

## **AGENCY SHOP AND FAIR SHARE AGREEMENTS: AN HISTORICAL PERSPECTIVE**

**BEVERLY L. NELSON-GLODE, M.B.A., J.D.**

*Director of Personnel  
City of Renton*

### **ABSTRACT**

To block employers' attempts to defeat fledgling unions, and to keep established unions from raiding their ranks, early labor organizations often insisted on including language in the collective bargaining agreement to protect the union's status. These agreements have evolved from requiring union membership as a condition of employment to requiring nonunion employees to pay a fair share of the costs of collective bargaining. This article explores the evolution of agency shop and fair share agreements from a perspective of employee protests against the use of mandatory union fees.

### **INTRODUCTION**

The existence of union security agreements can be attributed to the tumultuous history of the labor movement in the United States. Prior to the 1930s, unions, in an attempt to block employers intent on defeating union efforts and to keep rival unions from raiding their ranks, insisted on including language in collective bargaining agreements that protected the union's status. Most often these agreements required membership in the union as a condition of obtaining employment [1].

This "closed shop" arrangement was denied legal sanction, at least in the railroad industry, when Congress passed the Railway Labor Act (RLA) in 1926

[2]. However, Congressional imprimatur for the closed shop was given to the rest of the private sector in 1935 under the Wagner Act [3].

In 1947 Congress passed the Taft-Hartley Act [3, 4],<sup>1</sup> amending the Wagner Act, and revoking the legality of closed shops in the United States. In its place the “union shop” was created. While union membership could no longer be required to get a job, employers and unions could agree that once hired the employee had to acquire membership within thirty days [4, §8(2)(3)].

The Taft-Hartley Act can also be credited with providing the impetus for two other forms of union security agreements—the “agency shop” and “maintenance of membership agreement”—by inviting states to enact legislation prohibiting union security agreements.<sup>2</sup> Agency shop agreements are legal in those states with right-to-work statutes that prohibit labor agreements making employment contingent on union membership [1]. In an agency shop, employees are not required to join the union to remain employed. Instead, employees electing not to join the union are required to pay a fee to the union for its services as their bargaining agent [1]. Maintenance of membership agreements require that those employees voluntarily joining the union must remain union members throughout their period of employment [1].

In the public sector, approximately twenty states have statutes authorizing union security agreements for public employee organizations [5]. In addition to providing for the types of union security agreements permitted in the private sector, several states also permit “fair share” agreements, [5, N. 12, 1726]. Similar to the agency shop, fair share agreements do not require that employees eventually become union members. However, those choosing not to join must pay a service fee equal to the union’s cost for collective bargaining activities [5, 1727].

This article explores the development of the agency shop and fair share union security agreements from a perspective of employee protests against the use of these mandatory fees. The focus is on the effects of recent court decisions, with consideration given to future implications and areas requiring further clarification.

<sup>1</sup> The Wagner Act of 1935 together with the Taft-Hartley amendments of 1947 are commonly referred to as the National Labor Relations Act.

<sup>2</sup> This section states, in pertinent part, “Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.” [4, §14(6)].

## THE RLA CASES

As originally enacted, the RLA did not specifically provide for union shop agreements [2]. However, in 1951 Congress added section 2, Eleventh [6]<sup>3</sup> which permits agreements that require union membership to be acquired within sixty days as a condition of continued employment.

The 1951 amendment to the RLA was first challenged on constitutional grounds in *Railway Employees' Department v. Hanson* [7]. In that case the employees claimed that the union shop provision of the RLA was a *per se* violation of their First and Fifth Amendment rights [8]. More specifically, they argued that the union shop provision deprived them of their freedom of association by making union membership mandatory [8]. Further, it infringed upon liberty interests associated with the right to work since it would require payments for activities not related to collective bargaining [8].

The contention that mandatory union membership would “force men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights” [8, q. Hanson, 236] was dismissed by the Court for lack of evidence. Finding the basis for the Fifth Amendment claim to be speculative, the Court also dismissed that claim. However, the Court cautioned that if the mandatory dues were “in fact imposed for purposes not germane to collective bargaining, a different problem would be presented” [8, q. Hanson, 235]. More important, the Court stated that “if the extraction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity . . . , this judgment will not prejudice the decision in that case” [8, q. Hanson, 238].

### The Street Decision

Less than four years after its decision in *Hanson*, the Court was again faced with the issue of the legality of section 2, Eleventh of the RLA. *International Association of Machinists v. Street* [9] presented the “different problem” [8] the Court made reference to in *Hanson*. The employees in *Street* challenged the constitutionality of section 2, Eleventh to the extent that it permitted the use of their compelled payments to “finance the campaigns of candidates for federal and state

<sup>3</sup> Section 2, Eleventh provides, in pertinent part, “Notwithstanding any other provisions of this chapter, or any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—(a) to make agreements, requiring, as a condition of continued employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class . . . ” [6].

offices whom [they] opposed and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed" [9, 744]. The Court found that it was unnecessary to reach the constitutional issues addressed by the lower courts since the legislative history of the RLA could be construed to deny a union authority to use an employee's dues, over the employee's objection, for political purposes which are disagreeable to the objector [9, 750]. Accordingly, while the Court held that the union shop agreement was legal, it also held that section 2, Eleventh could not lawfully be used to extract payments for political purposes from a dissenting employee [9, 768-771].

