

STATE OF WISCONSIN
BEFORE THE ARBITRATOR

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MAR 12 1980

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

In the Matter of the
Mediation/Arbitration Between

NORTHEAST WISCONSIN VOCATIONAL,
TECHNICAL AND ADULT EDUCATION
DISTRICT

and

NORTHEAST WISCONSIN TECHNICAL INSTITUTE
FACULTY ASSOCIATION

Case XXVII
No. 25233 Med/Arb 528
Decision No. 17465-A

APPEARANCES:

Dennis W. Muehl, Executive Director, Bayland Teachers United, appearing on behalf of the Northeast Wisconsin Technical Institute Faculty Association.

Mulcahy & Wherry, S.C., Attorneys and Counselors at Law, by Dennis W. Rader, appearing on behalf of the Northeast Wisconsin Vocational, Technical and Adult Education District Board.

ARBITRATION HEARING BACKGROUND:

On December 13, 1979, the undersigned was notified by the Wisconsin Employment Relations Commission of appointment as mediator/arbitrator, pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act in the matter of impasse between the Northeast Wisconsin Vocational, Technical and Adult Education District, hereinafter referred to as the Employer, and the Northeast Wisconsin Technical Institute Faculty Association, referred to herein as the Association. Pursuant to the statutory requirements, mediation proceedings were conducted between the parties on January 15, 1980. No public hearing was conducted as no members of the public either requested such hearing or were present for a hearing. Mediation failed to resolve the impasse and the matter proceeded to arbitration that same day. At that time the parties were given full opportunity to present relevant evidence and make oral argument. The proceedings were not transcribed but post hearing briefs were filed with and exchanged through the Arbitrator.

THE ISSUE:

The sole issue to be arbitrated is a union security clause known as full fair share. Prior to submitting this single issue to the mediator/arbitrator, the parties agreed to the following stipulation:

"...that negotiations have settled all aspects, questions and proposals for the 1979-80 Master Working Agreement between the parties with the exception of that (those) item(s) listed below. In addition, it is hereby agreed that both parties shall submit the aforementioned Working Agreement to their respective bodies for ratification and subsequent to ratification if such should occur, the parties agree that said document shall be utilized immediately as the Working Agreement between the parties until the resolution of that

"(those) item(s) is yet resolved.

"It is further agreed that those items remaining unresolved as listed below shall be mutually recognized as unresolvable and the appropriate subject of arbitration under 111.70; and further that such resolution as obtained from said arbitrator shall, if appropriate, be recognized as being included within a part of the 1979-80 Master Working Agreement between the parties.

"Single issue fair share.

All other aspects of the 1979-80 Master Working Agreement with the exception of fair share have been ratified and implemented into the 1979-80 agreement.

THE FINAL OFFERS:

THE ASSOCIATION'S OFFER:

ARTICLE I. RECOGNITION

Section I. The Association, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, members and non-members, fairly and equally and all employees in the bargaining unit shall be required to pay, as provided in this section, their fair share of the costs of representation by the Association. 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's Constitution and Bylaws.

Effective thirty (30) days after the date of initial employment of an employee or thirty (30) days after the opening of school in the fall semester, the District shall deduct from the monthly earnings of all employees in the collective bargaining unit, except exempt employees, 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 employees from whom deductions are made with each monthly remittance to the Association.

1. For purposes of this Section, exempt employees are those employees who are members of the Association and whose dues are deducted and remitted to the Association by the District pursuant to the Membership Dues Checkoff Provision of this Agreement or paid to the Association in some other manner authorized by the Association. The Association shall notify the District of those employees who are exempt from the provisions of this Section by the 15th 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 Section 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.

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

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 Section (fair share agreement), and in reliance on any lists or certificates which have been furnished to the District pursuant to this Section; 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 section (fair share agreement) through representatives of its own choosing and at its own expense.

Referendum required. This Fair Share clause shall become effective after approval by 50% plus one (1) of the eligible voters in a referendum conducted by the WERC. Such referendum shall be conducted as soon as administratively feasible following the issuance of an arbitrators (sic) award.

This fair share clause, upon passage of the referendum, will go into effect as soon as possible in conjunction with the regular monthly membership dues deduction program. Specific time limits referred to above will be waived, if necessary, to provide for the implementation of this fair share provision during the term of the 1979-80 agreement.

THE EMPLOYER'S OFFER:

The employer rejects fair share.

STATUTORY CRITERIA:

Since there is no voluntary impasse procedure agreement procedure agreed to between the parties regarding this issue, the undersigned is required under the Municipal Employment Relations Act to choose either the entire final offer of the Association or the entire final offer of the Employer.

Under Sec. 111.70(4)(cm)(7) the mediator/arbitrator is required to give weight to the following factors:

- A. The lawful authority of the municipal employer.
- B. Stipulations of the parties.
- C. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of

any proposed settlement.

