CHAPTER 6

UNION SECURITY IN THE CONTEXT OF LABOR ARBITRATION

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Federal law does not directly require employees to formally affiliate with the labor organizations that represent them in collective bargaining. Rather, in an exception to the general prohibition against employer "encouragement" of union causes, the law permits an employer and a labor union to enter into a contract whereby the employer agrees to require employees to become union "members" as a condition of their continued employment.

Union security agreements have been a ready source of litigation before the National Labor Relations Board (NLRB) and the courts.[1] As a part of the collective bargaining agreement, union security agreements are a frequent subject of arbitration. The legal and the contractual issues are often the same.

Coverage of Union Security Agreements

Union security provisions apply only to employees who are within the bargaining unit covered by the agreement. Owners[2] and supervisors[3] are excluded. Arbitrators are divided over the treatment of employees who are members of the unit under the literal terms of the contract but who would be excluded from it under the National Labor Relations Act (NLRA). Some defer to external law; others do not.[4]

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[1] *See generally* Haggard, Compulsory Unionism, the NLRB, and the Courts (1977).

[2] *Machinists, Inc.*, 81 LA 169 (Merrifield 1983); *Beyerl Chevrolet*, 68 LA 343 (Bolte 1977).

[3] *Hacienda Health Care*, 101 LA 551 (Levy 1993).

[4] *Compare Hartford Provision Co.*, 89 LA 590 (Sacks 1987) *with Modesto Milling*, 78 LA 249 (Craves 1982).

Section 8(a)(3) of the NLRA[5] purports to authorize employers and unions to agree to make union "membership" a condition of employment within 30 days after hire. The section, however, has a proviso that an employee may not be terminated for nonmembership caused by reasons other than a failure to tender periodic dues and fees.

After initial uncertainty about this, in *Communications Workers v. Beck*[6] the U.S. Supreme Court explicitly affirmed what had been implicit in its decisions for many years, namely, that all an employee could be required to do as a condition of employment was to tender the payment of money to the union; formal membership in an associational sense could not be required.

Despite *Beck,* union security agreements have continued to be drafted in terms of requiring "membership." Although the NLRB, the courts, and most arbitrators now recognize that this does not mean what it appears to mean, individual employees, not well versed in the witty nuances of labor law, have continued to be misled. This prompted the Board's recent decision in *Electronic Workers (IUE) Local 444 (Paramax Systems),*[7] where the Board held that unions have an affirmative duty to inform employees that formal membership is not required.

A union's breach of this statutory duty does not, however, relieve the employer of the contractual obligation to continue to withhold union dues. This, at least, is the conclusion that the arbitrator reached in *Great Western Carpet Cushion Co.*[8]

Fair Share Agreements

Although the general nature of the union security obligation has been clarified, controversy still exists over exactly how much the union may charge nonmembers and what the union may use this money for. Since most of the recent arbitration decisions dealing with "fair share" agreements have relied extensively on "external law" in determining what the agreement means, a brief review of that law is in order.

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[5]29 U.S.C. §158(a)(3).
[6]487 U.S. 735, 128 LRRM 2729 (1988).
[7]311 NLRB 1031, 143 LRRM 1161 (1993).
[8]95 LA 1057 (Weiss 1990).

External Law

The courts have focused on two issues: (1) the kind of expenses that may be paid for out of compulsory dues, and (2) the procedures a union must follow when a nonunion employee challenges an expenditure.

The Supreme Court first began to define permissible fair share expenses in 1961. In *Machinists v. Street*,[9] the Court held that the Railway Labor Act does not permit a union, over the objections of its nonmembers, to expend compelled agency fees on political causes. The Court reached the same conclusion as a matter of constitutional law in *Abood v. Detroit Board of Education*.[10] In *Ellis v. Railway, Airline & Steamship Clerks*[11] the Court expanded on the class of prohibited expenditures, holding that, as a matter of statutory law, a union operating under the Railway Labor Act could tax a nonmember employee only for those expenses "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative . . . in dealing with the employer on labor-management issues."[12] Subsequently, in *Communications Workers v. Beck*[13] the Court applied the same test to union security agreements negotiated under the NLRA. Later, in *Lehnert v. Ferris Faculty Ass'n*[14] the Supreme Court essentially fused the private-sector and the public-sector limits.[15] The Court held that the activities for which compulsory dues can be spent by a public-sector union "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."[16]

The second major issue that the courts have faced in dealing with fair share agreements relates to the adequacy of the procedures that are available to fee payers who object to the union's use of the money. In *Chicago Teachers Union Local 1 v. Hudson*[17] the Supreme Court held, as a matter of constitutional law, that a public employee union is required in advance to provide "an adequate

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[9]367 U.S. 740, 48 LRRM 2345 (1961).
[10]431 U.S. 209, 95 LRRM 2411 (1977).
[11]466 U.S. 435, 116 LRRM 2001 (1984).
[12]*Id.* at 448.
[13]*Supra* note 6.
[14]500 U.S. 507, 137 LRRM 2321 (1991).
[15]*See Auto Workers Locals 70, 571, 699, 723, & 6000*, 94 LA 1272, 1275 (Walt 1990) ("standards for public sector and private sector employees closely parallel each other").
[16]500 U.S. at 519.
[17]475 U.S. 292, 121 LRRM 2793 (1986)

explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[18]

The Supreme Court has not addressed the question of the adequacy of procedures under agreements subject to the NLRA or the Railway Labor Act. The Second Circuit, however, has held that these "heightened procedural safeguards" do not apply to private-sector union security agreements.[19]

Arbitration Decisions

If a nonmember employee challenges the amount of the fee and the employer honors that request to reduce the amount of money sent to the union, the union may file a grievance and take it to arbitration. Arbitrators have held, however, that the alleged "illegality" of the amount of the fee is not a defense to the grievance. The employer, rather, is bound by whatever the union certifies as the correct amount.[20]

In lieu of the traditional "union versus employer" type of arbitration, the American Arbitration Association (AAA) has devised a procedure that circumvents the employer's involvement altogether.[21] The rules are designed to satisfy the procedural requirements of *Hudson* and to allow the arbitrator to decide whether the challenged uses of monies are proper.[22] Nearly all of the reported arbitration decisions involving fair share fee challenges have occurred under this procedure. The courts, however, have held that these decisions are not enforceable under section 301, because they are not based on a contract "between an employer and a labor organization."[23] To the extent that these procedures provide a procedurally fair method for resolving these disputes, this reasoning is unfortunate. Not everyone agrees, however, that the procedures are fair or that the decisions under them are consistent with external law.

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[18]*Id.* at 310.

[19]*Price v. Auto Workers*, 927 F.2d 88, 136 LRRM 2738 (2d Cir.), *cert. denied*, 112 S.Ct. 295, 138 LRRM 2536 (1991).

[20]*Springfield, Ill., School Dist. 186*, 91 LA 1293 (Malin 1988); *see also Lutheran Senior City*, 91 LA 1309 (Duda 1988).

[21]American Arbitration Association, Rules for Impartial Determination of Union Fees (June 1, 1986).

[22]*See* Florey, *Fair Share Proceedings: A Case for Common Sense*, 44 Arb. J. 35 (1989).

[23]*Food & Commercial Workers Local 951 v. Mulder*, 812 F. Supp. 754, 142 LRRM 2247 (W.D. Mich. 1993).

Certainly the reported decisions have taken a rather expansive view of what constitutes a "chargeable expense."[24] Unless an expense involves activities that are open only to union members or relate directly to political or ideological matters, that expense is likely to be upheld as chargeable to fee payers. Arbitrator Philip Ross put it in these terms:

> In my view, the aspect of collective bargaining for which compulsory employee fees are unrebatable includes union activities designed to maintain and enhance its effectiveness. Moreover, those activities in which unions have customarily been engaged as a by-product of their historic development as bargaining agents are part and parcel of the American collective bargaining system.[25]

Therefore, it is usually easy enough to concoct some theory that demonstrates the nexus between these expenditures and the union as a bargaining agent. For example, in one case fee payers objected to expenses relating to the operation of a recreational facility on the ground that it was used, in part, by families of bargaining unit members. Arbitrator Alan Walt denied the challenge:

> The evidence reflects the strong belief of the Union that support by family members is essential to the activities in which it engages and that it is a more effective representative when those activities are supported by the entire family. In the case of a strike, for example, the Union contends that "family participation and support becomes crucial" because of the economic hardships that arise.[26]

This sounds very much like a "for the want of a nail . . ." type of reasoning.

