WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEFORE ROBERT J. MUELLER, MEDIATOR/ARBITRATOR

In the Matter of the Arbitration of the Impasse Between	:	
WEST BEND JOINT SCHOOL DISTRICT NO. 1	:	
and	:	AWARD AND OPINION
WEST BEND EDUCATION ASSOCIATION, Affiliated with CLUE, WEAC/NEA	:	Decision No. 17365-A

Case No.	XXV No. 25711 Med/Arb 420
Hearing Date:	
Mediation/Arbitration	January 14, 1980
Appearances:	
For the School District	Mulcahy & Wherry, S.C., Attorneys at Law, by MR. CHARLES C. MULCAHY
For the Association	MR. DENNIS G. EISENBERG, Executive UniServ Director
Mediator/Arbitrator	MR. ROBERT J. MUELLER
Date of Award	April 4, 1980

BACKGROUND

The Union brief succinctly and objectively recited the background facts which led to the subject arbitration hearing and the arbitrator incorporates such recitation as the background statement which is as follows:

"The previous collective bargaining agreement covering a duration time period from August 15, 1977 through August 14, 1980, contained limited reopeners for the 79-80 school year. Reopeners were limited to (1) the base salary amount, (2) the school calendar, (3) changes in WIAA standards, (4) fair share, and (5) any two other economic or non-economic subjects. The issue of fair share was bargained to an impasse and a voluntary impasse agreement was reached (A-2) wherein the parties stipulated that fair share would be separated out for separate resolution through the mediation/arbitration process. The parties voluntary stipulation procedure resulted in a contract duration for the school years of 79-80 and 80-81. (The parties also stipulated to a separate impasse procedure on the issue of layoff/staff reduction which went to the Commission through a declaratory ruling process and has no relevance in this instant matter.)

"The above voluntary impasse procedure regarding the single issue of fair share was agreed to on August 23, 1979. Thereafter, the parties exchanged final offer positions on the issue of fair share. The Commission certified an impasse on the final offers on October 29, 1979. The Commission was advised of the selection of Attorney Robert J. Mueller as the Mediator/Arbitrator on November 7, 1979. Following the Mediator/Arbitrator selection, a petition was received from five members of the community to request an open hearing on the matter

before the Mediator/Arbitrator. On January 14, 1980, a public hearing was held on the matter at the District offices. Immediately following the hearing, the parties attempted to mediate the matter but were unsuccessful. The Mediator/Arbitrator served notices on both parties that he would then take evidence on the impasse unless both parties withdrew their offer. Both parties indicated that they would not withdraw their offer.

"At the hearing both parties introduced evidence and testimony in support of their respective positions. Pursuant to an agreement by the Arbitrator and the parties, additional evidence was submitted into the record following the hearing, which have been marked and received by the Arbitrator. Prior to the close of the hearing, the District requested certain data and documentation on expenses of the CLUE UniServ unit operations. The Arbitrator requested the union to show cause why the District should not receive the information which it contended were necessary for potential rebuttal of evidence in the record. Following several communications by both parties, the Arbitrator ordered the union to produce the documents which the District had so requested. The union complied with the order and the record was closed. Following the closing of the record, both parties agreed to submit briefs on the matter on or before March 3rd, and had an opportunity to submit reply briefs thereafter."

ISSUE

The issue concerns the choice of the final offer of either the Union or the Employer on the basis of determining which offer is the more reasonable by application of factors a through h of Section 11.70(4)(cm) 7 of the Wisconsin Statutes.

FINAL OFFERS OF THE PARTIES

UNION FINAL OFFER:

"A new paragraph 7, Article III, entitled 'FAIR SHARE' shall become effective the date of issuance of the Arbitrator's award if fifty percent (50%) plus one (1) of the eligible voters in the bargaining unit approve the incorporation of this clause in a referendum conducted by the Wisconsin Employment Relations Commission.

"'All employes in the bargaining unit shall be required to pay, as provided in this paragraph 7, 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.

"The District shall deduct from the earnings of all employes in the collective bargaining unit, except exempt employes and/or employes who receive no paycheck during the deduction period outlined below (e.g., on layoff status), 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. Such deductions shall be in the same manner as provided for in paragraph 6 of Article III (i.e., deductions from the second through the eleventh payroll checks). (During the implementation period of this paragraph 7 fair share deductions will be prorated from the effective date of the Arbitrator's award.) 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 paragraph 7, exempt employes are those employes who are members of the Association and whose dues are deducted and remitted to the Association by the District pursuant to Article III, paragraph 6 (Dues Deduction), or paid to the Association in a manner authorized by the Association. Employes subject to this fair share provision may transmit fair share payments to the Association treasurer in a full lump sum payment in a manner authorized by the Association. In the event that lump sum payment is utilized the Association will notify the District (by October 1 for the 80-81 school year and thereafter) of the names of those employes using the full lump sum payment method. The Association shall notify the District of all those employes who are exempt from the provisions of this paragraph 7 (by October 1 for the 80-81 school year and thereafter). The Association shall notify the District of any changes in its membership affecting the operation of the provisions of this paragraph 7 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, prior to any required fair share deduction.

