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A Guide to the Changing Court Rulings on Union Security in the Public Sector: A Management Perspective

R. THEODORE CLARK, JR.*

Introduction

Over the past fifteen years an increasing number of state legislatures have mandated or authorized the negotiation of fair share agreements whereby non-members can be charged for their pro rata share of the representational costs expended by the exclusive bargaining representative.[1] Although fair share clauses admittedly have an impact on a dissenting employee's first amendment rights, the Supreme Court in *Abood v. Detroit Board of Education*[2] held that there was a substantial governmental interest in preventing the "free rider" problem and that non-members could be charged the pro rata cost for negotiations, contract administration and grievance adjustment. On the other hand, the Court in *Abood* held that objecting non-members could not be charged for a union's expenditures on political and ideological causes unrelated to collective bargaining.

In the eight years since the Supreme Court's decision in *Abood* there has been an increasing amount of litigation over issues not specifically resolved by the Court's decision in *Abood*. While the number of issues are many, they essentially break down into two broad categories. First, what union expenditures can be charged to an objecting non-member, i.e.,

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[1] The following states by specific statutory provision have authorized the negotiation of agency shop or fair share agreements: Alaska, California, Connecticut (state employees and teachers), Hawaii, Illinois, Kentucky (fire fighters), Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Dakota, New York, Ohio, Oregon, Rhode Island (teachers and state employees), Vermont (municipal employees), Washington, and Wisconsin. Three states—Hawaii, Minnesota, and Rhode Island (state employees and teachers)—specifically mandate fair share deductions wholly apart from negotiations. For example, the Minnesota statute provides that "the employer upon notification by the exclusive representative . . . shall be obliged to check off" from non-members "a fair share fee for services rendered by the exclusive representative." MINN. STAT. ANN. § 179A.06(3) (West 1966).

[2] 431 U.S. 209 (1977) [hereinafter cited as *Abood*].

where should the line be drawn between permissible and non-permissible expenses. Second, what procedures must be made available to prevent, in the words of the Supreme Court in *Abood*, "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."[3]

In *Ellis v. Brotherhood of Railroad, Airline & Steamship Clerks*,[4] the Supreme Court had to grapple with both of these major issues. Moreover, there has been a spate of decisions since *Ellis* which indicate that while some issues may have been put to rest by *Ellis*, others are emerging, especially with respect to the procedures whereby objecting non-members can challenge fair share payments. The Seventh Circuit's recent decision in *Hudson v. Chicago Teachers Union*[5] is illustrative of new issues arising in the wake of the Court's decision in *Ellis*.

The focus of this article will be on the Court's treatment of these two key issues in *Ellis*, as well as their treatment in decisions issued subsequent to *Ellis*. But first it is necessary to review the Supreme Court's seminal decision in *Abood* in order to get a better perspective on the issues presented to the Court for decision in *Ellis*.

The *Abood* Decision

In *Abood*, the Court was openly candid in stating that there would "be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which compulsion is prohibited"[6] and in further noting that in the public sector—as opposed to the private sector—"the line may be somewhat hazier."[7] Given the amount of litigation subsequent to the Court's decision in *Abood*, this is one of the Court's more classic understatements.

The basic problem with the Court's decision in *Abood* is that it can be read in dramatically different ways depending on one's perspective. On the one hand, the Court repeatedly stated—at least four times by this author's count—that fair share fees could be charged to non-members for "collective bargaining, contract administration, and grievance adjustment."[8] If one focuses only on this aspect of the Court's holding in

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[3] *Id.* at 237.

[4] ___ U.S. ___, 104 S. Ct. 1883 (1984) [hereinafter cited as *Ellis*].

[5] 743 F.2d 1187 (7th Cir. 1984) [hereinafter cited as *Hudson*].

[6] *Abood*, 431 U.S. at 236.

[7] *Id.*

[8] *Abood*, 431 U.S. at 220, 221, 225, 232.

