, or those subject to the Fair Share payments, from transmitting dues/payments 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.

I. The Association , and the Wisconisn 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 actions taken or not taken by the Board, which Board action or non-action is in compliance with this Agreement, and in reliance on 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 tis attorneys.

J. The Fair Share provisions of this Article shall take effect at the beginning of the period of service for teachers for the 1978-1979 school year.

VI. "FACTORS CONSIDERED". Section 111.70 4 (cm) 7 of the statutes sets forth factors to which a mediator-arbitrator shall give some weight. These factors will be considered. The section setting them forth 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."

VII. LAWFUL AUTHORITY. There is no question here as to the lawful authority of the Employer to function if either offer is included in the Agreement.

VIII. STIPULATIONS OF THE PARTIES. As has been noted, the parties have agreed to all other issues related to the Agreement.

IX. FINANCIAL ABILITY. There is no matter here related to the financial ability of the government to meet the costs of a proposed settlement. There is a question of the financial ability of the Association to meet the cost of one of the offers. This is discussed later.

X. THE INTERESTS AND WELFARE OF THE PUBLIC.

Both parties discussed the philosophy and policy of "Fair Shares", the Association more so than the District. The arbitrator will attempt to make a reasonable summary of the positions of the parties, stated at length, since this is a major factor in this case.

The Association's Position. The Association supplied a 175 page MEMORANDUM AND BRIEF at the hearing in support of its position. This document consisted of opening statements and eight chapters of arguments. The arbitrator judges from this material that it is the principal argument of the Association that it is not only in the Association's interest that its offer receive the award, but it is also in the interest of the Employer and the public that the Association offer receive the award. The arguments of the parties are not to be glossed over since the issue of Fair Share here stands uncomplicated by other issues.

A Summary of the "Union Opening Statements". The Association says that Fair Share was the subject of negotiation in 1975-1977, but it dropped the issue. It acknowledges that the question of non-membership has affected the Association for some time. There was a rival union at one time which no longer is present, but there is dissension both in the membership and non-membership of the bargaining unit. The Board of the District has no way encouraged or discouraged membership.

The Association says that it was lead to believe for certain reasons, which it mentioned, that the Employer would resist Fair Share in any form. The Association then at the later stages of mediation made several offers to settle, including Fair Share to be implemented only if 60% of the votes of eligibles was in favor of Fair Share, but the Board rejected the offer.

The Association says it wants this issue disposed of, because it wants the economic security of Fair Share, and because Fair Share clouds other issues, and interferes with bargaining in that it forces the Association to disclose its less firmly held positions, so that in the end it gets neither Fair Share nor the other issues. A shrewd employer can cause the Association to compromise its other positions without giving Fair Share.

The Association stresses that an award of a modified maintenance of membership clause will not put the matter out of the way, because "the Association will, if the award is for the employer, continue to seek the Fair Share clause as embodied in its own final offer."

The Association says that this case is unique because it is one of a kind. There have been 12 cases involving Fair Share, and only two have Fair Share as a single issue, both of them as yet undecided at the time of the hearing - Manitowoc and Two Rivers. The Association gave a summary of the other cases. The other cases had other issues involved. Of nine cases cited, the union gained six awards.

The Association notes that the matter may be difficult to decide since the Employer has put in what the Association considers "at least half a final offer", which is unsatisfactory. The Employer cannot argue a philosophy opposing Fair Share since it gave such a feature to another union in the school system; without the modifications presented in this case.

The Association says it presents its Memorandum and Brief as a result of the decision to approach the matter as more an academic problem and issue than an adversary issue in labor relations. The Association says the presentation may have shortcomings, but it may be important in disposing the issue of union security in Wisconsin employment bargaining.

In Chapter One of its Memorandum and Brief, the Association analyzed types of provisions on Fair Share and its contemporary prevalence. The Association makes the point that there is a tilt in the public against unions, and attempts to provide union security are considered take-overs of the rights of management among other things. It points to a history of resistance to unions in their formation and growth. It deplores the philosophy that keeping a union weak is good business, and it says that as a result of the struggle, certain conditions of union security have arisen, which include the closed shop, the closed shop agreement, the modified closed shop, the union shop, the all union shop, the modified shop union, the agency shop, maintenance of membership, the open shop and the closed anti-union shop, the non-union shop. In addition to these conditions, there is the dues check-offwhich has become a union security item and is recognized in Wisconsin law. This latter provision, the Association says, is inadequate for union security in a modern active labor organization because of the sophistication of the union structure needed to counter the professional labor relations consultants of management.

The Association makes a point, which it repeatedly emphasizes in its documents and exhibits, that if only a portion of the beneficiaries of a contract provide economic support to the union, the costs to those who do provide it is proportionately increased.

The Association states that of the various management-union relationships described above, it is barred from closed shop or union shop provisions, and it will not voluntarily select a maintenance of membership or open shop clause. It is seeking an agency shop clause. It is doing this because, among other things, it sees in the future that faculty members will hold on to their jobs, and not resign or move; that there will be fewer positions; and that there is an increase lay-off of Association staff members usually the younger teachers. Thus teachers who do not want union membership will be able to stay, and the Association is not likely to improve its position under a maintenance of membership provisions. The level of financial support for the Association thus will remain the same or be less. The Association cites an authority in its Memorandum and Brief, (Chapter 1, p. 20) that maintenance of membership provisions went from 25% of the contracts in labor negotiations in 1946 to 8% in 1966. It cites another authority to the effect that the union shop or modified union shop is the more prevalent form of union security in 1972, and maintenance of membership was a very minor type of agreement. Maintenance of membership clauses are also held to constitute a very small part of labor agreements, and often were existing in connection with union shop agreements. The Association says that such agreements were a result of the war years, but are obviously unacceptable and transitional type of provisions, and if one is adopted here, it will bring another future impasse.

The Association also contends that the agency shop or "Fair Share" is the only acceptable alternative. Individuals whom the Association wants to reach have numerous reasons for not joining, none of which objections are valid as constitutional objections to an agency shop. Further some non-members may be members of a rival union. The Association also notes that some teachers may not want to join because of past strong positions taken by the Association in dealing with the employer.

The Association also argues that management tells unions to sell themselves, but even when management expresses respect for unions, the non-members do not join. For the various reasons mentioned, the Association concludes that it needs widespread economic support, and that it will never approach the degree of perfection needed to gain this voluntary support from all eligible employees.

