

BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

In the Matter of the Petition of
NORTHWEST UNITED EDUCATORS
Initiating Final and Binding
Arbitration Between Said
Petitioner and
COOPERATIVE EDUCATIONAL
SERVICE AGENCY #4

Case X
No. 22608
MED/ARB-36
Decision No. 16368-A

AWARD

I. **MEDIATION.** Mediation in the above entitled matter took place on July 13, 1978, at the offices of the Northwest United Educators, 15 W. John Street, Rice Lake, Wisconsin. The parties were successful in resolving all the remaining issues between them on a contract for July 1, 1977 to June 30, 1979, except the issue of Fair Share.

Following efforts to mediate Fair Share, the mediator-arbitrator concluded that a reasonable time for mediation had passed and notified the parties in writing on July 13, 1978, that on July 14, 1978, at 10 a.m. he would conduct a hearing in final and binding arbitration at the offices of the Northwest United Educators.

In the mediation session, the parties agreed to the following provision:

"ARTICLE VI

"WORKING CONDITIONS

"Add C: If a teacher is required to write Individual Education Programs (IEP) or attend conferences in connection with IEP's, and if the teacher believes such activities can be accomplished only outside of normal working hours, the teacher shall communicate with the Administrator of CESA #4 to gain approval for such overtime work. Such approval shall not be unreasonably withheld. Compensation for such overtime work shall be on the basis of the yearly salary rate of the teacher computed in terms of an hourly rate and shall be at straight time. The Board may compensate the teacher in cash or in compensatory time."

II. **THE ARBITRATION HEARING.** A hearing in final and binding arbitration on the sole remaining issue of Fair Share was conducted as noted above. The parties presented exhibits and witnesses who were sworn, and subsequently supplied Briefs.

III. **APPEARANCES.**

For the Union:

AL MANSON, Executive Director, Northwest United Educators,
15 W. John St., Rice Lake, Wisconsin 54868

ROBERT WEST, Executive Director, Northwest United Educators,
at the above address

For CESA #4:

HAROLD ROETHEL, Consultant, Wisconsin Association of School
Boards, 320 Graham Avenue, Eau Claire, Wisconsin 54701

Present for the Union:

Pat Chuchwar

Present for CESA #4:

William M. McDougall, CESA No. 4 Administrator
John N. Rude, Clerk, Cameron School District
Edward Johnson, Member, Barron School Board,
Member, CESA No. 4 Board

IV. **THE ISSUE OF FAIR SHARE.** The final offer of the Northwest United Educators on Fair Share was as follows:

"Article VII - Organization Rights - Change Title to 'Fair Share Agreement'"

"Replace Article with:

- "A. NUE, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, NUE and non-NUE, fairly and equally, and all employees in the unit will be required to pay, as provided in this Article, their fair share of the costs of representation by the NUE. No employee shall be required to join the NUE, but membership in NUE shall be made available to all employees who apply consistent with the NUE constitution and bylaws. No employee shall be denied NUE membership because of race, creed, or sex.
- "B. The employer agrees, that effective thirty (30) days after the date of initial employment or thirty (30) days after the opening of school it will deduct from the monthly earnings of all employees in the collective bargaining unit an amount of money equivalent to the monthly dues certified by NUE as the current dues uniformly required of all members, and pay said amount to the treasurer of NUE on or before the end of the month following the month in which such deduction was made. Changes in the amount of dues to be deducted shall be certified by NUE fifteen (15) days before the effective date of the change. The employer will provide NUE with a list of employees from whom such deductions are made with each monthly remittance to NUE.
- "C. NUE shall indemnify and save harmless the Board from any liability it may have including, but not limited to, damages and cost of defense said Board may suffer by reason of action taken or not taken by the Board for the purpose of complying with this Article.
- "D. This Article is to become effective upon ratification of this contract by both parties, or upon the date this contract may be implemented by court order, whichever is earlier.

"Delete Article XIV - Maintenance of Membership."

The final offer of Cooperative Educational Service Agency #4 on Fair Share was as follows:

"The CESA #4 Board of Control proposes that all provisions, with appropriate date changes, shall remain the same (except those tentatively agreed upon and stipulated to on March 28, 1978) as in the 1976-77 agreement."

The clause in the former Agreement related to this issue is as follows:

"Article XIV - MAINTENANCE OF MEMBERSHIP

"A presently or past employed employee who is a member of the NUE fifteen days after this agreement becomes effective shall remain a member in good standing for the duration of this agreement. Any newly hired employee or employee who is presently not a member who voluntarily joins the NUE must also remain a member in good standing for the duration of the agreement."

