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Is the Free Rider Back on the Bus? *Lehnert* From a Union Perspective

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I. Introduction

The purpose of fair share fee provisions in collective bargaining agreements is to allow unions to assess the costs of their efforts evenly upon all members of the bargaining unit, thereby avoiding "free-riders," i.e., those who benefit from union representation without paying for it. This article will assess the extent to which this purpose continues to be served in light of the decision from the U.S. Supreme Court in *Lehnert v. Ferris Faculty Association.*[1] Further, this Article addresses the application of *Lehnert* to public sector employees, particularly teachers.

The Supreme Court first addressed the constitutionality of fair share fee provisions in the public employment context in *Abood v. Detroit Board of Education.*[2] The Court held that an agency shop (or fair share) fee may constitutionally be charged to nonmembers. However, the public sector union may not use fair share fees for political or ideological purposes unrelated to its role as exclusive representative. While giving general guidelines, the *Abood* Court did not attempt to define the dividing line between expenditures that can constitutionally be charged to nonmembers and those that cannot.[3]

The Supreme Court more specifically addressed the line-drawing issues in *Ellis v. Railway Clerks*[4] in the context of challenges brought by nonmembers to use of their fair share fees. *Ellis* was a private-sector case concerning an employment relationship governed by the Railway Labor Act. It is the most recent pre-*Lehnert* case to set forth a test to determine which expenditures can properly be charged as part of the fair share fee. This test has subsequently been applied in the public sector as well.

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1. ___ U.S. ___, 111 S. Ct. 1950 (1991).
2. 431 U.S. 209 (1977).
3. *Id.* at 237.
4. 466 U.S. 435 (1984).

The *Ellis* Court set forth the following test for determining which union expenditures can properly be charged to nonmembers who object to paying a fair share fee:

> . . . [W]hen employees such as petitioners object to being burdened with particular union expenditures, the 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 costs 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.[5]

Although the *Ellis* Court addressed a number of specific expenditures to which the nonmembers objected, it could not have foreseen all of the line-drawing issues that would arise. Its general test, therefore, was subsequently applied by numerous state and federal courts in attempts to solve line-drawing problems concerning union expenditures.

Prior to *Lehnert,* the most recent fair share case from the Supreme Court was *Chicago Teachers Union v. Hudson.*[6] *Hudson* was not a line-drawing case, but rather a "procedures" case. It concerned how fair share fees can be collected, instead of what fair share fees can be collected. The Court found that procedural safeguards were necessary to minimize infringement on the constitutional rights of nonmembers. These safeguards include the requirements that nonmembers be provided: (1) "an adequate explanation of the basis of the fee," (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending."[7]

Although *Hudson* spawned a tremendous amount of litigation, it is not relevant to the sorts of line-drawing issues that were the subject of *Lehnert.*

In general, *Lehnert* adopted the union's positions. The Court found that almost all of the expenses charged to nonmembers by the Ferris Faculty Association were constitutionally justified. When viewed by unions across the country, the percentage of union expenditures that are considered chargeable remains substantially unchanged under *Lehnert. Lehnert* does, however, require re-allocation of some relatively insignificant charges.

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5. *Id.* at 448.
6. 475 U.S. 292 (1986).
7. *Id.* at 310.

The objecting nonmember teachers in *Lehnert,* represented by National Right to Work Legal Defense Foundation, Inc., lost on both major issues presented to the Court.

First, National Right to Work lost its argument for a different formulation of the test for chargeable expenditures. A majority of the Court rejected the notion that the test for chargeable expenditures should be whether the costs incurred were for performing the union's statutory duties as bargaining agent. Justice Scalia adoted National Right to Work's position in his dissenting opinion, in which he was joined by Justices O'Connor, Souter, and Kennedy. The Scalia test can be referred to generically as the "DFR" test. It would limit chargeable expenditures to those incurred by a union as part of its duty of fair representation to bargaining unit members.[8]

National Right to Work also lost on the issue of bargaining unit by bargaining unit allocation of the union's costs. The court unanimously decided that the cost of affiliation with a state and national organization was properly charged to fair share fee payors. The Court imposed no requirement that these costs be allocated to the specific local bargaining unit in which they were incurred, with the possible exception of litigation expenditures.