In Chapter II, the Association discusses management and union labor relations stability as influenced by union security. The essential argument in this chapter is that union security provisions are beneficial to the employer for various reasons. One example is that the Union may be under constant "economic black-mail" from its members if it makes reasonable decisions. Union representatives may make a good choice in resolving an issue and lose members as a result.

The Association cites authorities to the effect that union security is the key to stability in labor relations and that some management people agree. For example, there might be a disruptive minority within a union, who would cause trouble for the Employer; but if there is union security, the union majority can take care of this and insure an uninterrupted flow of work. Further a union could be undermined when it does not have security and be replaced after interorganizational rivalry. This poses difficulty for management. Where agency shop provisions exist, unions spend great effort to maintain order and stability. Also where union leadership is insecure, management cannot be certain of union commitments.

The Association argues that public management should accept the inevitable result of bargaining on union security that has been demonstrated in the private sector of the economy. Public employee unions will continue to press for the agency shop. An intelligent management would not resist the demand, but determine what things of value they could secure for themselves in an exchange.

A benefit to management will be that once it has a stable relationship through union security, management will know that agreements will be kept, and it will be able to predict in planning what a union response will be to change in operations or policy. The Association believes that unions and management in public employment will be able to accept new and more mature relationships. Each side has access to competent consultants, and there is no danger that a strengthened labor union will have harmful effects on management.

In its Chapter 3 of the Memorandum and Brief, the Association discusses at length a concept that union security is a natural labor-management dynamic which enables the parties to provide steady service by an endless series of balanced subsets of behaviors, powers, abilities, desires and needs, which result in an ability of a system to function without noticeable stress. This is in contrast to the present condition in which a strong management faces a weak union. The Association lists examples of security provisions for both the Association and Employer in contracts. It lists 23 such provisions that might appear for union security and 21 provisions for the employer. In the proposed Agreement for Two Rivers, there are 14 union security provisions and 20 management security provisions. The most important item of all for the Association, namely economic security, is absent; and it is essential that it be present as a balancing factor.

The Association contends that in addition to the security provisions in the contract, the Board is strongly fortified by its powers under the Wisconsin statutes. Thus the Association request for Fair Share would work no injury on the Employer. The Board has a very strong management agreement; and if it would accept the Association proposal, it would have done little more than ease Association anxiety over its economic security.

Chapter 4 of the Memorandum and Brief is an Association analysis of four Supreme Court cases, Abood et al v. Detroit Board of Education (230 NW 2nd 322); Railway Employees Dept. AFL, v. Hanson, (351 U.S. 225); International Association of Machinists v. S. B. Street, (367 U.S. 740); Brotherhood of Railway and Steamship Clerks V. Allen, (373 U.S. 113). From these cases, the Association concludes that at the present time agency shop provisions and the union shops are valid under the Constitution of the United States, and that unions may expend funds for support of political candidates or ideologies, and the only bar is that if someone paying into the union protests, the union is not to exact expenses for such purposes from the protester.

In Chapter 5 of the Memorandum and Brief and in its Amendment to the Memorandum and Brief, the Association recites recent history of court cases and Wisconsin Employment Relations decision in Wisconsin which decisions the Association believes supports the legality of the agency shop and Fair Share; and the only condition that may have to be considered is the matter of an employee objecting to payments for political purposes. In such case the Association has budgeted its funds so that the amount collected from each employee can be readily ascertained; and if an employee should protest, it would be easy to determine the exact amount he or she need not have to pay for such an item. Further the Association notes that the Wisconsin Supreme Court has supported the integrated bar, in which all attorneys are compelled to contribute to the bar association; and this in effect is the agency shop principle.

From all this the Association concludes that the eventual state of agency shop/Fair Share in public employment in Wisconsin will take the form of automatic union security guarantees upon recognition of the union as the exclusive bargaining representative, and this is rational and consistent with the evolution of stable and informed labor relations policy. This condition will be hastened through voluntary agreements among other things.

In Chapter 6 of the Memorandum and Brief, the Association discusses the duty of fair representation and its relation to union security. It notes the numerous court decisions which lay upon unions the burden to fairly represent all persons under union shop, agency, or Fair Share agreements. It holds that unions on the whole have been conscientious about this, but in order to meet the burden, unions must have skilled personnel. This requires union security. Thus the adoption of the Wisconsin legislature to permit agency shop/Fair Share agreements in public employment was intended to encourage the use of such agreements, which is a sound employment practice as evidenced by experience in the private sector. The Association holds that the courts, the legislature and agencies of government would not want to place only on the willing people the burden of paying the increasing costs of mandated union representation. Currently Association members consciously assess themselves to meet the expense necessary for adequate services. Yet they share benefits with free-riders who should without further delay be caused to support the representation.

The Association contends that management has an interest in competent union representation, because it can incur monetary costs as a result of incompetent representation.

In Chapter 7 of its Memorandum and Brief, the Association cites the text of court decisions, writers on labor problems, and recently enacted legislation in nine states which grants a form of maintenance of membership clause or something stronger. Four other states which provide union or agency shops are cited.

The Association says that the Association members are becoming sensitive to the failure of non-members to support the costs; and when the members recognized the increased costs due to the failure of non-members to pay their share, the members became hostile toward the free-riders and toward employers who encourage the free-riders either through action or inaction.

The Association mentions statistics to the effect that the $91 dues required of members to support the WEAC budget of $3,549,000 in the 1978-1979 year would need to come only to $75.51 per person if all the non-members paid. This would be a decrease of 18%. In Two Rivers with a local budget of $1,230 funded by 123 members with dues of $10, if the 20 non-members paid for support, the local dues needed to have been $8.60 or a decrease of 14%. The Association says that its patience with free-riders wears thin. It also notes that the decisions of courts, agencies and neutrals state that those who reap the benefits of representation must be expected to bear the costs of the representation.

The Association further notes that the National Public Employer Labor Relations Association, an organization of Chief Negotiators of city, county and state governmental units, produced a model bill which includes both agency shop and dues deduction for membership dues and agency shop fees.