"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.

"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.

"3. If, through inadvertance or error, the District deducts the wrong amount or fails to make a deduction which is properly due and owing from the employe's paycheck, an appropriate adjustment shall be made on the next paycheck of the employe and submitted to the WBEA. The District shall not be liable to the WBEA, employe, or any other party, provided it acts in compliance with the requirements of this paragraph 7, for the remittance or payment of any sums deducted from the employe's wages other than the employe's fair share of the costs of representation (as provided in Section 111.70 (1) (h), Wis. Stats., and as certified to the District by the Association in the manner provided herein.)

"The Association and the Wisconsin Education Association Council do 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 paragraph 7 (fair share agreement), and in reliance on any lists or certificates which have been furnished to the District pursuant to this paragraph 7, provided that the defense of any such claims, demands, suits or other forms of liability shall be under

the control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challenging the application or interpretation of this paragraph 7 (fair share agreement) through representatives of its own choosing and at its own expense."

EMPLOYER'S FINAL OFFER:

"Create a new Article:

" I. MEMBERSHIP NOT REQUIRED:

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

"II. EFFECTIVE DATE AND EMPLOYEES COVERED:

This Article shall be effective following the issuance of a mediator/arbitrator's award as provided herein. Following issuance of the award, the WBEA must certify to the District the amount equal to each employee's proportionate share of the cost of the collective bargaining process and contract administration and those bargaining unit employees who were WBEA members on September 21, 1979. Within thirty (30) calendar days following this certification, the District will commence fair share deductions from the monthly earnings as provided herein.

Effective with the 1980-81 contract year and thereafter, the employer shall deduct from the second through the eleventh monthly checks of all regular bargaining unit employees (as specified in A. and B. below) an amount equal to such employee's proportionate share of the cost of the collective bargaining process and contract administration as certified to the employer and shall pay such amount to the treasurer of the WBEA on or before the end of the month following the month in which such deduction was made. Any change in the amount of the deduction shall be preceded by thirty (30) calendar day notice to the employer.

"A. Present Employees: As to persons employed on the effective date of this Article (see II. above), such deduction shall be made and forwarded to the treasurer of the WBEA from the monthly earnings of only those employees who are members of the employee organization on September 21, 1979. Prior to the deduction of any fair share monies, the Association must certify to the District that said employees were WBEA members on September 21, 1979. Unit employees who are not members on September 21, 1979 shall not be covered by this Article. However, the aforementioned employees not covered by this Article may opt to have fair share monies deducted under this Article at any time by written request, and thus become covered by this Article, as if they were WBEA members on September 21, 1979.

"B. New Employees: Such deductions shall be made and forwarded to the treasurer of the bargaining representatives from the earnings of the employees hired after September 21, 1979 as provided herein.

"C. Other Employees: Bargaining unit employees who receive no paycheck on any given payroll date are excluded from the requirements of this Article, e.g. on layoff status.

"III LUMP SUM PAYMENT:

Nothing in the foregoing shall prevent Association members or those subject to the fair share payments from transmitting dues/payments to the Association treasurer in a lump sum payment. In the event that the lump sum payment is arranged, the Association will promptly inform the District at least ten (10) working days prior to the first pay period of the school year.

" IV RESPONSIBILITIES OF THE EMPLOYER AND THE COLLECTIVE BARGAINING REPRESENTATIVE:

"A. If, through inadvertance or error, the employer deducts the wrong amount or fails to make a deduction which is properly due and owing from the employee's paycheck, an appropriate adjustment shall be made on the next paycheck of the employee and submitted to the WBEA. The employer shall not be liable to the WBEA, employee or any other party by reason of the requirements of this section of the Agreement for the remittance or payment of any sums other than the cost of the collective bargaining process and contract administration as certified herein, which are actually deducted from employee wages earned.