V. BACKGROUND LEADING TO ARBITRATION. CESA #4, a Municipal Employer with offices at Cumberland, Wisconsin, and NUE, a labor organization with offices at Rice Lake, Wisconsin, had an agreement which expired June 30, 1977. NUE represents various types of teachers employed through CESA #4.

The parties met for the first negotiation session for a new agreement on April 5, 1977, and exchanged proposals on April 19, 1977. Thereafter the parties met on numerous occasions until January 26, 1978, when the Union petitioned for mediation-arbitration under Section 111.70 (4) (cm) of the Municipal Employment Relations Act. An investigation was conducted on March 28, 1978, by Duane McCrary, an investigator for the Wisconsin Employment Relations Commission, and as a result of the investigation, the Commission was advised that the parties were at an impasse. The Commission concluded that an impasse within the meaning of Section 111.70 (4) (cm) 6 existed, determined that the conditions precedent to the initiation of Mediation-Arbitration as required by the statute existed, and ordered that Mediation-Arbitration be initiated. Frank P. Zeidler was appointed mediator-arbitrator on May 30, 1978. The matters then proceeded as noted above.

VI. DESCRIPTION OF A CESA. Board Exhibit 3 provided a description of a Cooperative Educational Service Agency or "CESA". There are 19 such agencies in Wisconsin. They are created under Chapter 116 of the Wisconsin Statutes and "are designed to serve educational needs in all areas of Wisconsin and as a convenience for school districts in cooperatively providing to teachers, students, school boards, administrators and to others special educational services including without limitation because of enumeration, such programs as research, special student classes, data collection, processing and dissemination, inservice programs and liaison between the state and local school districts." The governing Board of Control consists of eleven members who are also local school board members. The CESA's are funded by the State only for administration in a fixed annual amount, which was \$41,700 for 1977-1978. All the other costs of any program operated by a CESA must be paid for by participating school districts contracting for a particular service.

While a CESA may pro rate costs among districts for a cooperative program, it cannot assess costs against any unit unless it enters into a contract for such service, and it cannot levy taxes.

VII. FACTORS CONSIDERED. Section 111.70 (4) (cm) 7 of the Wisconsin Statutes 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 interest 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 hospitalizations benefits, the continuity and ability 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.

Of the above factors, the following factors are not involved here: cost-of-living, overall compensation and the ability of the unit of government to meet the costs.

VIII. GENERAL BACKGROUND CONDITIONS. CESA #4 includes portions of Rusk, Barron, Polk, Burnett, Washburn and Douglas County. It includes the following school districts:

Minong
Webster
Siren
Grantsburg
Frederic
Luck
Milltown-Balsam Lake
St. Croix Falls
Osceola
Amery
Clear Lake
Turtle Lake
Clayton

Spooner
Shell Lake
Cumberland
Birchwood
Rice Lake
Cameron
Barron
Prairie Farm
Chetek
Weyerhauser
Bruce
Ladysmith-Hawkins
Tony

The CESA #4 District, as an employer independent of the school boards in the district was subject to an order of the Wisconsin Employment Relations Commission by Byron Yaffe, Examiner, on December 29, 1977. In this order CESA #4 and its Board of Control, officers and agents were to cease and desist from non-renewing teaching contracts of teachers who were involved in lawful concerted activity on behalf of the Northwest United Educators. CESA #4 was not to discriminate against laid off employees who had engaged in lawful concerted activities, and a good faith effort was to be made to offer such employees re-employment. CESA #4 was not to interfere with, restrain or coerce or discriminate against any employees exercising rights under Section 111.70(2) STATS., and not to fail to send all districts within CESA #4 letters of recommendations for laid off teachers, or failing to assist them.

This order came in the Case of Northwest United Educators and Norris Rawhouser vs. Cooperative Educational Service Agency No. 4. Norris Rawhouser, the Complainant, a social worker employed by CESA #4 from 1966 to 1974, was not given a contract in 1974. He had been elected President of CESA #4 NUE unit in 1973. Among other things the Board was ordered to make him whole for any loss in pay and was to recommend him for employment again. It was testified in the hearing that the make whole damages would possibly come to \$60,000. The WERC Order did not apply to any of the districts in CESA #4. CESA #4 cannot levy taxes, but the Examiner of WERC held that it could borrow money, could also levy the cost of the Rawhouser settlement on school districts, or could get legislative relief.