In Chapter 8 of its Memorandum and Brief, the Association analyzed its proposal. Pertinent parts of this chapter, relating to the interest and welfare of the public will be cited. The Association provided a table on membership and non-membership. For the school year 1972-1973 there were 151 persons estimated as eligible to be members, 109 members and 42 non-members. For 1975-1976 there were 150 eligibles, 121 members and 21 non-members. For 1978-1979 there were 143 eligibles, 123 members and 20 non-members. The Association estimates that in 1979-1980 there will be 141 eligibles, 123 members and 18 non-members.

In another table it is noted that in 1973-1974 local dues were $10, UniServ dues $20, State dues $6, and national dues $25, for a total of $101. In 1978-1979 the local dues were still $10, UniServ dues were $48, State dues were $86, national dues were $35, and the total was $179. All members are required to pay the unified dues. All of the bodies to which dues are paid are known as the United Teaching Profession (UTP). The state organization will return $3.00 of its share of the dues if any member requests return of money spent for political action. No Fair-Share teacher will be required to make such a payment.

Association Exhibits. In support of its Memorandum and Brief supplied at the hearing, the Association supplied 29 exhibits. Exhibits pertinent to the issue of the interests and welfare of the public will be noted here. Association Exhibit 3 was a tearsheet from the Wisconsin School News, April, 1978, with an article noting an expected 200,000 drop in enrollment by 1982. Association Exhibit 4 was a WEAC document on declining enrollment by Paul du Vair. There was a decline especially in public school enrollment, and the suggestion was made to lower class size to keep up the number of teachers.

Association Exhibit 5 was a table showing enrollments, past and projected, in the Two Rivers School District. In 1972-73 the total enrollment was 3,232. In 1978-1979 it was 2,887; and it is projected to be 2,823 in 1979-1980, a drop of 409 pupils since 1972-1973, and a decline of 13%. Association Exhibit 6 was a table of increase in members of the National Education Association. It was 453,797 in 1950, 1,886,532 in 1976, and 1,679,684 in 1977 after a disaffiliation of New York City and State.

Association Exhibit 7 was a series of documents highly critical of non-joiners. Association Exhibits 9 through 19 were exhibits which gave in great detail the table of organization, the rights of persons belonging to various organizations in UTP, the philosophy of the organizations, the services they render, and the budgets.

Association Testimony. A fact to be noted is that an Association witness testified that there was some opposition to the Association among younger and more militant teachers.

The Association's Summary Brief. The Association supplied a brief after the hearing which summarized the Association's position, and also addressed the Employer's arguments on public policy. The Association asserts that it does not agree with the conclusion that because the legislature did not adopt certain bills since 1973 that mandatory Fair Share is not the public policy. The Association holds, for example, that if a mandatory Fair Share proposal based on a referendum had been introduced, it would have passed.

Further Fair Shares was not the highest organizational priority of four principal public employee organizations; rather the bill which allowed a limited right to strike had a higher priority, and this passed. The Union says the Fair Share bill must be viewed in light of a political reality that legislators were informed they would be off the hook on the lower priority Fair Share bill if they supported the limited right to strike bill.

The Association also argues that Fair Shares was not beneficial to the organizing efforts of a rival union, the American Federation of Teachers, and so the AFL-CIO paid lip service only to the bill for Fair Share, and legislators friendly to the AFL-CIO did not press it.

The Association also cites the integration of the Wisconsin Bar, which it says is an agency shop arrangement. Such an agency shop became public policy before any law was passed. The Association stresses its argument that the evolution of labor relations will inevitably lead to union security in the form of agency shop clauses in all contracts, and that the public policy of the State is to encourage this.

The Association further states that in all the court decisions and official comments it cited, no statement was made that the agency shop is contrary to the policies of the State of Wisconsin.

As to Maintenance of Membership Agreements, the Association states it considers this as creeping erosion of the union shop which is its preferred standard. The Association says that the agency shop is a first order compromise. Maintenance of membership is a second order compromise, but the Employer is proposing a modification of maintenance of membership, which is a third order compromise.

The Association also takes issue with the contention that under maintenance of membership eventually it would have the full work force in the agency shop. For reasons cited earlier and repeated in this second brief, the Association believes that there will be no greater increase in the number of teachers voluntarily joining the Association. The Association also repeated its belief that declining birthrates and fewer teachers would also work against further membership increases.

The Association says that it will suffer annual losses of $3,638 on prospective income, and because it has not had Fair Shares, it has suffered a loss of $25,465 as shown in its Exhibit 25.

The Association in a Reply Brief says that its statements that if it does not get full Fair Share in this issue, then it will continue to press for it, does not indicate its inflexibility, but shows the Association's desire for a proper standard. It cites Arbitrator Stern in a decision of August 2, 1978, in Manitowoc. The arbitrator in that case said that differences between professional and non-professional employees do not justify the difference in Fair Share treatment; and that the arbitrator chose Fair Share, 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 the collective bargaining system.

The Association rejects the criticism by the Board of the Association exhibits which show how Association members feel about free-riders.

Position of the Board. The Board believes that collective bargaining must be a give and take process with compromise on both sides, and that the Board does not consider its function at the bargaining table as one of establishing immutable principles. The Board says it approaches collective bargaining in the spirit of meeting problems and finding solutions by agreement. Thus, individual members of the Board with personal opinions on Fair Share moderate their views and act in concert in the best interests of the community, the school, students, parents, and faculty. Thus the Board maintains that the arguments in support of either offer on Fair Share should be made strictly on statutory criteria and not on philosophy or policy arguments, or reviews of the history of unions. The Board says that its exhibits of bills in the legislature which have failed to pass show that there has been a concerted effort to legislate Fair Share; but it is not public policy to institute it at present without Employer agreement first. Arguments on the history and social policy of Fair Share are more useful in attempting legislation, but not in this particular issue.

The Board says that its offer represents a sincere effort on its part to produce a satisfactory solution to the demands of the Association and the rights of the non-Association members. The Board has shown a consistent concern for employees which it hired without giving them notice that they would be forced to pay Fair Share.

On the matter of the Board having granted Fair Share to its custodial and maintenance employees, this was done only after the Board polled the members of the unit and found that all but one member was in the union, and this member had no objection to Fair Share as he was retiring soon. This state of affairs does not exist in the teachers unit since 18 teachers do not belong to the Association. Among these teachers, some have expressed opposition to Fair Share.

