BEFORE THE ARBITRATOR

In the Matter of the Petition of:	Case 35 No. 48520 INT/ARB-6728
LASATA NURSING HOME EMPLOYEES, LOCAL 3465, AFSCME, AFL-CIO	Decision No. 28088-A
To Initiate Arbitration Between Said Petitioner and	Sherwood Malamud Arbitrator
OZAUKEE COUNTY (LASATA NURSING HOME)	Heard: 1/11/95 Record Closed: 3/31/95 Award Issued: 5/30/95

APPEARANCES:

Helen Isferding, District Representative, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, by Roger E. Walsh, 111 E. Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the Employer.

ARBITRATION AWARD

Jurisdiction of Arbitrator

On November 3, 1994, the Wisconsin Employment Relations Commission appointed Sherwood Malamud to serve as the Arbitrator to issue a final and binding award pursuant to Sec. 111.70(4)(cm)6.c., Wis. Stats., in an interest dispute between Ozaukee County (Lasata Nursing Home), hereinafter the County or the Employer, and Lasata Nursing Home Employees, Local 3465, AFSCME, AFL-CIO, hereinafter the Union. Hearing in the matter was held on January 11, 1995, at the Ozaukee County Courthouse in Port Washington, Wisconsin, at which time the parties presented evidence in support of their respective positions. Briefs and reply briefs were exchanged through the Arbitrator by March 31, 1995, at which time the record in the matter was closed. Based upon a review of the evidence, testimony and arguments presented by the parties, and upon the application of the criteria set forth in Sec. 111.70(4)(cm)7.a.-j., Wis. Stats., to the issue in dispute herein, the Arbitrator renders the following Award.

ISSUE IN DISPUTE

The remaining issue in dispute for the 1993-1994 Agreement concerns the Union's proposal to modify Section 1.05 by adding the following language:

> Effective date of award, all new employees shall be covered by this section.

The Union proposes the deletion of paragraph "E" from the Interim 1993-1994 Agreement. The Interim Agreement contains the following parenthetical statement, "(NOTE: This Section is subject to revision pending the outcome of the pending interest arbitration proceeding.)" The section referenced is Section 1.05 E. It provides as follows:

> (E) Secret Ballot Election. The provisions for payment of fair share set forth herein shall be implemented only upon conduct of a referendum election by the Wisconsin Employment Relations Commission (W.E.R.C.) as stipulated by the parties, and upon certification of results by said Commission that a majority of the eligible employees in the bargaining unit have voted in the affirmative to implement said fair share agreement.

The Employer proposes the retention of the current language in the 1993-94 Agreement.

This issue is resolved through the application of the following Statutory Criteria.

STATUTORY CRITERIA

The criteria to be used to resolve this dispute are contained in Sec. 111.70(4)(cm)7, Wis. Stats. Those criteria are:

> 7.Factors considered. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall 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.
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> d.Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours

and conditions of employment of other employes performing similar services.

e.Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities.

f. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes in private employment in the same community and in comparable communities.

g.The average consumer prices for goods and services, commonly known as the cost-of-living.

h.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.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

j. 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.

BACKGROUND

The parties have resolved all but this issue for the 1993-1994 Agreement. That Agreement has been printed and implemented. The Union proposes that fair share apply solely to new employees hired as of the date of the Arbitrator's award. The Union proposes the implementation of fair share for new employees without the conduct of a referendum.

The parties entered into the following stipulations at the hearing. These stipulations provide context for this dispute:

1. The 1986-1987 Agreement between the parties was the initial contract between the parties, and it was settled by voluntary agreement. Helen Isferding was the Union's representative during the negotiations which resulted in the 1986-1987 Agreement.

2. The Referendum Authorization Election held on June 10, 1988, pursuant to Section 1.05(d) was the first attempt at a Referendum Authorization Election by Local 3465, AFSCME. Subsequent to this June 10, 1988, Referendum Election, Local 3465, AFSCME, made no further attempts to have the WERC conduct a Referendum Authorization Election pursuant to Section 1.05 E.

3. Local 3465, AFSCME, never made a formal proposal in any negotiations for:

   (a) A Referendum Authorization Election vote in which the required majority to effectuate the fair share agreement was 50% plus one of those voting;

   or

   (b) A provision to limit eligible voters in any Referendum Authorization Election to non-probationary employees.

4. One Lasata employee voluntarily sends dues directly to the Union rather than having Union dues deducted by means of voluntary payroll deduction.