The decision in *Street* was significant in that the Court reaffirmed the legality of compulsory contributions to the costs of collective bargaining while declaring forced support of political causes unlawful. Further, while the Court specifically stated that it expressed no view with respect to other costs incurred by the union, and not associated with collective bargaining, its acknowledgment of their existence is important [9, 769]. The Supreme Court appears to suggest that costs associated with nonpolitical (i.e., activities of a nonideological nature) may be financed by compulsory dues even though not directly related to the collective bargaining function.

Still further, the *Street* Court in remanding the case to the lower court, suggested the types of remedies that would best reconcile the interests of the parties. The Court proposed that employees who notify the union of their opposition to political causes, toward which the union has expended funds, be entitled to recover that portion of their dues equal to the portion that the objectionable expenditure bore to the union's total budget [9, 775].

### The Allen Court

When *Railway Clerks v. Allen* [10] reached the Court in 1963, it pointedly presented the issue of whether objecting employees could be charged for non-political union expenditures that were also not associated with the costs of collective bargaining. In *Allen*, the North Carolina Superior Court issued an injunction upon a finding that union dues were used to "support or oppose legislation . . . influence votes in elections for public office . . . make [political] campaign contributions . . . [and] support the death-benefits system operated by the petitioner Brotherhood of Railway Clerks" [10, 117]. The injunction restrained the union from collecting all payments from objectors pending a showing by the union of the proportion of expenditures "reasonably necessary and related to collective bargaining" [10, 117].

In its decision the Court held that, consistent with its findings in *Street*, employees remain obligated for the costs of the union's expenditures which are germane to collective bargaining and thus the injunction was improper [10, 119-20]. However, an injunction against political expenditures was permissible

and individual dissenting employees could receive restitution for that portion of dues expended by the union on activities objectionable to the employee [10, 121]. Holding that the respondents had to first pay the compulsory dues and then receive restitution for the union's political expenditures, the case was remanded to the lower court [10, 121]. Once again the Court never reached the gray area comprised of nonpolitical activities that are not directly related to collective bargaining because the lower court did not attempt to draw the line between political expenditures and those related to collective bargaining [10, 121].

Nonetheless, the *Allen* decision brought several new facets to the developing law. First, the Court made it clear that an employee need only object "to *any* political expenditure by the union" [10, 118] (emphasis added) and was not required to identify and prove objection to specific activities. Second, the Court stated that the union had the burden of proving the proportion of political expenditures to total expenditures, adding that the calculation need not be exact [10, 122]. Finally, the *Allen* Court strongly suggested that unions develop internal accounting procedures and remedies to rebate or reduce dues in proportion to political expenditures [10, 122-3]. By doing so, the Court suggested that limiting objectors' payments to those costs germane to the collective bargaining process would satisfy the demands of the First Amendment [10, 123-4].

## **Ellis v. BRAC**

It was not until 1984 that the Court was presented with a case ripe for decision on the issue of which nonpolitical costs, not ostensibly related to collective bargaining, were nonetheless germane to the collective bargaining process. That case, *Ellis v. Railway Clerks* [11], provided a "litmus test" for determining when objecting employees could be charged with a particular union expense [11, 448].<sup>4</sup>

Unlike the prior RLA cases, the collective bargaining agreement in *Ellis* provided for an agency and not a union shop [11, 439]. The appellants in that case contended that they were being compelled to pay more than their pro rata share of expenses incurred in negotiating agreements and settling grievances [11, 439]. Additionally, they argued that the respondent union's rebate scheme, which allowed collection of full dues with payment of the rebate the following year, was inadequate to protect the rights of objecting employees [11, 441-4].

Although the Court suggested the rebate scheme in *Street*, it rejected the concept in *Ellis*. In holding that the rebate scheme was impermissible, the Court stated that under the pure rebate system "the union obtains an involuntary loan

<sup>4</sup> Specifically, the Court stated that "the test must be whether the challenged expenditures are necessary or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" [4, 448].

for purposes to which the employee objects” [11, 144]. The Court suggested that less intrusive alternatives, i.e., interest-bearing escrow accounts or advance proration were available and only slightly, if at all, more cumbersome on the union [11, 444].

In deciding whether the six expenditures in question were chargeable to the appellants, the Court looked to the legislative history of section 2, Eleventh. Finding that union conventions were necessary to the very existence of the organization since the election of officers and establishment of bargaining objectives were carried out at these meetings, the Court stated it had “little trouble in holding that petitioners must help defray the costs” [11, 448]. Similar reasoning was used with regard to the costs of social activities since they promoted stronger ties between workers [11, 450].

The Court found that the expenses associated with publication of the union’s monthly newsletter were chargeable to the objectors to the extent that it dealt with information relevant to contract administration and collective bargaining issues [11, 450]. Emphasizing the fact that the union’s rebate scheme did not charge objectors for that portion of the publication devoted to the political issues was important, because of the magazine’s direct communicative content, the Court added, “[i]f the union cannot spend dissenter’s funds for a particular activity, it has no justification for spending their funds for writing about that activity” [11, 451].

The costs associated with general organizing efforts and litigation not connected with the bargaining unit were held to be impermissible [11, 451-3]. The Court found that “by definition . . . organizing expenses are spent on employees outside the collective bargaining unit already represented” [11, 452]. Further, that Congress did not intend to extend the free-rider rationale to the point where it served to increase the union’s industry wide bargaining power [11, 451]. The same reasoning was applied to the litigation expenses at issue. The Court held that [11, 453]:

. . . objecting employees need not share the costs of the union’s challenge to the legality of the airline industry mutual pact; of litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964.

