STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of TEAMSTERS UNION LOCAL NO. 695 To Initiate Arbitration Between Said Petitioner and CITY OF MIDDLETON (Police Department)	Case 31 No. 51667 MIA 1920 Decision No. 28418-A

Appearances:

Teamsters Union Local No. 695 by Previant, Goldberg, et al., by Marianne Goldstein Robbins.
City of Middleton by Melli, Walker, Pease & Ruhly, S.C., by Jack D. Walker, Esq.

ARBITRATION AWARD

Teamsters Union Local No. 695 (Union) is the collective bargaining representative for non-supervisory law enforcement personnel in the employ of the City of Middleton (Police Department). The parties have been unable to agree upon the terms to be included in their collective bargaining agreement for the period January 1, 1995, through December 31, 1996. The Wisconsin Employment Relations Commission's investigator certified that the parties had arrived at an impasse; the Commission entered its order for binding arbitration on May 24, 1995. The parties selected the undersigned from a panel of arbitrators provided by the Commission. The Commission entered

its order appointing the undersigned to issue a final and binding award pursuant to Sec. 111.77(4)(b) of the Municipal Employment Relations Act on June 27, 1995. After due notice had been given to the public, the arbitration hearing was scheduled to commence at 10 a.m. on October 16, 1995. On September 13, 1995, the City served two Subpoenas Duces Tecum upon a representative of the Union. Those subpoenas resulted in a Motion to Quash the subpoenas. The motion was sustained by a decision and order dated October 13, 1995. The parties were advised of the decision to quash the subpoenas by a facsimile message on October 12, 1995. A copy of the decision and order was provided to the parties immediately prior to the October 16, arbitration hearing.

Both parties presented sworn testimony and documentary evidence on the hearing record. A certified hearing transcript was provided to the parties and to the undersigned on November 2, 1995. Initial briefs were exchanged through the arbitrator on November 30; and, reply briefs were exchanged on December 18, 1995.

ISSUES IN DISPUTE

The principal reason that the parties have been unable to agree is because the Union's proposal includes a fair share provision. There is also a disagreement about the language to be included in the contract for the purpose of establishing reimbursement for travel time.

UNION'S POSITION

FAIR SHARE - "Arbitrators have frequently recognized that the most important criteria in selection of a final offer is the comparison of employees to those performing similar duties in comparable communities." The Union cited comments from previous arbitration awards to support its contention. It argued that a number of arbitrators have recognized the importance of external comparables in deciding whether to include a fair share clause in a contract for the first time. It cited three prior arbitration awards in which arbitrators had discussed the fact that external comparables had fair share provisions in their contract as significant factors in selecting union offers, which included fair share.

"Arbitrators have frequently recognized geographic proximity as a major factor in establishing comparability." The Union said that it had identified communities adjacent to Middleton, Monona, Fitchburg and Sun Prairie, as comparable. It said that an arbitrator had found those cities to be comparable to Middleton in a 1982, Public Works arbitration proceeding. It said that it had also recommended the Town of Madison and the City of Stoughton, because, they are suburban Madison communities which operate on the same work schedule and perform similar duties. Stoughton, Monona, and Sun Prairie were found comparable to Middleton by the arbitrator in a 1978 proceeding involving the Middleton Police Department. The Union said that the City of Madison and Dane County should also be considered comparable to

Middleton in this proceeding. It argued that data it had presented supported finding that Middleton, while being comparable to the other municipalities, has relatively greater resources and a lower mill rate.

The Union argued that the City had offered only the Village of Oregon as comparable. It said that the City had failed to offer any evidence to support a finding that Oregon is comparable to Middleton. The Union said that Oregon was found to not be comparable in a 1981 arbitration proceeding involving the Public Works Department; it urged that same finding herein.

The Union said that each of its proposed comparables has a provision in its contract which requires employees to pay the assessed fair share, whether or not they become union members. It anticipated that the City would argue that while the Union had proposed a fair share provision in Oregon it did not include that provision in its final offer. The Union argued that it had attempted to obtain fair share language in Middleton in both of its previous contracts. It resorted to arbitration when it became apparent that Middleton would not agree to the "standard provision." There is no stronger argument in support of the Union's offer for fair share than the fact that every comparable police department has such a clause in its labor agreement.

The Union argued that its fair share proposal should be favored in order to assure that all members of the bargaining unit contribute financially to their representation. It cited a 1991 decision in which Arbitrator Flager observed that "[t]he

philosophical respects of this issue will never be resolved... . Suffice it to say that in my 38 years of arbitration experience, the far more common resolution of the fair share argument has gone to the position that all beneficiaries of the fruits of the bargain must contribute to the costs of achieving the labor contract." The Union said that this is the principal which has caused it and its predecessor to seek a fair share clause in the Middleton Police Department contract.

The Union responded to the City's argument that since all members of the bargaining unit have authorized a dues deduction, there will be no financial impact. "This state of affairs, however, does not detract from the selection of the Union's final offer at this time." It noted that one arbitrator had rejected the need argument where 92.65% of a bargaining unit had agreed to a dues check off. Another arbitrator found that a high percent of union memberships supported a fair share provision. The Union argued that the fact that all members of the bargaining unit are already paying dues supports the Union's proposal. It said that some arbitrators had preferred fair share clauses which excluded mandatory contributions from "grandfathered employees." It said that its offer would not disadvantage any current employees. It would assure that newly hired employees "contribute to the costs of achieving the labor contract, should any newly hired officers decide not to join the Union."

The Union argued that because the other two represented units in Middleton have included a fair share provision in their

final offers, which are also in arbitration, internal comparisons favor the Union's offer. It said there is no internal pattern to omit the clause. "If anything, it is more likely than not that other bargaining units will attain a fair share clause in their successory labor agreements."

The Union said that the City, rather than focusing upon statutory criteria, had based its opposition to fair share upon policy considerations and the prior activities of Local 695 and other Teamster affiliates. It noted that the City had argued that "Fair share should not be involuntarily imposed upon a city in the interests and welfare of the public." It said that this Union has no financial involvement with either the Chicago or Appleton Teamsters' Locals, about whom the City had introduced evidence. It said that the primary concern relating to this Union's activity relates to a Middleton corporation that has not had any involvement with this Local since 1991. "It is unclear how this evidence has a bearing on the interests and welfare of the public. The fact that members of Local 695 were involved in a strike against the Corporation before 1991 did not prevent it from beginning to represent Middleton Police Officers in 1991. "The City hasn't questioned the legality of Local 695's representation of Middleton's officers." It said that the City also acknowledges that fair share is legal. The City argues that because some members of Local 695 may have acted illegally in a strike, fair share should not be imposed on the City.

The Union said that fair share would not have any financial impact upon the City. It would only affect a newly hired officer who chose not to join the Union. It said that the City was arguing on behalf of such officers. It said that other arbitrators have rejected such arguments, because, the employer is not the representative of employee interests. The Union pointed to the provisions of Wisconsin's Municipal Employment Relations Act as the means by which the bargaining unit may seek removal of fair share. The Union cited a prior arbitration award in which the arbitrator had discussed employees' recourse through the WERC, if they are dissatisfied with fair share.

The Union said that policy issues relating to Unions and their members have been addressed by the Municipal Employment Relations Act and are administered by the WERC. "That forum also addresses the issues raised by those fair share individuals who question the manner in which their fair share is calculated by the Union." It said that these issues are not matters to be addressed by an employer in arbitration proceedings. It cited judicial and arbitral authority to support that position.