Abood, it would follow that fair share fees can be charged only for activities directly related to "collective bargaining, contract administration, and grievance adjustment" and that any other union expenditures, not directly related to such activities, cannot be charged to an objecting nonmember. Using this approach, the court in *Beck v. Communication Workers of America*[9] held that the collection of agency shop fees for any purpose other than "collective bargaining, contract administration, and grievance adjustment" was "improper."[10] In a subsequent proceeding before a special master to determine, as the special master phrased it, "what proportion of the union's total expenditures is attributable to activities other than collective bargaining, contract administration and grievance adjustment," the special master determined that only nineteen percent of the agency shop fees were expended on permissible activities and that the union "has improperly charged the Agency Fee Payers eighty-one percent of the dues paid by them to [the union]."[11]

On the other hand, *Abood* can be read, and was read by virtually every union,[12] to mean that a dissenter can only object to the use of fair share fees to finance union expenditures which are spent on "ideological activities unrelated to collective bargaining."[13] So phrased, the inquiry then focuses on what portion of the union's expenditures is devoted to political and ideological activities unrelated to collective bargaining. Not surprisingly, when this is the focus of the inquiry it produces a radically different result. Typically, the proportion of union expenditures spent on political and ideological activities unrelated to collective bargaining amounts to less than fifteen percent of the union's total expenditures.[14]

Another problem with the two different formulations of what expenditures can be charged to objecting non-members is that they are not

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[9] 468 F. Supp. 93 (D. Md. 1979).

[10] *Id.* at 96.

[11] Beck v. Communication Workers of America, Civil No. M-76-839, 166 DLR, D-1, at D-12 (Special Masters Report, D. Md. 1980), adopted with modifications, 112 LRRM 3069 (D. Md. 1983).

[12] For example, the policy adopted by the Illinois Education Association, an affiliate of the National Education Association (NEA), provides that "no individual required to pay a fair share fee to a local association affiliated with the Illinois Education Association—NEA shall be required, through the payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration which he/she opposes." *See* Exhibit 1 attached to the complaint filed in Hagen v. Illinois Education Association, No. 84-1313 (C.D. Ill. filed Nov. 15, 1984).

[13] *Abood*, 431 U.S. at 236.

[14] In the complaint filed in Hagen v. Illinois Education Association, No. 84-1313 (C.D. Ill. filed Nov. 15, 1984), plaintiffs alleged that the fair share fees charged by the IEA, using the standard quoted in footnote 12, for 14 different school districts ranged from 92% to 100% of the dues charged to full union members.

mutually exclusive. Thus, there are many union expenditures which are neither directly related to collective bargaining, contract administration and grievance adjustment nor directly related to ideological activities unrelated to collective bargaining. Examples include expenditures for union organizing, legal fees incurred for matters unrelated to negotiations and contract administration, social activities, union conventions, and benefits payable only to union members.

In *Abood* the Court also dealt with the issue of what remedy should be available to dissenters who object to the use of the fair share fees of non-permissible purposes.[15] Citing its earlier decision in *Allen*,[16] the Court said that the remedy could properly provide for a refund of the portion of the compelled fair share fees in the proportion that impermissible union expenditures bear to total union expenditures and a "reduction of future exactions by the same proportion."[17] Again citing *Allen*, the Court also "suggested that it would be highly desirable for unions to adopt a 'voluntary plan by which dissenters would be afforded an internal union remedy,'"[18] noting that this suggestion was "particularly relevant to the case at bar, for the Union has adopted such a plan. . . ."[19] Commenting further, the Court noted that it might be appropriate, in view of the union's internal procedure, for the state court on remand "to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute."[20] The Court, however, commented that it was expressing "no view as to the constitutional sufficiency of the [union's] internal remedy . . . ,"[21] noting that if any dissenters concluded that the internal remedy was "constitutionally deficient in some respect, they would of course be entitled to judicial consideration of the adequacy of the remedy."[22]

Although the Court in *Abood* thought that the task of defining the appropriate remedy to protect the rights of dissenters had been "simplified" by reference to its prior decisions, in litigation subsequent to *Abood* the courts differed widely on what procedures and remedies must be provided to dissenting non-members. For example, while some courts held that unions had to establish escrow accounts for challenged fair share fees

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[15] In *Abood* the Court reiterated its prior holding in *Allen* that objecting non-members are entitled to relief if they have expressed their opposition to non-permissible expenditures "of *any* sort that are unrelated to collective bargaining" and that there is no obligation on the dissenter to identify particular causes which he or she may oppose. *Abood*, 431 U.S. at 241 (emphasis added).