"B. Indemnification and Hold Harmless Provision: The WBEA shall indemnify and save the employer harmless against any and all claims, demands, suits, orders judgments, or other forms of liability that shall arise out of, or by any reason of, action taken or not taken by the employer under this section, including but not limited to indemnification in the following instances:

"1. Damages and Costs:

In the event the provisions of this fair share agreement are successfully challenged in a court or an administrative body, and it is determined that the employer must pay such sums as have been deducted from earnings in accordance with the provisions hereof or any other damages, the WBEA agrees to indemnify the employer in full, including any and all costs or interests which may be a part of such order or judgment, for all sums which the employer has been determined to be liable.

"2. Reasonable Attorneys Fees:

In the event an action is brought by any party (other than the employer) challenging the validity of the provisions of this fair share agreement or any deductions from earnings made pursuant thereto, in which the employer is named as the defendant, the WBEA agrees that it will indemnify the employer in full for reasonable attorney fees and costs necessary to defend the interests of the employer in those instances where the defense of the employer has not been tendered to the Association."

POSITIONS OF THE PARTIES AND DISCUSSION

Both parties addressed the issue from the following three basic concepts and areas of consideration. No. 1, public policy and ideological considerations. No. 2, critical evaluation of the various provisions of each parties' final offer, and No. 3, evaluation of comparative data involving other employer-employee relationships and the existence or non-existence of union security provisions existing in such relationships.

The Employer suggests in its brief that of the statutory factors that are to be considered and applied to this case, two are of primary relevance. They state as follows:

> "The District avers that two criteria are paramount in the deliberations of this case namely, the interest and welfare of the public as well as the bargaining relationship between the parties which falls under the heading of 'other factors traditionally taken into consideration'. Less important, but also relevant are comparisons with other public employee units and private sector comparables."

DISCUSSION ON NO. 1, PUBLIC POLICY AND IDEOLOGICAL CONSIDERATIONS

The evidence revealed that at the time of the hearing, the District had in its employ a total of 431 employees covered by the bargaining unit. Of such total, 111 employees were not members of the Union and were not paying dues. On the basis of such exhibit it would therefore appear that 320 employees were dues paying members.

Evidence and testimony entered into the record further reveal that during contract negotiations in 1975, that approximately 92 employees filed written petitions with the School Board indicating opposition to any agreement between the Employer and Union that would call for compulsory Union membership and/or payment of dues as a condition of employment.

In the early part of 1977, a representation election was conducted by the Wisconsin Employment Relations Commission which appears to have occurred as a result of the efforts of a number of employees who were dissatisfied with the then current Collective Bargaining representative. The results of such election were certified by the Wisconsin Employment Relations Commission under date of March 8, 1977 and indicated the following results:

"The result of the election was as follows:

1.	Total number eligible to vote	412
2.	Total ballots cast	378
3.	Total valid ballots counted	378
4.	Ballots cast for West Bend Teachers Union, Local 1691, WFT, AFL-CIO	71
5.	Ballots cast for West Bend Education Association	272
6.	Ballots cast for West Bend Professional Educators	32
7.	Ballots cast for no representation	3"

The Employer addressed the concept of public policy and the status of the parties in their brief, relevant parts thereof being as follows:

> "The current impasse over fair share in West Bend Schools poses a dilemma and demands a compromise. The District does not feel it can abrogate the rights of teachers who are not members of the Association. The Association asserts a need for added stability for assistance in achieving its bargaining and contract administration objectives.
>
> "The fundamental basis for the Board's position is

two-fold. First, a significant minority of approximately 100 teachers have been steadfast in their opposition to compulsory fair share contributions over a long period of time. Quality education has continued to evolve in an orderly and professional manner despite spirited bargaining on this topic between the parties. Indeed, the relationship between the District and the Association during the past two (2) years has improved and matured. This positive evolution has been in the best interests of the community, the school system, the students, parents and the faculty. Taken within this context, the District's final offer represents a sincere effort to offer a reasonable solution to the demands of the Association and its members and the rights of non-Association members. Second, the School Board continues to embrace the belief that the Constitutional rights of this vocal and significant minority should not be abrogated via a compulsory fair share clause.
...

"The position of Justice Black on individual liberty and the Bill of Rights can be simply and quickly stated. Justice Black stated repeatedly his conviction that the Bill of Rights must be in practice what it is in language - a bill of absolute rights. In Bates v. Little Rock, 361 U.S. 516, 528 (1960) Mr. Justice Black with Justice Douglas said:

> "First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harrassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right ... These are principles applicable irrespective of their race, color, politics or religion. (emphasis supplied)

"This concept is directly applicable to the instant case, since the freedom of association means simply the freedom to join or not to join any organization including a labor union, and it logically follows that concommitant with the right not to join is the right not to pay tribute to an organization in which one does not believe. The District itself, a local government entity, through good faith collective bargaining and compromise has sought to protect the basic freedom of teachers through the modified fair share proposal. This proposal protects teachers who were not notified of the basic change in their rights before they accepted employment. The government should certainly set a leading example in terms of preservation of rights.
...