The foregoing information was derived from Union Exhibit 11. Board Exhibit 10 was a decision of the Wisconsin Supreme Court in the matter of Phyllis Ann Browne et Al, V. The Milwaukee Board of School Directors, et Al., August Term, 1977. In this matter the Plaintiffs-Appellants, appealed an order of the Circuit Court for Milwaukee County. This order was later affirmed by the Supreme Court. The appeal was from two parts of the Circuit Court decision which referred to the Wisconsin Employment Relations Commission to determine what share of the Plaintiffs-Appellants non-union dues were being spent for purposes impermissible under state decisions and a previous decision of the Wisconsin Supreme Court in an earlier appeal of the matter. The appeal was from this order and also a refusal of the Court to hold in escrow the amount of money deducted from the pay of non-union public employees under a Fair Share agreement until the decision was made as to what amount was necessary to cover the cost of the contract administration and collective bargaining.

These two cases are matters of concern to the parties, and the way they are of concern shall be described later.

Union Exhibit 9 listed the CESA #4 personnel for 1975-1976, and the arbitrator counted 56 employees in the bargaining unit as far as he could identify them. For 1977-78 he counted 51 such employees. It is the arbitrator's understanding that at present there are perhaps 22 members in the bargaining unit, but formerly there were more than twice that many.

IX. PERTINENT STATUTORY PROVISIONS:

Section 111.70 (1):

"'Fair-share agreement' means an agreement between a municipal employer and a labor organization under which all or any of the employees in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of

all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employees affected by said agreement and to pay the amount so deducted to the labor organization."

Section 111.70 (2):

"Municipal Employees shall have the right of self-organization and the right to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner provided in a fair-share agreement."

X. THE LAWFUL AUTHORITY OF THE PARTIES. A major issue in this matter is whether the Employer can lawfully function under an award which brings the Union provision into the agreement between the parties.

The Board's Position. The Board believes that the Union proposal on Fair Share exceeds the lawful authority of the Employer to grant. The Board notes that in the guidelines set forth in Section 111.70 (4) (cm) 7a of the Statutes is the leading criterion set forth. The Board notes that in Browne above (83 Wis. 2d 316) the Court stated that "the statute itself forbids the use of Fair Share funds for purposes unrelated to collective bargaining or contract administration." Thus according to the Court, Fair Share dues can be deducted from non-members only in the amount to cover costs of contract administration and collective bargaining. The Board says that the NUE proposal would require the same amount of dues being required of all members, and it says nothing about deductions that concern only collective bargaining and contract administration.

The Board submitted Board Exhibit 11 which was a statement of the "Goals" of the WEAC. The goals included teacher welfare, an independent united teaching profession, governmental relations, teacher image, professional development, and social change. The Board holds that money for these purposes, would be in contravention of the Fair Share statute as interpreted by the Supreme Court. The Board says that any reasonable person reading the WEAC document must come to the conclusion that moneys collected by the WEAC and its affiliates are used for purposes that are not directly related to collective bargaining or contract administration; and that the amount of money used for such purposes is more than minuscule.

The Board further notes that in a footnote of the Browne decision, the Court said it has interpreted the Wisconsin Statutes as providing that it is an unfair labor practice to require a municipal employee to pay for anything more than their proportionate share of the cost of collective bargaining and contract administration. The Board says that the Union proposal does not use the proper wording to achieve this end stated by the Court. If the arbitrator were to give the award to the Union, he would be putting the Board in a very tenuous position. The arbitrator could be awarding a clause which might render the Board liable to a prohibited practice charge from an aggrieved non-union employee. If the Board refused to implement the award, it would be subjected to a prohibited practice charge and the awarding of damages for failure to implement the award. Thus the Board would be in a position which could only be resolved through future litigation.

The Board notes that one of the major purposes of mediation-arbitration is to expedite settlements without the disruption of labor unrest. Future litigation on this issue will lead to a disruption of the education process and a demoralization of the teaching staff. If the Union had proposed an agreement with the proper language, the arbitrator might have had some justification, if he so thought, for making an award to the Union; but the Union has not done this, but has put a proposal which is likely to lead to future litigation. The Board suggests that the arbitrator award the final offer to the Board and allow the Union, if it wishes, in future years to submit language that fits the conditions. The Board is not asking the arbitrator to find the clause is illegal, but rather the Board is saying that the clause is sufficiently ambiguous so as to lead to future litigation and thus defeat the ends of labor peace.

