In the Matter of "Interest" Arbitration	)	
Between	)	WERC Case IV
CLINTON COMMUNITY SCHOOL DISTRICT	)	No. 23413
and	)	MED/ARB-197
CLINTON EDUCATION ASSOCIATION	)	Decision No. 16557-A

Introduction

On September 25, 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 Clinton, Wisconsin on November 8, 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 November 9, 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.

Post hearing briefs were filed with the arbitrator on November 20, 1978 and interchanged among the parties.

The Issue

The sole issue involved was the question as to whether a "fair share" provision should be included in the 1978-80 Agreement.

The Final Offers

Of the [redacted] District

The Association, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, Association and non-Association, fairly and equally. All employees of the bargaining unit shall be required to pay their fair share of the costs of representation by the Association as established in Wisconsin Statutes

111.70(1)(h) [i.e. the cost of negotiations and contract maintenance] as determined by WERC as remanded to it by the Supreme Court Case of Browne vs Milwaukee Board of School Directors. No fair share deduction shall be made until the WERC determination for the Clinton Community School District or State is rendered. No employee shall be required to join the Association, but membership in the Association shall be available to all employees who apply consistent with the Association constitution and by-laws.

The Association shall notify the employer of its membership within forty-five (45) days after the opening of school or WERC determination is rendered. Thirty days (30) after Association notification of membership, the employer shall begin to deduct from the bi-monthly earnings of those employees who haven't joined the local Association, an amount of money to equal the cost of negotiating and contract maintenance. The amount of fair share deduction shall be divided into 10 equal amounts with the payments to be deducted from 10 consecutive paychecks. The amounts deducted shall be paid to the treasurer of the Association on or before the end of the month following the month in which such deductions were made.

The Association shall idemnify and save harmless the Board against any and all claims, demands, suits, orders, judgments, or other forms of liabilities that shall arise out of, or by reason of, action taken or not taken by the employer under this section, including but not limited to idemnification of damages and costs of Court or administrative agency decisions and reasonable attorney fees. If an error is discovered with respect to deductions under this provision, the Board shall correct said error by appropriate adjustments in the next paycheck of the teacher or the next submission of funds to the Association. In the event that the Association, its officers, or agents engage in or encourage any Clinton strike, work stoppage, or work slowdown, the deductions and payments of fair share contributions made in accordance with this agreement shall be terminated forthwith by the Board.

Of the CEA

A. All employes in the bargaining unit shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employe shall be required to join the Association, but membership in the Association shall be available to all employes who apply, consistent with the Association's constitution and by-laws.

B. Effective thirty (30) days after the date of initial employment of a teacher or thirty (30) days after the opening of school in the fall semester, the District shall deduct from the bi-monthly earnings of all employes in the collective bargaining unit, except exempt employes, beginning with the first pay period in October their fair share of the costs of representation by the Association, as provided in Section 111.70(1)(h), Wis. Stats., and as certified to the District by the Association, and pay said amount to the treasurer of the Association on or before the end of the month following the month in which such deduction was made. The District will provide the Association with a list of employes from whom deductions are made with each monthly remittance to the Association.

1. For purposes of this Article, exempt employes are those employes who are members of the Association and whose dues are deducted and remitted to the Association in some other manner authorized by the Association. The Association shall notify the District of those employes who are exempt from the provisions of this Article (by the first day of September of each year), and shall notify the District of any changes in its membership affecting the operation of the provisions of this Article thirty (30) days before the effective date of such change.

2. The Association shall notify the District of the amount certified by the Association to be the fair share of the costs of representation by the Association, referred to above, (two weeks prior to any required fair share deduction).

C. The Association agrees to certify to the District only such fair share costs as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in this regard. The Association agrees to inform the District of any change in the amount of such fair share costs thirty (30) days before the effective date of the change.

D. The Association shall provide employes who are not members of the Association with an internal mechanism within the Association which will allow those employes to challenge the fair share amount certified by the Association as the cost of representation and to receive, where appropriate, a rebate of any monies determined to have been improperly collected by the Association.