Although the Court did not reach the issue of whether the union could compel objecting employees to support its death-benefit program, it did find that the employees were not entitled to a refund of payments already made [11, 454-5]. Comparing the death-benefit program to an insurance plan, the Court noted that the objectors were entitled to the benefits of the plan while their dues were being collected [11, 454-5].

While the RLA cases were important in developing and framing the questions, they did not fully address the issue of which nonideological expenditures outside the realm of negotiation and contract administration costs were chargeable to objectors [8, 21-2]. Pursuit of an answer to this question, or at the very least a clarification of the parameters for resolving the issue, was to continue in the public sector.

## PUBLIC SECTOR DEVELOPMENTS

Union security clauses in the public sector have been the subject of considerable debate [12]. Much of the opposition has centered on the argument that the use of state power to compel payment of union fees infringes on First and Fourteenth Amendment rights of freedom of speech and association [12]. The contention that such agreements violate the right to work under the Fifth and Fourteenth Amendments' due process clauses has also been advanced [12]. On the other hand, proponents of union security agreements maintain that such clauses are necessary and advantageous to both the union and public sector employer [12]. Not only do the agreements equitably distribute the costs of collective bargaining among those benefiting from the union's efforts, they also foster labor stability and peace [12].

It has been suggested that as long as financial support is the sole requirement of union security agreements, the conflict is confined to issues of labor stability and union power; not constitutional issues of freedom [12]. However, the broad objectives of some public sector employee organizations, in particular those representing educators, transcend issues germane to the collective bargaining process [13].<sup>5</sup> Therefore, it is not surprising that the first challenge to union security provisions to reach the Supreme Court, from the public sector, developed under a collective bargaining agreement covering teachers.

### **Abood**

The principal public sector case addressing the issue of whether it is constitutional to compel public employees to support union activities was *Abood v. Detroit Board of Education* [14]. Upon being certified as the exclusive representative of the Detroit teachers, the Detroit Federation of Teachers Union negotiated a collective bargaining agreement with the board of education that contained an agency shop provision [14, 211-12]. Two separate groups of dissenting employees filed suit to have the agency fee clause declared invalid because,

<sup>5</sup> The concerns and objective of the National Education Association and American Federation of Teachers once were stated as "all matters which affect the quality of the educational program" and "anything that affects the working life of the teacher" [13, at 40].

inter alia, it compromised their First and Fourteenth Amendment rights [14, 213-15]. More to the point, the nonmembers alleged that the union engaged in a number of activities not germane to collective bargaining, contract administration or grievance settlement that they found objectionable [14, 213-15]. They contended that funds obtained under the agency shop agreement would be used to support these objectionable activities in which they had no voice [14, 213-15]. The two cases were consolidated at the appellate level.

In its discussion of the issues in the case, the Court noted that the Michigan statute authorizing agency shop agreements was broadly modeled after the federal labor laws [14, 223]. Additionally, that “[s]everal aspects of the Michigan law that mirror provisions of the Railway Labor Act are of particular importance here” [14, 223]. Accordingly, the Court found that the “same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue” [14, 225].

Holding that the agency fee was constitutional insofar as the monies were used to finance contract administration, collective bargaining and grievance settlements, the Court turned to the appellants’ contention that the inherently political nature of collective bargaining in the public sector invoked “weightier First Amendment interests” [14, 229]. The Court’s response was that the difference between private and public employment was in the uniqueness of the employer—not the work performed [14, 229-30]. Hence public and private employees sought the same advantages and had the same needs. Therefore no special First Amendment advantages attached simply because a union represented public sector employees [14, 230-32].

However, the Court noted that because the Michigan statute specifically authorized unions to include the costs of noncollective bargaining expenditures in the agency fee, it presented constitutional issues not reached in *Hanson* or *Street* [14, 232]. Further, because “a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment” [14, 234], the appellants’ contention that the Michigan statute compels support of ideological causes they find objectionable was meritorious [14, 234].

In remanding the case to the lower court, the Court noted that there may be “difficult problems in drawing the lines between collective bargaining activities, for which contributions may be compelled and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited” [14, 236]. In fashioning a remedy, should one be appropriate, the Court suggested that the decisions in *Street* and *Allen* provided directions that would be appropriate [14, 237-42].

The *Abood* case was pivotal in the development of the law surrounding union security agreements. The *Abood* Court synthesized the differences between



private and public sector collective bargaining by defining the issue in the case as simply a question of the limits applicable to the use of agency fees extracted from objecting employees [15]. The *Abood* decision clarified how First Amendment concerns are implicitly involved when ideological objections arise, as well as how the risk of forced ideological association is interrelated with the concerns of collective bargaining [8, 23-4].

Some of the issues left unanswered by *Abood* were addressed by the Court's decision in *Ellis* seven years later. Because the *Ellis* Court addressed the issue of the extent to which compelled financing may be used to support union activities in a less restrictive fashion than a narrow reading of *Abood* would imply, it has significant implications for public sector union supporters [5, 1732-3]. However, *Ellis* did not address the issue of the extent to which compelled funds could be used for lobbying activities which are an important part of public sector collective bargaining. Where the issue has been addressed, *Abood* has been interpreted narrowly to restrict the use of compelled funds to lobbying that bears directly to "ongoing collective bargaining" [10, 1733].

## Hudson

Because *Abood* did not present the Court with a specific remedy for review, the rebate scheme in *Street* was offered as guidance [14, 232]. However, in *Ellis* the Court rejected the *Street* rebate scheme noting that it provided the union "an involuntary loan for purposes to which the employee objects" [11, 444]. In doing so, the Court suggested that alternatives less intrusive to the rights of objectors were available to the union to resolve the "free rider" issue. The second public sector case to reach the Supreme Court, *Chicago Teachers Union v. Hudson* [16] clarified what type of alternatives might be acceptable.