- D. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.
- E. The average consumer prices for goods and services, commonly known as the cost-of-living.
- F. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- G. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- H. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

POSITIONS OF THE PARTIES:

The parties chose to present their evidence in the arbitration hearing and to rely upon briefs to present their arguments. The result of this choice is that the arguments of the parties do not necessarily address each other's position since some arguments were made upon suppositions of argumentative positions taken. For this reason, the arbitrator will present the arguments of the parties as they were addressed in their respective briefs.

The Employer argues that its position of maintaining dues checkoff rather than accepting any form of fair share is reasonable and consistent with the American system of labor relations in three ways:

1. It protects the sanctity of the individual's rights, particularly when there are "pockets of resistance" to Union membership as exists at Northeast Wisconsin Technical Institute, and, particularly, since these individuals have neither requested, nor been represented by the Union membership in grievance matters or in matters pertaining to wages, hours and conditions of employment.
2. It reflects the fact that there is no public policy in Wisconsin which favors fair share for public employees, and,
3. It contends that its continuing willingness to maintain dues checkoff reflects the perfect balance "between a union's desire to dip into the employee's paycheck and the individual's freedom not to associate with the Union."

In conjunction with its argument that there are some members of the bargaining unit who choose not to be members of the Association and who must be protected in their right to freedom of choice, the

Employer argues further that the Union has demonstrated no need for fair share monies to fulfill its statutory duty of representation. The Employer continues that the Union says it represents all of its bargaining unit members well, and, further, it has not needed extra funds to do so. The Employer concludes, therefore, that since the Association has not related its request for fair share to a cost of representation, it should not force individuals to pay for services which they do not want.

Further, the Employer contends that an arbitrator awarding "full fair share" to a collective bargaining unit at Northeast Wisconsin Technical Institute would reverse the present situation in two ways:

1. It would start a trend of requesting fair share in other contracts among its other bargaining units, since the district has not awarded fair share clauses in any form to any of its other bargaining units, and
2. It would affect the "fair share - none fair share" balance of vocational, technical and adult education districts as comparables in the negotiations process.

Finally, the Employer contends that, when the comparables are considered in this situation, modified fair share should be considered as similar to no fair share. Given this assumption, the Employer argues that all comparables, except those of local municipal and county governmental units will support the Employer's position. Included in those comparables are vocational, technical and adult education districts contiguous to Northeast Wisconsin Technical Institute, all vocational, technical and adult education districts in the State, K-12 feeder schools to Northeast Wisconsin Technical Institute, and all K-12 schools in the State.

The Association's argument on union security is that the proposal supports itself on the basis that it is legal, consistent with legislative intent and public policy and reasonable when comparables, membership, equity and its offer of a 50% referendum plus one vote in the final offer are considered.

Arguing that a union security clause is legal in the public sector, the Association states that the proposal does not interfere with the lawful authority of a municipal employer since the United States Supreme Court and the Wisconsin Supreme Court have ruled that public sector fair share clauses are legal and enforceable. In conjunction with this position, the Association further contends that the Employer is likely to argue that fair share clauses in the public sector are not consistent with legislative public policy. In rejecting this contention, the Association argues that Sec. 111.70 of the Municipal Employment Relations Act provides that fair share may be a part of a collective bargaining contract. Further, it argues that the comparables in the area school districts, the area municipalities over 2,000 population and the area counties will support the public's acceptance of a fair share concept.

The Association differs from the Employer arguing that the concept of modified fair share must be considered in the same vein as fair share and that if this is done, all comparables identified

whether Association members or not, share in the cost of representation and the benefits secured as part of bargaining.

DISCUSSION:

The Employer's final offer is to reject the Association's proposal to provide full fair share benefits to the bargaining unit, however, it has agreed by implementation of its 1979-80 contract to continue providing what is known as "dues checkoff". The Association's final offer, on the other hand, is commonly referred to as full fair share. Having examined the form and content of that request, the undersigned sees no significant deviations in what is normally acceptable fair share language as upheld in Abood v. Detroit Board of Education, (431 US 209, 52 L Ed 2d 261, 97 S Ct 1782) and Browne v. Milwaukee Board of School Directors, (83 Wis. 2d 316, 1978) and thus will give no further consideration to that language.

In regard to what constitutes legal fair share fees, this arbitrator, like others before her, does not believe that Sec. 111.70 of the Municipal Employment Relations Act extends such jurisdiction to her. Further, the State Supreme Court in Browne has ruled that what constitutes legal fair share fees is a separate legal issue from the constitutionality of union security clauses and has remanded that subject to the Wisconsin Employment Relations Commission for determination. Thus, the undersigned does not consider the Employer's argument relevant to the issue of whether or not the dues charged by the Association for representation is fair as properly before her and will not discuss it further. The Employer's argument that the Association must demonstrate a need financially in order to secure what is essentially a philosophical concept is an interesting argument but one better reserved for the negotiations process than the arbitration process.