In view of these facts the Board is in a dilemma which requires a compromise. The Board cannot dismiss the wants or desires of either the Association or non-members; and so the Board offered what it considers to be a solution agreeable and amenable to both parties in its maintenance of membership offer. The Association is guaranteed its current level of membership, and future members will be required to contribute to Fair Share. Also persons who are not members of the Association on April 17, can join the Association thereafter and contribute to Fair Share if they desire. The only benefit the Board gets from this is that those who expressed opposition will have the right to choose whether to contribute or not. This is a conciliatory effort of the Board.

The Board rejects the Association argument that declining enrollment will be adverse to new teachers joining the Fair Share program. The Board says that first its offer provides for teachers not members of the Association to join at a later date. Further, the argument that only younger teachers who are members of the Association will be laid off, must be countered by the testimony in the hearing that there was no correlation between age and Association membership. The Board says that the Association can, through normal attrition (retirement and layoff) and Association recruitment policies, enlarge its membership. Declining enrollment need have little or no effect on Association membership.

The Board rejects the Association argument that maintenance of membership is a concept unique to World War II, but holds that it must be viewed as a currently dynamic mechanism to resolve the current dispute.

In its Reply Brief the Board noted that it presented its case with rational, unemotional and concise arguments. It says however that it and the arbitrator have been bombarded with arguments presented with the emotionalism of a crusader. It asserts that the Association has attempted to obfuscate the issue, but has unjustifiably questioned the integrity of the Board by innuendo and insinuation. The Board therefore requests that the matter be decided in the context of collective bargaining and arbitration law. The Board objects to what it terms as "the Union's attempt to make this proceeding a labor relations Armageddon." In response to the Association contention that the Board surreptiously received the Association documents before the hearing, the Board says it resents such unprofessional allegations and deplores such tactics. It asserts it did not have the Association documents presented at the hearing, but did have copies of documents used in another case on the related issue, and these were obtained properly from the Employer.

The Employer notes that it had believed that the issues in the Manitowoc Fair Share case and the Two Rivers modified Fair Share case were different, and when the Manitowoc Brief was presented, the Association was failing to address the real issue in this case. The Association may have been chagrined over the Employer's decision for modified Fair Share, but this is the Employer's business.

The Employer asserts in the Reply Brief again that public policy about Fair Share is that it is bargainable, and a negotiable item with no ideological presumptions. In its exhibits on legislation that failed to pass, the Board was merely showing that it is a bargaining item. The Association response as to why it failed to pass is of little import, and then lends support to the Association's inflexible posturing and refusal to compromise.

The Board says that the Association's Brief shows that the real issue underlying Fair Share is one of power. It says that this is confirmed by Arbitrator Stern in the Manitowoc case who affirmed this fact. In light of this information about the real issue, the Association's arguments for Fair Share, justice democracy, and so on, appear toothless. The Board says that the Union's argument reveals that the only issue for the Union is a matter of a power struggle between the largest teacher unions and the non-member teachers, and Employers are pawns.

As to the comparison between the State Bar Associations and the teacher unions, a major difference is that the Bar is an association of professionals who have undertaken to police themselves. The teacher unions are labor organizations with no record of self-policing.

As to maintenance of membership, the Board says in its Reply Brief that the Association displayed its unwillingness to investigate a more flexible posture and unwillingness to compromise and to accept the arbitrator's decision, and states that Fair Share could again become an issue creating an impasse. In this the Association exhibits lack of respect for individuals' rights and labor peace. Even though the Association berates the modified Fair Share offer, yet Arbitrator Stern in Manitowoc, in the text of his decision, clearly approved of such compromise.

Discussion on Interests of the Public. From the foregoing recitation made at some length of the positions of the parties on whether or not Fair Share is in the public interest, the Association contention is that Fair Share, or the agency shop, is in the public interest because of the historical trends which make it almost inevitable, and which therefore should be supported by a decision here in its favor. The Association holds further that it is in the interest of the Employer to have a strong union which is not troubled by internal quarrels and which therefore cannot deliver on its commitments, because the Employer can predict better in planning for changes

what the Association response will be. Further, Fair Share would have been the declared legislative policy but for some recent distractions from bills with higher priorities. Also the Board in this case has all the security it needs to protect itself.

The Board's position basically is that its maintenance of membership proposals solves a dilemma for the Board in meeting the demands of two conflicting groups of teachers in its employ.

The foregoing propositions can be reduced to consideration of what the current public policy is including the trends cited by the Association. That policy in Wisconsin is found in Section 111.70 (1) (h) and 111.70 (2). The former section defines Fair Share agreement, and the latter section indicates that a Fair Share system is to be obtained by agreement between the parties. Fair Share is therefore not mandated by the legislature. This reduces an arbitrator to the position of weighing a proposal for the inclusion of Fair Share, not on the basis of whether the arbitrator believes in it as a principle himself or herself, but as to its merits with respect to all the other criteria set forth in the statutes by which offers in final and binding arbitration are to be decided. Public policy is such that Fair Share is neither mandated to be barred nor to be accepted, but must be achieved through agreement. The interests of the public do not command that Fair Share be mandated each time it appears in arbitration. Since it is not mandated to be accepted, the arbitrator then proceeds to other criteria as a means of determining the outcome of this matter.

The arbitrator is favorably impressed by the more reasonable offer of the Board of a type of Fair Share in attempting to give the Association assurance of all new teachers being placed under Fair Share and yet meet the demands of persons conscientiously opposed to Fair Share. However, the decision in this matter must depend on the weight of additional factors also, of which comparability and the exact language of the indemnification clause are fully as important.

The Association presented considerable information on the structure of its organizations and affiliations and on the responsibility of the Association and UTP organizations to have a concern for the interest of non-members. The arbitrator believes that the Association if granted Fair Share would conduct itself democratically and protect the interests of non-members. However, the tone and character of Association Exhibit 7, detracts from the Association arguments in this respect.

XI. COMPARABILITY. Both parties provide exhibits and discussion on the issue of comparability of their offers with what prevails in comparable school districts, governments and private employment. These presentations shall be summarized.

The Association's Position. Association Exhibit 2 showed a table which indicated that maintenance of membership furnished only a low percentage of contracts nationally. It says that this is a valid exhibit to be applied in this, and there are no such contracts in CESA 10.

Association Exhibit 22 listed 18 public employees' unions in Manitowoc County, none of them teachers' organization, who had Fair Share agreements. In Sheboygan County there were nine public unions with Fair Share, in Calumet six public employee unions with Fair Share, and in Kewaunee County five such unions. In Sheboygan County 13 companies in the private section with Fair Share were listed, and the exhibit listed 55 counties with Fair Share in one or more employee bargaining units.