5. The County Personnel Committee executes the collective bargaining agreements with Local 3465, AFSCME, and Local 35 of the Office and Professional Employees International Union (OPEIU), AFL-CIO.

6. Lasata Nursing Home is a 200-bed nursing facility located in Cedarburg, Wisconsin. There are private and public pay residents at Lasata.

(Stipulation as set forth in Employer's initial brief.)

The Union was certified as the exclusive collective bargaining representative in June 1985. In the election conducted by the WERC in June 1985, 188 were eligible to vote. Of those eligible, 157 voted. The Union obtained 113 votes.

The stipulation for a referendum was executed on April 15, 1988. On April 18, 1988, the parties signed the successor to the initial agreement for calendar years 1988 and 1989. The referendum vote was conducted on June 10, 1988. At that time, 167 were eligible to vote. The Union obtained 78 of the 117 voting. Under the referendum provision, the Union was required to obtain 50% plus one of those eligible to vote, 84 votes.

The Employer bargains with three other collective bargaining units. The courthouse unit was organized by the OPEIU in the same year Lasata was organized by AFSCME. The Courthouse unit first contract contained a dues deduction provision. It is not until the second agreement that a fair share provision was included. Its implementation was conditioned upon the OPEIU prevailing in a referendum with the same majority standard as appears in the Lasata Agreement. The OPEIU initiated and prevailed in a referendum. Subsequently, the fair share provision continues to appear in the Courthouse agreements.

The Collective Bargaining Unit of Deputy Sheriffs has participated in two referenda votes. In 1972, when it was represented by an independent association, a referendum vote was conducted. The Union prevailed under the same majority standard as provided in the Lasata agreement. In 1979, when AFSCME represented this law enforcement unit, a second referendum was conducted in which the Union prevailed. In 1992, a representation election was conducted in which LAW prevailed. In this election, 52 were eligible to vote. Of the 34 who voted, 30 voted in favor of LAW. The fair share agreement in the 1991-92 agreement between AFSCME and Ozaukee County was continued in the agreement between LAW and the County for 1993-94. However, LAW did not stand a referendum vote.

The Ozaukee County Highway Employees' Association, an unaffiliated Local Association, has a full fair share agreement. It was implemented without a referendum. That fair share agreement was first included in the 1985-1986 Highway contract.

There is a high turnover rate of employees in this unit. Of the 188 employees eligible to vote in 1985, only 33 remain on the Lasata payroll. As of May 31, 1994, 158 employees are in this unit. Of those 158, 39 or 25% of the work force were on probation. The probationary period at Lasata is 1040 hours.

Union Exhibit 24 further documents the persistence of this high turnover rate. In the 1992 Annual Report to the Ozaukee County Board, management of the Lasata Nursing Home reported that it had hired 99 employees and the employment of 79 was terminated in 1991.

Of the 158 employees in this unit on the Lasata payroll on May 31, 1994, 20 had requested the County to deduct their dues. Pursuant to the stipulation noted above, one employee directly pays union dues to the Union. Union Exhibit 26 is a list of dues paying members of this local as of December 23, 1994. The Arbitrator counts 48 members. It appears from this record that the size of the unit remains at 158 employees.

This is the second interest arbitration between these parties over this unit. The first interest arbitration award resolved a wage dispute, inter alia, for the 1990-1991 contract over the increase for "over rate employees."

POSITIONS OF THE PARTIES

The Union Argument

The Union notes the high turnover rate of employees. As a result a significant portion of the work force is on probation. The facts establish the need for a change to the current language. Employees on probation fall at the lowest end of the employee wage scale. They do not have an investment in time with the Employer or in the unit. Probationary employees are not required to pay fair share dues. Yet, the Union must represent them. The Union argues that if employees are dissatisfied with the fair share provision, they may petition the WERC for a referendum.

The Union suggests that this Arbitrator follow the three-pronged test for implementing a change to contract language adopted by many arbitrators. Under that test, the arbitrator asks: 1) Is there a need for a change? 2) Does the proposed language remedy the condition or problem? 3) Does the

proposal of the party pressing change impose an unreasonable burden upon the other party?

The Union argues that the high turnover rate and the presence of a large number of probationary employees makes it impossible for the Union to prevail in a fair share referendum in which the Union must prevail by a majority of 50% plus one of all eligible voters. In support of this argument, the Union notes that 30 employees, or 19%, of the employees are on probation. Fully 25% of the work force, 39 employees, have worked for this Employer for less than one year. If the majority necessary to implement fair share had been a simple majority of those voting, the Union would have prevailed by a wide margin in the referendum conducted in 1988.