[16] Railway Clerks v. Allen, 373 U.S. 113 (1963).

[17] *Abood*, 431 U.S. at 240.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 242.

[21] *Id.* at 242 n. 45.

[22] *Id.*

pending a determination of the proportion of the exacted fees which could be retained by the union,[23] other courts held that all that was required was a rebate following a determination of the portion of the exacted fees that were being used for impermissible purposes.[24] The courts also disagreed on whether an objecting fair share fee payer had to exhaust any available internal union procedure before raising a judicial challenge.[25]

In view of the various ways in which the parties and the federal and state courts interpreted the Court's holding in *Abood*, it was clear that the Court would eventually have to readdress these issues and the opportunity to do so was presented in *Ellis*.

The *Ellis* Decision—Determining What Expenditures Can Be Charged to Dissenters

At issue in *Ellis* was whether objecting non-members could be required to contribute, pursuant to a negotiated agency shop clause, toward the cost of the following six challenged union activities: (1) union conventions, (2) litigation not involving the negotiation of agreements or settlement of grievances, (3) union publications, (4) social activities, (5) death benefits for employees, and (6) general organizing efforts. After noting that in its prior decisions the Court had not been called upon to "define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed upon dissenters,"[26] the Court stated:

> [T]he test must be whether the challenged expenditures are necessarily 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. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct cost of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.[27]

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[23] Ball v. City of Detroit, 269 N.W.2d 607, 98 LRRM 3137 (Mich. Ct. App. 1978); School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (Mass. Sup. Jud. Ct. 1982).

[24] Browne v. Milwaukee Board of School Directors, 98 LRRM 2574 (Wis. S. Ct. 1978) (court interpreted the Supreme Court's prior decisions to "stand for the proposition that employees who are compelled to pay union dues are still required to pay those dues pending a determination of what portion of those dues are being used for statutorily impermissible purposes").

[25] *Compare* School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (Mass. Sup. Jud. Ct. 1982) (exhaustion of union's internal rebate procedure not required), *with* Link v. Antioch Unified School Dist., 191 Cal. Rptr. 264 (Cal. App. 1st Dist. 1983) (exhaustion of union's internal rebate procedure required).

[26] *Ellis*, ___ U.S. at ___, 104 S. Ct. at 1892.

[27] *Id.*

Applying this test, the Court held the union could charge objecting employees for the following expenses: (1) the cost of the union's convention, (2) social activities, and (3) union publications insofar as the publications reported activities for which the union could charge the dissenting employees. On the other hand, the Court held that the union could not charge objecting employees for expenses incurred in: (1) litigation not involving the negotiation of agreements or settlements of grievances, and (2) its general organizing efforts. With respect to the latter, the Court noted that "[u]sing the dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can only afford the most attenuated benefits to collective bargaining on behalf of the dues payer."[28] Since the union had been decertified during the pendency of the litigation, the Court found it unnecessary to rule on whether dissenters could be compelled to contribute toward the cost of the union's death benefit, but it did observe that it "would have no hesitation in holding that the union lacks authorization under the RLA to use non-members' fees for death benefits they cannot receive."[29] The Court stated that the RLA's union security provisions are based on the presumption "that non-members benefit equally with members from the dues to which union money is put."[30]