In an effort to resolve its "free rider" problem, the Chicago Teachers Union successfully negotiated a fair share fee clause in its agreement with the board of education after the School Code was amended in 1981 [16, 295]. To determine the fair share fee to be assessed nonmembers, the union divided its noncollective bargaining and contract administration costs by its total income for the year; rounding that figure off resulted in an assessment equal to 95 percent of member dues [16, 295]. The union also established a three-step procedure for adjudicating protests from nonmembers [16, 296]. Under its procedure, complaints would be heard by the union's executive committee first, brought before the executive board if still unresolved, and finally placed before an arbitrator to be selected by the union [16, 296]. It was this three-pronged appeal procedure to which non-member employees objected.

The nonunion members contended that the appeal procedure violated their rights of freedom of expression and association under the First Amendment as well as their Fourteenth Amendment due process rights [16, 297-8]. In addition,

they alleged that the procedure allowed their fair share fees to be used for impermissible purposes [16, 298]. The union defended the constitutionality of its procedure and took the further step of placing all monies collected from objecting fair share payers in an interest-bearing escrow account [16, 299].

Affirming the finding of the Appeals Court that the union's procedure was "constitutionally inadequate" [16, 300], the Court declined to address the question of whether the fair share fees were being used for impermissible activities [16, 301].<sup>6</sup> The Court found the primary issue to be whether the union's procedure met the objectives outlined in *Abood* of "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities" [16, 302].

The union's procedure was found deficient because it provided nonmembers with inadequate information on the amount of funds expended for purposes benefiting fair share payers [16, 307]. Rather than identify what was spent on contract administration, collective bargaining and grievance settlements, the union identified expenditures that did not benefit the objectors [16, 307]. Thus the union never explained why the fair share fee was set at 95 percent of member dues [16, 307]. Further, the Court found that the union's procedure failed to provide a "reasonably prompt decision by an impartial decision maker" [16, 307]. These two defects in the procedure combined to increase the risk that dissenting non-member funds might be used for impermissible purposes [16, 309].

The Court found that the union's attempt to quiet the constitutional complaints of nonmembers by placing the entire fair share fee of dissenters in an interest-bearing escrow account was equally inadequate [16, 309]. Noting that this method denied the union access to funds it was unquestionably entitled to use, the Court found that the infringement on First Amendment rights occasioned by agency shop agreements required safeguards that minimized that intrusion and eased the nonmember's burden of objection [16, 308-9]. Therefore, constitutional concerns could only be addressed by a procedure that provided a reasonable explanation of the basis of the fee, including an escrow account for challenged amounts during the pendency of the dispute, and provided a system for dispute resolution before an impartial party [16, 311].

The *Hudson* Court can be credited with having thoroughly established the minimum requirements for a constitutionally valid agency shop or fair share agreement [17]. In *Hudson* the Court explained that while the Constitution permitted the state to compel nonunion members to pay their fair share of the costs of

<sup>6</sup> The Court of Appeals found that "the category of impermissible expenditures, included all those that were not germane to collective bargaining, even if they might not be characterized as 'political or ideological' " [16, 300].

collective bargaining as a condition of employment, it did not permit the use of those funds to subsidize ideological activities the nonmember found objectionable [17, 264]. In the public sector, the *Abood* and *Hudson* decisions make it clear that the Constitution is triggered only upon a finding of governmental action in the negotiation and administration of agency shop and fair share agreements [17, 264].

In the private sector, the *Hanson* Court found that the union shop agreement impinged on constitutional interests because the RLA preempted a state right-to-work statute [17, 259]. Later, the possibility that the RLA could preempt state law and confer a privilege on the union which, when exercised, deprived nonmembers of their rights, was sufficient for the *Ellis* Court to find state action and apply constitutional restraints [17, 259]. The basis for the Court's ruling in *Ellis* appears to lie in the statutory language of the RLA rather than any actual preemption of state law [17, 259]. The Supreme Court relies on this same type of distinction as it addresses the first case arising under the National Labor Relations Act (NLRA) to be granted certiorari [17, 257-9].

## THE NLRA OBJECTORS

### **Communication Workers of America v. Beck**

In June 1976 twenty employees from several subsidiaries of American Telephone and Telegraph Company brought suit challenging the use of their agency fees by the Communication Workers of America (CWA) [18]. These employees, who chose not to join the union, alleged that CWA used portions of their agency fee to support organizing activities, charitable, political and social events, and lobbying for labor legislation [18, 2645]. They contended that by setting the agency fee equal to member dues CWA violated their First Amendment rights, section 8(a)(3) of the NLRA, and its duty of fair representation [18, 2645].

The District Court citing frequently from the *Abood* decision, found that the union's use of an objector's agency fee for purposes other than those germane to the collective bargaining process infringed upon the employee's free speech and associational rights [18, 2645; 19]. Consequently, CWA was enjoined from future collection of amounts in excess of permissible expenditures and was ordered to return excess assessments from past collections [18, 19]. Citing *Allen*, the court placed the burden of proving the portion of agency fees it was entitled to retain on CWA, adding that the calculations need not be absolutely precise [18, 19]. The order also provided that if the parties failed to agree on the amount CWA expended for permissible purposes a special master would be directed to make the determination [18, 19].