The unit-by-unit allocation issue is even more important to unions than is the test for chargeable expenditures. Even if the DFR test were adopted by a majority of the Court, a high percentage of the expenses currently included within the fair share fee would continue to be chargeable. However, if a unit-by-unit allocation of costs were to be demanded, the administrative and operational burden on state and national unions would be so great as to jeopardize the advantage of collecting a fee in the first place.

Therefore, *Lehnert* is a victory for unions. The remainder of this Article will discuss the Court's analysis of particular categories of expenditures as they relate to unions generally, rather than as they relate only to the Ferris Faculty Association.

II. The Test for Chargeable Expenditures

Justices Rehnquist, White, Stevens, and Marshall joined in Justice Blackmun's test for chargeable expenditures. Under the Blackmun test, chargeable activities must:

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8. The union won on the issue of the test for chargeability by a 5-4 vote. The narrowness of the vote, followed by the retirement of Justice Thurgood Marshall, may make unions somewhat nervous about the continued efficiacy of the test.

> (1) be "germane" to collective bargaining activities; (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.[9]

Of the three prongs of the test, the third appears to be the most important to Justice Blackmun. His subsequent analysis of particular expenditures is based primarily on the extent to which the First Amendment rights of nonmembers are burdened.

The Blackmun test also incorporates the notion that, if a union can charge for an activity, it can also charge for publicizing it, and the obverse.

The Scalia test, which was adopted by four members of the Court, requires that to charge constitutionally a nonmember for a particular expenditure, it must:

> at least be incurred in performance of the union's statutory duties. I would make explicit what has been implicit in our cases since *Street*: a union cannot constitutionally charge non-members for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.[10]

Justice Marshall wrote a separate opinion concurring in part and dissenting in part. Justice Marshall's opinion is totally favorable to the unions: he concludes that all of the challenged activities are chargeable and would affirm the decision of the Sixth Circuit. Thus, as to the chargeable activities recognized by Justice Blackmun, Justice Marshall provides the fifth vote necessary to constitute a majority. The Scalia opinion, however, is more favorable to the unions than the counterpart position taken by Justice Blackmun on the issue of the chargeability of certain out-of-the-bargaining-unit litigation. Because Justice Marshall takes a more expansive position on chargeability than does Justice Scalia, the portion of the Scalia opinion relating to litigation expenses can be treated as representing the view of the Court.

III. Out-of-Unit Activities

Justice Blackmun's opinion supporting chargeability of out-of-unit activities is joined by four other Justices. Therefore, it commands a majority of the Court. Blackmun states:

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9. *Lehnert*, 111 S. Ct. at 1959.
10. *Id.* at 1979.

> We therefore conclude that a local bargaining representative may charge objecting employees for their pro-rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit.[11]

Thus, the unions dodged a potentially lethal bullet. Blackmun qualifies this test, however, by stating, "there must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization."[12] Blackmun explains that non-chargeable services could include charitable donations or interest-free loans to an unrelated bargaining unit. Of course, these examples pose no problems for most state and national affiliates because they have almost never charged objecting employees for charitable donations or loans to unrelated bargaining units. However, Blackmun does carve out litigation as an exception to the general rule that state and national affiliate services are chargeable. (Litigation will be discussed at length *infra.*)

The majority also holds that, as a benefit of being associated with the state and national affiliate, unions can charge for sending delegates to state and national conventions, even though the conventions may not be devoted solely to the activities of the local association. This conclusion is based on Blackmun's reliance on the third prong of his test for chargeable expenditures; i.e., he concludes that there is no additional First Amendment infringement.[13]

Justice Scalia, on the other hand, would not allow unions to charge for sending delegates to state and national conventions, unless the conventions involved matters "specifically relevant to the union's bargaining responsibilities."[14] However, Justice Scalia would allow unions to charge nonmembers for annual fees charged by parent organizations in exchange for "contractually promised" availability of services.[15] This appears to be contradictory because a primary means for bargaining unit members to find out about services provided by parent organizations is to attend conventions. Joining Justice Scalia's minority opinion, Justice Kennedy stated in a separate opinion that the Scalia test should be applied on a case-by-case basis and that "rigid categories such as conventions

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11. *Id.* at 1961.
12. *Id.* at 1961-62.
13. The majority rejects the notion that *Ellis* is distinguishable because the convention expenses approved there were not for conventions sponsored by affiliated parent unions. *Id.* at 1964-65.
14. *Id.* at 1980.
15. *Id.* at 1981.