In *Ellis*, as in its prior RLA union shop cases, the Court stated that its initial obligation was to determine "whether the statute can be reasonably construed to avoid the constitutional difficulty."[31] Accordingly, the Court did *not* directly rule on whether certain of the challenged union expenditures (e.g., union organizing expenses) could be constitutionally charged to objecting non-members. The initial question posed by the Court's decision in *Ellis*, then, is whether the Court would draw the line in the same way in a public sector case in which it could not avoid making a constitutional determination. Despite the Court's unwillingness to make a constitutional determination where it was possible to base its decision on its interpretation of the RLA's union security provisions, it seems reasonably clear, at least to this observer, that the Court would reach the same result as a matter of constitutional adjudication. While the Court, for example, interpreted the RLA so as to prohibit a union from using agency shop fees to pay for organizing efforts, it is exceedingly difficult to believe that the Court in a public sector case directly involving the first amendment would hold that the cost for union organiz-

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[28] *Id.* at ____, 104 S. Ct. at 1894. In a footnote, the Court further noted that "it would be perverse [to interpret the RLA] as allowing the union to charge to objecting non-members part of the cost of attempting to convince them to become members." *Id.* at ____, 104 S. Ct. at 1894 n.13.

[29] *Id.* at ____, 104 S. Ct. at 1895 n.14.

[30] *Id.*

[31] *Id.* at ____, 104 S. Ct. at 1890.

ing could be charged to objecting non-members, especially in view of the Court's statement that organizing costs "can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer."[32] Accordingly, it is reasonable to assume that the test which the Supreme Court articulated in *Ellis* to assist in defining the line between permissible and non-permissible expenditures under the RLA will likewise be used in reviewing expenditures when challenged under the first amendment. A review of the court decisions issued subsequent to *Ellis* indicates that this, in fact, has been the case.

Application of the *Ellis* test has helped to resolve one of the most vexing questions with which the courts have had to grapple since *Abrood*, i.e., whether it is constitutionally permissible for public sector unions to spend fair share fees for various lobbying activities. Lobbying is undeniably a political activity, but in many instances it is also arguably germane to a union's functions as an exclusive bargaining representative. In *Abood* the Court recognized that "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table. . . ."[33] In acknowledging this reality, the courts that have addressed this question since *Ellis* have ruled that lobbying activities that are germane to the union's representative function may be charged to objecting fair share fee payers.

In *Robinson v. State of New Jersey*,[34] for example, the Third Circuit set forth the following rule:

> So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication than any other form of union activity that may be financed with representation fees. . . .[35]

The Third Circuit set forth the following rationale to justify its decision:

> Public employee bargaining is distinctive in that at least a portion of a union's attention is directed away from the bargaining table, even for what would be designated the standard terms and conditions of employment under the NLRA. . . .
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> . . . .
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> Since many of the essential terms and conditions of employment that are mandatory subjects of bargaining under Sections 8(d) and 9(a) of the NLRA are governed by state authorities in the public employment context, a public employee union unable to lobby the state authority would be severely handicapped in performing its duties as a bargaining representative.[36]

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[32] *Id.* at ____, 104 S. Ct. at 1894.

[33] *Abood*, 431 U.S. at 236.

[34] 741 F.2d 598 (3d Cir. 1984) [hereinafter cited as *Robinson*].

[35] *Id.* at 609.

[36] *Id.* at 607, 609.

In reaching its decision, the Third Circuit specifically relied on the Supreme Court's statement in *Ellis* that objecting employees may be compelled to pay fair share fees for "the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."[37]

Similarly, in *Champion v. State of California*,[38] the Ninth Circuit upheld the constitutionality of using fair share fees for certain lobbying activities, noting that "[t]he determination of whether certain expenditures are proper depends on the nature of the bargaining process."[39] After examining various California statutes which directly impact on the scope of negotiations in California, the Ninth Circuit stated:

> Because public employees work for the State, matters which are ordinarily left to direct negotiation in the private sector are covered by statute. . . . The importance of legislation affecting public employment . . . requires that public employee representatives be given broad authority to protect their members' interests before the legislature.[40]

While it thus appears that fair share fee payers may be compelled to contribute toward the cost of certain lobbying activities, it must be emphasized that not all lobbying costs can be charged to dissenters. As the Third Circuit held in *Robinson*, the lobbying activities must be "pertinent to the duties of the union as a bargaining representative" and must not be used "to advance the political and ideological positions of the union."[41] For example, it would seem reasonably clear that a union could not, over a non-member's objection, use fair share fees to lobby for adoption of the Equal Rights Amendment,[42] passage of a nuclear freeze resolution, or Senate rejection of appointments to the United States Supreme Court.