Association Exhibit 23 listed 54 union shop agreements in the Manitowoc-Two Rivers area. Association Exhibit 24 listed 43 school districts in the WEAC Northeast Region with 6,077 teachers who had a Fair Share agreement.

The Association in its Summary Brief notes that the Two Rivers School District is in Cooperative Educational Service Agency 10 and in the Kettle Moraine UniServ Council area. Kettle Moraine UniServ districts included districts within Manitowoc, Sheboygan, Calumet and Fond du Lac Counties (New Holstein District). Of districts in these areas, Fair Share provisions are present in New Holstein, Kiel, Howards Grove, and Sheboygan, and as a result of a recent award in arbitration, new in Manitowoc also.

The Brief says that the UniServ Council is involved in bargaining in Elkhart Lake, Plymouth, and Sheboygan Falls on Fair Share.

The Brief says that there will be 1,625 members of the UniServ Council in the 1978-1979 school term. Following the Manitowoc decision, those without Fair Share will be about 19%.

The Association notes that all employees in Two Rivers Municipal Employment, including non-instructional personnel of the School District, are covered by Fair Share. Teachers in Valders, Cedar Grove, Oostburg and Random Lake districts which are contiguous to the UniServ Council and in CESA 10 have Fair Share. Virtually all County employees in CESA 10 have Fair Share, as do employees in Kewaunee, the next county north. City employees in Two Rivers, Manitowoc, Kiel, Sheboygan, Kewaunee, New Holstein, Chilton and Plymouth all have Fair Share. The Association also says that

the area's major private sector employees are heavily unionized and have union shop agreements, and the Association lists these employers in tables on pages 13 and 14 of its Summary Brief. The Association says that 31% of the employers have union shop agreements, but these cover 87% of the total employees.

The Association says that its exhibits provide the following items on "comparability" and provide the following conclusions:

1. Over 80% of Kettle Moraine teachers are covered by full Fair Share. 600 teachers are covered by Fair Share agreements in Northeast Wisconsin.

2. Several school districts in communities contiguous to Kettle Moraine UniServ have full Fair Share.

3. Virtually all City and County employees in CESA 10 have Fair Share, including the City of Two Rivers.

4. There are no "maintenance of membership" provisions in effect in any Kettle Moraine or contiguous districts.

5. Union shop provisions are overwhelmingly found in the industrial standard contracts.

The Association notes that the Employer did not make any oral argument with respect to private sector comparability, and restricts its exhibit to chosen school district employees and then only teachers. The Association says that including the other types of comparison which are to be found in the factors to which the arbitrator is to give weight will support the Association case.

The Association objects to the listing by the Board of school districts into categories of comparability. It objects to using the number of students as a principal sorting determinant, and says this is inapplicable and irrelevant.

The Association also argues that when the teachers in three divisions of the Employer's Sample of Most Comparable, Comparable, and Less Comparable are taken together in one group, 56.97% have Fair Share; if Manitowoc teachers are added, this comes to 64.06% that are covered.

The Association says that it did a considerable amount of research on comparability before deciding to put Fair Share before the arbitrator, and it is confident that its data is adequate to give it the award, since it has used data from regional teachers groups, public sector and private sector agreements.

The Association disputes the contention of the Board that it has historically employed Brillion, Chilton, Kiel, Manitowoc, Mishicot, New Holstein, Plymouth, Random Lake, Valders, and Sheboygan Falls, as its standard in comparisons. It says there has been no agreement of the Association to this; but the Board has specifically told the Association that it would not compare Two Rivers to Manitowoc. Further the Board's scheme for categorizing districts is rejected by the Association, which says that more general and broad-spectrum regionalized concepts should be used. The Association security provisions belong to a more generalized state of industrial being, and is not a fragmented patchwork of isolated contract provisions. The mediator-arbitrator should employ a broad latitude of consideration in coming to a decision.

The Association says that using the corrected statistics available, 50% of the districts which the Board uses as the Most Comparable districts now have Fair Share, and none have maintenance of membership provisions. The Association stresses that the pattern of contracts of all types, public and private, should be considered as did the arbitrator in the Manitowoc case. It also notes however that Arbitrator Stern in this case did not consider comparability. It also holds that its exhibits on comparability should not be made subject to the "adverse inference" rule and claims of "missing data" as the Board demands.

The Board's Position. Board Exhibit 8 was a list of schools which the Board considered most comparable and their "Third Friday" enrollment. This is given here in full.

Exhibit 8

THIRD FRIDAY ENROLLMENT*

SCHOOL DISTRICT	1976-77	1977-78
MOST COMPARABLE		
Brillion	1,016	989
Chilton	1,223	1,204
Kiel	1,650	1,659
Manitowoc	6,059	5,992
Mishicot	1,378	1,548
New Holstein	1,841	1,864
Plymouth	2,378	2,405
Random Lake	1,325	1,370
Sheboygan Falls	1,931	1,942
TWO RIVERS	2,883	2,848
Valders	1,221	1,270
COMPARABLE		
Cedar Grove	835	831
Elkhart Lake	769	829
Hilbert	556	606
Howards Grove	977	1,048
Kohler	534	546
Oostburg	899	916
Reedsville	767	810
Sheboygan	10,308	10,106
Stockbridge	241	273
LESS COMPARABLE		
Kaukauna	3,314	3,314
Kimberly	2,934	2,808
Menasha	3,953	4,016
Kewaunee	1,380	1,362
Denmark	1,490	1,711
Luxemburg	1,865	1,966
Algoma	1,056	917
Ashwaubenon	3,939	4,023
De Pere	2,139	2,224
West De Pere	2,217	2,225
NOT COMPARABLE		
Appleton	12,497	12,471
Neenah	7,150	7,146
Oshkosh	10,330	10,357
Green Bay	20,462	20,786
Wrightstown	802	827

*Department of Public Instruction

The basis of this comparability of Most Comparable, Comparable, Less Comparable and Not Comparable was as follows:

Most Comparable - Geographical proximity, location in the same CESA, approximately same student enrollment, approximately same instructional staff.

Comparable - Geographical proximity, same CESA location, less comparable according to staff and students.

Less Comparable - Not same geographical location, not same CESA, may or may not have same enrollment or staff.