In response to the City's concern about its liability arising out of the fair share provision, the Union said that it had addressed that "issue by providing a standard indemnification clause." It said that the City had not presented evidence that the interest of the public will be injured by the Union's proposal. "The public welfare may be benefited by encouraging a stable bargaining relationship."

REIMBURSEMENT FOR TRAVEL TIME - The Union said that the City may have raised this matter as a disputed issue because it recognized flaws in its fair share arguments. It said that the Union's travel reimbursement proposal is based upon an agreement between the parties. "Travel time to and from training would be compensated provided it required traveling over 30 miles from the Police Department and would be measured at the rate of 50 miles per hour." It said that the City Administrator had admitted that the agreement, "embodied in Union's proposal, meets the City's basic concern." It said that the additional provision contained in the City's offer, that travel time is to be measured in advance by the Department, came from an earlier discussion between the parties. "However, given the agreement on the 50 mph standard which admittedly provides an objective criteria for measuring travel time to and from training, the City's additional proposal that it calculate the amount of travel time in advance is surplusage."

CITY'S POSITION

FAIR SHARE - The City said that none of its employees had "ever been required to pay money to a private organization, such as a labor union, as a condition of public employment." It said that there have been three employee units which have been historically been represented by a union. None of these units has ever been subject to a fair share requirement. The City said that its police unit has been covered by union agreements since 1973. "Now, in 1995, at a time when all the unit employees are

in fact voluntarily paying union dues to the Teamsters, the Teamsters seek to impose government coercion for evermore, in this proceeding. The City opposes the concept of coerced dues payment; ...the imposition of 'fair share' over the objection of the local elected government...would be neither fair nor reasonable."

The City reviewed its historical relationship with this unit starting with the Middleton Professional Policeman's Association which represented the unit in 1973. Teamsters Local 695 represented the unit from January 1, 1976 through December 31, 1978. The parties negotiated contracts, without a fair share provision, in each 1976 and 1977. The parties went to interest arbitration over four issues, including fair share in 1978. The City made eight arguments about fair share in that proceeding. All but one of those arguments are being repeated herein. The arbitrator, in 1978, ruled against the Union on the fair share issue, "...not on the concept of paying fair share-but on demonstrating what constitutes a fair share."

The City said that between 1978 and 1991, two different bargaining representatives had represented this police unit. The City pointed to 9 contracts between the City and Wisconsin Professional Police Association (1979-1982) and Middleton Professional Police Association (1983-1991), which it said had been negotiated without fair share. "In 1992, despite its knowledge of the Middleton position on fair share, Teamsters Local 695 again became the representative. It was not forced to

do so: it chose to do so." Local 695 negotiated these parties' last two agreements, neither of which contain a fair share provision.

The City said that it has two other bargaining units which have historically been represented by AFSCME. Neither of those units have fair share, both are seeking it at present. It noted that in 1979, an arbitrator had "ruled against AFSCME in a case which involved fair share" for City Hall employees. Middleton's Public Works Department prevailed in arbitration, but fair share was not included in that Union's offer. "AFSCME has represented both units from and after both of those awards without fair share, and without any ill effect."

The City reviewed an exhibit in which a member of this unit's bargaining committee had written to a member of the City's Personnel Committee. That correspondence discussed the City's position on fair share and referred to union membership levels in the City's three bargaining units. The letter contained the following statement. "As the City Hall bargaining unit still has less than 50% membership, the revocation of a fair share provision by that unit seems almost certain." The City argued that this arbitration exists because of matters affecting that AFSCME unit. It said that the AFSCME' final offers do not contain grandfather clauses for dissenting employees. The non dues paying members of the City Hall unit have been employed "without forced dues payments for years. If the Teamsters win

this proceeding, it will likely have an effect in the City Hall proceeding."

The City said that if fair share "has been the standard for years,...it is not because local electorates like it, but because the interest arbitration system imposes all or nothing 'agreements' without regard to the views of local elected officials." It said that in this instance, the Union had voluntarily agreed to represent this unit without fair share in their last two contracts. It noted that Local 695 is not seeking fair share in a pending arbitration proceeding in Oregon. It speculated that if Local 695 prevails in this case, it could assert in the next Oregon proceeding that fair share is "accepted" by all municipalities. It argued that if that happened, all of the police in the area would be "required to pay money to the Teamsters or some other union in order to be police."

The City said that the proposed fair share provision fails to establish a procedure to limit deductions to amounts required for collective bargaining and contract administration. The City said that the question of what constitutes "fair" was the deciding factor when Arbitrator Gilroy held against the Union's request for fair share in 1978. It said that three of the seven contracts that the Union presented as comparables address that question. It denied that the City of Madison and Dane County can be considered comparable to Middleton, because, they are larger and more complex units of government. "...it is notable that the

(perhaps) more sophisticated metropolitan employer bargainers obtained language which addresses the question of what constitutes a proper amount for fair share." It reviewed language from the Madison and Dane County contracts which it said provides an internal mechanism to dissenters who don't want to contribute to non fair share union expenses.

The City said that this is a serious First Amendment issue. Persons cannot be required to pay money to a union for improper purposes. The First Amendment is a restriction on government action. Under fair share, government forces employees to pay money to a private organization. "Therefore, it cannot be said that the issue of a proper fair share amount is none of the employer's business, in deciding whether to have fair share." It said that, it is the City's business because it would be the City that violated the employee's rights. The Union's proposed hold harmless clause does not address the problem, the City does not want to violate its employees' rights.

The City said that the issue is "whether it is reasonable to award fair share if in fact there is no procedure in place for objection, or if in fact, the Union has analyzed its dues structure to give credit for expenditures which would not pass muster under the first amendment." It said that the Union had not shown that it has a procedure to permit dissenters to object. It said that none of the Union's exhibits contain "a word about a procedure or about how to calculate a constitutional amount." It reviewed some of the provisions of the Constitution of the

International Brotherhood of Teamsters, and argued that the local union is prohibited from setting the amount of the fair share. It asked, "if an individual wanted to avoid paying per capita tax, would he have to join the international as a party, because the local cannot control per capita tax?" The city raised a series of questions about the Union's dues assessments.

The City said that the Union's agreement with the City of Fitchburg provided for a mechanism to allow employees to challenge the amount of the fair share certified by the Union. It said that despite the arbitrator's concern about this matter in 1978, and despite the City of Middleton's concern about the matter, the Union has failed to provide such an opportunity for relief in its offer to the City of Middleton. It argued that the Union had neither established a fair share amount, other than full dues, nor a procedure for challenge. "Apparently, the Teamsters think it appropriate to merely give lip service to First Amendment rights...

This is not a fair reading of the constitutional law." The City discussed two U.S. Supreme Court decisions, from which it concluded that five Justices "would not permit a prior restraint by the government, by collecting fair share dues equal to union dues, and arguing about it later." The City concluded that these Supreme Court cases require that the Union establish safeguards before it collects from non-members.

The City argued that even if the Court did not require safeguards, it is not reasonable for the Union to refuse to

consider reasonable steps toward resolving this serious constitutional issue. It said that the Teamsters certified two times hourly earnings per month for both Union members and fair share payers. "Thus, either Teamsters Local 695 never spends any money for any purpose other than collective bargaining and contract administration, or the Teamsters are collecting unconstitutional amounts." It said that is apparent from the International's per capita tax, that raw dues is not a proper fair share amount. It reviewed Local 695's and Joint Council 39's annual reports to the U.S. Department of Labor, and argued that the data on those reports showed that the dues and per capita tax imposed upon members exceed amounts which are properly included in a fair share. "It is apparent on this record that the Teamsters do not operate as independent locals, but form a Byzantine organization from local through international." It said that this is relevant to the issue involving Local 695.