"Obviously the public hearing provisions of the mediation/arbitration law were enacted to fulfill some purpose. The public hearing provision was not placed in the statute for citizens to merely engage in an exercise of futility. Rather, where the application of the testimony was pertinent and significant it should be given weight by the arbitrator along with the other statutory criteria. To interpret otherwise would be to render the public hearing meaningless.

"The uncontrived public hearing on the issue herein reflected the sentiment of the community concerning full share. At the public hearing, Steve Chantelois stated he would support a local voluntary union however he characterized the Association offer as imposing the tyranny of the majority over the individual freedom of each bargaining unit member. Of importance to him was the concept of personal freedom and the right to choose. He felt that under the Association offer, those considerations would be completely abolished. As to the assertion by the Association that those members not paying dues were free riders, he simply replied that in fact

they were captive passengers. Other statements were also made at the public hearing reflecting and confirming the widespread community opposition to full fair share."

The Employer contends that the modified fair share proposal of the Employer serves to satisfy the reasonable needs of the Association, recognizes the rights of non-association teachers and provides a more reasonable approach and would gradually evolve to the point where all employees are actually members of or paying toward the support of the Association. They contend that such result is more desirable than the imposition of immediate and compulsory full fair share which results in the deprivation of individual rights and disruption of the educational process.

The Union addressed the public interest concept in its brief, relevant parts thereof being as follows:

> "The WBEA would assert that any grandfathering of nonmembers out of a fair share agreement is not within the public's interest for the following reasons: There is testimony in the record that there are some substantial problems in various schools because nonmembers are reaping the benefits that members must pay for. This spillover effect has a detrimental relationship among the majority of members who, as witness Hensel testified, do not, in some cases, even substitute for teachers who are not paying members of the Association. While the District may make a similar argument, it would seem to make sense that if 3/4 of the school employes feel that fair share is appropriate (i.e., voluntary membership) and only 1/4 would oppose such a position, then the greatest public good can be said to come from having 3/4 of the working staff satisfied as opposed to 1/4 of the working staff. The WBEA would also doubt that even 1/4 would be dissatisfied with the imposition of full fair share. The record indicates (A-49) that two similar cited districts would had fair share invoked through the arbitration process had membership increase from the 79% to 99% in Elmbrook's case and from 73% to 96% in Fond du Lac's case. If, in fact, freeriders were opposed to membership, they certainly would not have joined and would have maintained their status of nonmembership and fair share payers. Essentially, it boils down to an economic issue -- if nonmembers can get something for nothing then they feel no compulsion to pay for that which they will receive. It is not in the public interest, thus, to essentially have two salary schedules, one for members and one for nonmembers. The legislature's intent is absolutely clear in the matter. The WBEA asserts that an exact parallelism exists when a member earning $10,700 per year (current base salary) pays a representation fee equal to the dues of $198.50. Thus a base salary teacher would have a net earnings of $10,898.50 due to the fact the individual is receiving all the benefits of the collective bargaining agreement, including salary, without paying for any of the representation costs. Furthermore, had the member had a fair share agreement in effect for the 79-80 school year (s)he would have had dues reduced by an amount of $9.15. The WBEA can see no public interest in having like employes doing the same work being paid and taxed at two different rates.
>
> ...
>
> "Wisconsin's bargaining law, 111.70, mandates upon the union an obligation to represent fairly and equitably all of those who are members of the collective bargaining unit. It is this solemn obligation which requires the WBEA and other unions to represent members as well as nonmembers without regard to their membership status.
>
> ...