E. The Association does hereby indemnify and shall save the

District 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 District, which District action or non-action is in compliance with the provisions of this Article, and in reliance on any list or certificates which have been furnished to the District pursuant to this Article; provided, that the defense of any such claims, demands, suits or other forms of liability shall be under the exclusive control of the Association and its attorneys.

Appearances to Present the Case

For the CEA ------ Evan E. Hughes, UniServ Director
Rock Valley United Teachers
Route 7
Janesville, WI 53545

For the District - David Y. Collins
Attorney
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Beloit, WI 53511

The Position of the District

The District is willing to grant fair share but argues it is wise to await the WERC determination in the Browne case. It asserted that an examination of past union expenditures shows a bewildering array of factual and legal issues as to what constitutes proper use of dues for negotiations and contract administration which needs determination. Continuing, the District argued, that until there is some authoritative determination the District has no way of testing the validity of the fair share deductions demanded by the CEA.

The District asserts that the internal union procedures are not satisfactory because they will force the professional non-union teacher into expensive and time consuming efforts.

The District asserted that the save harmless provision does not offer a solution. It cites two Wisconsin cases (Metz, 4 Wis. 2d 96 (1958) and Dunphy, 267 Wis. 316 (1954) for the proposition that one cannot validly indemnify against a liability arising out of a violation of a statute. Further, it argued there is a substantial question as to whether the District could delegate its authority to defend itself to other than its own agent.

The District finds in the proposal of the CEA something which will assuredly bring litigation, stimulate dissention among the professional staff and have an impact upon interest of the public. Finally the District argues that evidence relative to comparability is irrelevant where both parties have agreed to fair share but disagree on the timing and mechanics.

The Position of The CEA

The fundamental argument made by the CEA is, of course, that there is a basic unfairness in non-union members getting the benefit of representation by the Union without bearing the cost of such representation.

The CEA is aware that even the District does not reject such argument. But the difficulty, the CEA says, is that over the years since 1972 when the District first showed that it was not unalterably opposed to fair share there has been no realistic implementation of fair share. The CEA argues that if it accepted the District offer of fair share for 1978-80 there would again exist a situation where the CEA would be unable to collect fair share for what could be the entire span of the Agreement if there was not a prompt resolution in the Browne case. And indeed the CEA argues that since the Browne case involves another union its resolution may not apply to the kind of facts found in this case where dues are divided among a number of teacher groups.

At the arbitration hearing the Union clarified the internal procedures offered by paragraph D of its proposal. It asserted that the final opportunity for binding arbitration given to an employee who objected to the use of dues collected from him was most just. Furthermore, the CEA stressed that the District would have the protection of the save harmless provision of paragraph E.

The CEA submitted evidence to establish that in CESA 17 which is made up of 15 districts there were 11 that had fair share agreements equal to the amount of dues. Among the 10 school districts in Rock County, 6 districts were shown to have fair share equal to the amount of dues.

Discussion and Opinion

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. Many of the factors have to do with ability to pay and financial comparisons. Obviously these factors do not apply to this case.

There was a public hearing held prior to mediation-arbitration. The arbitrator estimates that not more than 50 people were present. Perhaps about 12 members of the public spoke. It appeared that almost all who spoke were teachers -- most of whom seemed opposed to fair share. The arbitrator took cognizance of all that was said. The central theme of opposition was concern that dues would be used for other than negotiations and contract administration.

In a Med/Arb decision (Hayward Community School District and Northwest United Educators, WERC Case XII No. 22479-Med/Arb-35 [November 1, 1978]) where the sole issue was fair share the undersigned approved the offer of the NUE which sought deduction equal to the full amount of union dues. His reason for doing so was spelled out in great detail. In summary form the reasons were expressed in this fashion:

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 the problem

that if money in 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.