While any effort to categorize permissible and non-permissible expenses may oversimplify what is sometimes a difficult definitional problem, there are certain union expenditures which could not be charged to objecting non-members, including any expenses related to illegal strikes or work stoppages,[43] charitable contributions, and voter registration and

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[37] *Ellis*, ____ U.S. at ____, 104 S. Ct. at 1892.

[38] 738 F.2d 1082 (9th Cir. 1984).

[39] *Id.* at 1086.

[40] *Id.*

[41] *Robinson*, 741 F.2d at 609.

[42] While it might be argued that passage of the ERA would assist unions in pressing comparable worth/pay equity arguments, passage of the ERA, like recruiting members from outside the bargaining unit, would "afford only the most attenuated benefits to collective bargaining on behalf of the dues payer." *Ellis*, ____ U.S. at ____, 104 S. Ct. at 1894.

[43] Section 17.04(1)(f) of the Rules and Regulations of the Massachusetts Labor Relations Com-

political education activities.

Another difficult problem is the determination of the proper allocation of a union's overhead expenses, including expenses for staff salaries, benefits, rent, building maintenance, equipment, supplies, etc. The fairest way to allocate such expenses would be to first determine the percentage of time that union officials and union employees spend on permissible activities. For example, if it is determined that union officials spend eighty percent of their time on permissible activities, it would then be appropriate to charge fair share fee payers eighty percent of the cost of staff salaries, benefits, rent, equipment, etc. On the other hand, fair share fee payers should not be charged for the cost of salaries and other related overhead expenses for the percentage of time that union officials are engaged in activities that cannot be charged to dissenters, e.g., union organizing efforts, lobbying activities to advance the union's political and ideological positions, charitable activities, etc.[44]

The *Ellis* Decision—Determining What Procedures Must Be Provided to Dissenters Who Challenge Fair Share Fees

The second major issue presented to the Court in *Ellis* was the adequacy of the union's rebate program. Under the union's program, while objecting non-members were entitled to a rebate of the amount of the agency shop fees that were used for non-permissible purposes, the union was able to use the agency shop fees prior to the determination of the amount of the rebate. In holding that the union's rebate scheme was inadequate, the Court stated:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.[45]

Rejecting administrative convenience as a justification for the union's

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mission provides that an objecting fair share fee payer cannot be charged for any cost allocable for "[f]ines, penalties or damages arising from the unlawful activities of a bargaining agent or a bargaining agent's officers, agents or members . . . ."

[44] Section 17.04 of the Rules and Regulations of the Massachusetts Labor Relations Commission provides that "[o]verhead and administrative costs allocable to any activity" which cannot be charged to an objecting fair share payer must likewise be excluded in computing the permissible fair share fee.

[45] *Ellis*, ___ U.S. at ___, 104 S. Ct. at 1890.

rebate scheme, the Court noted that "there are readily available alternatives, such as advance reduction of dues and/or interest bearing escrow accounts, that place only the slightest additional burden, if any, on the union."[46] In view of such alternatives, the Court ruled that "the union cannot be allowed to commit dissenters' funds to improper uses even temporarily."[47]