At the United States Court of Appeals, both parties took exception to the finding of the special master that CWA's expenditures for permissible purposes equalled 21 percent of its total expenditures [20]. However, despite a finding that the special master, in reaching the 21 percent figure, used a modified "clear and convincing evidence" rather than the "preponderance of evidence" standard of proof established by *Ellis*, the findings of the master were not disallowed [20, 1209-11]. The Appeals Court found that the error had no impact on the conclusions regarding chargeable and nonchargeable expenses [20, 1209-11]. Accordingly, the District Court's finding that disallowed CWA's expenditures for political, organizing, labor legislation and community service activities, based on the special master's report was affirmed [20, 1211-12]. Allocations of CWA's expenditures consisting mostly of personal time, which CWA's accountant refused to certify, were remanded to the court below for reconsideration by a special master since it was unclear which standard of proof was applied when these expenses were disallowed [20, 1211-12].

The decision of the Court of Appeals was a divided one with Chief Judge, Harrison Winter [20, 1213], dissenting. The issue that divided the court concerned whether section 8(a)(3) of the NLRA could be interpreted as placing limits on the union's ability to spend the fees it collects [20, 1213]. The majority, preferring not to rest its judgment on constitutional grounds, found that a cause of action existed under section 8(a)(3) of the NLRA and granted relief on that basis [20, 1196].

The Supreme Court found that the lower court properly exercised jurisdiction over the employees' claims that their First Amendment rights were violated by CWA's extraction of agency fees equal to member dues and that CWA's actions resulted in a breach of the judicially created duty of fair representation [18]. However, the National Labor Relations Board (NLRB) had primary jurisdiction over the employees' claim that CWA violated section 8(a)(3) of the NLRA by setting agency fees equal to member dues [18, 2646].

The Court noted that whenever "an activity is arguably subject to sections 7 or 8 of the [NLRA], the States *as well as the federal courts* must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted [18, 2646-7]. Because courts have jurisdiction over union security clause challenges brought under section 2, Eleventh of the RLA, and because section 8(a)(3) of the NLRA is virtually identical in all material areas, the court below erroneously concluded that it had direct jurisdiction over section 8(a)(3) claims [18, 2647].

It is because the RLA does not create an agency comparable to the NLRB with power to administer the provisions of the statute that the courts must adjudicate claims arising under the provisions of the RLA [18, 2647]. However, the Court noted that where unfair labor practice issues "emerge as collateral issues in suits brought under independent federal remedies" [18, 2647], they may be resolved. Further, that federal jurisdiction over the judicially implied duty of fair

representation has been well-established [18, 2647]. Therefore, since the Court of Appeals has jurisdiction over the fair representation claim, as well as the constitutional challenge, it could decide the section 8(a)(3) issue as a collateral matter [18, 2647].

Turning to the question that divided the Court of Appeals and prompted Chief Judge Winter to dissent from the majority opinion, the Court acknowledged that while it was held that section 8(a)(3) has been “whittled down to its financial core” [18, 2648], it has not determined if that core includes support for all union activities [18, 2648]. Nonetheless, the question did not pose an issue of first impression and the Court found it significant that the language in section 2, Eleventh of the RLA mirrored that in section 8(a)(3) of the NLRA in all material respects [18, 2648]. Accordingly, the Court found that “Congress intended the same language to have the same meaning in both statutes” [18, 2649]. Consequently, the Court held that the decision in *Street* was controlling [18, 2648].

Looking at the legislative history of section 8(a)(3) of the NLRA the Court found that Congress clearly intended to address union concerns regarding free-riders while “withholding from unions the power to cause the discharge of employees for any other reason” [18, 2650]. The Court reached the identical conclusion upon review of the legislative history of section 2, Eleventh of the RLA and held that the authorization to collect monies under the statute did not give unions “unlimited power to spend the exacted money” [18, 2651-2].

More important, the Court stated its finding that, “justification for authorizing the union shop limits the expenditures that may properly be charged to nonmembers under section 2, Eleventh to those ‘necessary or reasonably incurred for the purpose of performing duties of an exclusive [bargaining] representative’ ” [18, 2652] had recently been reaffirmed. Furthermore, the Court found that the “parallel purpose, structure, and language of section 8(a)(3)” [18, 2652] required that it be interpreted in the same manner as section 2, Eleventh of the RLA [18, 2652]. Finally, the Court stated that “only the most compelling evidence could persuade [it] that Congress intended the nearly identical language of [the] two provisions to have different meanings” [18, 2653].

Of significance, the Court noted that despite the differences in the history of unionism in the various industries regulated by the NLRA and RLA, it is clear from the legislative history of the RLA that Congress intended to create the same right to bargain for union security agreements under the RLA that existed under section 8(a)(3) of the NLRA when it enacted section 2, Eleventh [18, 2642-55]. Still more important, the union’s contentions that section 8(a)(3) cannot reasonably be interpreted to prohibit compulsory fees in excess of the costs of collective bargaining and that Congress rejected any notion of placing limits on either the use or amount of dues equivalents unions were entitled to collect are not supportable [18, 2653-6]. The Court found that by enacting section 8(a)(3) Congress sought to remedy the abuses of compulsory unionism while providing a

mechanism whereby employees getting the benefits of union representation could be made to share its costs [18, 2653-6].

The last argument advanced by the union as a reason for distinguishing *Street* was that the lack of federal preemption makes *Hanson* inapplicable [18, 2653-6]. The union contended that because section 14(b) of the NLRA expressly reserves the right to outlaw union security agreements in the state, the government action essential to the RLA cases was absent [18, 2653-6]. The Court determined that it “need not decide whether the exercise of rights permitted, though not compelled, by section 8(a)(3) involves state action [18, 2656]. The Court held that even if no state action was involved the nearly identical language of the two statutes demands that they be interpreted in the same manner [18, 2656]. Consequently, the Court concluded that section 8(a)(3) of the NLRA “authorizes the extraction of only those fees and dues necessary to ‘performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues” [18, 2657].