The Union notes that Local 150 prevailed in a fair share referendum at Washington County's nursing home only after a 16 year period in which the initial required majority was 66% of those eligible. In 1993, the Union was able to obtain fair share and meet the majority necessary of 50% plus one of those employees eligible to vote. The Union notes that for 16 years, some employees were free riders.

The Union notes the following decisions set out the obligations that accompany exclusive representation, citing: IAM v. Street, 367 U.S. 740 (1961) and Vaca v. Sipes, 386 U.S. 171 (1967). The individual interests of an employee is subordinated to the interests of all employees. The Union cites the following decisions concerning free riders: Oil, Chemical & Atomic Workers v. Mobil Oil Corp., 426 U.S. 407 (1976); NLRB v. General Motors Corp., 373 U.S. 734 (1963).

The Union emphasizes that it is costly to negotiate and administer a collective bargaining agreement. The Union has already proceeded to arbitration on one occasion for this unit. It is eight years since this Union has represented these employees. It is time that fair share be implemented. The Union emphasizes that it attempts to obtain, through this arbitration award, the economic resources to fulfill its statutory obligations as the exclusive collective bargaining representative of these employees.

Under the Union's proposal, employees hired prior to the date of the Award are able to withdraw. If they have not voluntarily paid dues in the past and have refrained from joining the Union, they need not join the

Union or pay fair share dues. New employees will know, when hired, that along with taking a job at Lasata, they will be required to pay Union dues.

The Union notes that it took two years to arrive at an initial collective bargaining agreement. The Union attempted to commence the process to initiate a fair share referendum in May 1987. That stipulation was executed in April 1988. The election itself did not take place until June 1988.

The Union argues that the comparability criteria, both internal to Ozaukee County and other municipal employers in Ozaukee County and comparable County employers support the Union's fair share proposal. The Union maintains that of the other three units in Ozaukee County, the representatives of two of those units, the independent Highway Association and LAW, did not have to stand a fair share referendum to implement the fair share contained in their respective agreements.

The Union rejects the Employer's argument that the highway contract is negotiated by the Ozaukee County Highway Committee, while the collective bargaining agreements at Lasata and at the Courthouse are negotiated by the Personnel Committee as an explanation for the presence of fair share in the Highway Agreement without a referendum. The Union emphasizes that all the collective bargaining agreements are subject to ratification by the Ozaukee County Board. There is one employer. It is Ozaukee County.

The Union notes that, when the payment of Union dues by employees of private sector employers was introduced in the organizing drives of the 30s, it was customary for the Union to exclude those employees who were hired before the Union began to represent those employees. Over the years, as new employees were hired and were required to pay Union dues, the Union shop developed. Arbitrator Stern elucidates this point in his decision in Monroe School District, 26896-A (Stern, 1991).

The Union lists the following municipal employers located in Ozaukee County that provide fair share without a referendum: Saukeville, Port Washington, and the Port Washington Schools. A modified fair share agreement as proposed by the Union appears in the Mequon and the Village of Grafton-D.P. W. contracts.

The following comparable counties have implemented fair share with a referendum, but with a majority of those voting rather than those eligible: the four Sheboygan County units; the Washington County professional and nonprofessional units; the City of Sheboygan units; the Sheboygan teacher aides in the Sheboygan Schools. The City of Plymouth and the Plymouth Schools have fair share without an election. Manitowoc County Hospital has fair share without an election, as does the Homestead Nursing Home of Calumet County.

The Union argues that no quid pro quo is needed, in this case. If the Arbitrator adopts the quid pro quo analysis, it argues that its request for half a loaf rather than a full fair share serves as a quid pro quo for its proposal. The Union concludes this argument by stating that if the highway unit can have full fair share without a referendum, why can't the Lasata unit? The Union concludes that its proposal is fair, equitable and it should be adopted by the Arbitrator.

In its Reply brief the Union makes the following additional comments in response to the Employer's arguments.

With regard to the second decertification petition, a hearing was scheduled to determine the validity of that petition. Then the petition was withdrawn.

The Union notes that there has been no showing of a quid pro quo offered by the independent highway association for it to obtain full fair share without the conduct of a referendum. The Union argues that the statutory criteria do not permit the Employer to afford favored status to one union over another.