The Board rejects the NUE contention that the save harmless clause in the Agreement between the parties takes care of the Board's argument as to legality of the Fair Share clause. The Board says that the clause does not do this. The Board may be indemnified for damages and costs, but it is not protected from the fact that it would have violated the law by trying to carry out the provision of the Union. The Board does not want to commit an unfair labor practice or a prohibited practice, and does not

want the stigma of violating the law posted in its building in the form of a WERC notice. The Board says that in essence the NUE is saying, "Go ahead and steal; we will indemnify you for the cost of defending yourself and the value of the goods stolen." If one steals, there is no way that anyone can indemnify one for the fact that one has stolen. NUE's save harmless clause cannot indemnify the Board from being found guilty of a prohibited practice. One cannot be indemnified for the commission of a crime or civil violation.

Further the savings clause does not take care of the legal problems, but only provides that the rest of the Agreement is valid when a particular clause is found invalid.

The Board says that its legal position is straight forward; it holds that the language in question is sufficiently ambiguous and overbroad so that in awarding such a clause, the arbitrator may be ordering the Board to commit a prohibited practice. If an employer cannot legally grant such a provision, it is beyond the arbitrator's authority to award it. The Board reminds the arbitrator that the Union was offered an opportunity in the mediation session preceding the hearing to amend the language to be free from the problems stated, but the NUE failed to accept the offer to change.

The NUE's Position. The NUE rejects that contention of the Board that its Fair Share provision is illegal because of the Browne decision. The NUE says that the Court has consistently found that the principle of Fair Share is legal, and this includes Browne. The Union notes that Browne raises a question of a possible percentage of the Union dues being determined as being appropriate, and this has resulted in a WERC study for this purpose. The Union notes that there is a savings clause in the Agreements between the parties and also a save harmless clause in the NUE Fair Share proposal.

The NUE protests that the question of legality was not raised by the Employer until the day of the arbitration hearing.

It is NUE's contention that the record of cases show that the Fair Share proposal of the Union has not been found to be illegal, and that the Employer has ample protection against the possibility that the amount of money to be deducted might be modified by subsequent WERC and/or Court action. The issue of legality is not a substantial one for the Employer since the Employer did not raise it until the last moment.

The NUE points to arbitration in a case involving the Manitowoc School District (WERC Case VXII, No. 22629, MED/ARB-46) in which there was the single issue of Fair Share. It notes the reasoning of Arbitrator Stern on this issue of legality. The arbitrator rejected the argument of illegality, because it was not known at the time of the award whether the proposal was illegal. He said that the arbitrator will have the benefit of guidelines on the question of illegality after the WERC has issued its ruling. The arbitrator speculated in Manitowoc about what the WERB might require, but rejected the presumption of illegality and left the determination to other forums.

Discussion. As this arbitrator sees the Board position here, it is not a request for the arbitrator to hold the NUE provision illegal. The Board says that in effect and quite patently the language of the Union proposal is illegal, because it would set the Fair Share dues at the same level as other Union dues, and this money is used for more than just collective bargaining and contract administration. The Board holds by ruling in favor of NUE, the arbitrator would be acting ultra vires and exposing the Board to litigation one way or the other, either from the Union or from a non-union employee. In essence therefore the Board is being subjected to unfair treatment, and it will have a stigma one way or the other of having gotten into litigation and being termed to have violated the law.

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

A troubling request is that of the Employer for the arbitrator not to render an award to NUE because the Board is placed in the likelihood of having its reputation besmirched with a decision rendered against it for a prohibited practice. The arbitrator can well understand the sensitivity of the Board to this prospect in view of Rawhouser, and realizes that the Board cannot be indemnified for the embarrassment which it may have to suffer in posting a notice that WERC or some court has ruled against it. The arbitrator, however, believes that having once found that neither of the offers are illegal as far as he can determine, he must then proceed to make a determination of which offer more nearly meets the statutory guidelines. Prospects of litigation, though given some weight in order to keep labor peace, nevertheless cannot fully outweigh the application of the other criteria set forth by the statutes. Thus the decision in this case will include a further consideration of other factors to be considered, and the study of the merits of this issue will not stop on the issue of possible litigation which may arise.

XI. STIPULATIONS. The stipulations made by the parties in the process of negotiation and various types of mediation have resulted in agreement on all matters except the instant issue.

XII. THE INTERESTS OF THE PUBLIC AND THE FINANCIAL ABILITY OF THE GOVERNMENT TO MEET COSTS.

There is no issue about meeting costs, but there is an extensive concern by the parties about whether Fair Share is in the interests of the public. The Board raises the issue of the morality of Fair Share. The NUE raises the issue of Fair Share being critical to its operations. These matters will be discussed in sequence.