The Court's decision makes it rather clear that it found the pure rebate scheme to be, in its judgment, a "statutory violation."[48] Nevertheless, in the public sector context it would seem equally clear that a pure rebate system would not pass constitutional muster and at least one court has so held.[49] On the other hand, on the basis of decisions issued since *Ellis*, it is less clear whether the alternatives suggested by the Supreme Court in *Ellis* ("advance reduction of dues and/or interest-bearing escrow accounts"[50]) would be upheld against constitutional challenge. In *Robinson*, the Court held that "the constitutional issue is the establishment of a system that would protect against the involuntary subsidization of union political and ideological expenditures without unduly burdening legitimate union functioning."[51] Despite the Court's statement in *Ellis* that it was interpreting the RLA, the Third Circuit in *Robinson* opined that the Supreme Court in *Ellis* "approved as satisfying the first amendment either an advance reduction of dues or the placing of contested funds in an interest-bearing escrow account."[52] Accordingly, the Third Circuit, after noting that the New Jersey statute provided for a fifteen percent differential between the amount charged to fair share fee payers and the dues for full union membership and that each of the unions involved had created an escrow system for a portion of the fair share fees, held that the New Jersey statute did not unconstitutionally infringe upon the first amendment and due process rights of non-consenting employees. Rather, the court directed that the district judge on remand examine the challenge procedures in question "to determine whether the escrow procedures satisfy the *Ellis* requirement that the unions not be in a position to exact a forced loan from non-consenting employees."[53]

In *Tierney v. City of Toledo*,[54] the court refused to issue a preliminary

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Hudson v. Chicago Teachers Union, Local No. 1, 743 F.2d 1187 (7th Cir. 1984). *See also* Tierney v. City of Toledo, 116 LRRM 3475, 3477 (N.D. Ohio 1984).

[50] *Ellis*, ___ U.S. at ___, 104 S. Ct. at 1890.

[51] *Robinson*, 741 F.2d at 612.

[52] *Id.*

[53] *Id.* at 614.

[54] 116 LRRM 3475 (N.D. Ohio 1984).

injunction against implementation of a rebate procedure which, in the court's judgment, appeared to fall within the constitutionally viable alternatives outlined in *Ellis*, to wit:

> The Plaintiffs' fees are placed in an interest bearing escrow account; and the portion of such fees devoted to political or ideological causes by the union are refunded with interest. In addition, the dissenting payor's fees for years subsequent to 1983 are given an advanced reduction based upon the percentage used in the previous year to calculate the dissenting fee payor's final refund. Finally, the fees are not used or committed by the union to promote any ideological or political causes, but held in an interest bearing escrow account maintained separately from other union funds.[55]

On the other hand, in *Hudson*, the court found fault with a rebate remedy which was coupled with an advance five percent reduction in the fair share payer's fees. After noting "that *Ellis* is as good a precedent under the Due Process clause of the Fourteenth Amendment as under the Railway Labor Act,"[56] the court noted that "[a] union cannot just choose some level of agency fee and, if it chooses too high, have the use, interest free, of the excess that it is later ordered to refund, until it refunds it."[57] In holding that a proper escrow arrangement is required in order to protect the dissenters' constitutional rights, the court observed that "[i]t would be best if the union turned management and not just custody of the account over to a bank or trust company."[58]

A major issue which the Supreme Court did not address in *Ellis* is the procedure for adjudicating a dissenter's claim that fair share fees are being used for impermissible purposes. In two prior decisions, however, the Supreme Court intimated that an internal union procedure might be appropriate to adjudicate such claims. In *Allen*, the Court suggested that unions consider adoption by their membership of a "voluntary plan by which dissenters would be afforded an internal union remedy."[59] And, in *Abood*, the Court suggested, without expressing a view as to its constitutionality, that disputes over the appropriate amount of fees that can be charged to non-members might be referred to an internal union remedy as a possible means for settling any discord.[60] Citing both of these decisions, the court in *Tierney v. City of Toledo*,[61] held that it was "not presently inclined to hold that the internal union procedure herein is in-

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[55] *Id.* at 3477.
[56] *Hudson*, 743 F.2d at 1196.
[57] *Id.*
[58] *Id.* at 1197.
[59] Railway Clerks v. Allen, 373 U.S. 113, 122 (1963).
[60] *Abood*, 431 U.S. at 242 n.45.
[61] 116 LRRM 3475 (N.D. Ohio 1984).

herently unfair or in violation of due process."[62] In so ruling, the court noted that counsel for the union had assured the court "that the arbitrator will be impartial, and that the burden of proof in establishing the amount spent on matters germane to collective bargaining, contract administration, and grievance adjustment would be upon the [union]."[63]