The Union argues that its proposal is clear and unambiguous. The Union's proposal simply states that new employees hired subsequent to the date of the award will pay fair share. There is no ambiguity in the Union's proposal.

The Union notes that since January 1993 there have been 55 additional employees in this unit. It simply establishes that the high rate of employee turnover continues to the current date.

The Union emphasizes that the County's arguments concerning the conduct of referenda in Sheboygan County occurred with a different majority, that of those voting rather than of those eligible. Under the standard of those voting, the Union would have prevailed in the referendum conducted in June 1988. The Union concludes with the following argument:

> Laying this matter to rest in favor of the Union will do much to insure labor peace, equity among bargaining units, and among the employees who want a union but do not want to pay. It provides a means to respect the choice of Union membership and paying dues for employees hired prior to the award. It provides choice for new employees just coming to Lasata in deciding whether or not they want to work for an organized union facility. It provides a period of time for new employees, before dues will be taken out, either after probation or one year employment (sic). **It is fair.**

On that basis, the Union urges that the Arbitrator select its final offer.

The Employer Argument

The County details the representative status of the Union. As of June 1994, 20 bargaining unit members authorized the County to deduct their dues and one employee pays his dues directly to the Union. Twenty-one of 158 employees, or 13%, pay Union dues. There have been two attempts to decertify the Union. The first was filed in 1992 without a showing of interest. It was dismissed. The second was withdrawn in June 1994 prior to the hearing scheduled on that petition.

Fair share has been implemented in the Courthouse and in the Deputy Sheriffs' unit through referenda with the same majority standard as in Lasata. The Employer places great emphasis on the fact that the Ozaukee County Highway contract is negotiated by the Ozaukee County Highway Committee rather than the Personnel Committee. The different Employer bargaining committees explains why a fair share referendum was not required for the implementation of fair share in the Highway unit.

The County notes that Sheboygan County implemented fair share pursuant to fair share referenda in which a majority of those voting was the standard for implementing fair share. Fair share in the Washington County Deputy Sheriffs unit was implemented on the basis of a majority of those eligible. The Employer notes that it is not clear what majority was necessary to implement fair share in the Washington County Social Service units. The nursing home at Washington County and the six elections conducted until it obtained fair share are noted in both the Union and Employer arguments.

The County maintains that the Union proposal should be rejected by the Arbitrator because of the inherent ambiguity of its proposal. The Union's proposal fails to define who is a "new" employee. Under Section 1.05(a), all employees in the unit are subject to fair share. The County points to the cryptic manner in which the Union proposal is framed. One possible interpretation of the Union's proposal would generate a windfall for the Union in that all employees in the unit would have to pay fair share.

The Employer emphasizes there is no indication of support for the payment of fair share, as shown by the evidence of the few employees on voluntary dues deduction and the two attempts to decertify the Union. This case is unlike that decided by Arbitrator Slavney in Janesville School District, Dec. No. 26060-A (Slavney, 1990).

The County argues that the Union has failed to meet the standard recognized by this Arbitrator to change the status quo. The County notes that in this Arbitrator's decision in Sheboygan County (Highway Department), Dec. No. 27719-A (Malamud, 1994), this Arbitrator cited the requirements for changing the status quo noted by Arbitrator Vernon. Those requirements are that the party proposing a change to the status quo establish: 1) a need for the change; 2) the proposal addresses the need; 3) is the change supported by the comparables; and 4) the nature of the quid pro quo, if offered.

The County maintains that the Union has not demonstrated a need for the change. Its proposal is ambiguous. The Union's proposal for fair share without the conduct of a referendum is not supported by the comparables; The Union offers no quid pro quo for its proposal.

The County concludes that its final offer is preferred. It retains the status quo. The Arbitrator should select its final offer for inclusion in the 1993-1994 Agreement.

In its Reply brief, the Employer responds to the Union's arguments by adding the following comments.

The County maintains that the Union's argument concerning the majority necessary to implement fair share under the initial agreement and continued thereafter in all subsequent agreements is no more than a complaint. The County notes that the Union does not propose a different majority standard to implement the fair share. It does not propose the exclusion of probationary employees from those eligible to vote. Rather, the Union proposes that the fair share be implemented without a vote. The Union asks the Arbitrator to impose fair share on new employees.

The County notes that as a practical matter, it would be very difficult for new employees to initiate a fair share referendum. Employees who are employed at Lasata prior to the date of the arbitration award would not necessarily support an effort to eliminate fair share for new employees. The Employer notes that the contractual standard for the implementation of fair share is the statutory standard for continuing a fair share agreement.