The Board's Position on the Morality of Fair Share. The Board says that Fair Share is a moral issue. It calls it "legalized extortion", when extortion is "an act of practice of taking anything from a person by force or any undue or legal power or ingenuity". Non-union teachers have no choice as to whether dues are deducted from their checks without oral or written approval from them. The Federal and State governments require written authorization for making income tax deductions; does the Union have greater stature than this? To take dues money from the teacher after the payroll check is cashed would be stealing. To take it before the check is cashed is the same action.

The Board says that the legislature does not take the responsibility for this action, but has passed the buck for extorting dues money to the parties in collective bargaining. The legislature apparently did not want to be saddled with an issue which would make it responsible for an act which involved morality. The Union cannot be accused of extorting money, as it does not finance the teachers. Only the Board is held fully responsible for removing the dues money under a compulsion clause labeled "Fair Share."

The Board holds that this process is a violation of individual rights as it violates the individual's freedom of choice. The process also discriminates against minorities which may be opposed to the views and philosophies of the Union. Compulsion is not the American way of life.

The Board notes that the Union has to bargain for all employees in the bargaining unit, but if it is unhappy about bargaining for non-union members, it can go to the legislature and have the law changed to bargaining only for their members, and the Board will support the Union on this issue.

The Board contends that there is no evidence that Fair Share has been a benefit to education, and the Union itself makes no such claim.

The Board estimates that if the Union gets Fair Share, some of the money would go for increased salaries and benefits to Union personnel, and some would go for more legislative activity to get more control for the Union. More money would be available for mediation/arbitration, to train negotiators, to pay for legal service, to increase the scope of bargaining, and for many other things. The people from whom the money would be extorted would have nothing to say as to how the money would be spent.

The Board makes certain other points. The Board says that Fair Share was made attractive by putting an appealing name on it instead of describing it as compulsion. Fair Share is not necessary for the Union to exist because the National Education

Association, of which the Union is an affiliate, has the second largest membership in the nation. By asking for Fair Share, the Union is saying that it is not capable of doing a good job for members to attract them voluntarily. Further the NUE has substantial quarters which gives evidence that it has flourished without compulsory payments.

The Board asks why teachers in CESA 4 are not capable of making up their own minds as to what is best for them. They will be deprived of their rights under the bill of rights by a forced tribute, and their lives are to be controlled by a simple majority with disregard for the freedom on which the nation was founded. The Board asks how the United Teaching Profession can call itself independent when non-members are forced to contribute to its goals and objectives which they do not believe in and are not willing to support. The Board therefore cannot in good conscience force the teachers to help finance an organization which they do not want to support and which does not need the members or the money. There are only a handful of teachers involved, and the Board should not be a party to an agreement which would coerce them into unwilling support.

The Union's Position. The Union rejects the contention of the Board about morality, and relies principally on the text of the decision of Arbitration Stern in Manitowoc. The text cited will be given here only in an approximate summary. Arbitrator Stern noted that the arguments on the sanctity of individual rights deserve careful consideration since Americans have valued highly the belief that individuals should have the freedom to speak and act freely with restraint unless they injure others. Fair Share fees clearly violate the freedom of the individual to fully oppose his legally selected bargaining agent. However under Wisconsin law an employee within a bargaining unit may undertake efforts to decertify the Union or to aid a rival organization, but will have to pay Fair Share fees.

What the Board in Manitowoc was saying was that it and a minority of teachers oppose Fair Share, and no arbitrator should therefore impose it. This argument is an appealing one but only indirectly relevant. What the Board was doing is defending the sanctity of individual rights as compared to individual bargaining. Such a system of bargaining however was made subservient to the principle of majority rule with the establishment of legally certified bargaining units and representatives by acts of the Congress.

The Congress favors collective bargaining as a means of resolving problems between employers and employees, and regulates labor policy as does the legislature of Wisconsin. In effect an employee organization is treated as if it is a public utility. It is regulated in many ways, and government regulates the conflict between employers and employee organizations by listing prohibited practices and establishing a regulatory agency. The Union is therefore no longer a voluntary association of individuals, but is an entity charged under law to provide representation and fair treatment for all employees in the certified unit.

While it is true that some individuals have not had the choice to bargain individually, the freedom to follow this course has been denied by the legislative action of establishing bargaining units and exclusive representation by a certified bargaining agent. The principle of an exclusive bargaining agent negotiating a contract for all employees within a unit deprives employees of rights which they possessed singularly, but which is now possessed collectively by the bargaining agent on behalf of all individuals in the unit.