Justice Blackmun, writing for the dissent, took issue with the majority’s resolution of the section 8(a)(3) issue [18, 2657]. Joined by Justices O’Connor and Scalia he argued that the Court made no attempt at construction of the NLRA but rather relied excessively on *Street* to reach its decision [18, 2657]. According to the dissenting opinion, the plain language of the statute simply will not permit a conclusion that section 8(a)(3) restricts compulsory fees to those germane to the collective bargaining process [18, 2660]. Additionally, the dissent takes issue with what it terms the majority’s invoking of a “single-minded legislative purpose, namely, the eradication of a ‘free rider’ problem” [18, 2664] to support its finding.

The dissent points to the history of unionism in the industries covered by the NLRA as well as to the legislative history of section 8(a)(3) and concludes that the Congress involved in enacting that statute explicitly declined to legislate along the lines attributed to it by the majority [18, 2664]. As a result, the dissenting justices would have dismissed the complaint for failure to state a cause of action since agency fees equivalent to member dues are clearly permissible under section 8(a)(3) of the NLRA in their view [18, 2666].

### **Price v. Automobile Workers**

Shortly after the Fourth Circuit issued its decision in *Beck v. Communication Workers of America* [20], the Second Circuit was presented with *Price v. Automobile Workers* [21], a case involving similar issues. In *Price* a group of General Dynamics Corporation, Electric Boat Division employees alleged that the union shop agreement recently negotiated by their employer and Local 571, UAW, violated their First Amendment rights of freedom of association and speech as well as their Fifth Amendment due process rights [21]. The employees contended that requiring them to pay an amount equal to member dues forced them

to support political and ideological activities which they found objectionable [21, 3131]. Furthermore, that the UAW breached its duty of fair representation by collecting and spending fees obtained from objecting employees [21, 3131]. Still further, that the international union's procedure for rebating monies spent on political activities was inadequate [21, 3131].

Addressing the employees' constitutional claims the Court of Appeals found that without the existence of government or state action "the union shop clause would be simply the product of negotiations between private parties" [21, 3131]. Hence, the reliance by the objecting employees on *Hanson* for their argument that state action was involved was inappropriate [21, 3131]. The court found that the line of RLA cases as well as *Abood* were distinguishable because there was no government action involved in the instant case [21, 3131-3].

The court stated that the test for government action enunciated by the Supreme Court [21, 3132],

First, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. \*\*\*Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

was not met, since the NLRA, unlike the RLA, contained no preemption of state law [21, 3133]. Rather, that section 14(b) of the NLRA explicitly provides that states may proscribe formation of union security agreements [21, 3133].

Acknowledging that the Fourth Circuit reached a contrary conclusion in *Beck*, the Court of Appeals found that "[b]y authorizing the inclusion of union shop clauses subject to the whim of the states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA" [21, 3133]. The court disagreed with the *Beck* majority finding that government action existed because the federal statutes accorded unions a monopoly status [21, 3133]. The court also found that unlike *Abood* no government official was involved in the negotiation of the union security agreement and thus the second part of the test for government action failed [21, 3133].

Addressing the issue of whether the UAW breached its duty of fair representation, the court noted that this statutory duty is implied from section 9(a) of the NLRA [21, 3134]. For a breach to be found, the "union's conduct towards a member of the collective bargaining unit [must have been] arbitrary, discriminatory, or in bad faith" [21, 3134]. The court found nothing in the record to indicate that the UAW had acted in an arbitrary, bad faith or discriminatory manner [21, 3134]. Further, because the duty of fair representation can arise only when three parties are involved, and only the union and the dissenting employees

are involved in this issue, it is actually an internal union matter that does not involve the employer or invoke the duty of fair representation [21, 3134].

Clearly the opinion of the Second Circuit and that of the dissent in *Beck* are in accord. However, *Price* was remanded for further consideration consistent with the majority opinion in *Beck* [22]. On rehearing, the District Court dismissed the employees' constitutional claims for lack of state action [23]. The court also found that since *Beck* the UAW's actions had not been discriminatory, in bad faith or arbitrary and therefore the employees' claim that the union had breached its duty of fair representation could not be sustained [23]. Additionally, the court noted that the UAW had a new procedure for resolving objections to expenditures which closely tracked those issued by the NLRB following the decision in *Beck* [23, 24].

The UAW's new procedure provided for objecting employees to receive a report disclosing expenditures made by the union for the purpose of providing collective bargaining services upon completion of the union's year-end audit [23]. Objectors would then have forty-five days within which they may challenge the expenditures and percentage chargeable to nonmembers [23]. Amounts in dispute would be placed in an interest-bearing escrow account pending a hearing before a member of the American Arbitration Association, to be selected by the Association [23].

Consequently, the court granted the union's motion for summary judgment as to any post-*Beck* violations [23]. The court also granted General Dynamics' motion to dismiss with respect to any post-*Beck* violations [23, 2141]. The court noted however that because it was well-established that an employer may "be held responsible for violating the NLRA when it 'participates' with a union in arbitrary or unfair activity [23, 2411], resolution of any pre-*Beck* claims the employees may have against General Dynamics would remain pending a determination on the retroactivity of *Beck* [23, 2141].