Apparently, challenges to the procedures may not be raised in a normal arbitration context. In *City of Bucyrus,*[27] for example, the union grieved when the city stopped deducting fair share fees after employees complained about the rebate procedure. Arbitrator Nicholas Duda held that the alleged legal insufficiency of the procedures would be a defense only if the city could show that the specific provisions had been declared unconstitutional by an appropriate court. The exclusive arbitral method for challenging the adequacy of the union's rebate procedures is thus through the

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[24]*See, e.g., Firemen & Oilers (IBFO) Local 100,* 95 LA 189 (Duda 1990); *American Fed'n of Teachers Local 2121 (California),* 95 LA 25 (Concepcion 1990); *Auto Workers Locals 70, 571, 699, 723, & 6000, supra* note 15; *Transportation Communications Union,* 93 LA 732 (Harkless 1989); *National Educ. Ass'n,* 90 LA 973 (Concepcion 1988).

[25]Unpublished opinion of Philip Ross, *quoted in* Florey, *supra* note 22, at 40.

[26]*Auto Workers Locals 70, 571, 699, 723, & 6000, supra* note 15.

[27]100 LA 427 (Duda 1993).

same AAA-sanctioned procedure used to challenge the amount of the fee itself. This procedure was followed in *Montana Education Ass'n*,[28] where the arbitrator held the *Hudson* requirements were satisfied.

Grandfather Clauses

When an employer and a union enter into a union security agreement for the first time, they often provide a "grandfather clause" for existing employees, making the provision applicable only to persons "hired" after the date of the agreement. A recurring issue has arisen as to whether existing employees who are not members of the original unit become "new hires" when transferred or assimilated into the bargaining unit. Arbitration decisions are divided, most of them holding these employees subject to the union security provision.[29] A few, however, have construed the term "new hire" literally and held that employees transferring into the unit cannot be required to become "members."[30]

Conditions of Discharge of the Employee

Frequently, before an employee can be discharged for nonmembership in a labor organization, the employer or the union must meet certain specified conditions. Arbitrators tend to enforce them strictly.

Method of Notification of Employer. For example, in *Florida East Coast Railway*[31] the union security provision of the contract required the union to notify the employer of an employee's dues delinquency on a special form. Arbitrator Lawrence Seibel held that the use of a slightly different form put the employer under no duty to terminate the employee.

Notification of Employee. A condition precedent that arbitrators will impose, even where the contract does not specifically require it, is that the employee be given notice of breach of the union membership obligation. In *Westinghouse Electric Corp.*[32] the arbitra-

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[28]91 LA 1228 (Corbett 1988); *see also East St. Louis Sch. Dist.*, 88 LA 1122 (Canestraight 1987).

[29]*Pacific Tel. & Tel. Co.*, 61 LA 368 (Block 1973); *Southern New England Tel. Co.*, 61 LA 184 (Zack 1973); *Sargent Eng'r Corp*, 43 LA 1165 (McNaughton 1964).

[30]*See, e.g., Lord Mfg. Co.*, 55 LA 1005 (Keller 1970); *Chrysler Corp.*, 21 LA 45 (Wolff 1953).

[31]45 LA 6 (Seibel 1965).

[32]56 LA 588 (Wolff 1971).

tor held that a union seeking the discharge of an employee has "a fiduciary duty" to give the employee advance notice.

Belated Tender. Whether an employee who is delinquent in the payment of union dues has the right to make a "belated tender" and thus prevent termination is another issue frequently faced by arbitrators. In *Schulze & Burch Biscuit Co.*[33] the arbitrator upheld the discharge of the employee on the ground that a tender of dues after the union has already demanded discharge comes too late; the employer is required to honor the union's demand.

In contrast, many other arbitrators have allowed employees to retain their jobs by tendering the unpaid dues within a designated period after the arbitration decision.[34]

Impartial Treatment

Another right that employees who are delinquent in their dues frequently assert is impartial treatment by the union. Disparate treatment of employees may prevent a discharge,[35] especially if the union appears motivated by considerations other than the failure to pay the required dues.[36]

Maintenance-of-Membership Agreements

A maintenance-of-membership agreement typically provides that an employee who is a member of the union at the time the collective bargaining agreement is signed, or who becomes a member during the term of the contract, must remain a member for the duration of the contract. This was an especially popular form of union security during the early days of the Taft-Hartley Act. Nearly all of the early decisions operated on the assumption that these agreements contemplated true union membership. Under *Beck*, however, the only "membership" an employee can be required to "maintain" is to pay a "fair share" of union bargaining expenses.

Who Is a "Member"? This question frequently arises where, in a prior organizational campaign, an employee signed a union "au-

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[33]42 LA 280 (Solomon 1964).

[34]*See, e.g., Great W. Carpet Cushion Co., supra* note 8; *Westinghouse Elec. Corp., supra* note 32; *Midwest Mfg. Co.*, 44 LA 1163 (Temple 1965).

[35]*See Union Pac. R.R.*, 23 LA 234 (Leary 1954); *Southern Pac. Co.*, 21 LA 471 (Osborne 1953).

[36]*Cf. Schulze & Burch Biscuit Co., supra* note 33.

thorization card." Subsequently, the union negotiates a maintenance-of-membership agreement and seeks to require that everyone who signed a card maintain "membership" in the union—or, in today's terminology, continue to pay an agency fee for the duration of the contract. Whether the union is successful in this claim depends upon the wording of the authorization card, the circumstances surrounding its solicitation, and the subjective intent of the employee who signed the card.[37]

Escape Periods. Under a maintenance-of-membership agreement the employee has the right to resign from membership when the contract terminates. However, when a labor contract is automatically renewed or no hiatus occurs between the effective dates of successive contracts, the right to resign can be effectively denied. For this reason maintenance-of-membership agreements usually provide an "escape period" of a certain number of days before or after the "anniversary date" of the contract. When this term is used in conjunction with contracts of more than a single year, difficulties of construction often result.[38]

Checkoff Agreements

Under a checkoff arrangement the amount that employees owe the union is deducted from their paychecks by the employer and forwarded directly to the union. Federal law, however, requires that the employee consent to this arrangement and imposes certain other limitations. Thus, checkoff arrangements are somewhat complicated and have precipitated a fair amount of litigation.[39] Many of these same issues have also arisen in the arbitration context.

Coverage. Under most collective bargaining agreements checkoff deductions are limited to "initiation fees" and "periodic membership dues." As a result, arbitrators have been required to distinguish those deductions from "special assessments," "fines," and other financial obligations an employee might owe to the union. The test for distinguishing "dues" from "assessments" was stated in *Saco-Lowell Shops*[40] as follows:

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[37] *See, e.g., Rexnord, Inc.*, 77 LA 1166 (Traynor 1981); *Pizza Co.*, 55 LA 1033 (Gross 1970); *Roberts Wholesale Co.*, 49 LA 395 (Krinsky 1967); *Midwest Mfg. Co., supra* note 34.

[38] *See, e.g., Springtrol Inc.*, 59 LA 1307 (Mueller 1972).

[39] *See* Haggard, *Union Checkoff Arrangements Under the National Labor Relations Act*, 39 DePaul L. Rev. 567 (1990).

[40] 25 LA 18 (Hogan 1955).

> [T]he critical distinctions between assessments and dues are that assessments are for special purposes and are limited to a specific period in time. When *both* elements are present in the facts the increase involves an assessment rather than an increase in dues. . . . But where the increase involves both special purpose and [a] specific period in time the proper ruling is that the increase is in reality an assessment. . . .[41]

Union fines usually may not be collected through checkoff arrangements either, thus requiring arbitrators to determine the true nature of the monetary obligation at issue.[42]

Revocation. Most of the checkoff problems that have confronted arbitrators have centered on timing and the circumstances under which the employer's obligation to honor checkoff authorization ceases. This requires an interpretation of not only the collective bargaining agreement but also the checkoff authorization form and federal statutes touching on this matter.