The Employer emphasizes in light of the evidence of a lack of support for fair share in this unit, it is better not to change the fair share language. In Washington County, a recognized comparable to Ozaukee County, the Union representing nursing home employees of that county's nursing home persisted and ultimately prevailed in changing the standard for eligibility from 66% of those eligible to a majority of those eligible. Ultimately, when the union did prevail, it did so by a majority sufficient to meet the initial 66% standard. Here, the Union attempted to prevail in a referendum on only one occasion. In Washington County, the Union initiated six referenda votes.

The County argues that the manner in which the Union's proposal is framed, leaves intact Section 1.05(c). Under that provision, the fair share is applicable to non-probationary employees, not just new employees. The Union may argue it intends that the language apply to new employees, however, the language of its proposal is ambiguous, at best. When read as

written fair share may be imposed on all non-probationary employees in this unit.

The Employer distinguishes Arbitrator Stern's award in Monroe School District on the grounds that Monroe deals with an initial agreement. The fair share issue was one of several outstanding issues for an initial collective bargaining agreement for support personnel. Here, the Union proposes the deletion of a provision that has been in all of the agreements between these parties.

The County notes that both Sheboygan and Washington Counties require fair share referenda prior to the implementation of any fair share provision.

The County maintains that the Union provides no quid pro quo for its proposal. It dismisses the Union's argument that it is requesting half a loaf and that request constitutes a quid pro quo. The Employer notes that this logic would support any Union demand for a wage increase. The Union could argue it initially sought a 10% increase. Its offer should be granted because it only seeks a 4% increase in arbitration.

The Employer concludes that the Arbitrator should continue the status quo by selecting the Employer's, rather than the Union's, final offer for inclusion in the 1993-1994 contract.

DISCUSSION

Preliminary Matters

The parties did not anchor their proposals to the statutory criteria. The interest and welfare of the public, comparability, and such other factors are the three statutory criteria that are reflected in the arguments of the parties. The Arbitrator addresses all three statutory criteria in the Award which follows.

The Employer argues that the Union's proposal is ambiguous. On that basis alone, the Arbitrator should select the Employer's final offer. The Arbitrator disagrees. The Union's final offer clearly states that the fair share provision contained in the agreement shall apply to employees hired

subsequent to the date of this award issued. The other provisions of the agreement which set forth the manner in which fair is to be administered apply to those employees subject to the provision; i.e., new employees hired after the date of the issuance of this award.

Comparability

The Union argues, and the Arbitrator agrees, that two of the other units did not stand a referendum vote. The Highway unit contract contains fair share. The Highway Committee represents the Employer Ozaukee County. The Arbitrator rejects the Employer's argument that the Highway and Personnel committees are separate employing entities.

The failure to require LAW to stand a referendum vote when it became the exclusive representative of the Deputy Sheriffs unit provides stronger support for the Union's position. LAW obtained 30 of 34 votes in the recent representation election. Relative to the size of the unit, 52 eligible to vote, LAW's majority was less than this Union's majority. This Union prevailed by a vote 113 out of 157 eligible to vote, 72%. LAW obtained 58% of those eligible. Yet, the Employer agreed to simply continue fair share from the contract with AFSCME without requiring LAW to stand a referendum.

The OPEIU, the only other organized unit other than this unit, stood a referendum vote. On this evidence, the Arbitrator concludes that the internal comparables under the criterion, Such Other Factors, support the Union position.

The municipal employers located in Ozaukee County and the counties agreed to by the parties as comparable to Ozaukee, in the main, have implemented fair share pursuant to a referendum vote. For most of the units, the standard for implementing fair share is a majority of those voting, rather than a majority of those eligible. The Union does not propose a different voting standard. It proposes fair share without a vote. On this issue, the Arbitrator concludes this evidence supports the Employer's position, that fair share be implemented pursuant to a referendum.

The comparability issue is determined under two separate criteria, comparability and Such Other Factors. The Arbitrator gives greater weight to the internal comparables. At the time Lasata and the Courthouse were

organized, the County insisted on a fair share referendum in this unit's first contract and the Courthouse second contract, while including fair share without a referendum in the Highway's 1985-86 contract.

The Status Quo Analytical Framework

The Union's modified fair share proposal is the singular issue to be determined in this arbitration proceeding. Who will pay the expenses of Union representation? The Union proposes a modified fair share. New employees will pay the freight. The Employer proposal retains present language under which a majority of those eligible will determine if employees must pay the expense of collective bargaining.

