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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

In the Matter of "Interest" Arbitration)	
Between)	WERC CASE
HAYWARD COMMUNITY SCHOOL DISTRICT)	XII No. 22479
and)	MED/ARB-12
NORTHWEST UNITED EDUCATORS)	Decision No. 16434-A

Introduction

On July 20, 1978 the undersigned was appointed by the Wisconsin Employment Relations Commission to act as a mediator-arbitrator in the instant dispute. Immediately upon notification the undersigned contacted the parties.

As required by Wisconsin Statute 111.70(4)(cm)6.b. a public hearing in respect to the matter in dispute was held at Hayward, Wisconsin on August 21, 1978. At the close of such hearing a mediation session was held. No voluntary agreement followed, the parties did not withdraw their final offers and on August 22, 1978 an arbitration hearing was held at which the parties were given full opportunity to present facts and arguments in support of their final offers. As required by the statute there was compliance with all requirements as regards notification of the parties.

The NUE filed a lengthy comprehensive brief at the conclusion of the hearing.

The Board filed a post hearing brief which was received on September 11, 1978. Documents bringing up to date what was happening in so called comparable areas on negotiation developments on "fair share" were filed by the Board on September 27 and October 3, 1978. Also filed by the Board on September 27, 1978 was the decision by Arbitrator Zeidler relative to "fair share" in WERC Case X No.22608 Med/Arb-36 decided September 21, 1978 which involved NUE and Cooperative Educational Service Agency #4.

Filed after the hearing by the NUE were documents pertaining to developments on fair share negotiations in so called comparable areas. Such documents were received on September 22 and 28, 1978 and October 13, 1978. Also filed on October 2, 1978 was the decision of Arbitrator Flaten in WERC Case XVII, No. 22816 Med/Arb-72 involving the issue of "fair share" in the Fond du Lac School District.

All documents filed after the close of the arbitration hearing were interchanged between the parties.

The Issue

The sole issue involved was the question as to whether a "fair share" provision should be included in the 1978-79 Agreement.

The Final Offers

Of the NUE

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 (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 of 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 and the Wisconsin Education Association Council do hereby indemnify and shall save the Hayward School District 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 reason of action taken or not taken by the Board, which Board action or non-action is in compliance with the provisions of this Agreement, and in reliance on any list or certificates which have been furnished to the Board pursuant to this article, provided that any such claims, demands,

suits or other forms of liability shall be under the exclusive control of the Wisconsin Education Association Council and its attorneys.

D. This provision shall not be retroactive.

Of the BOARD

The Board's position on the remaining issue of Fair Share is a definite "no" on any form of Union Security. This issue is related to the agreement between NUE and the Board of Education of the Hayward Community Schools for the school year of 1978-79.

Appearance To Present the Case

For the NUE ---- Robert West, Executive Director
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For the Board -- Harold Roethel
Special Consultant
Wisconsin Association of School Boards
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The Position of the Board

In many respects the position of the Board is identical in language to its position as described by Arbitrator Zeidler in Case X, No. 22608 Med/Arb-36 decided September 21, 1978. This is not surprising in view of the fact that the Board representative in this case is the same consultant who served in the Zeidler case. Briefly stated the similar arguments of the Board are:

1 - Due to the Browne case (83 Wis. 2d 316) decided by the Supreme Court of Wisconsin dues can be deducted from non-members of the Union only in the amount to cover costs of contract administration and collective bargaining. In response to Supreme Court remand the WERC has not yet determined how to calculate such deduction.

2 - It is obvious that "goals" specified by the

Wisconsin Education Association Council include purposes that are not directly related to collective bargaining or contract administration and that the amount of money that will be used for such purposes is more than minuscle.

3 - In view of language in the Browne decision if the arbitrator were to give the award to the NUE he would be putting the Board in a very tenuous position because it might make the Board liable to a prohibited practice charge from an aggrieved non-union employee or if it refused to implement the award the Board would be subjected to a prohibited practice charge and the awarding of damages for failure to implement. Thus the Board would be faced with the need for resolution through future litigation.

4 - One of the major purposes of mediation-arbitration is to expedite settlements without disruption and labor unrest. Future litigation will lead to disruption and demoralization of the teaching staff.

5 - Fair share is actually immoral because it amounts to extortion. If the Board takes money from teachers who do not wish to contribute it is akin to stealing.

6 - The "save harmless" clause offered by the NUE does not take care of the Board's argument because although the Board may be indemnified for damages and costs it is not protected from the fact that there is no way the Board can escape the tarnish of being found guilty of a prohibited practice. The Board objects to an attitude which says in effect "Go ahead and steal; we will indemnify you for the cost of defending yourself and the value of the stolen goods."