As in *Tierney*, substantially all of the internal union procedures for adjudicating dissenters' objections to fair share fees provide for the filing of a complaint initially with the union, an internal appeal to a union committee, followed by arbitration before an impartial arbitrator selected by the union. While the constitutionality of this type of internal union procedure has been upheld by several courts,[64] the Seventh Circuit Court of Appeals in *Hudson* recently held that such a procedure was "constitutionally inadequate."[65] The internal union procedure in question provided that a dissenter had thirty days from the date the fair share fee was first deducted from his or her paycheck to file an objection with the union. Following a review by the union's executive committee and a personal hearing, the objector had the right to request arbitration. Where arbitration is requested, the arbitrator is picked by the union president from a list of fifty arbitrators accredited by the State Board of Education, with the union paying the arbitrator's fee.

In holding that the above-described procedure was not constitutional, the Seventh Circuit said that it was "from start to finish . . . entirely controlled by the union, which is an interested party, ..."[66] In particular, the court set forth three major flaws:

1. The union has the unilateral right to select the arbitrator.[67]
2. Since the union pays the arbitrator's fee, "this gives him a financial interest in deciding cases favorably to the union. . . ."[68]
3. The arbitrator is called upon to make "First Amendment determinations," an area in which the Supreme Court has cast doubt on "the competence of arbitrators."[69]

After determining that the parties had to "go back to the drawing board,"[70] the Seventh Circuit, without necessarily foreclosing consideration of alternative procedures, suggested the following:

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[62] *Id.* at 3478.

[63] *Id.* at 3477.

[64] *See, e.g.*, Tierney v. City of Toledo, 116 LRRM 3475 (N.D. Ohio 1984).

[65] *Hudson*, 743 F.2d at 1196.

[66] *Id.* at 1194.

[67] *Id.* at 1195. As the Court noted, "the union's relationship to dissenting members of the bargaining unit would, as a realistic matter, contain a sufficient residue of adverseness to raise serious objections to giving the union a unilateral choice of arbitrator." *Id.*

[68] *Id.*

[69] *Id.* at 1196.

[70] *Id.*

> [T]he constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision.[71]

The Seventh Circuit's decision in *Hudson* makes it clear that the obligation to provide dissenting employees with an impartial procedure to adjudicate challenges to fair share fees rates falls squarely on the shoulders of the public employer. It is this aspect of the Court's decision in *Hudson* that management representatives find most troubling. Fair share is a union issue, not a management issue. Where fair share is mutually agreed to by the parties and incorporated in a collective bargaining agreement, the public employer is making an accommodation to a union request. It hardly seems appropriate to place the obligation on the public employer to establish a constitutionally adequate procedure to deal with employees who object to fair share fees charged by an exclusive bargaining representative.[72] A predictable result of the court's decision will undoubtedly be an increased reluctance on the part of public employers—at least in the Seventh Circuit—to agree to fair share clauses. This, in turn, may well exacerbate collective bargaining disputes over this issue and make their resolution even more difficult.

Even in those situations where a public employer might be willing to agree to fair share, the public employer would be well advised to protect its interests in several ways, including the following:

1. Inclusion of a "wall-to-wall" indemnification clause to protect and hold the employer harmless against any and all costs and damages resulting from the employer's implementation of a fair share agreement.[73]
2. Provision in the fair share agreement that fair share fees will not exceed eighty-five percent of the dues regularly charged full union members (*i.e.*, an advance reduction to protect fair share payers from paying fees that might be spent on activities unrelated to collective bargaining).[74]

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[71] *Id.*

[72] *See* Havas v. Communication Workers of America, 108 LRRM 2405 (N.D.N.Y. 1981) ("Not only does no statute require an employer to supervise union expenditures, but also no contract provision requires the employer here to act affirmatively in regard to the plaintiffs' First Amendment rights").

[73] For an excellent discussion of the issues which a public employer should address in negotiating hold harmless and indemnification clauses, *see* Kay, Reinhold & Andreola, *Legal Problems in Administering Agency Shop Agreements—A Management Perspective*, 13 J.L. & EDUC. 61, 73-75 (1984).