(chargeable) and extra-unit litigation (non-chargeable)" should not be established.[16]

The majority opinion is a major victory for unions on the out-of-unit issue. Affiliation costs and costs of attending state and national conventions can clearly be charged to nonmembers. Under the language in the majority opinion, this is not an open question.

IV. Miscellaneous Professional Activities

The majority opinion allows the union to charge nonmembers for what it terms "informational support services." This includes those portions of a magazine published by the state affiliate that "concerned teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA and other miscellaneous matters."[17] Again, Blackmun's emphasis is on the third prong of his test for chargeable activities. The chargeability of these expenditures is based on the fact that there is "no additional infringement of First Amendment rights."[18]

Blackmun compares these expenditures to "*de minimis* social activity charges approved in *Ellis*."[19] It appears, however, that the rationale for charging these expenditures is based on their relationship to First Amendment rights, rather than on how much money was spent.

In this regard, *Lehnert* is strongly pro-union. These types of informational support services are attractive to members, particularly in unions composed largely of professional persons with no history of labor turmoil. The union is able to provide benefits beyond negotiating wages, hours, and working condition. These additional benefits allow it to attract and retain membership; and it can fund these activities in part through fair share fees.

Award programs are also important to local unions, which rely heavily on volunteers to do their work. These volunteers can be acknowledged through the awarding of plaques, pins or the like, and award banquets can be held, without deducting any of the expenditures for these activities from the fair share fee.

V. Lobbying

The biggest surprise to unions in *Lehnert* is that they can no longer charge for most lobbying activities. Prior authority from state and federal

16. *Id.* at 1982.
17. *Id.* at 1964.
18. *Id.*
19. *Id.*

courts was almost unanimously to the contrary. For example, the Third Circuit Court of Appeals, in *Robinson v. State of New Jersey,*[20] held that:

> 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 from any other form of union activity that may be financed with representation fees.[21]

Similarly, the Ninth Circuit Court of Appeals, in *Champion v. State of California,*[22] found that lobbying activities are chargeable and recognized the importance of legislation affecting public employment.[23]

State courts followed suit in upholding the chargeability of lobbying expenses. For example, the Indiana Court of Appeals followed *Robinson* in holding:

> So long as lobbying activities are pertinent to the collective bargaining duties of the exclusive representative and are not merely for the purpose of advancing the political or ideological positions of the exclusive representative, they are properly assessable against non-members.[24]

The unions assumed that the Supreme Court would not depart from the nationwide norm regarding chargeability of lobbying expenses.

However, Justice Blackmun, joined by Justices Rehnquist, White, and Stevens, held that:

> Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.[25]

Thus, under the Blackmun analysis, some lobbying activities are chargeable, and some are not.

Lobbying expenses are chargeable only if they relate to the ratification or implementation of a collective bargaining agreement. This relationship could be established if, for example, the salary schedule in the collective bargaining agreement were tied to appropriations by the legislature. For

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20. 741 F.2d 598 (3d Cir. 1984), *cert. denied,* 469 U.S. 1228 (1985).

21. *Id.* at 609.

22. 738 F.2d 1082 (9th Cir. 1984), *cert. denied,* 469 U.S. 1229 (1985).

23. *Id.* at 1086. *Champion* was not followed in a teacher collective bargaining case due to specific language of the state teacher bargaining law not applicable to the public employees in *Champion. Cumero v. Public Employment Relations Bd.,* 778 P.2d 174 (Cal. 1989).

24. *Abels v. Monroe County Educ. Ass'n,* 489 N.E.2d 533, 541 (Ind. App. 1986), *cert. denied,* (1987).

25. *Lehnert,* 111 S. Ct. at 1959.

example, some collective bargaining agreements provide that teacher salaries will be increased by an identified percentage of "new money" appropriated by the legislature for use in the school corporation. This pool of new money would then be divided among the teachers according to a formula identified in the agreement. In this situation, lobbying regarding legislative appropriations would clearly be connected to the implementation of the collective bargaining agreement.

Lobbying expenses incurred in a more public context, however, are not chargeable. For example, lobbying the legislature for general appropriations to fund education statewide would probably not relate to the ratification or implementation of a particular bargaining agreement.