The Board presented additional arguments particularly engendered by the atmosphere it asserted existed in the Hayward area. It called attention to the teacher strike which took place in the fall of 1972 (Incidentally not called by the NUE which at the time did not represent the teachers.). The Board asserted that since the strike a feeling of resentment exists among many in the community toward teacher unions. The argument continues that to use fair share to help entrench a union would certainly heighten the considerable resentment which now exists against teachers. The Board asserts it cannot ignore such feelings on the part of which it feels is a major segment of the community. The Board states bluntly that "where a community

reacts so strongly against a disruptive force (a union), a force that has disrupted the educational process for six years, the arbitrator should not usurp the community's judgement."

The Board argued that granting of fair share will not improve relations between the Board and the NUE but tend to create an unequal balance and thereby make more difficult a harmonious relationship.

The Board feels that the granting of fair share will be detrimental to maintaining a harmonious relationship between teachers because it is reasonable to conclude that many will object to NUE using their money for purposes with which they have no sympathy.

The Board argues that if the granting of fair share precipitates additional staff problems the students will suffer.

Finally the Board makes certain arguments based upon the status of fair share clauses in negotiated agreements in certain areas selected for comparison purposes. The comparability argument will be dealt with hereafter in a separate section.

The Position of the NUE

Certain of the NUE positions are also identical to those presented in the "fair share" case decided by Arbitrator Zeidler. Again this is to be expected because the NUE representative in this case also participated in the one decided by Zeidler.

The positions identical to those in the case decided by Arbitrator Zeidler can be summarized:

1 - By judicial decision the principle of fair share has been found legal and Browne did not decide otherwise. Browne merely raises the question as to what percentage of payment can be said to be solely for contract administration and collective bargaining. NUE notes that the Wisconsin Supreme Court has referred the matter back to the WERC for a study of the matter. And most importantly there is stressed the fact that the NUE offer includes a save harmless clause.

2 - NUE relied heavily on the decision in Manitowoc School District case (WERC Case VXII, No. 22629, MED/ARB-46) in which Arbitrator Stern rejected the presumption of illegality and left the determination of use of money collected forums and together

ultimately made an award of fair share.

3 - The NUE is obligated under law to represent all employees in negotiations. It fulfills that responsibility. Betterment through negotiations that has come in the form of salary, fringe benefits and working conditions go to non-NUE members as well as members. It is, therefore, only equitable that non-union employees be asked to pay their "fair share."

Other arguments particular to the fact situation were made.

The Union argued that because of a somewhat negative attitude that has developed in the community toward teacher unions since a teacher strike in the fall of 1972 (when NUE did not represent the teachers) many teachers fear joining the NUE who would otherwise join. Fair share is needed to overcome fear of community reaction.

Further the NUE asserted the fear of the existence of this same community attitude toward the union since the strike of 1972 means that Board members do not want to face the possibility of considerable heat that would be engendered if it granted fair share. In support of this argument the NUE introduced evidence that Board of Education bargaining team members made a tentative agreement on fair share with a grandfather clause which it later repudiated.

The NUE argues that lack of fair share perpetuates a split between union and non-union teachers and between union teachers and ~~money~~ in the community. It is time the argument goes that the feeling relative to the 1972 strike be concluded. NUE says it believes the existence of a fair share agreement will shift attention from how individual teachers regard the union to the entire bargaining process.

Another argument is that fair share is in the interest of a more stable employee-management relationship. It is asserted that a few members threatening to stop membership can have a too large amount of control over the union and that this is contrary to the concept of majority rule. It is wrong, the NUE says, if any minority which is not pleased uses dues payment as a lever to achieve its goals. It is asserted that a union which cannot be blackmailed by a minority element can deal in a more direct, consistent manner with the employer with the overall result that there will be a more stable employee-management relationship.

The NUE feels that the three decisions currently rendered by Arbitrators (Stern in Manitowoc, Zeidler in CESA #4

and Flatten in Fond du Lac) all support the reasonableness of adopting fair share from the standpoint of legality and idealogy. It admits that Zeidler did not award fair share but it points out that such conclusion was solely on the basis of comparability as he saw it at the time and for the area involved in his case.

The NUE presented figures on comparability that it argued pertained to this case. This evidence will be discussed hereafter.

Discussion

The arbitrator notes for the record that he is aware of Section 111.70 (4)(cm) 7 of the Wisconsin Statutes which directs that an arbitrator should consider a number of specified factors. The arbitrator has complied with the statute. Some of the factors have to do with ability to pay and financial comparisons. Obviously those factors did not apply to this case.