"I'm sure that this instant Arbitrator is well aware of the fact that the WBEA has a legal obligation to do those things which are required of it by law. As you know, the WBEA would under almost any conceivable circumstance be required to process and arbitrate, at considerable expense, a meritorious grievance by a nonmember. This is to say nothing of the collective bargaining benefits that have been bestowed upon nonmembers in the past such as fully paid health, dental, life and long term disability insurance, some of the best leave provisions in the State of Wisconsin, substantial layoff protections for all members of the unit, etc. It is exactly for those reasons which we have heretfore cited that the Congress of the United States and the Wisconsin Legislature have expressly provided that fair share and similar provisions are appropriate vehicles for employer-employer groups to bargain over. In the U.S. Supreme Court decision, Railway Employes vs. Hanson, the Court held that closed shop agreements in railway operations were not a violation of constitutional rights. Fair Share plans and other similar plans have been upheld on the grounds that, 'to find differently might undermine the strength of the bargaining agent and allow 'freeriders' to exist and reap benefits from representation.' Virtually every labor court of competent jurisdiction has come to the conclusion: 1) That a mandatory representation fee deduction is permissable in light of the legislature's concern over minimizing strife, 2) That mandatory dues assessments or its equivalent serve 'substantial public interest,' help prevent flagrant inequity and undermining the union's ability to perform its bargaining functions, and 3) The means adopted to achieve this legislative purpose have been upheld to be reasonable."

The evidence reveals that there are slightly in excess of 300 teachers in the bargaining unit who are contributing toward the expenses of their bargaining representative. Slightly in excess of 100 teachers, also within the bargaining unit, are not contributing. By its proposal, the Union is asking that all employees who enjoy the fruits and benefits of the Collective Bargaining Agreement that is negotiated on their behalf by their duly designated bargaining representative, should be required to contribute equally with all other members toward the necessary expenses of the designated bargaining representative. They contend that such arrangement is the one that is most equitable and fair to all concerned. They contend that the fair share method has been specifically authorized and approved by the legislature and the courts as a proper means to achieve such type equity.

A large part of the Employer's argument in opposition to the fair share proposal of the Union involves the Employer's express concern for the individual rights of the approximate 100 teachers who are not voluntarily contributing toward the expenses of the bargaining representative. The Employer contends that compulsory fair share would abrogate the constitutional rights of a significant minority and would abridge their freedom to join or not to join an organization and the right to pay tribute or not pay tribute to an organization, irrespective of their desires.

The ideological and constitutional arguments that can be brought to bear upon the issue of fair share is massive. Both parties have persuasively advanced and argued the majority of the opposing considerations relevant to that issue in their briefs in this case. Both parties have cited numerous treatises, excerpts of judges and court cases, traced and examined legislative history, and cited selective observations of other arbitrators.

In considering the arguments of the parties in conjunction with the legislative, case law and constitutional concepts, the

arbitrator is of the judgment that the emphasis that is attempted to be placed upon the individual rights of a minority with respect to the issue of fair share contribution, is somewhat misplaced and overemphasized.

First, prior to the passage of any collective bargaining statute for public employees, each individual employee had full individual freedom to negotiate with an employer whatever terms and conditions of employment as he was able to achieve. When the legislature enacted the collective bargaining statute, such full and unrestricted individual freedom was made subject to change. The law in substance provided that where a majority of the employees in an appropriate bargaining unit voted in favor of designating a named representative to bargain collectively for them and on their behalf on wages, hours and working conditions, that such designated bargaining representative then became the exclusive representative of all employees in such bargaining unit. In the considered judgment of the arbitrator, the advent of the collective bargaining law itself, whereby all employees became bound by a majority vote of those affected, more directly affected and subordinated the individual rights to collectivism and the will of the majority. It is therefore not the fair share issue which abrogates the individual rights, but the collective bargaining election itself whereby a majority of the employees vote in favor of and designate a collective bargaining representative and a collective bargaining status. Such an event changes the status of an employee from one of individual rights to one of collective rights by the will of the majority.

The question of whether or not it is constitutional to subordinate such type individual rights to that of collective rights, has long been settled by the legislatures and courts as being permissible and proper. The ideological and constitutional arguments and arguments on individual freedom of choice are more appropriately cast in the arena of whether there be a collective bargaining law or not. The ancillary and subsequent issue of fair share where collective representation is selected by a majority, is thus more appropriately determinable on the basis of other relevant considerations.

In the considered judgment of the undersigned, the issue of fair share should receive some consideration from the standpoint of equity. Under the existing collective bargaining law, a designated bargaining representative is obligated to represent all employees in a bargaining unit irrespective of whether or not they are members or nonmembers. That is the statutory mandate and one that the bargaining representative must comply with. In this situation, approximately three-fourths of the employees in the bargaining unit are contributing toward the expenses and costs of the bargaining representative. The Union contends that such three-fourths majority of all employees are in favor of a fair share arrangement whereby all employees in the unit are required to pay their equal and proportionate share of such costs and expenses. The Employer contends that slightly in excess of one-fourth of the employees are not in favor of contributing toward the costs of collective bargaining. The Union contends that such contention may not be accurate and that while some of the non-paying teachers may not wish to become members of the association, they nevertheless may not be adverse to contributing a fair share toward the cost of collective bargaining.