Payment of Fair Share under contract is only one of many restrictions in an Agreement which affect individual employees, boards and unions. These other provisions, such as about wages, benefits, and layoffs, constitute more significant intrusions into the rights of individuals than mandatory payment of fees. Thus the right of a loss of a job which will have to be processed through a Union is as important as imposition of Fair Share.

The Arbitrator in Manitowoc did not find that the payment of Fair Share is a more noxious requirement than other restrictions on the individual in a labor agreement.

The Union also cites Arbitrator Stern to the effect that if teachers, as professionals, value individuals rights so much more highly than others in society who have given them up in favor of collective action, then they should not engage in collective bargaining.

Discussion. In this matter the arbitrator notes the extensive and learned discussion of Arbitrator Stern in Manitowoc and understands that the parties are aware of it. The matter of the morality of Fair Share certainly requires extensive philosophical and legal discussion, and no doubt the end of such discussion has not been heard. This arbitrator approaches the issue of morality from the point of view of legislative enactment. This arbitrator concludes that the Wisconsin legislature has made the fundamental judgment that an agreement between the parties requiring all persons in a bargaining unit to pay something toward the operation of the legally certified bargaining unit is not immoral, but rather in the public interest as tending to promote labor peace.

The Congress and various state legislatures set up formal legislation which divided personnel in an economic unit into two groups, employers and employees, and created something of an adversary relationship between them for bargaining purposes, and now regulate this relationship in great detail. It was likely done under the belief that the parties would benefit by having less destructive relationships between themselves, and both sides, as well as the public, would gain from these regulated conditions. Certainly the employees were expected to benefit from this arrangement. The employees organizations however were expected to fund themselves out of the contributions to the organization in return for which the wages and conditions of employees were expected to improve.

One can speculate whether those wages and conditions would have improved more without these regulated relationships, but the opinion appears to have grown in legislatures that employees certainly did benefit, hence the notion of having all employees in the bargaining unit who benefit, whether in the organized body or not, to pay something toward the benefit they are getting from having someone represent them and bargain for them. Thus, too, the idea of "Fair Share" - a notion that one who pays Fair Share gets a quid pro quo in increased benefits, for which he or she should pay.

This arbitrator is not making these arguments personally but believes he perceives the rationale of legislatures in having authorized Fair Share, and perceives how the legislature might not perceive Fair Share to be immoral, but rather requiring someone to pay for benefits received.

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

The Interest of the Public in Union Security Through Fair Share. The most extensive presentation of the Union was on the subject of why the Union should have the security of Fair Share. The Union notes that there are 22 bargaining unit members in 26 school districts with more than a half dozen different programs, and the teachers are widely scattered. It is difficult to get them together as a group, and even the Employer has not brought them together. Thus NUE has to spend considerably more time and money providing effective communications for CESA 4 members than it does among members in any particular school district.

The Union notes that the system of CESA 4 contracting with individual schools first and then with individual teachers has resulted in a very high number of non-renewals. Individuals employed in a position are routinely non-renewed. 14 teachers were represented in the spring of 1978 in cases of non-renewal. There is also a high rate of turnover of staff. In 1974-1975 CESA 4 had 22 employees in the bargaining unit, but in 1977-1978 only ten of those individuals were still employed. Further in 1973-1974 there were more than twice the number of individuals in the unit. The result of these conditions is to produce a higher cost for NUE in servicing the teachers, explaining rights, representing and bargaining for them.

There is the added difficulty that CESA 4 teachers are usually educational specialists, and they need to be informed on the changes in the regulations governing their special field. This puts an added burden on NUE. There is a further complexity in that some CESA 4 teachers are subsequently employed by local school districts and, further, the problem of layoff requires extended representation of members concerning numerous provisions in their contracts. There may be loss of benefits when a teacher is transferred from a CESA position to a district position, for example.

The NUE says that the maintenance of membership provision in the 1976-1977 collective bargaining agreement has a severely diminished value for Union security because of high turnover. There is also a problem of how an employer could enforce a maintenance of membership provision in the case of an employee who withdrew from the Union and refused to submit a dues deduction form. This would be eliminated by the Fair Share provision under which the Employer could legally deduct dues. Without Fair Share the Board might have to discipline some employee who would refuse to maintain membership, and this might mean a discharge. The Fair Share provision is a more sensible manner of insuring payments continuing.