Justice Blackmun's opinion regarding lobbying appears to be primarily based on his application of the third prong of the chargeability test. When explaining the burden upon freedom of expression, for example, he notes that such burden is "particularly great" when in a "public context."[26]

Justice Scalia's four-member minority opinion rejects the chargeability of the lobbying expenses incurred by the Ferris Faculty Association. However, whether Justice Scalia would reject all lobbying expenses as nonchargeable is an open question. Other lobbying expenses must be judged under the general test presented by Judge Scalia to determine whether they were incurred as part of the duty of fair representation owed to non-members. If they were so incurred, they are properly chargeable. Accordingly, it appears that Justice Scalia would agree with Justice Blackmun to the extent that private lobbying expenses, such as those related to funding salaries in a particular contract, would be chargeable under either the Blackmun or the Scalia opinion. Since Justice Marshall takes the most pro-union approach and supports the chargeability of all expenditures at issue, clearly a majority of the court under either the Blackmun or Scalia opinion would allow lobbying expenditures to be charged if they relate to ratification or implementation of a local bargaining agreement.

In any event, the general holding regarding lobbying is bad news to national unions because the majority of their lobbying is not related to a particular local contract. Nevertheless, there is definitely a gray area that could spawn future litigation in drawing lines between different types of lobbying. While lobbying for support of a political candidate who favors the educational agenda of the union is not likely to be chargeable, lobbying to fund a local collective bargaining agreement is. Although the public-versus-private notion of lobbying may illustrate this distinction to some extent, many lobbying expenditures will have to be examined on a case-by-case basis.

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26. *Id.* at 1960.

VI. Litigation

The Supreme Court did not do unions any favors in addressing the chargeability of litigation expenses. Litigation expenses were not raised in the Petition for a Writ of Certiorari, nor argued by the parties in their briefs or in oral argument before the Court. Perhaps for this reason, the Court's analysis of litigation is confusing at best.

The chargeability of litigation expenses is addressed in Justice Blackmun's opinion, as well as in the separate opinions of Justices Marshall, Scalia, and Kennedy.

Justice Blackmun's general three-part test for chargeable activities was adopted by four other Justices, namely, Rehnquist, White, Stevens, and Marshall. However, Justice Blackmun would have imposed as an additional requirement for litigation expenses that they can be charged only in the bargaining unit where the litigation arises. In the second paragraph of Part IV(B) of his opinion, Justice Blackmun stated that the First Amendment "prohibits the use of dissenters' fees for extra-unit litigation."[27]

The second paragraph of Part IV(B) did *not* garner the support of a majority of the Court. Only four Justices agree that the costs of extra-unit litigation are non-chargeable. Justice Marshall specifically rejected Blackmun's analysis, finding it not warranted by the Constitution or by logic.[28] Under Marshall's view, the union should be able to charge for all expenses that meet the general test, and there should be no special exception for extra-unit litigation.

Under Justice Scalia's DFR test, the chargeability of litigation is limited to activities which the union has a statutory obligation to perform. Under the DFR test, the representation of members of its unit would include litigation related to cases brought before public employment agencies, for example, as well as cases arising out of arbitration provisions and collective bargaining agreements.

Once an expense meets Justice Scalia's general standard for chargeability, Justice Scalia's test does *not* require that any expenses be charged only in the bargaining unit where they were incurred. In fact, Scalia expressly rejects the "limited to the unit" analysis, finding that the state and national affiliates can charge a flat rate for their services. Litigation services are not excluded.

Justice Scalia explained:

> Another item relating to affiliated organizations that the Court allows to be charged consists of a pro-rata assessment of NEA's costs in providing collective bargainng services (such as negotiating advice, economic analysis, and informa-

27. *Id.* at 1964.
28. *Id.* at 1973.

> tional assistance) to its affiliates nation wide, and in maintaining the support staff necessary for that purpose. It would obviously be appropriate to charge the cost of such services *actually provided* to Ferris *itself,* since they relate directly to performance of the union's collective bargaining duty. It would also be appropriate to charge non-union members an annual fee charged by NEA in exchange for contractually promised availablity of such services from NEA on demand. As Ferris conceded at argument, however, there is no such contractual commitment here. The Court nonetheless permits the charges to be made, because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources, when the local is in need of them." . . . I think that resolution is correct.[29]

Therefore, under Justice Scalia's DFR test, any expenses arising from the union's duty of fair representation are chargeable to the fair share fee and can be assessed against nonmembers. No limitation to a particular unit is placed on these charges. The state and national affiliates can charge a flat rate for all such services, including litigation.