The City noted that in the 1978 arbitration case between these parties, a Police Officer testified that he didn't pay money to the Teamsters because he believed that in the public eye, the Teamsters were "linked to organized crime, corruption and financial management, and they enjoy being constantly subjected to financial irregularities and distrust in the pension fund." It argued that there may be another such person or citizen in the future. The City said that the Government of the United States has been trying to clean up the Teamsters Union since before 1978. It cited two out of state instances which

indicate that there is currently more work to do before that goal has been accomplished.

The City cited evidence that the former Secretary-Treasurer of the Appleton, Wisconsin Local, committed perjury and made illegal political contributions in 1992, "just as the Teamsters were re-entering Middleton." It argued that the attitude of Local 695 is not that these matters are not true, but that, Local 695 has no involvement with other local unions. It said this Union and the Appleton Local are members of the same Joint Council.

The City reviewed a series of exhibits and incidents involving Local 695 and a Middleton Corporation which occurred "just before the Teamsters re-entered Middleton." These involved "a large number of violent acts and threats in contempt of Federal Court orders," and resulted in a Federal Court order for the payment of $70,000 in contempt fines. "$70,000 is a lot of dues money." It said that the Union says that these matters are not relevant, because, it no longer represents the employees of that Middleton Corporation. "Might there be another set of private employers and private employees someday who might be concerned about the appearance of impropriety?" A different Teamsters local still represents some of the employees of that Middleton Corporation which was previously involved in the strikes with Local 695.

The City said that during the strike, referred to above, Middleton Police arrested a security guard who had been employed

to protect the employer's premises. It said that Police Officers have to make all kinds of calls during a disturbance. When the Police have to testify, credibility is important. "If the Middleton Police had been represented by the Teamsters during that strike, there was the vivid possibility of a Teamster arresting a person not a Teamster, during a Teamster strike." It argued that coerced dues payment magnifies the problem of protecting the appearance of impartiality. The City said that the Federal Government has had marginal success controlling illegal Teamster conduct over a period of decades, "including Local 695." It said that to award this Union fair share would be a government signal that government in general is not concerned about illegal Teamster activity.

The City said that the Union had not shown that it needs a fair share provision. It said the Union refused to provide information which would show that it needs the money or whether dues from this unit has had any effect on Union operations, "and by extension whether any of the dues money went to pay the $70,000 federal contempt fine. It said that neither Local 695 nor Joint Council 39's annual Report Form showed financial need. It argued that, since all Middleton employees are paying dues, there is no need for fair share. It noted that fair share would impose the duty upon a dissenter to start a legal proceeding "against a giant organization like the Teamsters, in order to be sure the employee is not involuntarily paying Teamster contempt fines." The City noted that the Union's offer is retroactive to

January 1, 1995. The last two employees began paying dues by checkoff in April or May. The City argued that it appears that the Union is trying to coerce both persons into paying retroactively.

The City said that the Union's offer would require probationary employees to pay dues. It said that this requirement would change the existing practice that probationary employees do not pay dues, "generally, even on a voluntary basis." It argued that the Union was trying to change a long standing practice without demonstrating any need to do so.

The City reviewed the duty of persuasion assumed by a party seeking to change the status quo through arbitration. It cited a 1989 arbitration case in which the arbitrator concluded that the Union had failed to establish need for fair share, "even though there were a large number of nonmembers, because there was no evidence that the employee group had been damaged." It argued that in this case "the only evidence is that there is no need." The City said that the Union had based its case entirely upon external comparability. It said that "the comparability situation was the same in 1991-92, when the Teamsters volunteered to represent this unit, and in 1993-94 when the Teamsters voluntarily agreed to a contract without fair share." It argued that the only hint of need for fair share is the City Hall Unit's claim.

The City referred to the second test arbitrators have sometimes imposed upon the party requesting a change in contract

language. Does the proposed language remedy a condition which requires change? "There is no condition in this case requiring change, and thus the language does not remedy anything." The City argued that, if the Union is attempting to avoid having a police officer avoid paying dues in the future, it is proposing to change the status quo, because, Officers in Middleton do not customarily pay dues prior to the end of their probationary period.

The City argued that, in its view, the request for fair share fails the third test, because, it would be burdensome. "The City is concerned about its own public image, and the image it and its officers convey to the public in labor disputes." It said that Middleton has had recent experiences with labor disputes in which this Union had to pay fines, "in a dispute which Middleton officers policed." It argued that, if fair share is ordered there is nothing the City can do to address the "public perception that the government is forcing public employees to potentially or actually finance the Teamsters in the payment of fines arising out of misconduct by the Teamsters toward citizens, in Middleton."

REIMBURSEMENT FOR TRAVEL TIME - The City said that its final offer contained two provisions which are not included in the Union's offer. They are:

1. Mileage shall be measured from the police department.

2. Travel time is to be measured in advance by the department.

It reviewed evidence of the parties' bargaining positions and the City's understanding of conversations that took place between the Chief of Police and the Union's bargaining committeeman. The City argued that it was reasonable to include the language proposed by the City, and not rejected by the Union.

The City said that the Union may not argue that it was surprised by this issue because the City had proposed its language in March, 1995, and the employer had highlighted the disputed language. It disputed the Union's contention that the Union's proposed language was tentatively agreed to, and pointed out that the parties did not execute tentative agreements in this proceeding. The City noted the testimony of a Union witness that the two offers mean the same thing. The City argued that its offer requires that travel time will be measured in advance from the police department, whereas, the Union's final offer deletes that advance determination requirement. The City argued that there is a difference in the parties' travel reimbursement proposals. Its offer is the more reasonable.

REPLY BRIEFS

UNION - The Union said that if those persons who pay dues want a referendum, they have a legal right to petition for one. "In this way a referendum is available, but only held where there is a perceived need for such, a far more economically efficient alternative." It rejected suggestions that the City Hall unit's proceeding has any relevance to the present matter. It also

argued that circumstances in Oregon are not relevant. "The fact that it may be the only community the City can locate which does not have fair share, does not alter its status."

The Union argued that the City, contrary to its stated position, "claims in opposition to the Union's proposal that what is at issue is the fair share amount and the procedure for establishing it." It argued that the City could have proposed alternative fair share language during negotiations in order to address that concern. It cited the 1978 Browne decision and argued that, its offer is facially constitutional and provides "a procedure to insure objecting non-members pay only for their share of the collective bargaining process and contract administration." It argued that these are matters between the Union and the employees, and not matters for interest arbitration.

The Union cited the 1987 Browne case, and argued that, it is "proper for the Union to initially assess fair share payers the same amount as is uniformly assessed as dues to members" provided that payors are notified of their right to object prospectively and have their dues reduced. It argued that there is no evidence that Local 695 does not have these procedures. It argued that it had not elicited evidence about its procedures, because, it does not believe this is an appropriate matter for collective bargaining. It cited a line of authority to support that position. The Union said that the City's argument, that, payment to the International Union should be excluded from fair share

because the International maintains a strike fund, demonstrates why decision makers have consistently held that the procedure for determining the amount of the fair share is not a subject for collective bargaining. It is a matter between the Union and the employees it represents.

The Union argued that there is no evidence to rebut the testimony that Local 695 does not financially support other Teamster locals referred to by the City. It said that the City's "Persona of the Teamsters" arguments, including Local 695's participation in a strike against a Middleton Corporation, are not relevant. The Union argued that the City's representation that the "award of fair share would be a 'government signal' approving the Teamsters Union" is without basis. Fair share is not the City's money, it is money of the employees that the Union represents.