[74] In upholding the constitutionality of the New Jersey statute in *Robinson*, the court noted that "[a]ll representation fee payers are, without request, given a fifteen percent advance reduction from the dues charged to union members" and that "[t]his protection is all that *Ellis* mandates." *Robinson*, 741 F.2d at 612 n.12. *Cf. Hudson*, 743 F.2d at 1196-97.

3. A contractual commitment from the union that it will establish an appropriate escrow arrangement for the fair share fees paid by any objecting employees during the period that said fees are being challenged.[75]
4. Acknowledgement that the employer has the right to establish hearing procedures before an impartial adjudicator to resolve any challenges raised by dissenting fair share fee payers.

A much better solution—and one in place in several states[76]—would be for the appropriate state labor relations board to establish by rule or regulation a hearing procedure whereby objecting employees could challenge fair share fees. Such a hearing procedure should include the opportunity for a hearing before a hearing officer designated by the state board, together with the right to appeal the hearing officer's decision to the state board. The state board's decision should then be subject to judicial review. This suggested procedure would seem to comply fully with the minimum constitutional standards prescribed by the court in *Hudson*. Moreover, it has the distinct advantage of shifting the cost of protecting the constitutional rights of fair share fee dissenters to the state and thereby relieve the public employer of this burden. In this regard, since it is the state which legislatively authorized the negotiation of fair share agreements in the first place, it is more than appropriate that the state should pick up the cost of complying with any constitutional safeguards which must be afforded to objecting fair share payers. Moreover, such an approach has the additional virtue of assuring that a uniform procedure is available state-wide.

Conclusion

Use of the test articulated by the Supreme Court in *Ellis* should make the task of drawing the admittedly hazy line between permissible and non-permissible expenditures somewhat easier. The *Ellis* test makes it clear that a union can charge an objecting non-member not only for the direct cost of negotiations and contract administration but also can charge for activities and undertakings reasonably related to the union's duties as exclusive bargaining representative. Thus, costs for such things as union conventions and social activities can be charged to objecting non-members, even though such expenditures presumably do not directly relate to collective bargaining and contract administration. Moreover,

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[75] *See Hudson*, 743 F.2d at 1187 (court held that an escrow arrangement was needed in order to protect the constitutional rights of dissenters, noting that "[t]he terms cannot be left entirely up to the union").

[76] *See, e.g.*, MINN. STAT. ANN. 179A.06(2) (West 1966); Section 6.01 *et seq.* of the Rules and Regulations issued by the Hawaii Public Employment Relations Board; Section 17.01 *et seq.* of the Rules and Regulations of the Massachusetts Labor Relations Commission.

both the Third Circuit and Ninth Circuit relied on *Ellis* in holding that lobbying expenses germane to collective bargaining are permissible. On the other hand, it is also clear that there are certain expenditures which cannot be charged to dissenters even though such expenditures do not necessarily involve ideological activities unrelated to collective bargaining. The direct holding in *Ellis* that litigation expenses not involving the negotiation of agreements or the settlement of grievances cannot be charged to objecting non-members is a good example.

While the Court's decision in *Ellis* that a "pure rebate system" does not pass constitutional muster resolves one of the procedural issues on which the lower courts were badly split, the Court did not directly address the constitutional adequacy of internal union procedures for the adjudication of objections raised by fair share fee payers. From a management perspective, the Seventh Circuit's recent decision in *Hudson* is particularly distressing in that it places the obligation on the public employer to protect the constitutional rights of dissenting fair share fee payers. While there may well be some precedent to support such an interpretation, it creates innumerable practical problems. If the courts are to hold, contrary to the United States Supreme Court's apparent approval of internal union procedures in *Abood*, that a neutral administrative procedure must be made available to dissenters, it should be the responsibility of the state through its public sector labor relations board(s) to establish such a procedure.

In summary, although the Court in *Ellis* resolved a number of important issues on which the courts were split with respect to fair share fees, other issues are emerging. The Seventh Circuit's decision in *Hudson* is indicative of these issues. Undoubtedly, the Supreme Court will have to address these issues in the relatively near future.