Justice Kennedy agrees with Justice Scalia and clearly would allow the union to charge for costs of extra-unit litigation. Justice Kennedy considers litigation expenses to be part of the costs of affiliation with state and national parent organizations:

> Justice BLACKMUN removes litigation and lobbying from the scope of the Court's holding that a local bargaining unit may charge employees for their pro-rata share of the costs associated with "otherwise chargeable" expenses of affiliate unions. This makes little sense if we acknowledge, as Justice SCALIA articulates, *ante,* at 1980-1981, that we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a pre-paid but non-contractual consulting or legal services plan.[30]

Therefore, a majority of the Court, collectively Justices Scalia, O'Connor, Souter, Kennedy, and Marshall, would apparently allow unions to charge for those litigation expenses that meet the DFR test, without requiring a showing that the expenses were incurred in a particular unit.

Under Justice Scalia's test litigation in *Evansville-Vanderburgh School Corporation v. Roberts*[31] would be chargeable. In *Roberts,* the Evansville Teachers Association, with financial support of the state and national affiliates, filed an unfair practice complaint with the state administrative board (Indiana Education Employment Relations Board) alleging that the school corporation had implemented a teacher evaluation plan without any discussion with the union. Under Indiana law, discussion is a *duty*

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29. *Id.* at 1980-81 (citations omitted).
30. *Id.* at 1982.
31. 405 N.E.2d 895 (Ind. 1980).

owed by the union to all teachers, despite their status of membership.[32] Under Justice Scalia's test, all expenditures of the state and national affiliates related to this litigation would be chargeable not only to nonmembers in the Evansville-Vanderburgh unit, but to nonmembers across the board.

Another case involving litigation expenditures that would be chargeable under Justice Scalia's test is *Eastbrook Community Schools Corporation v. Eastbrook Education Association.*[33] There the school corporation attempted to vacate an arbitration award in a grievance arising under the collective bargainng agreement. The court upheld the arbitrator's award, finding that the arbitrator had acted within his jurisdiction. This type of litigation concerns enforcement of the terms of a collective bargaining agreement and, therefore, meets Justice Scalia's DFR criterion.

On the other hand, Justice Scalia's test does not cover litigation that does not relate to the union's statutory duties. For example, ini *Werblo v. Hamilton Heights School Corporation,*[34] the state affiliate sponsored litigation on behalf of an individual teacher who was dismissed for alleged insubordination. Werblo claimed that she was dismissed in violation of her tenure and constitutional rights and brought an action under the Indiana Teacher Tenure Act and 42 U.S.C. § 1983. She prevailed under the state statute, and the § 1983 claim was settled. Expenses for this type of personal litigation on behalf of an individual would not likely be chargeable under Justice Scalia's test. (Under the Blackmun test, however, the local affiliate could charge for this type of litigation, provided the teacher involved was a member of the local bargaining unit.)

In the future, unions may choose to separate these types of litigation. The Scalia opinion appears to represent the majority of the court. Therefore, unions can charge for all litigation expenditures that meet the DFR test.

If the state and national affiliate pay most or all of a local union's litigation expenses, under the Scalia test the local union may choose to discontinue legal services to nonmembers for claims involving individual statutory or constitutional rights, because such claims would not relate to the local contract. This litigation would include claims by individual nonmembers that a school board cancelled a contract in violation of a state tenure law, e.g., arbitrarily or without sufficient evidence in support of statutory grounds for dismissal.

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32. IND. CODE §§ 20-7.5-1-2(o), 20-7.5-1-5.
33. 566 N.E.2d 63 (Ind. Ct. App. 1990).
34. 537 N.E.2d 499 (Ind. 1989).

If a local union pays most of its own litigation expenses, it could benefit more from application of the Blackmun test. The local union could simply adjust the amount of the fee to reflect the amount of litigation arising out of its own unit. This system, however, is simply unworkable if the state affiliate directs litigation because it would have to separate litigation expenses by unit and calculate fair share fees differently for each.