Under section 302 of the Labor Management Relations (Taft-Hartley) Act, a checkoff authorization "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner. . . ."[43] The law has been construed to allow the authorization to be automatically renewable, provided the employee is given a reasonable time to exercise this statutory right of revocation.[44] These provisions, directly or indirectly incorporated into collective bargaining agreements, have been the subject of a considerable amount of arbitral construction. The primary issues have involved those concerning identification of the "escape period" during which an employee may exercise the option of revoking the checkoff[45] and whether an authorization is suspended or automatically revoked during a contract hiatus period.[46]

Collective bargaining agreements frequently require an employee to notify the union of the desire to terminate a checkoff authorization. Indeed, one arbitrator read this requirement into

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[41] *Id.* at 21–22.

[42] *Consentino Price Chopper*, 92-1 ARB ¶8251 (Mikrut 1991) (distinguishing a "fine" from an "initiation fee").

[43] 29 U.S.C. §186(c).

[44] *Machinists Monroe Lodge 770 v. Litton Business Sys.*, 334 F. Supp. 310, 80 LRRM 2374 (W.D. Va. 1971), *aff'd*, 80 LRRM 2379 (4th Cir.), *cert. denied*, 409 U.S. 879, 81 LRRM 2391 (1972).

[45] *See, e.g., Houston Eng'rs*, 82 LA 856 (Milentz 1984); *Schadig Corp.*, 71 LA 229 (Marcus 1978).

[46] *See, e.g., Washington Post Co.*, 66 LA 553 (Gamser 1976); *Samsonite Corp.*, 58 LA 469 (Hon 1972); *Sperry Rand Corp.*, 44 LA 965 (Stein 1965); *Jewish Bd. of Guardians*, 43 LA 665 (Rose 1964).

the contract on the ground that it was an administrative necessity.[47] Some arbitrators require strict compliance with contract terms providing for notification in a particular manner;[48] others have been more tolerant.[49]

Whether a resignation from the union effectively revokes a checkoff authorization has been a recurring issue. The general rule is that resignation from union membership does not automatically result in revocation. Arbitrator Joseph Shister in *Bell Helicopter Co.*[50] noted, "The matter of Union membership has absolutely nothing to do with the *continuation* of dues deduction for the relevant annual or collective agreement period."[51] This rule, however, is not universal. For example, in *Chromium Process Co.*,[52] the arbitrator said that "to give them [resignation and revocation] a different effect because of a possible admitted conceptual distinction between revocation of authorization and withdrawal from union membership would be a legalistic approach not in accord with the sound administration of industrial relations."[53]

When an employee is terminated or is removed from the bargaining unit, the checkoff of union dues necessarily stops. Arbitration law is unclear whether this action operates as a total revocation of the checkoff authorization or merely as a suspension, with the obligation renewed when the employee rejoins the unit.[54] Consistent with NLRB law on this issue,[55] arbitrators generally hold that, when the union security agreement underlying the checkoff arrangement has been voided by employees through a Board-conducted deauthorization election, checkoff authorizations either became immediately revocable or are simply void by operation of law.[56] The employer's privilege or duty to stop withholding does not arise, however, until the results of the election are certified by the NLRB and the contract is deemed terminated.[57]

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[47] *Chromium Process Co.*, 45 LA 190 (Altieri 1965).

[48] *Matlock Truck Body & Trailer Corp.*, 72 LA 937 (Ferguson 1979).

[49] *Houston Eng'rs, supra* note 45; *Franklin Elec. Co.*, 50 LA 41 (Kates 1967).

[50] 36 LA 933 (Shister 1961).

[51] *Id.* at 937. *See also Telex Computer Prod.*, 58 LA 961 (Shearer 1972); *Samsonite Corp., supra* note 46; *Franklin Elec. Co., supra* note 49; *Minneapolis-Honeywell Regulator Co.*, 36 LA 1138 (Ruckel 1961); *Ranney Refrigerator Co.*, 13 LA 378 (Whiting 1949).

[52] *Supra* note 47.

[53] *Id.* at 195. *See also Douglas & Lomason Co.*, 58 LA 334 (Brandschain 1972).

[54] *Compare Armstrong Cork Co.*, 65 LA 907 (McKelvey 1975) *and Link Belt Co.*, 16 LA 242 (Baab 1951) *with Electric Energy*, 92 LA 351 (Kilroy 1989).

[55] *See Penn Cork & Closures*, 156 NLRB 411, 61 LRRM 1037 (1965), *enforced*, 376 F.2d 52, 64 LRRM 2855 (2d Cir.), *cert. denied*, 389 U.S. 843, 66 LRRM 2308 (1967).

[56] *North Hills Elecs.*, 46 LA 789 (Christensen 1965); *Ferris Sales & Serv.*, 36 LA 848 (Benewitz 1960).

[57] *Morton Salt Co.*, 81-1 ARB ¶8142 (Dworkin 1980).

Union Security and Religious Freedom

In several cases arbitrators have been confronted with the claim that a union security agreement should not be enforced against an employee whose religious beliefs prohibit membership in or even making financial contributions to labor organizations. While some union security agreements make allowances for religious objectors, arbitrators are not inclined to honor religious claims in the absence of an express exception.[58] On the other hand, if the contract contains an express exception, clearly an arbitrable question exists as to whether a particular employee is exempt from agency fee payments.[59]

Remedies

When an employee has failed to pay regular dues and the employer has breached the contract by not terminating that employee, the usual remedy is termination of the affected employee. When an employer is at fault for failing to deduct and remit dues, the usual remedy is to order that the employer make the union whole for the lost dues.[60] Arbitration decisions go both ways on the question of whether an employer forced to reimburse the union for lost dues can "recover" from the affected employees. Some arbitrators have ordered the employer to do this;[61] others have merely allowed it.[62] Especially when the employer has intentionally breached the contract, arbitrators have denied the right to recover from the employees.[63]

Union Security in Right-to-Work States

Although section 8(a)(3) of the NLRA allows employers and unions to negotiate union security agreements, section 14(b) authorizes the states to prohibit these arrangements altogether.[64] Labor arbitrators generally concede that they are bound by

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[58] *Benson Shoe Co.*, 62 LA 1020 (Mass. Bd. of Arb. 1974); *Union Pac. R.R.*, 22 LA 1020 (Warren 1954).
[59] *See California Sch. Employees Ass'n*, 84-2 ARB ¶8549 (Tamoush 1984).
[60] *Great W. Carpet Cushion Co.*, 95 LA 1175 (Weiss 1990); *Fifth Wheel Cafe*, 55 LA 1228 (Zimring 1969); *Savoy Laundry & Linen Supply*, 48 LA 760 (Summers 1967).
[61] *Miller-Smith Mfg. Co.*, 84-2 ARB ¶8414 (Roumell 1984).
[62] *Springfield, Ill., School Dist. 186*, 91 LA 1300 (Malin 1988).
[63] *U.S. Gypsum Co.*, 56 LA 363 (Valtin 1971).
[64] 29 U.S.C. §164(b).

this external law and construe union security agreements accordingly.[65]

Conclusion

Most union security agreement issues going to arbitration involve fairly routine interpretation and application of the agreements. In some respects union security arbitrations are no different from those over other contract terms; however, they do have two distinguishing characteristics.