Not Comparable - Size, location, instructional staff and student population not the same.

Exhibit 9 was a listing of the same districts with their instructional staff. Exhibit 10 was a listing of 331 school districts with no Fair Share, out of 461 school districts in the State, a total of 71.8% without Fair Share.

Board Exhibit 11 listed the comparison districts used in the other exhibits with no Fair Share. In the hearing and by virtue of the Manitowoc arbitration award, the data in this exhibit was corrected. Using the corrected data, 50% of the Most Comparable Districts do not have Fair Share. These districts are Brillion, Chilton, Mishicot, Plymouth and Sheboygan Falls out of ten districts. Five out of nine "Comparable" districts do not have Fair Share, or 56% Of the "Less Comparable" districts 60% do not have Fair Share.

The Board holds that in light of comparative data presented, the arbitrator must see its offer as most reasonable. The Board notes that 331 schools or 71.8% of the schools possess no Fair Share provision, and this alone would justify the Board in offering no Fair Share proposal at all instead of what it has offered. It notes that originally it showed 70% of the most comparable districts had no Fair Share provision and had included Valders. On the basis of new information it notes that the Valders contract does now have a full Fair Share provision, but this is a modified one where Fair Share monies are placed in a high school scholarship fund, which is something akin to what the Board is offering, in that it displays the same spirit of co-operation proposed by the Board.

The Board says that a clear majority of the districts shown by the Board as comparable do not have Fair Share agreements. These are data which would support an inflexible position of the Board on any Fair Share proposal.

The Board objects to Association Exhibit 2 on the subject of the prevalence of maintenance of membership clauses in contracts, on the ground that this exhibit does not explain or establish the comparative basis for its comparisons in making its claims of "union shop", "agency shop", and so on. Exhibit 2 of the Association also does not present clear and concise school district data that reflects the situation as it occurs in the Two Rivers region.

The Board challenges the methodological constructs used in preparation of Association Exhibits 22 through 24, the listing of unions in the public and private section with Fair Share agreements. The Board says that in each of the exhibits, the Association has made no attempt to contrast the total number of public or private sector employers or employees in the surrounding areas or districts with those employees or employers having Fair Share agreement. The Board notes that in the hearing the Association could not provide information on the number of employees thus covered. The data may represent a majority of units, but one cannot assume this from the data itself. This is particularly true in the presentation of data in Association Exhibit 24, and the Board says that the arbitrator must therefore consider the problem of missing data. This difficulty is not present in the Board data.

The Board is highly critical of Association Exhibit 7, calling it wholly inappropriate, and evidence why the Association can't get voluntary support.

In its Reply Brief the Board stressed certain issues. The Board states that the inclusion of data on districts where Fair Share is only an issue is irrelevant to this case. This only indicates that Fair Share is an overriding issue with WEA. The Board objects to the Association introducing in its Summary Brief new evidence in the form of an industrial directory about which the Board did not have an opportunity to conduct a cross examination of the evidence. The Board supports the validity of its comparisons and says they measure the true impact of Fair Share provisions in area contracts.

The Board objects to the Association's use of number of teachers covered. This has severe methodological problems, because among other things it gives greater weight to districts with more schools and teachers, and this skews the results. Instead, the Board method of comparing districts by size is more valid, and further the Association bargains with school districts and not teachers, so a comparison of districts instead of number of teachers as the Board made is more germane.

The Board rejects the criticism that it did not compare what is happening among other types of public employees. The Board says that, first, teachers are professionals in their duties as compared to other public employees. Also one must compare proper government entities, which in this case are school districts. Also Arbitrator Stern in Manitowoc did not rely on the level of unionization in his decision. Further the Association is inconsistent when it tries to compare its members with manual labor on Fair Share, and not use this standard when bargaining on wages and conditions of work.

The Board in its Reply Brief stresses that the settlement in Valders was a compromise pattern wherein non-union members can pay a sum into a scholarship fund. The compromise does not result in coercive payments to the Union. As to the number of districts that have a modified Fair Share agreement, the Association could not tell how many had this type of agreement, but at least two on the Association list do have such a compromise.

The Board says that this type of compromise would have won the support of Arbitrator Stern in the Manitowoc case, because he would prefer conventional arbitration which would have permitted him to fashion his own award rather than be forced to pick between Fair Share and no Fair Share. The Board also rejects the Association contention that the Board is a part of a "right-to-work" compaign. The Board says that instead it is the employer of all teachers, not just Association teachers, and must have a concern for all teachers. The Board purpose is to treat employees fairly.

Discussion. An arbitrator, under statutory guidelines, must compare the conditions of the employees involved in the offers with other employees performing similar services, with other employees generally in public employment in the same community, with other employees in public employment in comparable communities, with employees in private employment in the same community and with private employees in comparable communities. From the data supplied by the parties and the arguments recited above, the arbitrator here makes the following conclusions:

1. The Board's method of classifying school districts into the four categories of Most Comparable, Comparable, Less Comparable, and Not Comparable, is a helpful and valid method of analysis. (Bd. 8)

2. Most school districts in the State do not have Fair Share agreements. (Bd. 11)

3. Half of the Most Comparable districts as defined by the Board do not have Fair Share in some form. (Bd. 11 amended) These districts represent only 40% of the teachers in these districts. (Bd. 9)

4. Of the 29 districts considered comparable in some form with the Two Rivers District, 16 districts, or 55.2% of the districts, do not have Fair Share. These districts represent 41.8% of the teachers involved. (Bd. 9, 11)

5. 6,077 teachers in WEAC Northeast Region are covered by Fair Share agreements, but the evidence is missing as to the total number of teachers in this region. (Assn. 24) This total is now swelled by the inclusion of Manitowoc teachers.

6. There is a considerable number of public employee bargaining units in the Manitowoc-Two Rivers area who are covered by Fair Share agreements, including three such agreements in Two Rivers, and including one unit under the Two Rivers Board of Education. (Assn. 22)

7. There are a substantial number of Fair Share agreements covering other public employees in counties and communities near to or adjacent to Manitowoc County and the Two Rivers area. (Assn. 24)

8. There are a substantial number of larger employers with union shop agreements in the Manitowoc-Two Rivers area. (Assn. Summary Brief, p. 13 and 14.)