Since Justice Blackmun's opinion is so generally favorable to the union's positions, it is difficult to discern why he carved out an exception for litigation and applied the unit-by-unit approach to that expenditure only. Perhaps this distinction lies in the fact that Justice Blackmun also wrote the *Ellis* opinion, in which the Court held, as a matter of statutory interpretation, that litigation is only chargeable unit-by-unit.

The district court judge in *Lehnert*[35] had a veritable field day with Justice Blackmun's analysis of litigation expenses in *Ellis*. He characterized Blackmun's approach as "unique to litigation," and stated:

> Indeed, the requirement of a unit-by-unit breakdown of chargeable expenditures has never, to my knowledge, even been suggested in any of the Supreme Court's prior (or subsequent) union/agency shop decisions. Nevertheless, the Court offered no explanation of why the RLA required such a cost allocation and no rationale of why this type of allocation was appropriate to litigation expenditures and no others.[36]

The district court found that *Ellis* is not constitutionally binding on this issue because it involved a statutory rationale. Moreover, the court rejected the unit-by-unit rationale because it was "deeply troubled by the complete lack of rationale offered for the *Ellis* requirement of a unit-by-unit breakdown" as well as the "adverse implications of according constitutional significance to this particular statutory requirement and applying the new rule to the facts of the instant case."[37] The district court noted the following problems with requiring only litigation expenses to be broken down by bargaining unit:

> (1) Much if not all litigation that is related to the union's duties as exclusive representative addresses issues of shared concern.
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> (2) Since unions operate on a cost-sharing basis, extraordinary expenses incurred by any one unit in any given year are spread out over all units represented by the union, enabling the union to effectively represent individual members and units in hard cases that will have an impact on the greater whole while maintaining stable dues levels.

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35. 643 F. Supp. 1306 (W.D. Mich. 1986).
36. *Id.* at 1322.
37. *Id.* at 1324.

(3) A unit-by-unit breakdown of litigation expenditures would logically lead to drastic fluctuations in the amount of the service fee charged to the objecting non-members of individual units.

(4) Since fair share fees cannot legally exceed the amount of dues, a unit-by-unit breakdown of chargeable expenditures would only exacerbate the free rider problem and thereby frustrate the governmental interest that the Court has repeatedly recognized lies at the heart of statutes authorizing union/agency shops.

(5) Imposing a unit-by-unit breakdown of litigation expenses would create an unreasonable and unmanageable administrative burden on the unions.[38]

The district court concluded that Blackmun's unit-by-unit analysis for litigation expenditures is "not warranted by the Constitution or by logic under the facts of the case at bar."[39]

In light of the district court's stinging indictment of Blackmun's approach to litigation expenditures, it is not surprising that Blackmun addressed the issue, even though it was not directly raised in the Petition for Certiorari. Blackmun attempted to constitutionalize the litigation issue, which had previously been limited to a statutory analysis. Blackmun wanted a chance to say, "Yes, it does make sense."

VII. Public Relations

Under *Lehnert,* certain public relations activities are not chargeable. The Court held:

> [T]he public-relation activities at issue here entailed speech of a political nature in a public forum. More important, public speech and support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it.[40]

As with lobbying, the Supreme Court did not extend a blanket prohibition upon charging for public relations activities. Rather, the Court sought to alleviate the burden upon First Amendment rights imposed by activities that are political or public in nature. These public relations activities are "external" in that they do not relate to collective bargaining functions per se.

However, the Blackmun majority did not prohibit charging for "internal" activities that do not substantially burden First Amendment rights. The Court explained that activities related to "informational support services" that are "neither political nor public in nature" are chargeable ac-

38. Paraphrased from *Id.* at 1324-25.
39. *Id.* at 1325-26.
40. *Lehnert,* 111 S. Ct. at 1964.

tivities. A union can charge for these activities even though they may not "directly concern" the bargaining unit, but are for the "benefit of all."[41]

Accordingly, the Court held that the union could charge for:

> Those portions of the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs of the NEA, and other miscellaneous matters.[42]

To say that a certain activity involves "public relations" is insufficient to determine whether it substantially burdens First Amendment rights. A union may not generally charge for "external" public relations activities such as "informational picketing, media exposure, signs, posters and buttons."[43] The union may, however, charge for "internal" informational support services, even though they do not directly concern members of the bargaining unit. It appears that it makes a difference *where* the activity takes place.