It disputed the City's argument that fair share is not reasonable because all of the officers currently pay dues. It argued that this position contradicts the City's argument that the City Hall Unit proposal would impact non-member employees. "The principle behind the fair share provision is that all beneficiaries of the fruit of the bargain contribute to the costs of achieving it."

The Union argued that other arbitrators have not applied the three part test, required to change the status quo on monetary issues, to the inclusion of a fair share provision in a successor agreement. "Rather, arbitrators have utilized external

comparables and, as the City's post hearing brief tacitly acknowledges, these awards have favored inclusion of fair share provisions."

CITY - The City said that the Union had relied entirely upon the external comparable criterion. It said that the Union had cited a decision in which an arbitrator had said some arbitrators feel that criterion is the most important despite the fact that the legislature had not prioritized the criteria. "However, not even arbitrators who have prioritized external comparables conclude that external comparables are the only criterion." The City reviewed five cases that had been cited by the Union as support for the Union's offer. It argued that those cases are distinguishable on the facts, which do not apply to the circumstances of this case. It argued that in this case decades of the status quo, the absence of need and the failure to provide a proper fair share amount to objective criterion, which offset external comparability. It noted that in one case cited by the Union "not all the unit employees paid dues, and thus there was an arguable need." It argued that two cases cited by the Union "stand for the proposition that a high, but not complete, percentage of memberships is not a bar to a fair share demand."

In response to the Union's argument that the timing of its proposal is good because all members of this unit are paying dues, the City argued that this award will influence two pending AFSCME cases. It argued that there are a lot of non-dues paying members in one AFSCME unit. The City said that internal

comparability is the status quo. If it was not for interest arbitration, the Union would not have pushed for fair share.

The City repeated its objection that the Union's offer does not "address what the cost of representation is." It complained that the Union had argued that the existence of a referendum procedure protects the employees. "A referendum protects the majority." It said neither the rights of minority employees nor the rights of the City are protected by the referendum procedure. It noted the Union's argument that employee relations with their bargaining representative are exclusively an internal union matter.

> The city of Middleton agrees with that: the city is an outsider to the union-employee relationship, and the city wants to have nothing to do with that relationship once the employees have chosen a representative. In particular, the city does not want to be coerced into coercing its employees into having a relationship with the union. It is the imposition of government coercion by means of fair share which superimposes the city's interest and concern onto the relationship, or the lack of relationship, between the employee and the union. If there is fair share to which the government is a party, there is a constitutional freedom of association issue. If there is no fair share, there is no constitutional freedom of association issue.

DISCUSSION

FAIR SHARE - is the sole issue that prevented these parties from reaching a voluntary agreement.

> Fair-share agreements are generally regarded as devices whereby all public employees in the bargaining unit are "compelled to pay...his or her 'fair-share' of the

> [certified] union's actual cost of negotiations and representation... ." Hay, "Union Security and Freedom of Association," in Labor Relations Law in the Public Sector, 145, 146 (A. Knapp ed. 1977). Its validity rests on the theory that all employees who benefit from the majority union's representative efforts should financially support those efforts; the fair-share agreement is, in the words of this court in Board of School Directors vs. WERC, supra at 649, "related to the functioning of the majority organization in its representative capacity... ." Mil. Fed. of Teachers, Local No. 252 v. WERC, 83 Wis. 2d 588, 595-6, 266 N.W. 2d 314, 317 (1978).

Fair share agreements have been in effect in Wisconsin since 1971, when they were first sanctioned by the Wisconsin Legislature. A request for a fair-share agreement is a mandatory subject of bargaining in Wisconsin. Based upon the large number of arbitration decisions and WERC Orders and a limited number of Appellate Court decisions, it appears that fair-share provisions which once generated great resistance from some municipal employers and some employees who chose not to join unions, have gained greater acceptance over time. From the record in this case, it is apparent that the City of Middleton has not joined the growing number of municipalities that have been willing to go along with Union requests for fair share. This Union previously petitioned for arbitration in a case in which fair-share was an issue in 1978. That request was denied. The Union has attempted to obtain fair-share by agreement during negotiations over the parties' last three contracts. The parties' final offers initially contained six disputed issues. Over time, all of the major issues except the fair-share issue were resolved. When the

City determined that the Union would not give up its request for fair share, the City requested that this case be certified for arbitration.

The case having been certified under Sec. 111.77(4)(b) of the Municipal Employment Relations Act, the undersigned is required to give weight to the nine factors set forth in Sec. 111.77(6) Wis. Stats. However, except as noted herein, neither party addressed those statutory criteria.

The Union pointed out that all 19 members of this bargaining unit have signed a dues checkoff authorization and assignment. It relied heavily upon this fact and its comparison with external comparables to argue that its offer is the more reasonable.

The Union said that the adjacent cities of Monona, Fitchburg, Stoughton and Sun Prairie and the Town of Madison which have fair share agreements, constitute appropriate comparables. It argued that it is also relevant that the City of Madison and Dane County have fair share provisions in their contracts. The City did not contest the Union's proposed comparables. It argued instead that Oregon, which it did not claim is comparable, does not have a fair share agreement. It noted that Local 695 has not included fair share in its final offer in a pending Oregon arbitration proceeding. Based upon the foregoing and the evidence in the record, it is reasonable to consider the cities of Madison, Monona, Fitchburg, Stoughton and Sun Prairie, the Town of Madison and Dane County comparables to Middleton, for the limited purpose of recognizing that their

collective bargaining agreements contain fair share provisions and Middleton's does not include such a provision. This comparison gives strong support for the Union's offer.

The facts that no other bargaining unit in Middleton currently has a fair share agreement, but that, all three such units are currently in arbitration over this issue do not favor either party's offer.

The City's most strenuous objections to the Union's fair share proposal are most relevant to the statutory criteria relating to "the interests and welfare of the public." Two themes recur throughout the City's various arguments. They are that: no municipality should be required to impose a payment upon its employees for the benefit of a union as a condition of employment for the municipality; and, the City has a right or responsibility to make certain that any money withheld from its employees is the proper amount. The City emphasized the latter concern by suggesting that because Local 695 is affiliated with the International Brotherhood of Teamsters, money paid to it either would or could be transferred through the Teamster organization and used for illegal purposes.

Arguendo, if fair share money from this bargaining unit is used for illegal purposes, it is clearly not in the public interest. This forum, however, is neither qualified nor empowered to inquire into either the Union's fair share allocation formula or its application of fair share funds. The decision entered by the undersigned on September 13, 1995, in the

Union's motion to quash the City's subpoenas duces tecum, spells out the basis for those beliefs. There is no purpose in repeating that discussion herein. The conclusions set forth on pages 14 through 17 in that discussion are incorporated into this decision.

The City's argument that the decision in this proceeding "will likely have an effect in the City Hall proceeding...would affect the longstanding rights and expectations of persons in another unit..." is not well taken. There is sufficient challenge for an arbitrator to resolve most controversies based upon the record that is presented by the parties without the arbitrator having to assume the responsibility for a global impact from an arbitration decision. Decisions relating to disagreements between the City and its AFSCME units should be based upon the records in those proceedings. The decision in this case must be based upon the record herein, not upon speculation about how this decision may impact persons who are not parties to this action.