The Union does not suggest that its agreement to the implemented agreement was conditioned in any respect on its achieving fair share. Rather, the Union argues that it asked for half a loaf, a modified fair share plan applicable only to new employees. The proposal itself contains within it the quid pro quo for its adoption. The Employer dismisses this Union argument.

The Arbitrator agrees with the Employer's contention that asking for less than what one could have demanded does not constitute a quid pro quo for a proposal pressed in arbitration. In other words, the fact that a Union could have presented a final offer for a 10% wage increase, does not constitute a quid pro quo for a 3% final offer.

In a recent decision of this Arbitrator, New London School District, Dec. No. 28152-A (Malamud, 4/17/95), fair share and dues deduction represented one issue of well in excess of 20 issues outstanding in an interest arbitration dispute for an initial collective bargaining agreement in a unit of support personnel in the New London School District. In that case, the Association representing the support personnel prevailed in a second election by the narrow margin of 50 to 44. In light of the narrow vote, this Arbitrator held that a referendum was appropriate. However, the Arbitrator preferred the standard of a majority of those voting rather than the statutory standard of a majority of employees eligible to vote. In addition in that award, the Arbitrator required some quid pro quo for inclusion of fair share without a referendum in the Agreement.

In New London, the fair share issue was not determinative of the outcome. The prevailing party did so by a substantial margin. This case provides the Arbitrator with the opportunity to focus on the fair share issue. On further reflection, the Arbitrator changes his views as expressed in New London on the fair share issue with regard to the need for quid pro quo and the suitability of its inclusion in an initial contract without a referendum.

An understanding of the statutory scheme of the Municipal Employment Relations Act regarding fair share provides the basis for the application of the statutory criteria to this case of: the Lawful Authority of the Employer; the Interests and Welfare of The Public and Such Other Factors.

When a union is certified as a collective bargaining representative pursuant to a vote, the employees voting express their will to be represented by a union. At that point, fair share may be viewed as a cost of exclusive representative status. The Union correctly notes that it must represent all employees whether or not they are members of the Union. Fair share dues that are measured by the costs of collective bargaining and the administration of a collective bargaining contract ensure the Union's ability to carry out its statutory function. The inclusion of fair share is an integral part of the representative status of the union. No quid pro quo should be required. If employees want a union to represent them; they should be prepared to bear the costs of representation.[1]

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[1]See the analysis of Arbitrator Stern in his Award on this very issue soon after the effective date of the MED/ARB law in 1978. Relying in part of the views of Prof. Nathan Feinsinger, Arbitrator Stern concludes that fair share and the status of the exclusive collective bargaining representative go hand in hand.

> IT IS THE ADOPTION OF THAT PRINCIPLE, THE PRINCIPLE OF AN EXCLUSIVE BARGAINING AGENT NEGOTIATING A CONTRACT FOR ALL EMPLOYEES WITHIN A BARGAINING UNIT, WHICH HAS DEPRIVED EMPLOYEES OF RIGHTS WHICH FORMERLY THEY POSSESSED SINGULARLY AS INDIVIDUALS BUT WHICH NOW ARE POSSESSED COLLECTIVELY BY THE BARGAINING AGENT ON THE BEHALF OF ALL INDIVIDUALS IN THE BARGAINING UNIT. (Emphasis in the original) Manitowoc School District, Dec. No. 16227-A (Stern, 1978) p. 8.

On the employer side, the inclusion of a management rights provision in a collective bargaining agreement between a municipal employer and a union representing its employees should not require a quid pro quo. The employer has a statutory obligation to carry out its governmental mission. No quid pro quo is necessary to include a provision in the agreement which reminds employees of the statutory obligation that a municipal employer must fulfill. It is on the basis of the above analysis, that the Arbitrator treats both fair share and management rights as proposals that fall outside of the status quo-quid pro quo analytical framework.

The Employer makes an important distinction between an initial agreement and one in force for eight years-plus. Immediately after a union is certified whether the union has prevailed by a wide or narrow majority, the Union's expenses and performance have yet to be expended and evaluated. The statute grants representative status based on a majority of those voting, at this point in time. Inclusion of fair share in an initial agreement provides the Union with the economic means to carry out its statutory function. When a union begins to serve as the exclusive representative of a unit of employees, it is a heavy burden for a union to stand an election in which any employee who does not vote is considered a no vote.