NUE notes the effects of the Rawhouser order of the WERC. This case gives evidence of the unfair labor practices of three CESA 4 administrators. The Union says that the impact of the case is far reaching and the legal costs have been immense and will increase. The question of who will pay the damages remains. The debate within CESA 4 districts, and the time to rewrite the service contracts, has contributed to the high number of non-renewals within the Union. Although the Union conducted a legal action to protect employees rights, the net effect of the case is causing more non-renewals due to the potential financial ramifications of the case. The President of NUE-CESA 4 Unit testified how difficult it is to explain this case to employees. The employees have generally received the decision well, but it also reminds them that Union activity is controversial and may cause some individuals not to renew membership. With Fair Share individuals would join NUE with fewer fears that this would offend the Employer.

The Union also notes the general difficulty of servicing its members in CESA 4 due to the structure of the system. In the case of a problem with or for any employee, NUE has to deal both with the Administrator of the district which has the contract and with CESA 4 administrator.

The Board's Position. The Board did not address this matter in its brief and only indirectly addressed it elsewhere. It questioned why it should help strengthen an organization which would try to get more authority from the legislature to negotiate and make demands on the Board and involve it in mediation-arbitration and actions of various types. It saw no relevance of the Rawhouser matter to the issue at hand, even as an argument for the Union, since Union people themselves had mixed feelings about the results.

Discussion. The matter as to whether or not the granting of a Fair Share provision to the Union is in the public interest was not specifically addressed by the Union, in the opinion of this arbitrator. It devoted its arguments to why Fair Shares would be convenient and helpful to Union security. As pointed out earlier, this arbitrator does not make the presumption that Fair Share should be granted on the grounds that it is in the public interest without question. It is a matter to be achieved by the negotiation and the arbitration process. The Employer by inference on the other hand made out a case that Fair Share would eventually cost the taxpayer more by strengthening the Union in making demands. The arbitrator believes that neither party was persuasive as to its arguments as to whether the public interest is served by Fair Share imposed by arbitration as compared to its serving less comprehensive purposes.

XIII. THE ISSUE OF COMPARABILITY. Both parties submitted exhibits on the number of school districts in CESA 4 with some type of Fair Share. From these charts, from the testimony at the hearing, and from the Union Brief, the following table is derived:

Table 1

PRESENCE OF FAIR SHARE, FULL OR MODIFIED, OR TENTATIVE AGREEMENTS IN CESA 4 SCHOOL DISTRICTS

| <u>District</u> | <u>77-78</u> | <u>78-79</u> |
|-----------------|-----------------|----------------------|
| 1. Amery | Full Fair Share | Tentative Fair Share |
| 2. Barron | | |
| 3. Birchwood | FFS | Ten. FS |
| 4. Bruce | | |
| 5. Cameron | | |
| 6. Chetek | FFS | FFS |
| 7. Clayton | | |

| <u>District</u> | <u>77-78</u> | <u>78-79</u> |
|---------------------|--------------|-----------------------------|
| 8. Clear Lake | | |
| 9. Cumberland | FFS | FFS |
| 10. Frederic | | Agreement but Not Ratified |
| 11. Grantsburg | | |
| 12. Ladysmith | FFS | Agreement, but Not Ratified |
| 13. Luck | FFS | FFS |
| 14. Minong | | |
| 15. Osceola | | Ten. FS |
| 16. Prairie Farm | | FFS |
| 17. Rice Lake | | |
| 18. St. Croix Falls | FFS | Tentative |
| 19. Shell Lake | | |
| 20. Siren | | Modified FS |
| 21. Spooner | | |
| 22. Tony | | |
| 23. Unity | FFS | Ten. FS |
| 24. Turtle Lake | FFS | Ten. FS |
| 25. Webster | | |
| 26. Weyerhauser | | |

Thus 13 districts of the 26 districts in CESA 4 had Fair Share in some form or the prospect of it.

Board Exhibit 7 showed the school districts in CESA's Nos. 1, 4, 5, 6 adjacent to CESA 4. There were 13 districts in CESA 4 (as shown in the corrected information above) with some form of Fair Share; seven with Fair Share out of 16 districts in CESA 1; one district out of twenty in CESA 3; and three out of 25 in CESA 6. This makes a total of 24 out of 87 school districts in these CESA's with Fair Share. However, CESA 2 has Fair Share for its employees.

If the corrected information offered by the Union in its brief is correct, 13 districts out of 26 in CESA 4 now have Fair Share.

The Union's Position. The Union says that in CESA 4 in comparison with other districts, the concept of Fair Share is firmly established. The Union says that its Exhibit 6 shows the tentative agreement reached in CESA 2, with the United Lakeland Educators. In its Brief the Union reports that on August 8, 1978, in a bargaining session between NUE and the Osceola, St. Croix Falls, and Unity Boards of Education, a tentative agreement was reached to include full Fair Share in the 1978-1979 contracts with all three units. It says that thus 13 of the 26 CESA 4 districts will have Fair Share in 1978-1979, and 12 are full Fair Share agreements.