The City argued that the Union's proposal that "The employer shall deduct an amount certified by the Union as the dues uniformly required of all members from the pay of each employee in the bargaining unit" is not reasonable. That argument ignores language in the Union's offer which limits fair share to "their proportionate share of the costs of the collective bargaining process and contract administration... ." The City cited a series of Wisconsin and U.S. Supreme Court cases to support its

first amendment argument. Its conclusions, however, ignore the results of a series of Wisconsin cases including Browne v. Milwaukee Board of School Directors, 83 Wis. 2d 316 (1978) and Browne v. WERC, 169 Wis. 2d 79 (1992). It appears to the undersigned that case law interpreting the conflicting rights of labor organizations and fair share payors under Sec. 111.70(1)(f) and 111.70(2) Wis. Stats. supports the language of the Union's offer. It seems that the City has based its opposition to fair share on inconsistent positions. It argues on the one hand that it "does not want to be coerced into coercing its employees into having a relationship with the Union," when statute gives the Union the right to organize and collect fair share from all of the employees. It argues on the other hand, that it is concerned about the City's liability to ensure that the money it remits to the Union is used only for proper purposes, when the statute and the courts make it clear that, that is a matter between the fair share payor and the Union.

The City argues on the one hand that it is resisting fair share in this case because of "the persona of the teamsters" but, on the other hand, it argued that it is concerned that if fair share is awarded in this case, "it will likely have an effect in the City Hall proceeding." In that case, the AFSCME offer for fair share does contain language which addresses what constitutes a proper amount of fair share which the City argues to be lacking in this proceeding.

The City, in its reply brief said, "If fair share is not awarded, the Union might get fair share someday, if there is a local political change, and if the teamsters ever clear up their act." Those considerations make the City's position appear to be unreasonable. The Union's right to bargain for fair share should not be held hostage until there is a political change in Middleton. The members of this Union having selected Local 695, and having unanimously subscribed to dues check-off have requested that a facially legal fair share provision be included in their contract.

The employer has not been prejudiced by not being able to obtain the records it subpoenaed. The City has introduced evidence that members of Teamster affiliates have engaged in illegal conduct. Local 695 has been found to have been in contempt of court and has paid substantial amounts of money for its transgressions. That money had to come from somewhere. The City's argument was well presented and the message came through loud and clear. It doesn't want anything to do with the "Teamsters". Under the Municipal Employment Relations Act, however, employes have the right to bargain collectively through a labor organization of their own choice. The City is not permitted to refuse to discuss fair share, a mandatory subject of bargaining, because it does not approve of the membership's bargaining representative.

When the nineteen individuals who are members of this bargaining unit were hired by the City of Middleton to become

police officers, they were screened and hired in accord with the provisions of sec. 62.13 Wis. Stats. They subsequently selected Local 695 to act as their collective bargaining representative in the manner provided for in sec. 111.70 Wis. Stats. All nineteen of the "regular full-time and regular part-time law enforcement personnel of City of Middleton...excluding...employees not having the power of arrest"...have voluntarily elected to pay dues to Local 695. As professional police officers, the members of the unit are subject to discipline as provided in sec. 62.13(5) Wis. Stat. The Union's request for fair share will not have any monetary impact upon the City. The foregoing circumstances compel the conclusion that the Union's offer is reasonable and that the City's concerns about government imposing membership requirements upon its employees are unfounded.

Adopting the Union's final offer will impose contract language upon the City. The City has made it clear that it finds the fair share provision abhorrent. The City's arguments that awarding the fair share proposal will upset the status quo and, therefore, quid pro quo is required, is not apropos. Arbitrator Sherwood Malamud reviewed a line of authority which included the views of Professor Nathan Feinsinger and Arbitrator James Stern in his recent consideration of a Union's request for fair share. Mr. Malamud's concise summary of the law follows:

> 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.
>
> 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. Lasata Nursing Home Employees, Dec. No. 28088-A (Malamud 1995).

It appears to the undersigned that given the rights of these employees to organize for collective bargaining purposes, their right to select their bargaining representative and their willingness to pay dues and support the Union's request for fair share on the one hand and the City's opposition to fair share on the other, the contract language does give rise to a condition

that requires change. The Union's proposed language will remedy the condition without imposing an unreasonable burden upon the City of Middleton.

TRAVEL REIMBURSEMENT - It appears that the difference in the two offers relating to reimbursement for travel time and mileage expense is a difference without distinction. The City's Administrator described how the Police Chief and the Union Steward agreed to meet and come back with acceptable language that they would both agree to and present it to the negotiating committee on September 28, 1994. He testified that he didn't know the exact language was worked out. "Basically they're saying exactly the same thing. Both of them do not have the same words, measured or determined."

The Union argued that its "proposal is, by all accounts, based upon an agreement reached between the parties that travel time to and from training would be compensated provided it required traveling over 30 miles from the Police Department and would be measured at a rate of 50 miles per hour."

The City is correct in its assertion that the Union's offer does not contain the language, "Mileage shall be measured from the police department." The Union's offer does say "travel time to and from training over 30 miles from Police Department shall be counted as time worked... ." Both offers provide that "travel time is to be measured at an average of [Employer's offer inserts the words' speed of'] 50 miles per hour." Union exhibits and testimony make it clear that the Union believed that the parties

had reached an agreement on this issue. The City's argument that its offer which provides "Travel time is to be measured in advance by the department...is a more restrictive word on the City" appears to be moot, since, the City included that language in its final offer. It does not appear to make one iota of difference which party's travel reimbursement language is included in this agreement.

For the foregoing reasons, the offer of Teamsters Local 695 appears to be the more reasonable. That offer should be incorporated into the parties' collective bargaining agreement for the period January 1, 1995 through December 31, 1996.

Dated at Madison, Wisconsin, this 5th day of January, 1996.

John C. Oestreicher, Arbitrator

STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of *TEAMSTERS UNION LOCAL NO. 695* To Initiate Arbitration Between Said Petitioner and CITY OF MIDDLETON (Police Department)	:	Case 31 No. 51667 MIA 1920

Appearances:

Teamsters Union Local No. 695 by Previant, Goldberg, et al., by Marianne Goldstein Robbins.
City of Middleton by Melli, Walker, Pease & Ruhly, S.C., by Jack D. Walker, Esq.

DECISION ON THE MOTION TO QUASH SUBPOENAS

The arbitration hearing in these proceedings has been scheduled to be held in the Middleton, Wisconsin, City Hall Building commencing at 10 a.m. on October 16, 1995. On or about September 13, 1995, the City of Middleton served two Subpoenas Duces Tecum upon Mr. David Shipley, as the Secretary-Treasurer of Teamsters Local Union No. 695, and as the Secretary-Treasurer of Wisconsin Teamsters Joint Council No. 39. In close, proximity to serving the Subpoenas upon Mr. Shipley, the City served its brief in support of the subpoenas and in opposition to an anticipated Motion to Quash the subpoenas upon the Union and upon the undersigned. On September 27, the Union informed the City, and

the undersigned, that it would mail its Motion to Quash the subpoenas together with a brief in support of that motion to the City and to the undersigned on October 3, 1995. At that time, the Union requested "that the City telefax any response brief it files on or before October 10 or contact the [Union's attorney] if this schedule is not feasible." The Union telefaxed its Motion to Quash, Affidavit and Brief without attachments to the City and mailed copies with attachments to the City and to the undersigned on October 3, 1995. Those documents were received by the undersigned on October 4, 1995. The City mailed its Reply Brief to the Union and to the undersigned on October 9; it was received by the undersigned on October 10, 1995. During the afternoon of October 12, 1995, the undersigned faxed a message to the representatives of the parties. The message was that I had ruled that the subpoenas should be quashed in their entirety. I further informed the parties that I was working on a written decision which would be handed to them immediately prior to the October 16, arbitration hearing.