Under the statutory scheme of the Municipal Employment Relations Act (MERA), fair share is a bargainable subject. If it is bargained into the agreement by the Employer, the rights of employees are protected through the referendum process. A union must command a vote of a majority of those eligible to continue fair share. Presumably this referendum vote occurs well after the Union has been certified. Unit employees are in a position to evaluate the quality of service they are receiving. By this time, the Union should be able to get the vote out on its own behalf. The statute provides that fair share continues only if a majority, 50% plus one, of those eligible vote to continue fair share.

In light of these general principles concerning fair share, the Arbitrator now turns to consider the Union's proposal for a modified fair share. The parties include fair share in their collective bargaining agreement. The Union proposes the deletion of the referendum requirement. The Employer correctly notes that the Union's arguments concerning the different majority standard present in contracts of

comparable employers is irrelevant to a dispute in which the Union does not propose the adoption of a different voting standard or eligibility requirements for a referendum. The Arbitrator finds this argument pressed by the Employer applies to its position, as well. Neither party proposes a different majority standard for the implementation of the fair share agreement. The Arbitrator is confined to determine this dispute on the basis of the parties' proposals. The Employer proposes the retention of the status quo. The present language provides for the implementation of fair share upon the favorable vote by 50% plus one of those eligible to vote in a referendum. The Union proposes that new employees hired subsequent to the date of the issuance of this Award, pay fair share dues in accordance with Sections 1.05(a)-(d) of the Agreement.

Should the Referendum Be Deleted?

The Employer sets forth a compelling argument. The standard for the implementation of a fair share agreement reflected in the parties' agreement mirrors the statutory standard for the continuation of fair share. The need for a referendum in a unit in which the Union holds a narrow majority is important.

The Union responds by noting that after eight years of representation, the absence of fair share deprives the Union of the financial resources necessary to meet the expenses of negotiating and administering a collective bargaining agreement. There is merit to the Union's position. There is a very high turnover rate of employees in this unit. This high turnover rate has existed from at least 1991 through the present. Employees who are organized today may be gone tomorrow. The high turnover rate suggests the futility of an attempt to stand a referendum where the standard for implementation of the fair share is those eligible rather than those voting.

Arbitrator Stern in Monroe School District, Dec. No. 26896-A (Stern, 1991), had to choose between the Employer's proposal for a fair share referendum conducted under the statutory standard for the continuation of a fair share agreement or the Union's proposal for requiring fair share as part of an initial agreement. Arbitrator Stern observed at pp. 10-11 of his award as follows:

> The arbitrator finds the Association proposal on fair share to be preferable to the District proposal for the following reasons. First of all, when compulsory membership was introduced into many major private sector initial agreements, it was customary to exempt from payment of dues those hired under the previous arrangements who had not seen fit to joint the union voluntarily. Over the years, such arrangements have moved from modified union shops to full union shops as the grand fathered employees retired and new employees were required to pay union dues. The Association proposal represents a similar arrangement. It is a modified fair share arrangement under which current employees who work less than 600 hours a year are exempt from payment of the fair share fee.
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> Second, the arbitrator sees no need for him to order a referendum when, regardless of which offer prevails, employees have the right to petition the WERC for a fair share referendum to determine whether a fair share arrangement shall exist. Also, the arbitrator suspects that by ordering an immediate referendum, he would be contributing to unrest which would spill over into negotiations for the next contract and thereby make it more difficult for the parties to reach agreement without resorting again to arbitration.

Arbitrator Stern imposed fair share in a case in which the union prevailed in a certification election under the following terms: 130 employees were eligible to vote; 64 employees voted for the association and 53 against it. That election was conducted in 1989. However, as of July 1991, 72 of the 128 employees in the unit were members of the Association. Only three of the employees exempted from the fair share were members of the Association. Ultimately, Arbitrator selected the Union final offer, in the main, on other bases. However, Arbitrator Stern clearly expressed his preference for the Association's proposal for the imposition of fair share that excludes those employees who were not members of the Association.

The Arbitrator details the extent of organization in the case of the Monroe School District to highlight the difference between that case and this one. Here, the Union recognizes the limited membership in the Union. It does not attempt to have the Arbitrator impose fair share on employees in

the employ of this Employer at Lasata. Rather, it proposes fair share for new employees who will know at the time they agree to work at Lasata that should they complete probation, they will be required to pay fair share. Clearly, in light of the high turnover rate, the imposition of fair share on new employees will result in a substantial increase in the number of employees contributing towards the expense of the negotiation and administration of this contract.