The Union says that of the 13 remaining districts, seven are unsettled on the issue of Fair Share for 1978-1979. 13 of the 19 districts which settled therefore have Fair Share.

The Union says that the Board's exhibit thus shows clearly that Fair Share is more common in CESA 4 than in the other districts and is a concept firmly established in CESA 4 districts, as compared to other districts.

The Union says that the testimony showed that only three CESA districts in this area and the only ones of 19 in Wisconsin as far as the Union knows, have organized bargaining units. These are CESA 4, 6 and 2. CESA 4 and 2 are the only ones to have bargaining units of teachers. Thus the tentative agreement for CESA 2 become more significant, since it is on the eastern boundary of CESA 4.

The Board's Position. The Board says that it selected a more representative sample of what has been happening in northwestern Wisconsin than the Union did. It selected four CESA's while the Union selected only CESA 4. The NUE with its exhibit attempted to gerrymander the area which would be more advantageous to its position. The Board says its statistics establish a strong "no show" for Fair Share in northwestern Wisconsin. It says that out of 87 schools only 25% approximately have a form of Fair Share. Several of these are not full Fair Share.

The Board differs with the Union as to the number of districts in CESA 4 with Fair Share, asserting that only 11 of the 26 have Fair Share.

The Board says that schools in neighboring CESA's are like those in CESA 4. These are small rural schools for the most part, and a substantial part of the population in the bigger city schools are also rural students.

The Board says that 14 of the 26 schools in CESA 4 have close ties with nearby schools in adjacent CESA's. The Board notes that it is made up of representatives from individual school districts. CESA boundaries are not meaningful where individual school districts are involved, and the CESA boundary is not the significant division where neighbors are involved. It is not logical therefore not to take into consideration what is happening in a school a few miles away, because it is not in the same CESA. Thus the geographical location outlined by the Board is the proper area of comparison.

Discussion. On the basis of the information presented in the above arguments, the arbitrator believes that the Board offer more nearly meets the statutory guidelines of comparability. The arbitrator believes that there are 13 districts with Fair Share and 13 without Fair Share for 1978-1979, a kind of stand off. However out of five CEAS's in the area brought into some kind of comparison, only one has a Fair Share tentative agreement arrived at in free bargaining. Further the Board's Exhibit 9 clearly demonstrates that Fair Share is not a prevalent provision in Agreements in the northwest school districts.

XIV. CHANGES DURING THE PENDENCY OF THE PROCEEDINGS. Changes in the status of districts within CESA 4 with respect to Fair Share provisions in contracts have been noted.

XV. SUMMARY.

1. The Board argument of the illegality of the NUE Fair Share proposal is not substantiated in that the matter of how much dues a non-union member in a bargaining unit must pay for Fair Share is yet to be adjudicated. However, the fact that Fair Share is legal is of itself not a compelling argument for the acceptance of the Union offer.

2. The Board argument that Fair Share is extortion and immoral is countered by the legislative enactment which allows it, and which the arbitrator believes was based on a quid pro quo concept in which it is presumed that employee organizations get benefits for employees which individuals generally would not get for themselves; therefore it is permissible for the Employer to enter into an arrangement for all who benefit to pay something for the service and benefits they presumably receive. The argument of immorality is best addressed to the legislative body. The fact that Fair Share is not held immoral is also not a compelling argument as to its acceptance.

3. The Union contention that Fair Share would be in its interest and therefore in the public interest was not persuasively made, and the links between the two propositions were not established. The Board did not address the matter of Union security extensively.

4. As to comparability, the Board contention that Fair Share is not a general pattern yet in the northwest Wisconsin area among school districts was established, although there is a growing acceptance of it in CESA 4. Since more than 50% of the districts in CESA 4 have not accepted Fair Share as yet, and since the area pattern shows a lower percentage of Fair Share accepted in normal bargaining, and since nearby CESA's generally do not have Fair Share, the arbitrator holds that the Board position more nearly meets the statutory guideline on Fair Share. This matter thus is being decided on the sole guideline of comparability.

AWARD. The position of the Board of Control of Cooperative Educational Service Agency No. 4 on Fair Share shall be incorporated in the Agreement between the parties.

Frank P. Zeidler /s/
Mediator-Arbitrator
September 21, 1978