ARGUMENTS

CITY'S POSITION - The City of Middleton said that the only issue remaining "in dispute in this case is the Union's demand to include a fair share provision in the collective bargaining agreement." It said that the subpoenaed documents are relevant to the argument that the arbitrator should not change the status quo which has existed for more than 15 years. It cited a 1986 Wisconsin Employment Relations Commission decision which adopted Examiner Buffett's statement that "Where the evidence sought 'may

be relevant to the [City's] position at hearing, the Subpoenas Duces Tecum cannot be quashed on the grounds they lack *relevancy'*."

The City said that the requested documents are relevant to its position that, Middleton's Police Officers should not be required to pay money to an organization "which has habitually violated labor laws." It said that the International Teamsters Union and its "local unions' record of illegal activity is notorious and unending." It pointed to five attachments included with its brief and argued that those materials supported that statement. Those attachments are:

1. A copy of the Constitution of the International Brotherhood of Teamsters which demonstrates that the delegates to the International Convention, in June 1991, rejected some of the provisions of a Consent Decree which was entered on March 14, 1989, in the case of United States v. International Brotherhood of Teamsters, et al., 88 Civ. 4486 (S.D.N.Y. 1989). One such provision relates to an investigation by an independent review board of "allegations of corruption, including bribery, extortion, embezzlement, use of force or threats of force or violence... ."
2. An article from Labor Relations Week of August 2, 1995, relating to the swearing in of a "new team of reform minded leaders" for Local 738 in

Chicago. This article discussed many kinds of recognized corruption and alleged wrongdoing in the second largest Teamsters local in the country.

3. A copy of United States v. Dennis H. Vandenbergen 969 F. 2d 338 (7th Cir. 1992). This case related to illegal contributions by seven members of the executive board of Local 563 in Appleton, Wisconsin, to the Mayor's re-election campaign. The members voted themselves bonuses of $300 each and then contributed the funds to the Mayor's campaign fund. The contributions were illegal under the laws of the State of Wisconsin.

4. A copy of a Stipulation and Contempt Adjudication, dated October, 1983, wherein Local 695 agreed that it was in contempt of an order of the Seventh Circuit Court of Appeals in two actions brought by the National Labor Relations Board in 1978. The Union agreed not to engage in certain prohibited practices and further agreed: to prospective fines of up to $5,000 each for each subsequent incident violative of the Court's judgments or contempt order; and, to additional compliance fines of up to $1,000 per incident assessed against officers, agents or representatives of the Union. A provision in the Stipulation provided that it "shall not be deemed as an admission

constituting evidence in any proceeding to which the Board or General Counsel is not a party."

5. A copy of an Order, dated March 12, 1991, arising out of the Stipulation and Contempt Adjudication discussed at paragraph 4 immediately proceeding. That order, based upon a Consent Adjudication in Civil Contempt, resulted from Local 695 having engaged in various acts in connection with its strike against Lycon Inc. Under the terms of the Order, Local 695 agreed to pay a civil contempt fine which included $70,000 plus an additional $40,000 which would be suspended if certain conditions were met.

The City argued that the subpoenaed documents are also relevant to the City's arguments that: Middleton's "police officers should not be required to pay money to an organization which uses some of the money for non-fair share purposes"; and that, "it is not in the public's interest to impose a fair share provision in interest arbitration."

Finally, the City argued that its request for documents showing which police officers are members of the local is relevant to the argument "that if all or almost all of its police officers are members of the Union there is no need for a contractual fair share provision."

LOCAL 695'S POSITION - The Union reviewed the information that it has been requested to provide under the terms of the two

subpoenas duces tecum. It said that "none of the information sought is relevant to the present interest arbitration proceedings." The Union noted that ten of the City's twelve data requests relate to sources of revenue and expenditures. The City had asserted that this information is relevant to the argument that, some "fair share monies are used for activities not related to collective bargaining or contract administration." The Union said that its offer seeks only a fair share payment of the employees' "proportionate share of the collective bargaining process and contract administration." It said that this is "measured by 'the amount certified by the Union as the dues uniformly required of all members'." It said that its offer was based upon the requirements of Wis. Stat. 111.70(f); the Wisconsin Supreme Court has found the statute constitutional. Similar language has been found to be appropriately included in an interest arbitration award by the Wisconsin Employment Relations Commission.

The Union said that the amount collected as a fair share is restricted by statute and enforceable by employees. Those amounts are not a mandatory subject of bargaining. The Union does not have any obligation to provide the Employer with information about expenditures for the purpose of establishing the amount of a fair share. The Union cited a series of WERC and NLRB decisions to support its argument. "[T]he issue of the amount of a fair share fee is not a matter to be determined through bargaining or its alternative, interest arbitration. It

is a matter between individual employees and the Union which represents them."

The Union cited WERC decisions which had said that a school district did not have a right to the Union's financial information during negotiations over a fair share clause, "as the proposal is facially legal." In another case, the WERC rejected an Employer's argument that past expenditures of fair share money "for allegedly impermissible purposes provided a basis for rejecting a facially legal fair share clause." The Union said that the City is attempting to litigate the amount of the fair share fee by subpoenaing documents relating to the Union's income and expenditures. It said there is no evidence that the Local or Joint Council misused fair share funds. "By adopting a facially legal fair share clause, the Union is obligated to provide a procedure to individual objecting employees contesting the fair share amount." It argued that this procedure is between the Union and the employees. It is not a matter for collective bargaining or interest arbitration.

The Union said that the two requests for information about Local 695's procedure for establishing fair share payments are not relevant. It said that the issue of fair share procedure, like the issue of the amount of the fair share, is not a mandatory subject of bargaining. It cited a case in which an employer had refused to implement an arbitration award, because, the award did not "contain a mechanism to advise fair share payers about the use of their payments and a mechanism for

reimbursement of impermissible expenditures." It related the WERC discussion which applied Browne v. Milwaukee Board of School Directors, 83 Wis. 2d 316 (1978), to the foregoing facts. The WERC found that while the Union's offer in that case was "not couched in the exact statutory language, we conclude that the pertinent statutory intent is sufficiently set forth... ." The Union said that in the present case, the City of Middleton is attempting "to inject into this interest arbitration the issue of the Union procedure for calculating fair share amount... ."

The Union argued that the Employer does not have any exposure if the Union's procedure is found to be inadequate. It cited the 1992 Browne v. WERC case to support that contention. "Moreover, the statutory provisions of the Municipal Employment Relations Act seek to avoid employer oversight of the Union's fair share procedures." The Union said that its offer includes an indemnification clause which would protect the Employer from any possible liability. It completed this argument by citing both Wisconsin Employment Relations Commission and National Labor Relations Board decisions as authority for its conclusion, that, the City's effort to obtain Local 695's fair share procedures and data should be rejected.

The Union said that the City's request for records, that would disclose the identity of those Police Officers who are members of Local 695, is not relevant to the issue of need for a fair share requirement. It noted that the parties' existing contract contains a checkoff provision. The Union said that the

Employer had received requests in writing from those Union members who agreed to the dues checkoff. It said that, if there is a member of the Union who has decided not to disclose his membership, "the employer would have no right to obtain such information from the Union."

The Union said that WERC decisions provide that "an employer has no right to interrogate an employee" about union membership. It cited two sections of the Municipal Employment Relations Act which provide for secret ballots relating to fair share provisions. The Union argued that to require the Union to provide the Employer with the names of Union members would be inconsistent with the statutes and case law.