If one examines the results of the representation election that was held in 1977, one finds that of 378 ballots cast, only three voted for no representation whatsoever. On the basis of such voting results, one can see that 375 teachers voted in favor of collective bargaining as opposed to three who voted against collective bargaining per se. The results of such vote from that standpoint, would appear to indicate a preference by approximately 99% of the employees to subordinate the individual employee rights that existed prior to the designation of a bargaining representative

to that of collectivism and a collective bargaining status. Such vote clearly depicts a preference of the exercise of collective rights over that of individual rights by a resounding majority.

One must recognize also that the bargaining unit itself is one segment of the public to be considered under the public policy criteria. In this situation, it can reasonably be presumed that at least three-fourths of that segment of the public, consisting of those bargaining unit members who are making contribution to the association, favor fair share. With respect to that segment of the public, one can reasonably find that fair share is preferred by a majority.

The Employer contends that the public hearing and testimony of witnesses called by the Employer support the proposition that the public of the school district are opposed to fair share. While several witnesses did testify and enter appearances against the concept of fair share, the arbitrator is not persuaded from such minimal showing that the general public of the school district does, in fact, oppose fair share. The Union entered into evidence the fact that fair share provisions are contained in four other collective bargaining agreements involving Washington County and Washington County employees. In addition, such evidence revealed that the City of West Bend had granted fair share to employees in two other bargaining units with which the City of West Bend has collective bargaining agreements. The Employer's evidence indicated that while the largest local in Washington County has a fair share agreement, it provides for a referendum vote of 66% of eligible employees to vote in favor thereof and that to date such referendum has never been conducted. Additionally, the Employer presented evidence that the West Bend police contract does not contain a compulsory fair share provision.

In reviewing the evidence of the parties submitted into the record concerning the presence of fair share provisions in other labor agreements in the West Bend and Washington County area, the arbitrator arrives at the finding that such evidence fairly establishes that a majority of collective bargaining agreements in the immediate vicinity involving public employees does, in fact, contain a fair share clause and that the presence of such provision in the contracts in the area in which this school district is located, establishes in the judgment of the arbitrator, that the concept of fair share in collective bargaining agreements, is not an objectionable provision by virtue of the fact that such type clauses are found in a majority of the contracts in the area in which the same taxpayers reside and which consist of the "public" to be considered in this case. In view of the existence of such fair share provisions in such other contracts, the arbitrator concludes that fair share is not regarded as objectionable by the public.

Based on the consideration of the public policy and ideological considerations and in consideration of the equitable principles associated with the subject issue, the arbitrator is of the judgment that the Union proposal of fair share is to be prefered and is the more reasonable.

DISCUSSION ON NO. 2, CRITICAL EVALUATION OF THE VARIOUS PROVISION OF EACH PARTIES' FINAL OFFER.

Both parties submitted a summary of differences between the two final offers. The Employer's summary of such differences as set forth in their brief is as follows:

"Summary of Differences Between District and Association Fair Share Final Offers

	Category	DISTRICT	WBEA
1.	Employees Covered	All WBEA members as of 9/21/79, employees hired after 9/21/79 and employees who join WBEA after 9/21/79.	All Bargaining Unit employees
2.	Effective Date - Initial Implementation	Within 30 days after WBEA certification of membership (reasonable time for implementation)	Following passage of WERC referendum at 50% + 1 of eligible voters
3.	Individual Employee Challenge on Amount of Deduction	No Provision	Internal Union Mechanism
4.	Indemnification & Hold Harmless		
	What Covered	Damages, Costs & Reasonable Atty's Fees	Damages & Costs
	Who Defends	Board reserves right to select defense but may tender defense to WBEA	WBEA reserves righ and indemnificatio is contingent on WBEA selection of defense"

The Union entered a summary of differences between the two proposals as Exhibit A-44, which is as follows:

"SUMMARY OF DIFFERENCE BETWEEN WBEA AND BOARD FAIR SHARE PROPOSALS

Category	WBEA	BOARD
Referendum	50%+1 WERC Election	None
Application	All Bargaining Unit Employes	Only WBEA Members as of 9/21/79 (past nonmembers exempt)
Payment of Fair Share Assessment to WBEA Treasurer	Forward same as current dues deduction provision (immediately)	By end of next month following the deduction
List of Employe Deductions	Monthly Listing	No list of employes from whom deductions were made.
Lump Sum Payments	Employes can make lump sum payments in manner authorized by WBEA. District noticed by Oct. 1 (dues deduction start in mid-October)	Employes can "promise" lump future payment in some manner outside of WBEA collection timeliness. WBEA must give notice by approximately Sept. 5th.