It might seem that the philosophy of the arbitrator revealed in the Hayward case was so firmly presented that he would have no other choice but to follow his own precedent and approve the offer of the Association in this case. Such is not the fact. In the Hayward matter the Board of Education revealed that it was utterly opposed to fair share. In that matter it was clear that the concept of fair share was wholly contra to the ideology of the Board. In the instant circumstance the District revealed no such ideology. The Board in its offer was willing to go on record that it would begin to deduct for fair share when the WERC or a court of competent jurisdiction gave it some direction as to the yardstick that could be used to determine what proportion of dues can validly be viewed as going for negotiations and contract administration. It is true that from a realistic standpoint the answer may not come during the term of the 1978-80 contract. Nevertheless the Board is on record as not having a completely ideological distaste for the concept of fair share. Therefore, the precedent set by the Hayward case need not control in the present case.

Even more and directly significant in this case is the fact that a close study of the offer of the Association reveals a provision to which the arbitrator felt compelled to give the closest analysis.

In Paragraph B of the Association offer a provision requires the District to deduct from earnings of the employee "their fair share of costs of representation by the Association"

as provided in Section 111.70(1)(h) Wis. Stats., and as certified to the District by the Association (emphasis added). In Paragraph C of the Association offer the opening phrase states "the Association agrees to certify to the District only such fair share costs as are allowed by law and agrees to abide by the decision of the WERC and/or courts of competent jurisdiction in this regard."

By making this statement the Association is realistically agreeing with the desires of the District as expressed in its offer. It will not be possible for the Association to certify to the District "only such fair costs as are allowed by law" until there is a decision by "the WERC and/or courts of competent jurisdiction." Therefore, the Association is fundamentally asking for no more than the District desired as manifest in its offer. The District offers that it will deduct for fair share when the law clarifies the line between negotiations and contract administration and other interests of the Association.

The mediation session which preceeded the arbitration did not reveal that the provision of Paragraph C in respect to certification of costs would induce the Association to submit such a modest figure for negotiations and contract administration that the District would conclude that it was allowed by law. Therefore, if the arbitrator approved the offer of the Association it appears to him that he would be approving a document which would introduce a new form of tension between the District and the Association. The Association would certify payments which the District would in all probability resist on the ground that the Association could not demonstrate that the figure it certified could meet the test of being allowed by law. In such event the Association would likely react with a charge of breach of a negotiated agreement. Tension and ill feeling is forseeable to the detriment of the school system. Hence the arbitrator cannot approve an offer where such is a likely result.

Of course, it can be argued that tension will exist if the Association gets nothing more than a promise from the District that it will deduct fair share when the law is clarified as to the amount of dues that goes for negotiations and contract administration (essentially the offer of the District). Certainly some tension will exist but the arbitrator on balance does not view it as of the proportion that would follow if the Association offer were approved and then the District challenged a certification of fair share costs as not being allowed by law.

It is true that the Association offer contains a provision for an internal mechanism (which at time of mediation

was spelled out as to full detail) for the employee to challenge the fair share amount certified by the Association. Since the District took the position that this provision placed an unfair burden on the employee it can be expected that its existence would not deter the Board from challenging a certification of the Association on the ground that the fair share costs were not allowed by law.

The Association offer in Paragraph E also contains a save harmless provision. In his Hayward decision the arbitrator did state:

> The arbitrator does recognize the problem that if money in 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.

The facts in the instant case can be distinguished. The existence of the save harmless clause does not obliterate the fact that the offer of the Association only commits the District to deduct those dues for fair share costs which are allowed by law. By doing so the Association offer fundamentally grants no more than the District in its offer was willing to give. But it does furnish the distinct possibility of a District challenge to an Association certification as creating greater tension and thereby having an impact on community and student welfare.

In view of such probability the arbitrator feels the figures on comparability which do weigh in favor of the Association cannot determine the outcome in this matter.

The Award

The arbitrator adopts the last offer of the District.

DATE December 29, 1978

SIGNED _____

Reynolds C. Seitz
Impartial Arbitrator
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Milwaukee, WI 53233