There was a public hearing held prior to mediation-arbitration. The arbitrator feels impelled to make some statement concerning it. At the hearing he assured those present that he would take cognizance of arguments and statements made. He has done so. The group at the hearing was not counted. The arbitrator would estimate that it was certainly under 100 people. At the start of the hearing a representative of each party was allowed to make a brief presentation in support of his position. After that individuals were recognized by the arbitrator who served as chairman of the meeting. In all perhaps about 15 to 20 persons made statements. The audience was very orderly. The speakers were all calm and rational. Most who spoke were against fair share. Several spoke in favor of fair share.

As far as arguments went there was nothing new added to arguments presented by the parties. Almost all who spoke against fair share took the fundamental and rather simplistic position that one should not be forced to support by payment of dues equivalent an organization which might espouse positions not shared. On the part of many who spoke there seemed to be the misconception that if one paid fair share one would become wholly subject to union discipline.

Other Than Comparability Arguments

Now it is time to react to the arguments of the parties.

First dealt with will be those arguments that do not involve the question of comparability with other school districts.

In the private sector way back in 1937 the United States Supreme Court upheld the constitutionality of the National Labor Relations Act (NLRB v Jones and Laughlin Steel Co., 301 U.S. 1) which required bargaining in good faith on wages, hours and conditions of employment. It did so because it felt that by allowing employees to organize and bargain with their employers there would be more likelihood of preserving industrial peace than if the opportunity were denied. In the public sector a great number of states have seen fit to pass legislation which dictated bargaining in good faith on hours, wages and conditions of employment. The legislature in Wisconsin has long seen fit to so provide. The philosophy supporting such legislation exhibits the feeling that there is more hope for good employee-employer relations in such a provision than there would be if bargaining were not sanctioned. The passage of such legislation has not convinced all individuals that labor-management peace has been enhanced. There is still considerable feeling, particularly in some communities, that legislation has merely succeeded in strengthening the position of unions and that unions have abused the power secured.

Nevertheless the provision will remain the law unless public sentiment becomes strong enough to influence legislative action. Good faith collective bargaining in the area of public employment is decreed by law in Wisconsin and the Board in this case does not challenge its constitutionality.

The Wisconsin legislature has also in the public employment area authorized bargaining for a "fair share" agreement (Section 111.70(1)(h)(1975)).

In the section the fair share agreement is defined as:

> "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."

It is not surprising that since there still exist some sentiment against requiring collective bargaining in the public sphere that there would be sentiment against any plan which would force those who do not want to join a union to contribute financial support to a union. Those who feel that unions have abused power see in "fair share" a technique to provide even more power.

Legal challenges have been directed at statutes which

in the public sphere permit the negotiation of a fair share agreement. In 1977 in Abood v Detroit Board of Education the United States Supreme Court (975, Ct. 1782) dealt with the constitutionality of the Michigan statute permitting the negotiation of a "fair share" arrangement. Justice Stewart writing for the Court indicated that compelling an employee to finance any union activity that may be related in some way to collective bargaining is permissible under the First Amendment because such compulsion is relevant or appropriate to asserted governmental interests in the assessment of the important contribution of the union shop to a system of labor relations. His opinion recognized that it would offend the First Amendment to compel employees to further purposes apart from collective bargaining and contract maintenance. There was considerable divergence of thinking among the Justices as to whether the burden of litigation rested upon the employee who challenged an expenditure by the union or whether the state had to come forward and demonstrate as to each union expenditure that the compelled contribution is necessary to serve overriding governmental objectives.

In Wisconsin in the Browne case cited by the Board a challenge was made to the constitutionality of the fair share provision in the statute. The Wisconsin Supreme Court noted that the statute specifically referred to the fact that the dues collected were to be for "the collective negotiation process and contract administration" and like the Supreme Court in Abood found no constitutional problem with such use. But like the Justices in Abood it recognized the problem of using money collected from non-union employees for causes apart from collective bargaining and contract maintenance which they may not approve. The Wisconsin Supreme Court sent the matter back to the Wisconsin Employment Relations Commission for consideration of such matter.

The Board in this case argues that the arbitrator should not grant fair share while the matter is under consideration by the WERC. The NUE argues that its offer to "save harmless" fully protects the Board and that since the basic concept of fair share has been held legal the arbitrator should rule in favor of the NUE offer.

The Board has indeed raised a most significant issue. The arbitrator has given it the most serious attention and study. His reflection leads to the following conclusions.

1 - He agrees with the judicial decisions which have upheld the validity of the legislative requirement to bargain in good faith on wages, hours and conditions of employment on the ground that labor and management peace is more likely to be fostered than if such legislation did not exist.