1. *Dependence on External Law.* No portion of the collective bargaining agreement is more directly and thoroughly regulated by law than those provisions dealing with union security and checkoff. Therefore, the debate over arbitral reliance on external law[66] is particularly relevant here. The issue received fairly extensive discussion in *Hartford Provision Co.*,[67] where the arbitrator summarized the controlling principles as follows:

> Some arbitrators have taken the position that arbitrators should not consider issues outside the contract; others have said that arbitrators should freely consider external law. A middle position has been that an arbitrator should consider external law only when, in enforcing the contract, he would necessarily require a party to do something in apparent violation of external law. In other words, the arbitrator should not make an award which he believes will require someone to violate the law.
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> [T]here are [also other] situations where it is appropriate for the arbitrator to consider external law. One is where a statute has been incorporated by reference into the collective bargaining agreement. It is also appropriate for the arbitrator to consider external law when he must interpret an ambiguous provision of the contract. After all, as between two interpretations, one consistent with the external law and the other inconsistent, why pick the latter, when it will very likely lead to further proceedings in the dispute?[68]

Several factors mitigate in favor of liberal reliance on external law in the union security context. *First*, since contract language

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[65] *See Dyncorp Wallops Flight Facility*, 101 LA 1033 (Jones 1994); *Iowa-Illinois Gas & Elec. Co.*, 78-1 ARB ¶8047 (Warns 1977).

[66] *See generally* Feller, *Arbitration and the External Law Revisited*, 37 St. Louis U. L.J. 973 (1993).

[67] *Supra* note 4.

[68] *Id.* at 592.

frequently tracks the statutory language, we can reasonably assume that the parties intended to incorporate the statutory substance into the contractual framework—unless, at least, a contrary intent is clearly manifested. *Second,* and in a related vein, since the statutory and contractual regulation of union security arrangements are so thoroughly enmeshed, all of those issues should be resolvable in the same forum. Whether arbitration should be such a forum is, however, a separate matter. *Third,* given the approval that both the Supreme Court[69] and Congress[70] have recently given to arbitral resolution of statutory disputes in general, one can hardly contend that this is not a proper function of the arbitral process.

2. *The Interests of Individual Employees.* This is the second distinguishing characteristic of union security disputes. In the typical arbitration the interests of the grievants involved in the dispute are usually coincident with those of the union representing them. This is not true in arbitrations involving union security and checkoff arrangements. These provisions are primarily for the benefit of the union and are designed to compel employees who are not true members of the union to support the union financially. The number of these coerced union supporters has been estimated at roughly 3 million[71]—a not insignificant number. Nor are the interests of these employees necessarily coincident with those of the employer. Many employers do not regard union security arrangements as an unmitigated evil. Union security is often used as a valuable bargaining chit that the employer exchanges in return for something of greater economic value. Some employers even view "compulsory union membership" as affirmatively desirable in that it provides an additional source of control over potential troublemakers or wildcat strikers.

As a result, many violations go unremedied. The employer acquiesces in the union's demands, and the adversely affected employee either is unaware of the violation or lacks the power to file a grievance individually. Even when employers resist union demands and grievances are filed, do the employers always litigate union security issues as vigorously as they would an issue directly affecting the pocketbook or the ability to manage?

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[69] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

[70] Civil Rights Act of 1991, §118.

[71] Kranish & Butterfield, *Political Funding by Unions Targeted; Bush Signs U.S. Order on Using Member Dues,* Boston Globe, Apr. 14, 1992, at 3.

The AAA-sanctioned fair share arbitrations are more troublesome. Since the participants are limited to the union and the objecting employees, the representation an employer might provide in a normal union-employer arbitration is lacking. Moreover, protesting employees often are neither represented by counsel nor possess the expertise to evaluate and challenge the union's complicated and extensive financial data. It is to the credit of arbitrators who have heard some of these cases that they have attempted to assist the employees in framing the issues and in evaluating the financial data. One can, however, seriously question whether this is either appropriate or adequate. The fact that the arbitrator is paid by the union raises serious "appearance of justice" questions.

The problem is even broader than that. After more than 50 years under the NLRA, employers, unions, and arbitrators have become parts of an essentially conservative, well-entrenched, labor-management relations "establishment." The parties are familiar with each other and with the spoken and unspoken "rules of the game." Exclusive representation, collective contracts, the coincidence of employee and union interests, and the supremacy of the group over the individual are the fundamental premises underlying this miniature, unionized industrial society. Dissident employees do not fit easily into this cozy picture. They are not part of the "club." They reject the fundamental premises. They resent the compulsion they have been subjected to by their employer and a union that they dislike. And they are justifiably suspicious of and cynical about any process, allegedly created to vindicate their rights, that is established and controlled by one or both of these parties.

Conversely, it is not too hard to imagine the annoyance that both employers and unions might feel when these employees persist in the assertion of their rights. Arbitrations and fair share proceedings can be expensive and time consuming; some of the objections are more ideological than legal in their foundation; and pro se litigants are the bane of judges and adversaries alike. Although the "establishment" has provided procedures for the adjudication of these disputes, it has done so only because the law requires it. In sum, it is not an environment in which dissident employees are likely to feel welcome. In light of these considerations, the question is this: Are the traditional arbitration and AAA-sanctioned procedures truly capable of providing the kind of justice, and appearance of justice, required in this unusual situation? That the answer to that question might be "no" should be of concern to the arbitration community.

Comment

RAYMOND J. LAJEUNESSE, JR.*

The most significant aspect of Thomas Haggard's paper is his concern that traditional employer/union arbitration and agency fee arbitration under the procedures established by the American Arbitration Association (AAA) may not be truly capable of providing justice or the appearance of justice in cases involving compulsory unionism arrangements, because neither union nor employer represents the interests of the nonunion employees in these cases. Haggard understates that concern with regard to so-called arbitration under AAA *Rules for Impartial Determination of Union Fees.*

What occurs under AAA rules is not truly arbitration. The decision to have the AAA provide the "impartial decisionmaker" required by the U.S. Supreme Court in *Chicago Teachers Union Local 1 v. Hudson*[1] is made unilaterally by the union. The decision maker is unilaterally chosen by AAA, not by mutual agreement of the nonmembers and the union.[2] However, as the courts have held, by "definition, an arbitrator must be a person chosen by mutual agreement." The "essential element of arbitration" is "that the selection of the particular arbitrator or the method of selection of an arbitrator be established by mutual agreement between the parties."[3]

That nonmembers play no part in selecting the decision maker who determines their constitutional or statutory challenges to agency fees is not the only fact that raises a serious question as to the appearance of bias under AAA procedures. Discovery in litigation revealed that several union officials and attorneys, but no representatives of nonmembers, sit on the AAA governing board; union lawyers, but not lawyers for nonmembers, were instrumental in developing AAA rules for these disputes; and, most importantly, although nonmembers have no input, the special pool from

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[1]475 U.S. 292, 307, 121 LRRM 2793 (1986).

[2]*See* AAA, Rules for Impartial Determination of Union Fees (1988) (hereinafter cited "AAA Rule"), Rule 3.

[3]*Bethlehem Mines Corp. v. Mine Workers*, 344 F. Supp. 1161, 1165, 80 LRRM 3069 (W.D. Pa. 1972), *aff'd*, 494 F.2d 726, 85 LRRM 2834 (3d Cir. 1974); *see Associated Plumbing & Mechanical Contractors of Sacramento v. Plumbers Local 447*, 811 F.2d 480, 483–84, 124 LRRM 2824 (9th Cir. 1987); Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books 1985), 135–37.

which the AAA appoints for these cases consists of arbitrators recommended and regularly employed by unions in labor-management disputes. It is reasonable to infer that persons, no matter how well intentioned, whose livelihood depends upon employment by unions to arbitrate disputes with management, but who have no commensurate financial interest in fairness to nonmembers, inevitably have at least an unconscious bias toward unions in agency fee disputes.[4] Since employers and unions, who jointly impose the agency shop, are both adversaries of nonmembers in this context, arbitrators are unlikely to fear that ruling for a union in an agency fee case will reduce their chances of future employment in union-employer disputes.