Indemnification Attorney fees	WBEA/WEAC totally indemnifies if defense of suit is tendered to the Association for defense.	WBEA pays reasonable Attorneys charges are made if District is sued and defense is not tendered. WBEA has no control over how, what, when or why the District settles the suit."

The Employer addressed such area of consideration in its brief as follows:

> "The Issue section of this brief outlines the primary areas of difference between the parties' offers. The District views the differences on the effective date of the implementation as relatively minor since they reflect a nearly identical time frame. Similarly the reference to the Mechanism for individual employee challenge of fair share deductions is a matter of internal union procedure and not a direct concern to the employer. The Union is free to implement any procedure under either offer. Therefore this difference may be characterized as insignificant. Therefore, the grandfather provision versus referendum and the content of the indemnification clause emerge as the primary areas of disagreement."

The Union likewise placed the greater emphasis in analyzing the differences between the offers of the two parties on the same two areas. While both parties did address other differences contained in the proposals of the two parties, such other differences do not constitute substantial differences that would therefore be subject to major consideration. The undersigned agrees that the two major substantial differences between the proposals of the two parties, involves the principle of whether or not it should require contribution by all employees as opposed to the grandfather type provision and the differences as contained in the indemnification clause of the two proposals.

Consideration of the grandfather type provision to that of a full fair share provision involves consideration of the same individual freedom concepts and equitable principles that have been discussed in the prior discussion section of this Award. As hereinabove indicated, the undersigned is of the considered judgment that the equitable and majority rule considerations outweigh the opposing considerations concerning primarily that of individual freedom of choice, which rights are basically abrogated in favor of collectivism at the prior step when the employees, by a majority vote, elect to bargain collectively. The means and methods by which the collective approach to negotiations is to be funded, then becomes primarily an equitable consideration and one that should more properly be determined by a majority of the employees choosing such choice and being beneficiaries thereof. In the judgment of the undersigned, the full fair share proposal of the Union more appropriately fulfills such equitable and majority rule considerations than does the grandfather type proposal of the Employer.

With respect to the indemnification provisions of the two proposals, the main difference concerns the question of which party is to control the defense and litigation of any such action. Under the Employer's proposal, where the Employer is named as a defendant, the Employer could elect to defend and the Union would be required to pay the Employer the costs and expenses of the defense including its attorneys fees. The Union's proposal would hold the Employer

harmless and indemnify it in all respects where the defense of the action has been tendered by the Employer to the Association.

In its brief, the Employer suggested that in the event of litigation involving fair share deductions, the Union and the District would undoubtedly and normally both be joined as defendants. In such circumstances, they suggest that a joint defense would be a reasonable necessity. They suggest, however, that in such instances, it is logical and has been the prevalent practice for school districts to tender the defense to the association. It would appear from such observation, that the Employer is suggesting that even under the proposed language of the District, that the District would in most situations, tender the defense to the Association. The one area of concern expressed by the District involves the suggestion that there may be certain instances where a conflict of interest may arise between the District and the Association and that in such instances, the District should properly undertake its own defense and be reimbursed and compensated by the Association in that respect.

The arbitrator basically subscribes to those observations expressed by the Employer as above stated. However, in the judgment of the undersigned, the principal consideration to be applied to this type issue concerns an evaluation of determining which party has the greatest interest in defending those types of litigation that would be the most likely to be brought in this area. Clearly, the Association has the greatest interest in maintaining and defending the application of a fair share provision. The Association is basically the sole beneficiary of such type provision and the Employer is basically a spectator. It therefore follows that the Association would have the greater incentive to diligently pursue a defense of any such type litigation and would do so with vigor. The Employer does not have a similar type interest and would therefore not be similarly motivated.

The Association proposal contains very broad language with respect to holding the Employer harmless and with respect to indemnification. In view of such broad hold harmless and indemnification language, the arbitrator finds it hard to envision a situation wherein the Employer would not elect to tender the defense to the Association. By so doing, it is held harmless in all respects and indemnified. In the rare situation where a conflict of interest may exist, it would seem that the district would still be protected by tendering a defense because of the broad hold harmless and indemnification language that would then be effective irrespective of any such conflict. In that rare type case, the Association would then be faced with a very serious decision and by virtue of the hold harmless and indemnification provisions may be forced to elect to defend the interest of the Employer even though it may conflict with that of the Association. A tender of the defense would seem to carry with it the obligation on the other party to undertake the defense so tendered. Failure to do so or to prevail in any respect would, in any event, not jeopardize the Employer by virtue of the broad hold harmless and indemnification language of such provision.