These conclusions lead the arbitrator to the necessity of weighing several items here. In comparing the presence or lack of presence of full Fair Share agreements as versus maintenance of membership, the arbitrator considers the number of agreements in existence as the most valid criterion. In this the offer of the Board has a slight edge, in that while only 50% of the most comparable districts do not have Fair Share agreements, yet 55.2% of all of the districts considered to be in some degree comparable do not have Fair Share agreements, and most of the districts in the State do not.

Against this must be weighed the prevalence of Fair Share in the only other union in the school district, the presence of Fair Share in other public employees' unions in the City, and the prevalence of Fair Share in the public sector of Manitowoc County economy. Weighing all this together the arbitrator is of the conclusion that the Association offer on Fair Shares on the factor of comparability more nearly meets the statutory guideline, as it more nearly reflects prevailing conditions in school districts in the immediate area of Two Rivers.

XII. FACTORS NOT INVOLVED. The factors of the cost of living or overall compensation are not involved in this dispute.

XIII. CHANGES DURING PENDENCY OF THE ARBITRATION PROCEEDINGS. According to information supplied in the Association Reply Brief, the arbitrator in the Manitowoc case awarded the final offer of Fair Share to the Union. This involved 284 teachers. This involves changes in data showing the number of persons and districts now under Fair Share, which changes have been reflected in the discussion above.

XIV. OTHER FACTORS. The matter of other factors to be considered here is an important part of this proceedings. The "other factors" involved are the actual terms of the offers to which each side has raised some objections. These are objections centered on Sections A, B (1), and H, 2, of the Employer's offer as compared to Section I of the Association's offer.

A. The Employer's offer in Section A of the Fair Share agreement, says that membership in any employee organization is not compulsory, and employees have the right to join, not join, maintain or drop their membership in an employee organization as they see fit. The Association reads this in connection with Section B. 1 of this offer. This section provides that all employees who are not members of the employee organization on April 17, 1978, shall not be covered by this article, but that persons who are in the Association at that time shall continue to pay dues. However, employees not in at that time may subsequently join, at which time they would be covered by the agreement.

The Association says that these two provisions read together mean that employees not in the Association on April 17, 1978, and who join may later pull out of the Association, at which time they would not have to pay Fair Share. The Employer agrees. The Association further says that under "A" any member can quit and thereafter not have to pay Fair Share.

The arbitrator, reading the language, believes that any employee who enters the service after April 17, 1978, under the Board's offer would thereafter be under Fair Share as long as this contract provision existed. Those who were not in the Association but were employed on April 17, 1978, may opt to leave the Association again after joining, and thereafter not be required to pay Fair Share. The arbitrator does not find this a fatal bar to the acceptance of the Board's offer, and thus finds no fatal problem with Employer's Section A and B. I.

B. The major problem with the offers arises in the text of indemnification clause contained in each offer. The District offer says that the "collective bargaining representative" shall indemnify and save the District harmless against any claims, demands, suits, orders, judgments or liability for actions taken or not taken under the Fair Share provision, including full costs of and interests on sums for which the Districts should be liable. In event action is brought in which the Employer is named as the defendant, the "collective bargaining representative" agrees to indemnify the District in full for reasonable attorney fees.

The Association offers with the Wisconsin Education Association Council to indemnify the Board against claims, demands, suits or other liability for actions taken or not taken by the Board which are in compliance with the Agreement, but the claims, demands, suits, or other liability shall be under the exclusive control of the Wisconsin Education Association Council and its attorneys.

The Association's Position. The Association says that it is difficult for it to adequately demonstrate its worry about this issue, and it is not reassured by the claim of the Board that there will be no negative impact from the Board's proposal. The Association objects to the Board proposal on several grounds. It says that the Board has not shown an enthusiasm for Fair Share, and its defense might be doubtful. It could employ an attorney, not knowledgeable or indifferent, or it could employ a very costly attorney, and the Association as the collective bargaining representative could not meet these costs. The Association says that the Wisconsin Education Association Council would not likely back it with this kind of a clause, and the costs would run very high even for that agency. The Board also might settle a claim to its own advantage and Association disadvantage.

The Association states the State Employment Labor Relations Act, (SELRA) Subchapter VI, Chapter III of the 1978 Wisconsin Statutes in which Section 111.81 (6) states that the claims on the basis of Fair Share shall be under the control of the labor organization, designated by the contract negotiated under that subchapter. It holds that the Legislature has thus determined the union in that case shall be in complete control of Fair Share litigation. The Association says that under its proposal the Employer loses nothing.

The Association says that its presentation of the Fair Share offer is not part of a statewide action by WEAC affiliates, but is the concern of this local union itself. Hence it is not automatic that the WEAC would indemnify a local union with the kind of hybrid and abridged proposal of the Employer. The Association said it sought WEAC agreement to lend its indemnification to the local Association, and this was given. The WEAC can also withhold this commitment if the Board proposal is adopted, because of increased risk. The Association says that it has never seen a proposal on indemnification like the Board's offer. It also fears that there will be litigation by right to work groups which will present a hazard in meeting the costs.

The Association says that nothing in its offer would preclude the Employer from providing co-counsel, nor from hiring its own counsel and reject the indemnification of the Association offer to protect itself. However the WEAC will not assume such expense, and the local Association is far too small to assume such a prospective burden of expense.

The Board's Position. The Board's opinion is that there is no reason for strident outcries on the part of the Association that the Board's proposal is a flagrant miscarriage of justice. The Board's reluctance to extend Fair Share to the teaching unit stemmed from the fact that the Board wished to resolve the problem in a manner agreeable to all, because the Board realized that because of certain cases in Wisconsin, there was potential for further litigation. The Board may be forced into a suit, and this led to the Board's proposal to be indemnified for costs of its own protection.

The Board notes that in the language of its proposal nothing prevents the Association from directing its defense by its own attorneys. It is customary for the Employer to tender defense in cases where litigation occurs, particularly in those cases where the Employer knows that the defense is in capable hands. The Board says that it is difficult for the Board to have any control over future suits challenging constitutionality, and once it has acceded to the Association, the Board does not have control over any separate charges that may be brought against it. The Board must have the option of retaining its own attorney in those unforeseen instances where the Association cannot be of direct legal assistance.

The Board discounts the opposition of the Association to its proposal that the WEAC could not be included in defending a suit. The Board says it recognizes this concern, but it considers it only problematic. Nothing in the Board's language prevents the WEAC from joining the Association or the Association from seeking WEAC support. Since Fair Share is a state-wide strategy of WEAC, it is expected that WEAC will take an active part in defending the concept and providing indemnification of the Board.