The Union requested that the subpoenas served by the City upon David Shipley be quashed in their entirety.

CITY'S RESPONSE - In reply to the Union's arguments, the City said that, the cases and arguments cited by the Union are distinguishable from the facts and law of the present case. "Here, the City seeks information relevant to the City's arguments to reject an involuntarily imposed fair share provision." It argued that the City is entitled to introduce evidence that is relevant to its arguments against including a fair-share provision through arbitration.

The City said that in this case, the arbitrator must base the decision upon "relevant statutory factors, and all evidence...whether a fair share provision should involuntarily be made part of the parties' collective bargaining agreement." It

said that evidence relevant to the statutory factors is relevant to the arbitrators task of selecting or rejecting fair-share as a contract term. The City said that contrary to the Union's assertion that the City is attempting to establish the fair share amount or place limits on the amount, "the City is seeking to avoid any involvement in fair share." It said that the City is entitled to obtain evidence to support its arguments.

The City reviewed two proceedings that the Union had cited as authority for its argument. It noted that those decisions involved disputes which arose after fair-share had been placed in the parties' contracts. It argued that those "cases are not relevant to whether the arbitrator should hear evidence why he should not award fair share in the first place." The City noted that the Union had asserted as a fact that it had not financed any part of Dennis Vandenbergen's defense in its brief; but that, it had refused to provide relevant information in response to the subpoena. It said that the Union could not make the factual assertion absent the evidence to support it.

The City argued that the WERC decision in Winter and the 1978 Browne case are not relevant to the issue of "whether a union proposing a fair share to an arbitrator may refuse to provide evidence related to its previous implementation of such a fair share proposal." The City argued that it is not enough for the Union to say, it isn't relevant if we've violated the law in the past "because the clause is facially legal, [and] the arbitrator must assume we will abide by the law in implementing

the proper procedure." It argued that "the arbitrator should not make such an assumption; the City should be allowed to present evidence to the contrary."

The City said that, the Union's argument that its proposal to hold the City harmless for the City's administering a fair share provision does not insulate that City from being sued. It noted that in a previous interest arbitration proceeding involving these parties and the Union's fair share proposal, the arbitrator in rejecting the Union's request had said, "a fair share provision 'may be a source of future litigation'." The City argued that the Union's procedures are "relevant to the likelihood that there will be civil litigation involving the City." It said that the subpoenaed information is relevant to the arbitrator's decision about the fair share proposal.

DISCUSSION

Neutrals and the adversaries have historically assumed a tolerant posture about the admissibility of marginally questionable evidentiary material in arbitration proceedings under Wisconsin's Municipal Employment Relations Act. This attitude has been created in part by ERB 10.16 which incorporates Sec. 227.45 by reference:

> 227.45 Evidence and official notice. In contested cases:
> (1) Except as provided in ss. 19.52(3) and 901.05, an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05. The agency or hearing examiner shall give

> effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

The broad reach of the two subpoenas and the motion to quash in this instance, compel the undersigned to determine if, given the function of this interest arbitration proceeding, the subpoenaed data has reasonable probative value or is immaterial or irrelevant. The Wisconsin Legislature defined the purpose of interest arbitration proceedings in Wis. Stat. 111.70, which provides:

> (6) DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

At this point in these proceedings, the parties' expired collective bargaining agreement has not been placed into the record. However, based upon the status of this proceeding including the documents and arguments which have been presented to the undersigned, it is apparent that Teamsters Union Local No. 695 has been recognized as the exclusive collective bargaining representative for certain City of Middleton Police Officers as provided for in Wis. Stat. 111.05. The right of the employes in this proceeding to bargain for a fair-share agreement defined in

Wis. Stat. 111.70(1)(f), is governed by Wis. Stat. 111.77(6). Since the parties have not been able to agree upon one item, the inclusion of a fair-share provision in their agreement, it is the undersigned's responsibility to provide a "fair, speedy, effective and above all, peaceful procedure" to resolve that issue. The City's opening salvo that "The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America's (IBT) and its local unions' record of illegal activity is notorious and unending" combined with data requests which the City must have anticipated would be resisted by the Union placed the undersigned on notice that the City is determined to use its best efforts to prevail on the fair-share issue in this arbitration proceedings. The Union has responded to the challenge by requesting that the subpoenas be quashed in their entirety.

The Undersigned in order to provide the parties with a fair, speedy, effective and peaceful procedure, has determined that in order for the City's request to prevail, the City must demonstrate that the data it has subpoenaed is reasonably calculated to lead to the discovery of evidence that would be admissible evidence in this interest arbitration proceeding. Both parties have agreed that the threshold question is relevancy.

The City's assertions that the subpoenaed data is relevant to its right to present evidence in this arbitration proceeding have been carefully considered. It appears appellate courts in

Wisconsin have considered most of the issues raised by the Employer in a series of cases beginning with Browne v. Milwaukee Board of School Directors, 83 Wis. 2d 316 (1978) through Browne v. WERC, 169 Wis. 2d 79 (1992) and the two Berns v. Wisconsin Employment Relations Commission cases reported in 94 Wis. 2d 214 (1979) and 99 Wis. 2d 252 (1980). Those cases and various statutory provisions established the following conclusions of law.

1. Municipal employees have the right to organize and compel the payment of fair-share, subject to the right of the employer or a labor organization to petition for a referendum, 111.70(2).
2. The amount of the "fair-share" is defined by Wis. Stat. 111.70(1)(f).
3. The Wisconsin Employment Relations Commission has the authority under the Municipal Employment Relations Act "to fashion remedies to effectuate the purpose of the statute for fair employment and peaceful negotiation and settlement of municipal labor disputes.
4. The employees who are subject to fair-share, have the right to question whether the Union committed a prohibited practice under Wis. Stat. 111.70(3)(b), by deducting fair-share fees without first providing all of the procedural safeguards

required by Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292 (1986).

5. Nonunion employees must have a reasonably prompt opportunity to challenge the amount of the fair-share fee before an impartial decision maker.

6. The Municipal Employment Relations Act is designed to facilitate peaceful employment relations in the public sector. Requiring oversight by the employers of the Union's fair-share procedures may potentially undermine that design.

7. While municipal employers have a duty to ensure that Union's procedure satisfies legal requirements, their failure to do so is not a prohibited practice.

8. Since Local 695's fair-share offer incorporates the requirements of Wis. Stat. 111.70(f) the offer is "facially legal," the manner in which the fair-share is determined by the Union is not a mandatory subject of bargaining in this proceeding.

Relating the foregoing conclusions of law to the City's arguments the undersigned has concluded that the material subpoenaed by the City of Middleton is not reasonably calculated to lead to the discovery of admissible evidence for the following reasons.

Two of the City's arguments relate to the Union's use of the employee's fair-share contributions. These are that: the officers shouldn't be required to pay money to an organization which has habitually violated the labor laws; and, the officers should not be required to pay money to an organization which uses some of the money for non-fair-share purposes. Insofar as the City restricts the application of those arguments to fair-share contributions it is correct; and, the officers have the right to limit their fair-share contributions to the cost of the collective bargaining process and contract administration. There are numerous procedural and legal options available to the Police Officers to make certain that their fair-share contributions are appropriately limited to and expended only for permissible purposes. The Employer's right to challenge the fair-share agreement is limited to the petition provided for by Wis. Stat. 111.70(2). Since the City does not have any right or obligation to participate in determining what constitutes a fair-share, the subpoenaed data does not appear to be reasonably calculated to lead to the discovery of admissible evidence to support the City's arguments about the application of the officers' contributions.