These factors have been insufficient to convince the lower federal courts that decision makers chosen under AAA rules do not satisfy the *Hudson* requirement of an "impartial decisionmaker."[5] But the appearance of bias causes nonmembers to mistrust and avoid AAA proceedings in these cases, and the Supreme Court has not yet spoken on the issue. The lower courts have relied on an assumption that under AAA rules "the arbitrator may be removed for cause by the parties or if the personal disclosure mandated by the AAA reveals that the arbitrator is potentially biased."[6] However, unlike AAA rules for other kinds of cases, its special rules for agency fee disputes neither require it to disclose circumstances that create an appearance of bias *to the parties* (i.e., the nonmembers) nor permit them *peremptorily* to disqualify an arbitrator, but leave disclosure and disqualification to AAA discretion.[7] Such an arrangement in arbitration was held to violate due process by the Third Circuit in *Rogers v. Schering Corp.*[8]

There are reasons other than potential bias for concluding that AAA agency fee procedures are not an adequate substitute for judicial proceedings. In *McDonald v. City of West Branch, Mich.*,[9] the Supreme Court gave four reasons why arbitration "cannot provide

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[4] *Cf. Albion Pub. Sch. v. Albion Educ. Ass'n*, 344 N.W.2d 55, 57–58 (Mich. Ct. App. 1983), *appeal denied*, 419 Mich. 944 (1984) (arbitrator's employment by union to resolve agency-shop disputes in intraunion scheme "might reasonably give someone who is considering his services [in a labor dispute with the union] the impression that he might favor one litigant over the other"); *see generally Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147–50 (1968).

[5] *See, e.g., Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340–41, 127 LRRM 2929 (2d Cir. 1987).

[6] *Id.* at 340.

[7] *Compare* AAA Rule 4 *with Commonwealth Coatings Corp. v. Continental Casually Co., supra* note 4, at 149.

[8] 165 F. Supp. 295, 300–01 (D.N.J. 1958), *aff'd per curiam*, 271 F.2d 266 (3d Cir. 1959).

[9] 466 U.S. 284, 115 LRRM 3646 (1984).

an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that [42 U.S.C.] §1983 is designed to safeguard."[10] Three of those four reasons apply to agency fee cases.

First, McDonald recognized that "an arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land.'"[11] That is clearly true under AAA rules, because the AAA appoints "an arbitrator from a special panel of arbitrators experienced in *employment relations.*"[12] These are labor arbitrators, whom *McDonald* concluded "may not . . . have the expertise required to resolve the complex legal questions that arise in §1983 actions."[13] That is even more likely true here, where the primary issues are "the difficult line-drawing questions"[14] presented in deciding whether union activities may be charged to nonmembers under the First Amendment, including whether these activities "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."[15] As one prominent constitutional scholar said about a labor board, a labor arbitrator, "when dealing with questions of speech, is more likely to see the problem in terms of labor-management relations than in terms of first amendment interests."[16]

That observation has been borne out by AAA agency fee cases to date, in which the decision makers have almost universally rubberstamped the unions' allocations of their expenses as chargeable. For example, in two cases AAA arbitrators have explicitly refused to follow court decisions squarely on point with the issues before them. In *Indiana State Teachers Ass'n,*[17] the arbitrator declined to follow a holding of the Indiana court of appeals that defensive organizing expenses are nonchargeable to objecting public employees under the First Amendment,[18] rejecting the court's view that coerced support of defensive organizing significantly burdens the nonmember's right not to speak. In *American Federation of Teachers Local 2121 (California),*[19] the arbitrator held that a decision

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[10]*Id.* at 290.
[11]*Id.* (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57, 7 FEP Cases 81 (1974)).
[12]AAA Rule 3 (emphasis added).
[13]466 U.S. at 290.
[14]*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236, 95 LRRM 2411 (1977).
[15]*Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 137 LRRM 2321 (1991).
[16]Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 523 (1970), *cited approvingly in Chicago Teachers Local 1 v. Hudson, supra* note 1, at 303 n.12.
[17]AAA Case No. 52-673-00004-91 (Goldberg 1991).
[18]*Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666, 673, 140 LRRM 2406 (Ind. Ct. App.), *adopted sub nom. Fort Wayne Educ. Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992).
[19]95 LA 25 (Concepcion 1990).

of the California Supreme Court that organizing and most lobbying are nonchargeable under the statute he was interpreting[20] did not apply, because the fee was based on the union's expenditures in a year that predated the court's decision and he thought it would be "unduly cumbersome for the Union to seek to reconstruct its activities."[21]

Second, McDonald relied on the fact that, "because an arbitrator's authority derives solely from the contract, . . . an arbitrator may not have the authority to enforce §1983."[22] Similarly, AAA-appointed decision makers cannot provide all of the relief available in a judicial proceeding, because their authority derives from a union's agency fee procedure.[23] In an action under section 1983 against a public-sector union or in a duty-of-fair-representation action against a private-sector union, if a court finds that the union has treated as chargeable a category of activity that is constitutionally or statutorily nonchargeable, it not only can award damages but it also can enjoin the union from charging objecting nonmembers for that activity in the future.[24] However, union agency-shop procedures typically give the impartial decision maker authority only to require a refund of the part of the fees for the particular year at issue that was collected unlawfully.

The need for injunctive relief was graphically demonstrated by the California Teachers Association (CTA) in 1990. An arbitrator's decision concerning the CTA's 1989–1990 fee held that certain types of expenses, including lobbying on a tax measure, had been unlawfully charged to the objecting nonmembers. Nevertheless, after that decision had been issued, the union treated exactly the same types of expenses as chargeable in calculating the fee for 1990–1991. When the attorney for a group of nonmembers protested, the union's counsel responded that the nonmembers could invoke arbitration again if they did not like what the union had done!

Third, McDonald explained that "arbitral factfinding is generally not equivalent to judicial factfinding," because "'the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery [and] compulsory process . . . are often

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[20] *Cumero v. Public Employment Relations Bd.*, 778 P.2d 174, 183–91, 132 LRRM 2575 (Cal. 1989).

[21] 95 LA at 27.

[22] 466 U.S. at 290 (citation omitted).

[23] *See Food & Commercial Workers Local 951 v. Mulder*, 812 F. Supp. 754, 757, 142 LRRM 2247 (W.D. Mich. 1993), *aff'd*, 31 F.3d 365, 146 LRRM 2842 (6th Cir. 1994).

[24] *See Abood v. Detroit Bd. of Educ.*, *supra* note 14, at 240.

severely limited or unavailable.'"[25] That is clearly the case under AAA rules, under which "conformity to legal rules of evidence [is] not . . . necessary,"[26] and nonmembers have no right to either discovery or compulsory process.[27]

This is a particularly serious deficiency because, as the Supreme Court has repeatedly recognized,[28] the union alone possesses the facts and records that show whether its calculations of chargeable expenses satisfy the constitutional and statutory test for chargeability and the evidentiary burden of proving chargeable expenses. Consequently, although the issues are complex, nonmembers cannot prepare for impeachment and rebuttal in advance of a hearing under AAA rules. Even at the hearing they must depend upon the discretion of the AAA-appointed decision maker to require the union to produce witnesses and documentary evidence not included in its prima facie case.