## RECENT PUBLIC SECTOR ACTIVITY

*Ellis* provided the touchstone for determining when agency fees could be used to support activities other than grievance resolution and contract negotiation. However, *Ellis* did not present the Court with an opportunity to explore the relationship between lobbying activity and public sector collective bargaining, an area left open in *Abood* when the case was remanded to the lower court [14, 236]. Resolution of the extent to which compelled financing may be used to support lobbying activity in the public sector remained open until a second Michigan case reached the Court in November, 1990.

In *Lehnert v. Ferris Faculty Association* [25], a group of six dissenting faculty members brought suit against their local bargaining representative, the Michigan Education Association (MEA) and the National Education Association (NEA)



charging that their mandatory service fees were used for purposes unrelated to collective bargaining [25]. Specifically, the employees contended that the use of their service fees to engage in activities that included political campaigning and lobbying violated their rights under the First and Fourteenth Amendments [25].

The District Court found that requiring objecting employees to pay costs associated with miscellaneous professional activities, strike preparation, general public relations, conventions, lobbying, union “millage” campaigns and certain activities undertaken by the Michigan and National Education Associations was constitutional [25, 1390]. On review, the United States Court of Appeals upheld the District Court’s findings.

In affirming that the dissenting employees could be compelled to share the cost of certain ideological union activities the court stated, “We believe that the lobbying and other ‘political’ activities of the union in this case were, as required by *Ellis*, ‘reasonably employed to implement or effectuate the duties’ of the Ferris Faculty Association as the exclusive representative of *public* employees at Ferris State College” [25, 1391]. Accordingly, the Court of Appeals refused to find error in the District Court’s decision that the objectors could be compelled to pay the cost of certain activities undertaken by the MEA and NEA [25, 1393].

The Court of Appeals, finding no legal error in the District Court’s reasoning that the union’s preparation for an illegal strike and publication of those efforts amounted to “reasonable bargaining tools available to a public sector union during contract negotiations” [25, 1394], upheld the court’s decision that the activities were chargeable to nonunion members. Finally, the Court of Appeals ruled that the expenses related to miscellaneous professional activities and public relations were of a “de minimis” nature and “sufficiently related to” the collective bargaining process so as to be chargeable to nonmembers under *Ellis* [25, 1394].

The Court of Appeals relied on the “fundamental differences between collective bargaining in the public sector and in the private sector” [25, 1392], that the *Abood* Court referenced as the basis for the court’s broad interpretation of *Ellis*. In a separate opinion, concurring in part and dissenting in part, Circuit Judge Merritt took issue with the majority’s expansive reading of *Ellis* [25, 1394]. The dissent focused on the majority’s failure to require a close relationship between the challenged activities and the activities of the objecting employees’ bargaining unit [25, 1394].

In a fractured decision with shifting majorities, the Supreme Court enunciated the guidelines for determining which union activities objecting public sector employees may be constitutionally compelled to support. The Court stated that although earlier decisions suggest an individual analysis of each case is required [26],

*Hanson and Street* and their progeny teach that chargeable activities must (1) be “germane” to collective bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding “free riders”; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

In other words, the test for determining which union activities not directly related to collective bargaining, but nonetheless are chargeable to objecting nonunion members, has already been established.

Applying these guidelines to the challenged union activities, the Court found that objectors’ service fees could not be used to support lobbying activities unrelated to the “ratification or implementation of the dissenters’ collective bargaining agreement” [26], despite the unique relationship between lobbying and collective bargaining in the public sector [26, 1964]. Indeed, the Court found that use of objectors’ fees to support lobbying is equivalent to “compelled speech” and that when the topic of discussion is governmental affairs, it impacts the very essence of the First Amendment freedoms [26, 1960-1]. Hence, the Court held that the Michigan statute could not constitutionally require public employees to support political union activities or public relations efforts beyond those involved in ratification or implementation of the contract [26, 1960-1].

Addressing the petitioners’ objection to having their service fees used to support activities of the MEA and NEA, the Court found the charges permissible to the extent they were assessed for resources germane to collective bargaining and attainable by the Ferris Faculty Association, regardless of whether they were used by the local during the year [26, 1960-1]. Considering the unified membership structure of the local and its affiliate parents, the Court held that the dissenting employees could be charged for state and national convention expenditures since membership in the local conferred membership in the parent unions [26, 1960-1].<sup>7</sup> However, contributions by the local to its parent unions which are not a part of the local’s duty as an affiliate are not chargeable to dissenting employees [26, 1963].

Turning to the miscellaneous professional activities challenged by the nonunion members, the Court held that expenditures unrelated to the ratification and implementation of the employees’ contract could not be supported by objectors’ service fees [26, 1964-5]. Therefore, expenses associated with efforts to secure additional funds for public education in general were not chargeable to dissenters [26, 1964-5].

While the Court found the question of whether nonmembers could be assessed the cost of preparations for an illegal strike provocative, it noted that neither the

<sup>7</sup> The Court explicitly excluded the cost of litigation and reporting on litigation, unrelated to the bargaining unit from the list of chargeable activities [26, 1960-1].

Michigan statute nor the First Amendment proscribed the charge [26, 1965]. Thus, because the activity was germane to collective bargaining and directly benefitted all members of the bargaining unit, it was chargeable to dissenters [26, 1965].