Unique to this case, unlike previous mediation-arbitration cases of full fair share versus no fair share, is the concept advanced by the Employer that there is a recognizable difference between full fair share, modified fair share and no fair share. It is the Employer's contention that modified fair share language must be considered the same as no fair share or at least substantially different from full fair share since a considerable period of time will expire before Associations are able to achieve full fair share status under such provisions. The undersigned does not concur with that contention. Fair share and modified fair share, to the undersigned, are not separate and distinct except that modified fair share language is usually conceived in a voluntary agreement arrangement wherein the Employer has succeeded in gaining something in return for the language during the negotiations or mediation phase of collective bargaining. The end result is the same.

The Employer also advanced an argument that language such as that proposed by the Association "...should be changed through voluntary agreement between parties and arbitrators should not be setting trends..." The undersigned fully concurs with that statement, however, that choice is only available should the undersigned find in favor of the Employer since the choice available is full fair share versus no fair share. Thus, the final offers must be considered in light of the statutory criteria as identified above and the weight of that criteria will prevail.

Aside from the legal argument discussed above, both parties defended their positions on the basis of philosophical merit and comparables which the undersigned will now address:

Philosophy

The arguments advanced by both parties are classical. The Employer contends that there is no public policy which favors fair

share and the sanctity of the individual's rights of free choice must be protected. The Association contends that there is both legislative and community public policy and that if an Association is required by state statute to represent all bargaining unit members in negotiations and contract enforcement, there should be a corresponding obligation for all members of the bargaining unit to share in the support of these efforts. In reality, it is not the sanctity of the individual's rights nor the need to have all share in the cost of representation which prompts these arguments, it is to borrow and rephrase from the Employer "when someone says 'it is not the power, it's the principle' --- it's the power!"

In the opinion of the undersigned, the concept of fair share clauses in public sector collective bargaining agreements is current legislative public policy and has been so since the state legislature lifted its ban against such clauses in the early '70's. Further, Sec. 111.70 (1)(h) and 111.70(2) which define what the concept of fair share shall be and how it may be achieved further strengthens acceptance of a fair share clause as a matter of legislative public policy irrespective of specific legislation which failed to pass. Whether or not fair share clauses are acceptable public policy in a community, on the other hand, is totally dependent upon the comparables in that community.

The Employer has argued that the sanctity of the individual's rights must be protected, that we must not "punish someone for marching to the beat of a different drummer when America's greatness is founded on freedom of choice and variety of decision." One must ask, seriously, how payment for the cost of representation "punishes" someone for marching to the beat of a different drummer. Infringement on individual's rights is serious, indeed, but what is the infringement here? Payment of fair share costs of representation does not obligate the non-member to subject him/herself to union rules or discipline, it does not prevent the non-member from actively speaking out against an Association's bargaining position, it does not prevent the non-member from joining another union and, most importantly, it does not prevent the non-member from choosing to be a non-member of the association or to actively campaign for no union at all. The infringement occurred long ago when by law individual bargaining was prohibited and the individual was not allowed to withdraw from or reject the benefits of representation. The infringement occurred when the legislature mandated that once a Union has been certified, it has the obligation to represent all bargaining unit members, whether they are union members or not. Ideologically, the concept of payment for benefits and services received, kept and used, whether requested or not, does not seem so much an infringement on individual rights as other legislative acts have been.

Having drawn these conclusions, it is clear that the undersigned is not philosophically opposed to fair share agreements, thus, if there is to be a decision made on whether or not fair share should be awarded, that decision must be based solely upon the comparables provided by the parties.

Comparables

Essentially both parties submitted the same comparables. The difference in these comparables lies, as stated earlier, in how the undersigned chooses to interpret the concept of modified fair share. Since it is the conclusion of the undersigned that modified fair share and full fair share are the same in concept and therefore must be viewed as one in the comparables, a review of the comparables supports the Association's position.

The most important argument advanced by the Employer is that Northeast Wisconsin Technical Institute has no fair share clause in any other contracts with any of its other bargaining units. Recognizing as the Employer has stated "...arbitrators should not be setting trends by reversing the status quo on comparables," the undersigned is hesitant to award full fair share to the Association. However, this comparable advanced by the Employer is only one of several important comparables. Among those considered most important by this arbitrator are the vocational, technical and adult education districts within the geographic proximity of Northeast Wisconsin Technical Institute, all vocational, technical and adult education districts in the state and the K-12 feeder schools to Northeast Wisconsin Technical Institute. In all instances, when modified fair share is viewed the same as full fair share the percentages of those comparables having fair share range from 50% of the districts in the area, to 68% of those districts in the state to 77% of the K-12 feeder schools to the district. In view of these comparables, the trend is already set.

AWARD

Based upon full consideration of the exhibits and written arguments presented by the parties and due weight having been given to the statutory criteria set forth in 111.70 (4)(cm)(7), the mediator/arbitrator selects the final offer of the Association and orders that the final offer be incorporated into the written collective bargaining agreement as required by statute.

Dated this 10th day of March, 1980 at La Crosse, Wisconsin.

Sharon K. Imes
Mediator/Arbitrator