In conclusion, the undersigned is of the considered judgment that the indemnification proposal as contained in the Union proposal is the more appropriate.

DISCUSSION ON NO 3, EVALUATION OF COMPARATIVE DATA INVOLVING OTHER EMPLOYER/EMPLOYEE RELATIONSHIPS AND THE EXISTENCE OR NON-EXISTENCE OF UNION SECURITY PROVISIONS EXISTING IN SUCH RELATIONSHIPS

Both parties submitted a substantial amount of documentary evidence in support of their respective comparative position. There is a substantial similarity in the exhibits of both parties.

There is, however, some difference with respect to what each considers to be a modification of the fair share provision. The Employer has denoted some of the listed comparables as constituting modified provisions, whereas the Union has labeled the same listed comparables as constituting full fair share situations. The arbitrator has attempted to resolve such differences.

In the considered judgment of the undersigned, the comparability analysis should be made with respect to school districts, in the following order of preference. First, those school districts located in the immediate area for the reason that the immediate area more directly reflects the interests of the public in the area in which this Employer is situated. Secondly, an analysis of those school districts in the next largest comparable area which in this case are comprised of CESA Districts 16 and 19. Lastly, an analysis of school districts on a statewide basis to determine the overall presence of fair share provisions. The arbitrator also is of the judgment that consideration should be afforded to a comparative analysis of other public employee contracts existing in the immediate area of the City of West Bend and Washington County for the reason that such area also reflects more directly the public interest and sentiment of the public with respect to the concept of fair share in collective bargaining agreements in the area in which the district is located.

The exhibits of both parties list four other school districts as being located in Washington County in addition to the West Bend District. Such exhibits indicate that of such four other school districts, three contain full fair share provisions while the fourth is indicated as having a grandfather clause type provision, which the Union contended applied to no one as of the date of the hearing. Such facts would indicate from a comparative basis, that fair share should be favored.

With respect to a comparative analysis of those school districts located in the CESA 16 and CESA 19 areas consisting of the four county area of Milwaukee, Washington, Ozaukee, and Waukesha, according to the Union's exhibit identified as A-63, 84.8% of such districts contain full fair share provisions in their collective bargaining agreements, 9.7% contained grandfathered type provisions and 5.5% contained no fair share.

According to the Employer's analysis of that same area, the Board concludes that of the 36 districts reviewed by them, 15 have no fair share or have modified fair share provisions as opposed to 21 districts who do have fair share provisions. The apparent difference in the count of the parties appears to be a result of the Employer classifying certain Union security provisions as constituting grandfather type provisions whereas the Union has classified some of such same contracts as constituting full fair share provisions. The arbitrator does not deem it necessary to resolve such conflict for the reason that even if one accepts the Employer's analysis, the evidence reveals that a majority of the comparables do, in fact, provide full fair share in their collective bargaining agreements, and, on that basis, such comparability analysis again favors the inclusion of full fair share in this contract.

The statewide analysis of fair share provisions in school district contracts, according to an exhibit prepared and entered by the Employer, indicates that of the total state school districts constituting 435 in Wisconsin, 51.3% do not contain fair share provisions. The Union presented a comparison based on a statewide analysis but limited their comparison to the larger school districts, contending that only larger school districts should be compared for the reason that West Bend, by its size, is considered to be a large school district. The Union's exhibit listed the 21 largest

Wisconsin school districts which indicated that of such number 14 contained fair share and 7 did not.

The existence of fair share agreements within contracts of other public employees in the Washington County and West Bend area, has been hereinabove discussed in an earlier section of this Award. The evidence relating to such other public employee contracts reveals that a majority of such contracts do contain fair share provisions.

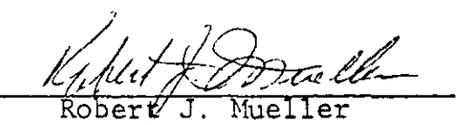
In conclusion, it is the considered judgment of the undersigned that the above comparative analysis would indicate that in this case, full fair share is to be favored.

It therefore follows on the basis of the above analysis of the facts and evidence submitted into the record by the parties and a consideration of the statutory factors applicable to the issue presented, that the undersigned renders the following decision and

AWARD

That the final offer of the Association is found to be the more reasonable and is hereby selected and directed that it be incorporated into the written Collective Bargaining Agreement as required by statute.

Dated at Madison, Wisconsin, this 4th day of April, 1980.



Robert J. Mueller
Arbitrator