The Board believes that the bargaining representative's fears are unfounded.

In its Reply Brief, the Board says that the Association is attempting to cloud the Board's offer by deliberately obfuscating and distorting the intent of the Board offer. The Board says that both the Association and the Board indicate in their offers that membership in the Association is not compulsory, so for the Association to criticize the Board's offer on its non-compulsory statement is to criticize the Association offer.

In its Reply Brief, the Board stressed that the Board, contrary to Association assertions, never intended that teachers who were Association members on April 17, 1978, would be able to evade the provisions of a mandatory Fair Share payment. The date of April 17, 1978, was set as a cut-off date to insure that present members of the Association could not withdraw to avoid being covered by Fair Share. The Association's contention is that the Union is attempting to twist this accommodation made by the Board to the Association.

On the matter of indemnification, the Board reaffirms that the Board's language on indemnification does not prohibit the WEAC from assisting the Local. It rejects the contention of the Local that WEAC will abandon the Local. The Board says that the Association's contention that the WEAC would not be willing to "buy into" a Fair Share provision not of its own philosophy indicates that Fair Share comes from the WEAC and not the Local. Further this indicates an unwillingness of WEAC to support its own Local. If this is so, the Board and non-member teachers should not be involved in an intra-union problem, and the arbitrator should not be required to resolve it for the Union. Moreover the Local has somehow financed the present litigation which has been costly.

Further, the Board asserts that if the Association is concerned about litigation from disgruntled members, then the prospect of litigation would be least if the Board's offer were accepted. The Board notes that Arbitrator Stern has said that the prospects for litigation under Fair Share are great. The Board's offer reduces this prospect of litigation.

On the matter of the inclusion in the Board's offer of language calling for "reasonable attorney fees," the Board says that its proposal is only that it be made whole in the case of litigation generated by Fair Share. The Board holds that it is a fundamental right of an individual who is being sued to determine who will defend his interests. It is only logical for the Board to include a provision allowing it to determine who is to defend it. The Board says that the Association would have the Board and arbitrator believe it does not have this right. Nothing in the Employer's offer would prevent the Board from tendering the defense to the Association, but the Board must be able to retain its right to determine who is best able to defend Board interests. There are conditions where separate representation might be essential. The Association has not come to grips with the fact that the District is the innocent victim in Fair Share litigation.

The Board especially objects to the Association arguments that the Board would "stick it to" the Association, that the Board is part of the Right-to-Work Committee, and that the Board intends to stir up litigation. The Board says that the Association arguments attacking the Board on reasonable attorney fees are base and baseless in that they presume ignorance or malevolence on the part of the Board. The Board says that the Association has never exhibited any antiunion animus, and has not questioned the integrity of the Association nor has it aligned itself with groups opposed to Fair Share. Antagonism and questioning of the Board's integrity has no place in this arbitration.

Discussion. The most serious problem for the arbitrator with the parties' Fair Share offers is in the matter of indemnification. In the Association offer, the Board is stripped of control of its own defense, unless it foregoes indemnification. In the Board offer, the Association is open to assessment for "reasonable" attorney fees, but there is the danger that sometimes these fees can be presented in what appear as unreasonable amounts. Further, the Association warns that its higher affiliate, the WEAC, might not accept support of the Local under the Board's proposal. Four matters have to be weighed here. They include whether an arbitrator has a right to make an award in which one side is compelled to give up its defense in litigation which may result from an Agreement. The next matter is whether the WEAC might leave its affiliate stranded in Fair Share litigation, because it does not like the indemnification clause. The third matter is whether the Board will claim unreasonable fees or not make a bona fide defense in a Fair Share litigation. The fourth matter is whether the Association would be protected by the term "reasonable" in the phrase "reasonable attorney fees necessary...."

As to the first matter, the arbitrator here believes that whether he can so order or not, one of the parties should not be stripped of the right of its own defense. This must be weighed against the prospects that WEAC may not accept the support of the Local and that the Board may exhibit bad faith or just plain self-concern in a suit under Fair Share. The arbitrator does not discount either of these, but feels that there is protection for the Local in the term "reasonable."

The arbitrator notes that Arbitrator Stern in the case of Manitowoc, did not address this problem, but on other grounds selected a union offer much like the Association offer here. This arbitrator feels uneasy about the language of both offers here, but finds the removal of the Board's control of its own defense through binding arbitration quite troubling.

A further factor in favor of the Board's offer is that as a modified Fair Share proposal with a grandfather clause, it is less likely to inspire litigation and may give the parties sometime to work out a better clause.

For the foregoing reasons the arbitrator believes that the Board's offer is the more reasonable offer here under the statutory guidelines.

XV. SUMMARY DISCUSSION. In the foregoing matter, the following is a summary of factors weighed and the results of the weighing.

1. The philosophy of Fair Share, the accepted responsibility of the collective bargaining agent and affiliated organizations, the anger of employees at free-riders, the estimated loss to the Local because of lack of Fair Share, the trends of labor history, and present legislative enactments and court decisions do not currently constitute a mandate for an award to the Association for full Fair Share. The Board's offer of maintenance of membership is a reasonable and fair offer, and in the interests of the various groups, including the general public.

2. On the basis of comparability, the arbitrator favors the Association's offer as more comparable to existing conditions in school districts in the region of Two Rivers. The Arbitrator recognizes the presence of full Fair Share granted in another Board unit, in bargaining units in City employment and in widespread acceptance of Fair Share in the public sector in Manitowoc and nearby counties, and by the union shop in many nearby larger manufacturers as a supporting factor.

3. As to the actual language of the final offers of the parties, the arbitrator finds that the offer of the Board is more reasonable in that the Association offer would strip the Board of its right to its own defense. Despite a danger of the Board presenting unreasonable costs, the arbitrator believes that the Board should not be denied its right to its own counsel by arbitral decision; he also believes that the term "reasonable attorney fees necessary" is a protection to the Association.

For the foregoing reason, the arbitrator believes that the final offer of the Board should be included in the agreement between the parties.

XVI. AWARD. The offer of the Board of the Two Rivers Public School District should be included in the 1978-1979 Agreement with the Two Rivers Education Association.

Frank P Zeidler
Mediator - Arbitrator
September 6, 1978