2 - He agrees that the legislative bodies and the courts have been wise in supporting the principle of requiring bargaining on an exclusive basis by the organization that represents the majority of the employees in an appropriate unit.

3 - He agrees that the union elected by the majority of the employees as their representative in the appropriate unit should be required to bargain on behalf of all employees in such unit -- even for those who do not belong to the union. He realizes that legislatures and the courts have looked with favor on such requirement.

4 - Since the union that represents the majority of the employees is obligated to bargain on behalf of all employees in the unit, the arbitrator feels it is equitable for the legislature and the courts to feel there is fairness in a law which permits the negotiation of a fair share agreement as long as the money collected from non-union employees is devoted to the negotiation process and contract administration.

5 - The arbitrator agrees with Justice Stewart in the Abood case that a fair share agreement does not infringe upon First Amendment rights because in the balance the government has an interest in fostering a climate which will bring about a more stable labor relations atmosphere.

6 - The arbitrator takes cognizance of the fact that as regards objections to the union stance in negotiations and contract maintenance the non-union employee is in little different position than the union member who may not share the views of the majority of the union members on a particular issue in negotiations except that he has no right to be heard at internal union discussions.

7 - The arbitrator takes cognizance of the decision of the United States Supreme Court in Madison

School District v Wisconsin Employment Relations Commission, 429U.S.167 (1976) that upheld the right of a public school teacher to oppose a negotiating position advanced by the representative union at a public school board meeting. Recognized was the fact that the Board could not bargain with such teacher or minority group. So teachers required to pay "fair share" would have a right to make known to the Board their position on matters in negotiation.

8 - The arbitrator takes cognizance of the fact that a teacher required to pay under a fair share agreement does not in any way subject himself/herself to union rules or discipline.

9 - The arbitrator does recognize that if money in ~~the problem~~ the problem form of dues equivalent is required to be paid the union under a fair share agreement individual teachers may challenge the use of any money for matters other than contract administration or the negotiation process. The arbitrator is, however, satisfied that the "save harmless" part of the NUE offer should afford the Board adequate protection.

10 - The arbitrator has taken cognizance that in all three of the cases brought to his attention in which arbitrators (Zeidler in CESA #4, Stern in Manitowoc and Flaten in Fond Du Lac) have been faced with the argument based upon the remand of the Browne case to the WERC, none of them have felt it improper to make an award in favor of fair share because of the existence of the Browne decision.

The statements just numbered from 1 through 10 obviously reveal that at this point in the discussion the arbitrator is in favor of approving the offer made by the NUE.

Additional comments need to be made and additional arguments analyzed.

The Board strenuously argued that the save harmless part of the NUE offer could not adequately protect the Board. The argument was not that the financial ability might be subject to doubt. The argument was that by virtue of the Browne decision

the arbitrator could be awarding a clause which in time may be so interpreted as to render the Board liable to a prohibited practice charge by reason of having employees pay for more than their proportionate share of collective bargaining and contract administration. The Board asserted it had a right to not be labeled with the stigma of an unfair labor practice charge.

The arbitrator is not persuaded by this argument. The technique of communication can be used to acquaint the public with any situation which may arise. The public can be made to understand that the Board has not committed a flagrant unfair act. Any future decision of the WERC or the Courts can very well give help in that respect. It is the opinion of this arbitrator that the Board is adequately protected by the save harmless part of its offer.

The arbitrator now turns his attention to the Board argument that feelings of resentment toward teachers engendered at the time of the strike in 1972 will be heightened or re-kindled if those teachers who did not support the strike are now required to pay money to the union under a fair share agreement and that cleavages between teachers will be widened.

In the first place the arbitrator will state that the tone of the public meeting, the statistical number who attended and the number who spoke did not indicate an atmosphere filled with great bitterness. Nothing was really said by the public about the 1972 strike. And, of course, it was known that NUE did not call that strike. Undoubtedly, however, the Board was right when it argued that there is antagonism on the part of many members of the community. Even the NUE does not deny that fact. The NUE also admits that some teachers may not join the union because of their fear that antagonism does exist. And it is probably very true that the Board action in refusing fair share is in response to its feeling that a significant number in the community would be opposed.

But the situation needs to be looked at from another perspective. As was stated earlier there were and still are people who are utterly opposed to the laws which gave employees rights under the National Labor Relations Act. There were and still are people who are utterly opposed to permitting public employees to bargain collectively for wages, hours and conditions of employment. But the majority of people acting through their representatives favor such laws and courts have found them constitutional on the sufficient interest government has in fostering good labor relations.