The Supreme Court's more recent approbation of arbitration of statutory disputes in *Gilmer v. Interstate/Johnson Lane Corp.*,[29] cited by Haggard, does not change the conclusion, based on *McDonald* and its precursors, *Alexander v. Gardner-Denver Co.*[30] and *Barrentine v. Arkansas-Best Freight System*,[31] that proceedings under AAA agency fee rules cannot provide an adequate substitute for a judicial trial. In *Gilmer* the individual required to arbitrate statutory claims had signed an *agreement* to arbitrate *all* claims against the other party.[32] As the Seventh Circuit said in *Farrand v. Lutheran Brotherhood*,[33] "*Gilmer* did not establish a grand presumption in favor of arbitration; it interpreted and enforced the texts on which the parties had agreed." In the typical agency fee case, however, there is no agreement to arbitrate; nonmembers simply inform the union that they wish to pursue the challenge procedure. In these circumstances, as *Gardner-Denver* held, "mere resort to the arbitral forum . . . constitutes no . . . waiver" of a statutory or constitutional cause of action.[34]

Because proceedings under AAA agency fee rules cannot provide an adequate substitute for a judicial trial, it is fortunate, not

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[25]466 U.S. at 291 (quoting *Alexander v. Gardner-Denver Co.*, *supra* note 11, at 57–58).
[26]AAA Rule 14.
[27]*See* AAA Rules 11–16.
[28]*See, e.g., Chicago Teachers Local 1 v. Hudson*, *supra* note 1, at 306 (citing cases).
[29]500 U.S. 205, 55 FEP Cases 1116 (1991).
[30]*Supra* note 11.
[31]450 U.S. 728, 24 WH Cases 1284 (1981).
[32]*See Gilmer v. Interstate/Johnson Lane Corp.*, *supra* note 29, at 23–24.
[33]993 F.2d 1253, 1255, 61 FEP Cases 1029 (7th Cir. 1993).
[34]415 U.S. at 52; *see McDonald v. City of West Branch, Mich.*, *supra* note 9, at 292 n.12.

unfortunate as Haggard says, that decisions under those rules are not judicially enforceable.[35] *Hudson* suggested an "opportunity" for arbitration as an *alternative*, less expensive, more "expeditious," and less formal means to "facilitate a nonunion employee's ability to protect his rights," but *not* as a substitute for "ordinary judicial remedies," which always "remain available."[36] As the Third Circuit recognized in *Hohe v. Casey*,[37] in *Hudson* the Supreme Court "concluded only that unions must provide nonmembers with an alternative to litigation," through which "'*prolonged and expensive litigation might well be averted.*'"[38] *Hohe* therefore held that nonmembers cannot be required to exhaust a union's *Hudson* procedure before seeking judicial resolution of their constitutional claims under section 1983.[39] By the same logic, a court should not defer to or give binding or preclusive effect to the decision-maker's award under such a nonjudicial proceeding.

For all of these reasons the district court in *Bromley v. Michigan Education Ass'n*,[40] an action under 42 U.S.C. §1983 challenging the constitutionality of an agency fee, erred in limiting the plaintiff nonmembers' discovery to the record in a prior AAA proceeding and in deferring to rulings of the AAA decision maker. Indeed, *Bromley* is directly contrary to the Supreme Court holding in *Hudson* that, if nonmembers submit their challenges to agency fees to a union's internal arbitration remedy, the "arbitrator's

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[35] *See Food & Commercial Workers Local 951 v. Mulder*, 141 LRRM 2449 (W.D. Mich. 1992), *adopted*, 812 F. Supp. 754, 142 LRRM 2247 (W.D. Mich. 1993), *aff'd*, 31 F.3d 365, 146 LRRM 2842 (6th Cir. 1994).

[36] 475 U.S. at 307–08 & nn.20–21, 310.

[37] 956 F.2d 399, 139 LRRM 2468 (3d Cir. 1992).

[38] *Id.* at 409 (emphasis in original) (quoting *Railway & S.S. Clerks v. Allen*, 373 U.S. 113, 123, 53 LRRM 2128 (1963)).

[39] 956 F.2d at 408–09; *accord Tierney v. City of Toledo*, 917 F.2d 927, 939–40, 135 LRRM 2801 (6th Cir. 1990). Because a nonmember asserting a constitutional claim cannot be required to exhaust a union's rebate procedures, Haggard is wrong in assuming that the only forum for challenging the constitutional adequacy of such procedures is those procedures themselves. *See Tierney v. City of Toledo, supra*, at 934–35. Although, as Haggard points out, the Second Circuit ruled in *Price v. Auto Workers*, 927 F.2d 88, 92, 136 LRRM 2738 (2d Cir.), *cert. denied*, 112 S.Ct. 295, 138 LRRM 2536 (1991), that *Hudson*'s procedural requirements do not apply under the National Labor Relations Act (NLRA), the Fourth Circuit explicitly held that they do apply under the Railway Labor Act and suggested that the procedural requirements under the NLRA's duty of fair representation are the same as under the First Amendment. *Crawford v. Air Line Pilots*, 992 F.2d 1295, 1301, 143 LRRM 2185 (4th Cir.) (en banc), *cert. denied*, 114 S.Ct. 195 (1993); *see Beck v. Communications Workers*, 776 F.2d 1187, 1203, 120 LRRM 2957 (4th Cir. 1985) (2 to 1 decision), *aff'd en banc*, 800 F.2d 1280, 123 LRRM 2289 (4th Cir. 1986) (6 to 4 decision), *aff'd*, 487 U.S. 735, 128 LRRM 2729 (1988).

[40] 843 F. Supp. 1147 (E.D. Mich. 1994), *appeal docketed*, No. 94-1164 (6th Cir. Feb. 22, 1994).

decision would not receive preclusive effect in any subsequent §1983 action."[41] Since *Hudson* cited *McDonald* for that proposition, it seems obvious that the *Bromley* court erred as a matter of law in not following *McDonald.* If *Bromley* is affirmed on appeal, the practical consequences will be those predicted by the Supreme Court in *Gardner-Denver*: "Fearing that the arbitral forum cannot adequately protect their rights . . . , some employees may elect to by-pass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement . . . would thus be reduced, and the result could well be more litigation, not less."[42]

Comment

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Thomas Haggard raises concerns about the ability of agency fee arbitrations to protect the rights of employees. However, taking the experience of the National Education Association (NEA) as an example, his concerns are, as a practical reality, unwarranted. The agency fee arbitrations conducted under American Arbitration Association (AAA) *Rules for Impartial Determination of Union Fees* (AAA Rules) provide an adequate means of holding unions accountable for their expenditures and protecting objecting fee payers from being forced to support financially any activities that are unrelated to bargaining and impermissibly burden their First Amendment rights. As courts confront the issue of assigning the proper impact of those arbitrations in subsequent litigation under 42 U.S.C. §1983 challenging the determination of the agency fee, they should reach the same conclusion and give proper deference to the arbitrators' decisions.

Regardless of how public-sector unions approached the determination of their agency fees prior to the Supreme Court's decision in *Chicago Teachers Union Local 1 v. Hudson,*[1] that decision has obligated unions to be more accountable to objecting

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[41]475 U.S. at 308 n.21 (citing *McDonald v. City of West Branch, Mich., supra* note 9).

[42]415 U.S. at 59; *accord McDonald v. City of West Branch, Mich., supra* note 9, at 292 n.11.

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[1]475 U.S. 292, 310, 121 LRRM 2793 (1986) (a union seeking to collect agency fees must provide "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending").

fee payers. The knowledge that unions have the burden of proving the chargeability of their expenditures has led NEA to institute a multifaceted procedure that determines the chargeability of hundreds of thousands of transactions in a given fiscal year.

Near, or soon after, the close of each fiscal year, dozens of NEA staff spend several weeks determining the chargeability of activities and expenditures from that year. In order to make these determinations, staff must review tens of thousands of time sheets and vouchers, thousands of pages of publications and reports, thousands of survey questions, and meeting agendas, and analyze their chargeability in accordance with guidelines developed by the NEA Office of General Counsel. These documents were prepared during the ordinary course of NEA business. After staff determinations are completed and summarized in written reports, those reports are subjected to verification by the independent public accounting firm that performs the audit of NEA's basic financial statements.[2] The auditors apply sampling techniques to see whether the chargeable and nonchargeable determinations made by NEA staff were consistent with the guidelines developed by the Office of General Counsel. As a result of this procedure, dissenting fee payers are assured of the reliability of NEA chargeable/nonchargeable calculations. If the fee payers are dissatisfied with those calculations, however, they may challenge them before an impartial decision maker.