The undersigned has carefully reviewed the City's arguments that it seeks "the source and amount of funds used by Local 695" in order to determine if those funds were used for illegal or non-fair-share purposes. Those are matters between the Union and its members or between the Union and its non-member fair-share

contributors. The information is not relevant to the City's argument about whether a fair-share provision should be included in the parties' contract in the proceeding. The City has filed a series of exhibits in support of its Subpoenas Duces Tecum which, if admitted into evidence in the arbitration proceeding, may be the basis for its arguments that a fair-share provision should not be imposed upon the City through arbitration.

The City has argued that "It is not in the public's interest or welfare to expend public funds and tax revenues, which in the form of employee fair share payments, are used to support an organization which violates the law and uses funds for the purposes other than collective bargaining and contract administration." To the extent that the City's "interests and welfare of the public" argument is dependant upon allegations about illegal activity and non-fair-share contributions, the conclusion is the same. To the extent that the latter argument is based upon the traditional statutory factors set out in Wis. Stat. 111.77(6), the subpoenaed material does not appear likely to lead to the discovery of admissible evidence in this proceeding.

The City's request for information containing the names of unit employees who were members of Local 695 from January 1, 1992, to-date, violates these employees' right to privacy. That privacy appears to be guaranteed by the four corners of the Municipal Employment Relations Act. The City has neither demonstrated that it has substantial need for the information,

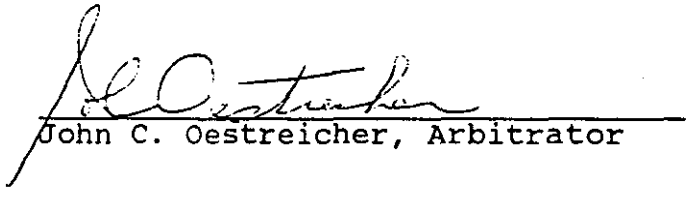
nor that it is unable, without undue hardship, to obtain the substantial equivalent of the requested information by other means.

An interest arbitration proceeding is not the appropriate forum to determine the chargeability to non-union employees for the expenses of Union activities. The Supreme Court has recognized the WERC's expertise to evaluate the legally chargeable components of fair-share. It is appropriate to take arbitral notice that such expertise is not a criteria for certification by the WERC as an impartial arbitrator.

ORDER

The Subpoenas Duces Tecum that were served upon David Shipley on or about September 13, 1995, are hereby quashed in their entirety.

Dated at Madison, Wisconsin, this 13th day of October, 1995.



John C. Oestreicher, Arbitrator

SUBPOENA

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

Case 31
No. 51667
MIA 1920

THE STATE OF WISCONSIN TO:
David Shipley, Secretary-Treasurer
Teamsters Local Union 695
1314 N. Stoughton Road, Madison, WI 53714-1293

PURSUANT TO SECTIONS 805.07 AND 885.01 OF THE WISCONSIN STATUES, You are hereby commanded to appear in person before the undersigned Arbitrator at the City Hall Building in the City of Middleton, Wisconsin, which is located at 7426 Hubbard Avenue on the 16th day of October, 1995, at 10:00 o'clock a.m., to give evidence in the action between Teamsters Union Local No. 695 and the City of Middleton (Police Department). You are further commanded to bring with you the following: See Attached.

Failure to appear may result in punishment for contempt.

Issued this 13th day of ~~August~~ September, 1995.

BY: _____
John C. Oestreicher
Arbitrator

ATTACHMENT A

SUBPOENA DUCES TECUM, CONT.

Definitions. As used in the following numbered paragraphs the words "International Union", "Local 695" and "Joint Council" mean as follows:

"International Union" means the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

"Local 695" means Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local Union 695, Madison, Wisconsin.

"Joint Council" means Wisconsin Teamsters Joint Council No. 39, Central Conference of Teamsters.

1. Any and all documents, reports, accounting statements and other records for the years 1989 through July 31, 1995, reflecting all income received by Local 695 from whatever source and every expenditure or transfer of funds of any type by Local 695, including but not limited to all operating statements, balance sheets, income and expense statements, bank statements, reports to the International Union and/or the Joint Council and/or the members of Local 695, and to the U.S. Department of Labor, and all income and expense summaries, computer printouts and other records regarding receipt of dues, fair share, fees, special assessments, fines and all other income and expenditures or fund transfers of any type.

2. All books and records, receipts, correspondence and other documents which describe or are related to the use, disbursement or payments of money received as "fair share" payments from police employees in collective bargaining units represented by Local 695.

3. All books, records, receipts, checks, correspondence and other documents which describe or are related to the payment of strike benefits paid by Local 695 beginning in April 1989 and during the period of its strike against Lycon, Inc., and any other strike occurring after April 1, 1989 to the present.

4. A copy of all books, records, receipts, checks and correspondence which describe the source and amount of the funds used to pay contempt fines in the Order issued by the Seventh Circuit Court of Appeals on March 12, 1991, in Case Nos. 78-1391 and 78-1681 against Local 695.

5. A copy of all books, records, receipts, records of checks, correspondence and other documents which describe the source and amount of funds used to pay attorneys fees and other costs incurred by Local 695 in defending against unfair labor practice charges filed by Lycon, Inc. against Local 695, and any related proceedings including but not limited to the injunction and contempt proceedings.

6. A copy of all books, records, receipts, checks, correspondence and other documents which describe the source and amount of funds paid to support the International Union Strike Fund since 1991.

7. Any and all books, records, receipts, checks, correspondence and other documents including records that describe Local 695's relationship with the Joint Council and payments Local 695 makes directly or indirectly to the Joint Council.

8. All documents, records, and correspondence related to the of dues and fair share rates, including but not limited to increases and decreases in dues and fair share rates from January 1, 1989 to present.

9. Any documents, records and correspondence containing the names of the City of Middleton Police Department unit employees who are or were members of Local 695 from January 1, 1992 to date.

10. Any documents relating to procedures for establishing the proper amount for fair share payments by nonmembers, including any documents relating to calculating amounts or percentages spent for activities that are not properly collectible under a fair share agreement.

11. Any documents relating to procedures for nonmember employees to challenge the fair share amounts and receive refunds and/or reductions of the fair share amount.

SUBPOENA

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

Case 31
No. 51667
MIA 1920

THE STATE OF WISCONSIN TO:
David Shipley, Secretary-Treasurer
Wisconsin Teamsters Joint Council No. 39
Central Conference of Teamsters

PURSUANT TO SECTIONS 805.07 AND 885.01 OF THE WISCONSIN STATUES, You are hereby commanded to appear in person before the undersigned Arbitrator at the City Hall Building in the City of Middleton, Wisconsin, which is located at 7426 Hubbard Avenue on the 16th day of October, 1995, at 10:00 o'clock a.m., to give evidence in the action between Teamsters Union Local No. 695 and the City of Middleton (Police Department). You are further commanded to bring with you the following: See Attached.

Failure to appear may result in punishment for contempt.

Issued this 13 day of ~~August~~ September, 1995.

BY: John C. Oestreicher
Arbitrator

ATTACHMENT B

SUBPOENA DUCES TECUM, CONT.

Any and all books, records, receipts, checks, correspondence and other documents that describe the source and amount of funds paid by the Joint Council which were directly or indirectly used in the defense of Dennis Vandenbergen during the period of 1988 through 1992, including attorney fees and costs.