Consequently in this instance, the arbitrator feels he should not reject the NUE offer on "fair share" because there is some opposition to it in the community. The really significant factor, as the arbitrator sees it, is that employee-employer relations should be improved through good faith collective

bargaining and it is equitable to expect all who benefit from such bargaining to pay their fair share of the cost.

Furthermore, it is the arbitrator's feeling, bolstered by what he heard at the public hearing, that quite a bit of the community opposition that does exist is grounded upon a total misconception of the meaning of fair share.

As regards the argument that the approval of fair share will induce tensions between teachers, the arbitrator feels that there may be considerable truth to the NUE assertion that fear keeps many teachers from joining the union. But apart from that the arbitrator finds considerable appeal in the NUE argument that a few teachers threatening to avoid membership can have a too large amount of the control over the union and is contrary to the concept of majority rule -- which is clearly recognized by labor legislation.

The Comparability Argument

It is now time to analyze the status of "fair share" agreements from the viewpoint of agreements signed in comparable communities. The NUE and the Board both agreed that schools in the Heart of the North Conference and CESA #1 were appropriate for comparison. The Board broadened the comparison by including schools in CESA #4. The schools involved are as follows:

DISTRICTS IN CESA #4	DISTRICTS IN CESA #1	HEART-OF-THE-NORTH
1. Amery	1. Ashland	1. Cumberland
2. Barron	2. Bayfield	2. Barron
3. Birchwood	3. Butternut	3. Rice Lake
4. Bruce	4. Drummond	4. Spooner
5. Cameron	5. Glidden	5. Bloomer
6. Chetek	6. Hayward	6. Northwestern
7. Clayton	7. Hurley	7. Ladysmith
8. Clear Lake	8. Maple	8. Chetek
9. Cumberland	9. Mellen	9. Hayward
10. Frederic	10. Ondossagan	
11. Grantsburg	11. Park Falls	

DISTRICTS IN CESA #4	DISTRICTS IN CESA #1	HEART-OF-THE-NORTH
12. Ladysmith	12. Solon Springs	
13. Luck	13. South Shore	
14. Minong	14. Superior	
15. Osceola	15. Washburn	
16. Prairie Farm	16. Winter	
17. Rice Lake		
18. St. Croix Falls		
19. Shell Lake		
20. Siren		
21. Spooner		
22. Tony		
23. Unity		
24. Turtle Lake		
25. Webster		
26. Weyerhaeuser		

On the basis of the most recent figures made available to the arbitrator the totals reveal that 11 fair share agreements are signed in CESA #1, 14 fair share agreements signed CESA #4 and that 4 fair share agreements are signed in Heart-of-the-North Conference. In several areas in Heart-of-the-North and CESA #4 the issue of fair share is not settled. In CESA #4 there are 4 Maintenance of Membership agreements and in CESA #1 there is one such agreement.

In the Manitowoc case in reacting to the issue of comparability Arbitrator Stern stated that "if the number of districts having fair share is to be the critical factor it would appear that the Board argument would prevail." However, he refused to "take refuge in the rubric of numbers." Nevertheless, he did point out that the prevailing pattern was one in which the largest school districts in Wisconsin have adopted fair share and that it is spreading to medium sized districts and will eventually cover most districts.

In the CESA #4 case Arbitrator Zeidler in reacting to the issue of comparability came to the conclusion that there were 13 districts with fair share and 13 without fair share and that only one had a fair share agreement arrived at in free bargaining. This analysis caused Zeidler to hold that "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 then meets statutory guidelines. This matter thus is being decided on the sole guideline of comparability."

In reacting to the comparability issue in the Fond Du Lac case Arbitrator Flaten indicated that he felt a good case could be made for either side but he was most impressed that six very similar neighboring communities . . . are evenly divided. He then went on to say that "though no clear concensus is revealed a definite pattern seems to be developing." He then went on to cite with approval Arbitrator Stern's comment on the significance of a developing pattern. Flaten concluded by stating that:

> While the statute directs arbitrators to consider the comparison with employees performing similar services in public employment in comparable communities in the state, such similarities or dissimilarities should not be the sole criterion upon which to base a decision. Instead the arbitrator will rely on the ideological principles espoused above.

Turning to the figures on fair share in the communities compared in this case it would appear that Zeidler might agree that the scale tilted in favor of the NUE. The figures surely establish that neither Stern or Flaten would hold against the NUE on the basis of comparability.

Neither will the undersigned.

The Award

The offer of the Northwest United Educators on fair share shall be incorporated into the Agreement between the parties.

DATE November 1, 1978

SIGNED _____

Reynolds C. Seitz
Impartial Arbitrator
1103 West Wisconsin Avenue
Milwaukee, WI 53233