Justice Marshall wrote a separate opinion, dissenting in part from the majority's finding that the costs of lobbying for increased public education funding, general public relations efforts and charges associated with reporting on litigation unrelated to the local union were not chargeable to objectors [26, 1966]. Justice Scalia, joined by Justices O'Connor, Souter and Kennedy in a separate opinion, dissented in part from the majority's decision concerning which collective bargaining activities the objectors may be compelled to support [26, 1975]. Instead of the three-part test outlined by the majority, Justice Scalia proposed a "statutory duties" test that would permit compulsory fees to be used only to support activities related to the union's duties as defined by state law [26, 1975]. The "statutory duties" test was rejected by the majority on the basis that state statutes are generally broadly written and do not define the duties of labor representatives with specificity [26, 1962-3]. More important, application of a "statutory duties" test would result in interpretation of the First Amendment in light of state statutory law as opposed to interpretation of state statutes in light of the first amendment [26, 1962-3]. Justice Kennedy dissented from that portion of Justice Scalia's opinion determining chargeable union activity under a "statutory duties" test [26, 1975].

## CONCLUSION

*Lehnert* is important in the development of the law in that it delineates which nonideological union activities that are not directly related to the collective bargaining process may nonetheless be supported by monies collected from objecting employees. In drawing the line between permissible and proscribed activities, the Court foreclosed the probability that public sector employees would be treated differently from their private sector counterparts because of the "fundamental differences" in the collective bargaining process referenced by the *Abood* Court. This decision reaffirms the Court's earlier posture that any differences between private and public employment do not affect the constitutional rights of employees.

The Court's decision in *Beck*, without doubt, has significantly affected private sector unions. The decision has also left more issues unresolved than settled and the onus of resolving those issues is primarily on the NLRB. Among the issues yet to be resolved are: the types of records a union must maintain and produce in support of chargeable activities; what type of procedure and form of notice will be deemed to provide employees with sufficient information for making an informed decision on whether they should object to an expenditure; how many opportunities to object must be given; acceptable procedures for calculating the proportion of member dues chargeable to objectors; and which activities nonmember objectors

may be required to support [8]. While the NLRB has already moved to address some of these issues in a memorandum issued shortly after the *Beck* decision, they remain potential areas of future litigation [24].

Another area awaiting clarification by the board is how religious objectors are to be treated. Section 19 of the NLRA provides that such employees may be required to pay an amount equal to union dues to a charitable organization.<sup>8</sup> Does the *Beck* decision now permit religious objectors to pay a reduced amount based on objections to the union's political activities [27].<sup>9</sup>

The board, having no dues objector precedents to draw from, will most likely accept the invitation of the *Beck* Court and rely on the RLA decisions [8]. However, those decisions do not provide much of a framework since the Court failed to reach many of the issues that will confront the board. Nonetheless the RLA line of cases established that objectors may not be charged for union expenditures related to general organizing efforts, political campaigns and litigation not directly related to collective bargaining activities [8]. On the other hand, the RLA cases held that objectors may be required to support activities remotely related to the collective bargaining process such as social activities, union conventions, and refreshments for business meetings, in addition to direct costs of collective bargaining and grievance administration [8].

The board will probably find a need to borrow from public sector precedent, which is more abundant than that available under the RLA. Even so, public sector law is still evolving, and the differences in public and private sector collective bargaining processes may possibly decrease the usefulness of these cases to the board [8, 7]. Whatever the differences, the board, once the trend setter, now stands to benefit from the public sector, which relied heavily on past board decisions to establish a coherent body of labor law.

As an example of the public sector assistance available, there is the Second Circuit's ruling that a public sector union cannot cite excessive costs as a basis for avoiding the procedural requirements established in *Hudson* [28]. The union's contention in that case is one just as likely to be made by a private sector union. Indeed, a spokesperson for the Communication Workers of America (CWA), when asked to comment on the consequences of *Beck*, referred to the decision as

<sup>8</sup> States in relevant part, "[a]ny employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation . . ." [4, §19].

<sup>9</sup> In that case, the Court of Appeals held that the District Court erred in finding as a matter of law that the religious objector was entitled to pay a reduced fee to the union's state and national affiliates based on objection to their pro-abortion stance [27].

“a costly annoyance [which] forced private sector unions to establish expensive and time-consuming record-keeping systems in order to be able to accommodate a small group of individuals” [29].

No one will dispute that the NLRB will be asked to confront many tough questions in the future. Nor can it be disputed that the Court has failed to provide a clear analytical framework from which the board could draw in establishing precedent [8]. Despite this lack of assistance the board has already begun to tackle some of the difficult problems. The Court of Appeals has upheld a board ruling that the amount of an agency fee is not a mandatory subject of bargaining [30]. While the decision raises some interesting issues for employers with regard to their liability for existing union security agreements requiring dues equivalents, it is a step toward creating a unified body of law to govern future labor-management relations in this new area.

As the legal status of agency shop and fair share agreements continues to evolve, it is impossible to predict whether the Court will continue to reaffirm long-standing precedent in this area. However, it has been hypothesized that retirements and appointments that shift the Court from a liberal to a more conservative viewpoint increase the likelihood of changes in long-standing precedent, especially in the area of labor law [31]. While shifting majorities in *Lehnert* give some weight to this prediction, the direction the Court will take in the future remains to be seen.

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Beverly Nelson-Glode has practiced in the field of public personnel and labor relations for over ten years. She holds a B.A. degree in Psychology from Chicago State University, an M.B.A. in Human Resources from DePaul University, and a J.D. degree from the University of Bridgeport School of Law. Ms. Nelson-Glode is currently employed as Director of Personnel for the City of Renton.

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Direct reprint requests to:

Beverly L. Nelson-Glode  
P.O. Box 1182  
Renton, WA 98055-9998