New employees will find it difficult to initiate a fair share referendum. First, they are new to employment at Lasata. It is not easy to initiate a referendum vote. A showing of interest is necessary. An employee new to an employment setting may find it difficult to approach other employees who are unknown to the employee in order to collect the signatures for a showing of interest.

Is it appropriate for the Employer, absent arbitration, to implement fair share for new employees or for employees already in its employ under circumstances in which in the recent past 13% have requested voluntary dues deduction and most recently, as of December 1994, no more than 30% of the employees in the unit are members of the Union?

The Union proposal to impose fair share on new employees, in time, may well bring the representation question to a head. If employees desire representation by a Union, they should be prepared to pay the expense of that representation. If they do not, they have an opportunity to reflect that either through the initiation of a referendum on the continuation of the fair share, should it be ordered by the Arbitrator, or through a decertification petition. The criterion, the interest and welfare of the public, is well served through bringing the representation question to a head. If employees are to represented by a union, then the Union representing them should be afforded the economic support necessary to fulfill its statutory obligations. The interest and welfare of the public is addressed through the stability which results from a union with the economic ability to represent the employees fairly. The economic wherewithal to say "no" to employees when their demands are overreaching or are not supported by contractual language comes from organizational and economic strength.

In this case, the Union proposes that the Arbitrator impose fair share under circumstances in which there is evidence that employees do not want

fair share; the contract and MERA provide the means to determine that question. The Arbitrator recognizes the organizational burden imposed by the high turnover rate of this unit. Unlike Monroe School District, where Arbitrator Stern determined that case at a point in time when the Union had support from a substantial majority of the employees it represents, the Arbitrator finds that it would be inappropriate for the Arbitrator to impose fair share under the Such Other Factors criterion. Where there is evidence that a majority may not want fair share, the employees in that unit should decide that question. The Municipal Employment Relations Act at Sec. 111.70(2) headed Rights of Municipal Employees provides the reason for this decision:

> Municipal employees shall have the right of self organization and the right to form, join or assist labor organizations to bargain collectively through representatives of their own choosing . . ., and such employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner provided in a fair-share agreement. Such fair-share agreement shall be subject to the right of the municipal employer or a labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employees in the collective bargaining unit desire that fair-share agreement be terminated. Upon so finding, the commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employees, it shall be deemed terminated.

SELECTION OF THE FINAL OFFER

This is a very difficult case. Both sides present persuasive arguments in support of their respective positions. The internal comparability factor is given greater weight than the external comparables. This data favors the adoption of the Union's position.

In this case, the Arbitrator has had an opportunity to review the basic principles underlying fair share under the Municipal Employment Relations Act. On the one hand, the Union has demonstrated that the high turnover rate of employees in this unit makes it difficult for the Union to prevail in a

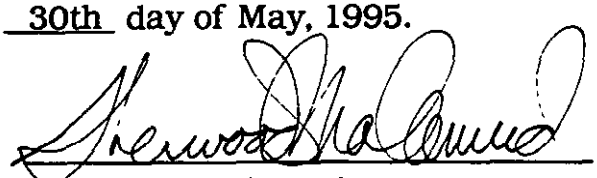
referendum in which the standard for implementation of fair share is a majority of those eligible to vote. It has made a convincing argument to change the standard and to revisit and carefully structure the eligibility of those who may participate in a referendum election conducted pursuant to a collective bargaining agreement to implement fair share. However, the Union does not propose changing the voting standard. In light of the evidence of the extent of Union support, be it the 13% figure presented by the Employer or the 30% figure presented by the Union, the Arbitrator concludes it would be inappropriate for him and contrary to the statutory purpose of the act to impose fair share, even the modified fair share proposal put forth by the Union.

Based on the above discussion, the Arbitrator issues the following:

AWARD

Upon the application of the statutory criteria found at Sec. 111.70(4)(cm)7a.-j., Wis. Stats., and upon consideration of the evidence and the arguments presented by the parties and for the reasons set forth above, the Arbitrator selects the final offer of the Employer for inclusion in the 1993-1994 Agreement between Ozaukee County Lasata Nursing Home Employees Local 3465, AFSCME, AFL-CIO and Ozaukee County.

Dated at Madison, Wisconsin, this 30th day of May, 1995.



Sherwood Malamud
Arbitrator