This approach is clearly inconsistent with other sections of Blackmun's opinion. "Informational picketing" is non-chargeable when related to "public relations," but chargeable when performed in preparation for an illegal strike.[44]

From a union viewpoint, activities revolving around a particular bargaining impasse must be considered chargeable under the majority opinion in *Lehnert.* However, expenses not devoted to a specific bargaining dispute and efforts to improve the reputation of public employees or generally to increase funding are not chargeable.

VIII. Illegal Strikes

Expenses relating to preparing for, but not participating in, illegal strikes are chargeable. Justice Blackmun addressed this issue in Part IV(F) of his opinion, joined by Justices Rehnquist, White, Stevens, and Marshall. Recognizing that preparation for potential strikes is an effective bargaining tool, Justice Blackmun stated:

> Petitioners can identify no determination by the State of Michigan that mere preparation for an illegal strike is itself illegal or against public policy, and we are aware of none. Further, we accept the rationale provided by the Court of Appeals in upholding these charges that such expenditures fall "within the range of reasonable bargaining tools available to a public sector union during contract negotiations.[45]

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41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1965.
45. *Id.* (citation omitted).

Blackmun concluded that the strike preparation activities aid in contract negotiations, "enure to the direct benefit of the dissenters' unit," and "impose no additional burden on First Amendment rights."[46]

Thus, Justice Blackmun again relies upon the third prong of his test for chargeability in basing his analysis primarily on the burdening of First Amendment rights imposed by the activity.

In his separate opinion, Justice Kennedy agrees with the majority that strike preparation activities are chargeable even under Justice Scalia's test:

> With respect to the strike preparation activities, I agree with the majority that these are indistinguishable in substance from other expenses of negotiating a collective bargaining agreement. I would find, under Justice SCALIA's test, that it was reasonable to incur these expenditures to perform the duties of an exclusive representative of the employees in negotiating an agreement.[47]

In fact, Justice Scalia's DFR test appears to cover strike preparation activities. Justice Scalia, however, finds that, even if strike preparation activities promote the union's bargaining objectives, they are not "undertaken as part of the union's representational duty."[48] This distinction makes no sense. As pointed out by Justice Kennedy, strike preparation activities appear no different from other expenses related to negotiating a collective bargaining agreement. Further, as suggested by Justice Blackmun, Justice Scalia's opinion regarding illegal strikes is illogical because he would allow unions to charge for the costs of affiliation, even though the state may not require unions to provide those services. The rationale that the costs of affiliation "aid" the local union in performing its statutory duties must be the rationale for allowing these expenditures to be chargeable. Nevertheless, Justice Scalia finds that strike preparation activities are not chargeable despite the fact that they also would aid the local union in performing its statutory duties in negotiating an agreement.[49]

Although, as previously noted, preparation for illegal strikes is clearly chargeable under the majority opinion, so-called public relations expenditures, such as "informational picketing, media exposure, signs, posters and buttons,"[50] are not chargeable. Thus, the same activities appear to be chargeable if called "strike preparation," but not chargeable if called "public relations." Unions may draw their own conclusions as to how best characterize activities to maximize the amount of the fair share fee.

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46. *Id.* at 1965-66.
47. *Id.* at 1981.
48. *Id.*
49. *Id.* at 1966 n. 6.
50. *Id.* at 1964 (citation omitted).

IX. Conclusion

The primary areas of litigation that will likely evolve from the *Lehnert* opinion are lobbying and litigation. Unions should anticipate that they may have to litigate what type of lobbying relates to the "ratification or implementation" of a collective bargaining agreement and what type of lobbying does not. In addition, unions will likely have to litigate what type of litigation falls under Justice Scalia's DFR test.

Unions will likely stop providing nonmembers with discrete services for which they cannot charge. For example, a union may choose not to provide litigation services to vindicate the individual statutory or constitutional rights of a non-member. A union cannot, however, stop providing an indirect benefit to a nonmember when it litigates a statutory or constitutional claim on behalf of a member; a favorable interpretation necessarily helps everyone similarly situated.

Likewise, unions cannot stop providing an indirect benefit to nonmembers when the union lobbies for public employee salaries, even though non-members pay nothing for this service. At least as to lobbying, the union cannot practically separate services to be provided to members only.

Therefore, as to lobbying and some types of litigation services, the "free rider," outlawed by the Supreme Court in *Abood,* may be back on the bus!