Supreme Court precedents have acknowledged that a certain degree of factual imprecision in the calculation of the fee must be expected. In *Hudson* the Court "continue[d] to recognize that there are practical reasons why '[a]bsolute precision' in the calcu-

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[2]Court decisions regarding the role of the auditor have been confusing. In large part this confusion stems from the nature of fee payer attempts to make agency fee procedures unduly burdensome for unions. *See, e.g., Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678, 132 LRRM 2650 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1810, 133 LRRM 3112 (1990); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340, 127 LRRM 2929 (2d Cir. 1987). However, when courts have examined the specific circumstances under which an audit of a union's chargeable and nonchargeable allocations is required, they have found that such verification is legally required only when the union places less than the entire agency fee of objecting fee payers into escrow. *Browne v. Wisconsin Employment Relations Comm'n*, 169 Wis.2d 79, 485 N.W.2d 376, 390–91, 140 LRRM 2647 (1992). *See also Belhumeur v. Labor Relations Comm'n*, 411 Mass. 142, 580 N.E.2d 746, 140 LRRM 2064 (1991). *See also Chicago Teachers Local 1 v. Hudson, supra* note 1, at 310 n.23. *But see Dashiell v. Montgomery County*, 925 F.2d 750, 756, 136 LRRM 2550 (4th Cir. 1991) (court requires audit of chargeable/nonchargeable breakdown but does not analyze *Hudson* in terms of relationship between audit and amount of fee placed in escrow). Auditing chargeable and nonchargeable allocations enables NEA to meet this requirement in states where its affiliates choose to escrow less than the entire amount of the objectors' fees.

lation of the charge to nonmembers cannot be 'expected or required.'"[3] In keeping with this principle, *Hudson* authorizes unions to base the calculation of their fees on expenditures from the preceding year, even though more precise methods of calculation probably could be implemented.[4] In addition, *Hudson* permits a union to satisfy its disclosure requirement to fee payers by providing "the major categories of expenses" as opposed to "an exhaustive and detailed list of all its expenditures."[5] *Hudson* also approves of arbitration as a means of satisfying the requirement that unions provide a reasonably prompt decision by an impartial decision maker. In so doing, the Court expressly rejects the notion that a "full-dress administrative hearing, with evidentiary safeguards, is part of the 'constitutional minimum.'"[6]

Accordingly, when responding to challenges to its agency fee calculations, NEA does not introduce every document relied upon for those calculations, nor does NEA present all the staff involved in the chargeability determinations.[7] Instead, NEA structures its case around documentary evidence showing the process followed in calculating the chargeable percentage of its expenditures. This evidence consists of samples of the above-mentioned documents, illustrating how NEA contemporaneously records all staff activities and expenditures during the course of the year, and how those data are used for payroll purposes, budget development, and reports to Association leadership, as well as for allocating expenditures into chargeable and nonchargeable categories. The evidence also includes the staff reports of chargeable and nonchargeable expenditures derived from those documents, as well as a report from the independent auditors verifying those allocations.

The need to prove its case before an impartial decision maker has prompted NEA to implement its demanding procedure for calculating the agency fee sought from dissenting fee payers. For

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[3]475 U.S. at 307 n.18 (quoting *Railway & S.S. Clerks v. Allen*, 373 U.S. 113, 122, 53 LRRM 2128 (1963)); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 239–40 n.40, 95 LRRM 2411 (1977).

[4]475 U.S. at 307 n.18.

[5]*Id.*

[6]*Id.* at 308 n.21.

[7]*See In re DuQuoin Educ. Ass'n, IEA-NEA*, 4 PERI ¶1064, Case No. 85-FS-0002-S (Ill. Educ. Labor Relations Bd. (IELRB) Opinion and Order, Apr. 8, 1988), at IX-238-240, 273 n.12, *aff'd in part and rev'd in part on other grounds sub nom. Antry v. IELRB*, 552 N.E.2d 313, 335–42 (Ill. App. Ct. 1990) ("It would not have been expeditious for all of the NEA staff involved in the calculations to have testified personally. Indeed such a requirement would be unduly burdensome").

the most part, NEA agency fee determinations are made by arbitrators in proceedings under AAA Rules. Those proceedings satisfy the dictates of *Hudson.* The AAA Rules do not permit the arbitrator to be the unrestricted choice of the union;[8] rather, the AAA makes the selection. While AAA Rules do not require strict adherence to legal rules of evidence, they do provide a quasi-judicial setting for hearing fee-payer challenges to union determination of the appropriate fee.

Numerous federal courts have approved the use of AAA arbitrations for agency fee determinations,[9] rejecting generalized charges that arbitrators are biased in favor of the unions.[10] Concern that arbitrator fees are paid solely by the unions is little more than a red herring. The assumption that arbitrators will favor unions because their future livelihood, that is, selection for grievance arbitrations, depends on currying favor with unions ignores the fact that selection for those arbitrations is made by union *and* employer. It is more reasonable to assume that employers are aware of arbitrator conduct in agency fee arbitrations, and that any apparent partiality toward unions would influence employer selection of arbitrators in subsequent grievance arbitrations.[11] In addition, the lack of mutual selection found in ordinary grievance arbitrations is really not a problem.[12] *Hudson* requires only that the arbitrator not be the unrestricted choice of the union. Arbitrations conducted under AAA Rules satisfy that requirement.[13]

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[8] *Chicago Teachers Local 1 v. Hudson, supra* note 1, at 308 n.21.

[9] *See, e.g., Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1376, 143 LRRM 2305 (9th Cir.), *cert denied,* 114 S.Ct. 439, 144 LRRM 2680 (1993); *Ping v. National Educ. Ass'n,* 870 F.2d 1369, 1372–74, 131 LRRM 2082 (7th Cir. 1989); *Damiano v. Matish,* 830 F.2d 1363, 1371, 126 LRRM 2727 (6th Cir. 1987); *Andrews v. Education Ass'n of Cheshire, supra* note 2. *See also Price v. Auto Workers,* 927 F.2d 88, 94, 136 LRRM 2738 (2d Cir.), *cert. denied,* 112 S.Ct. 295, 138 LRRM 2536 (1991).

[10] *Price v. Auto Workers, supra* note 9; *Damiano v. Matish, supra* note 9; *Andrews v. Education Ass'n of Cheshire, supra* note 2.

[11] *See* Malin, *The Legal Status of Union Security Fee Arbitration After* Chicago Teachers Union v. Hudson, 29 B.C. L. Rev. 857, 891 n.30 (1988). Any notion that employers and unions are united as adversaries of the nonmember fee payers in agency fee arbitrations ignores the reality that a union secures an agency-shop agreement only after hard bargaining. Employers do not give unions the agency shop free of charge. Most employers take a hands-off approach to agency fee arbitrations, under the correct assumption that these procedures are internal union matters. As objecting fee payers frequently have argued, if employers run the risk of liability in §1983 actions challenging the agency fee, they would be more interested in seeing arbitrators rule in the fee payers' favor to reduce the risk of liability in court litigation.

[12] *See* Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books 1985), 135–37.

[13] *Ping v. National Educ. Ass'n, supra* note 9; *Kidwell v. Transportation Communications Union,* 731 F. Supp. 192, 204, 133 LRRM 2692 (D. Md. 1990), *aff'd in part and rev'd in part on other grounds,* 946 F.2d 283, 138 LRRM 2537 (4th Cir. 1991), *cert. denied,* 112 S.Ct. 1760, 140 LRRM 2120 (1992).

Thus, generalized fears that the rights of dissenting fee payers will not be protected by the arbitrators are unfounded. As Haggard acknowledges, experience has shown that the agency fee arbitrator actively scrutinizes union evidence, acting as a sort of ombudsman for fee payers. The role played by the arbitrator may be about to assume new significance. For although Haggard may be correct in his assertion that thus far courts have not held agency fee arbitration decisions in the private sector enforceable under section 301 of the Labor Management Relations Act, the issue of the appropriate effect to accord such arbitrations in subsequent litigation under 42 U.S.C. §1983 challenging public-sector union agency fee calculations is now before the courts.

Much of the criticism of agency fee arbitrations stems from expectations based on traditional grievance arbitrations in the context of collective bargaining. In practice, however, agency fee arbitrations conducted under AAA Rules have developed into an entirely distinct breed of quasi-judicial proceeding. Courts considering the proper degree of deference to accord these proceedings in subsequent section 1983 actions must be cognizant of the special nature of agency fee arbitration. In *Bromley v. Michigan Education Ass'n*[14] the court concluded that in light of the special features of agency fee arbitrations, the arbitrator's factfindings and approval of union accounting procedures utilized in the computation of the fee were entitled to "great deference," and judicial review could properly be confined to the legal issue of whether the union's definitions of chargeable activity categories passed constitutional muster.[15]

In *Hudson* the Supreme Court stated that the "arbitrator's decision would not receive preclusive effect in any subsequent section 1983 action,"[16] citing *McDonald v. City of West Branch, Mich.*[17] However, *Bromley* recognized that because agency fee arbitrations differ significantly from grievance arbitrations, the Supreme Court's rationale behind *City of West Branch* was inapplicable.[18] Unlike a grievance arbitration, where the arbitrator's authority arises from

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[14]843 F. Supp. 1147 (E.D. Mich. 1994), *appeal pending*, Sixth Circuit Nos. 94-1164 & 94-1210.

[15]*Id.* at 1154.

[16]475 U.S. at 308 n.21.

[17]466 U.S. 284, 115 LRRM 3646 (1984). *See also Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 24 WH Cases 1284 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974). The combined effect of these three decisions was to hold that arbitration awards under collective bargaining agreements do not preclude subsequent litigation of certain federal statutory claims.

[18]*See also* Malin, *supra* note 11, at 886–93 n.4.

the collective bargaining agreement, an agency fee arbitrator's authority can be traced to the Supreme Court's mandate in *Hudson.* Moreover, the procedures of an agency fee arbitration are geared more toward protecting the interests of the individual employee. The employee controls the presentation, as opposed to relying on the union. In addition, while a grievance arbitrator's expertise centers on the law of the shop, an agency fee arbitrator's expertise includes the public law regarding agency fee which has been judicially developed. The decisions of agency fee arbitrators confirm this fact. Also, while legal rights at stake in a grievance arbitration focus on the contract, the legal rights at issue in an agency fee arbitration are the same constitutional rights that would be the subject of a section 1983 proceeding.[19] *Bromley* also recognized that although as a general rule, arbitral factfinding is not the equivalent of judicial factfinding, agency fee arbitrations conducted under AAA Rules provide significant procedural protections alleviating the concerns of the Court in *City of West Branch.* For example, AAA Rules provide fee payers with the following rights: (1) representation by legal counsel of their own choosing, (2) a stenographic record of the proceedings, (3) sequestration of witnesses, (4) testimony under oath, (5) cross-examination of witnesses, (6) adjournments for cause, and (7) a written opinion stating the reasons for the award. The rules also authorize the arbitrator to demand additional evidence from the union under appropriate circumstances. When AAA Rules are viewed in light of the requirement that the union bear the burden of proving that the fee is justified, it is clear that agency fee arbitrations provide a satisfactory vehicle for ensuring the accuracy of the fee.[20]

In addition to the *Bromley* factors, agency fee arbitrations are distinguishable from grievance arbitrations regarding remedies. Although grievance arbitrators "very often are powerless to grant

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[19]The significance of these distinctions between grievance and agency fee arbitrations, insofar as the latter serve as superior protection for the individual employee's rights, was recognized by the Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991). Subsequent lower court decisions limiting the reach of *Gilmer* focus on the scope of the authority to arbitrate found in individual agreements and thus are irrelevant to this discussion. The agency fee arbitrator's authority is contained in a single source—the Supreme Court decision in *Hudson. See, e.g., Farrand v. Lutheran Brotherhood,* 993 F.2d 1253, 61 FEP Cases 1029 (7th Cir. 1993).

[20]The court in *Bromley* found that, although the factfinding in an agency fee arbitration is not the equivalent of judicial factfinding, "it is designed to be as close to judicial factfinding as is possible in an arbitral setting." 843 F. Supp. at 1153.

the aggrieved employees as broad a range of relief" as would be available in a statutory-based judicial proceeding,[21] this consideration is irrelevant in an agency fee arbitration. Any constitutional injury that the objecting fee payer could suffer would not occur until after the arbitrator's award, and then only to the extent the award was in error.[22] Since the dissenting nonmembers' fees remain in escrow until after the arbitration award, the arbitrator effectively does possess injunctive power over those fees. Every year the ability of the union to expend dissenters' fees is contingent on the arbitrator's award. That award, in turn, is based on the union's ability to satisfy its burden of proof at the hearing. Given the minimal burden placed on fee payers to challenge a union determination of the reduced fee and thereby cause the arbitration to be held, that "arbitral injunction" is likely to occur each year.

Considering these distinctions between agency fee arbitrations and grievance arbitrations, the court in *Bromley* was justified in according the former a degree of deference that might not be proper for the latter. In holding that the arbitrator's factfindings and approval of union accounting procedures utilized in computing the fee were entitled to great deference, while expressly reserving questions of law for de novo review, the court in *Bromley* attempted to reconcile the special nature of the agency fee arbitration with Supreme Court precedent denying the preclusive effect of a grievance arbitration award on subsequent federal statutory claims.[23]

Whether that decision will be upheld on appeal is uncertain. However, it does provide a satisfactory accommodation of both *Hudson's* express limitation on the impact of agency fee arbitration in subsequent section 1983 litigation—i.e., the denial of claim preclusion—and its mandate that unions provide such arbitrations, a mandate that subsequently led to the development of agency fee arbitration into a satisfactory means of determining issues of fact and the reasonableness of union accounting procedures. As a practical matter, affirmance would make sense. The

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[21] *Barrentine v. Arkansas-Best Freight Sys., supra* note 17, at 745.

[22] *See* Malin, *supra* note 11, at 891.

[23] Thus, the *Bromley* court did not create an "exhaustion requirement." If an agency fee arbitration takes place, dissenting fee payers are not bound to participate before bringing a §1983 action in court, although they might be bound by the arbitrator's factfindings and determinations regarding union accounting procedures. In addition, if, hypothetically, an agency fee arbitration were not held, fee payers could still challenge the fee in court under §1983.

alternative—subjecting the federal court system to hundreds of agency fee challenges annually, each potentially involving the presentation of dozens or even hundreds of union witnesses and hundreds of thousands of recorded union transactions in an attempt to prove or disprove factual issues—would lead to massive delays in fee rebates to dissenting fee payers and in the availability of dissenters' fees to unions,[24] and would add profoundly to clogging the courts.[25] Many courts have already indicated that they do not relish this possibility.[26]

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[24]The fees would remain in escrow; *see Chicago Teachers Local 1 v. Hudson, supra* note 1, at 309–10.

[25]If courts were to permit de novo review of factual determinations made by agency fee arbitrators, fee payers would place less reliance on the arbitration system established by *Hudson*. In *Alexander v. Gardner-Denver Co., supra* note 17, the Court feared that, if there were a rule of deference to arbitration, employees with both contractual and Title VII claims would be tempted to forgo arbitration in favor of going directly to court. *Id.* at 59. However, due to the mandate in *Hudson*, an agency fee arbitration would take place regardless of judicial deference, because arbitration is triggered merely by nonmember objection to union determination of the reduced fee. If an agency fee judicial proceeding were in all respects de novo, the temptation for fee payers to abstain from meaningful participation in the arbitration would be great. However, if courts deferred to the arbitrator's factfindings and limited de novo review to legal questions of chargeability based on the arbitration record, the objecting fee payers would be more likely to participate in a meaningful way in the agency fee arbitrations.

[26]*See, e.g., Hudson v. Chicago Teachers Local 1*, 922 F.2d 1306, 1314, 136 LRRM 2153 (7th Cir.), *cert. denied*, 111 S.Ct. 2852, 137 LRRM 2696 (1991) ("[r]equiring the federal courts to micro-manage the fee calculation in every case challenging a union's fair share fee would place an overwhelming and unrealistic burden on the courts"); *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 433, 134 LRRM 2264 (6th Cir.), *cert. denied*, 488 U.S. 958, 135 LRRM 2872 (1990); *Laramie v. County of Santa Clara*, 784 F. Supp. 1492, 1500 n.4, 144 LRRM 2268 (N.D. Cal. 1992); *Lucid v. City & County of San Francisco*, 774 F. Supp. 1234, 1238 n.4, 138 LRRM 2805 (N.D. Cal. 1991).