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Union Support by Nonunion Bargaining Unit Members in Minnesota Public Employment

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NOTE

UNION SUPPORT BY NONUNION BARGAINING UNIT MEMBERS IN MINNESOTA PUBLIC EMPLOYMENT

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I. INTRODUCTION

The Minnesota Legislature enacted the Public Employment Labor Relations Act1 (PELRA) in 1971.2 PELRA was amended in 1973 to grant certified bargaining unit representatives3 power to assess fees

1. MINN. STAT. §§ 179.61-.77 (1982).
2. See Act of August 31, 1971, ch. 33, § 1, 1971 Minn. Laws Ex. Sess. 2710. The legislature indicated its purpose for enacting PELRA in section 179.61 of the Act which provides that:
   It is the public policy of this state and the purpose of sections 179.61-179.77 to promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare.

   The relationships between the public, the public employees, and their employer governing bodies imply degrees of responsibility to the people served, need of cooperation and employment protection which are different from employment in the private sector. So also the essentiality and public desire for some public services tend to create imbalances in relative bargaining power or the resolution with which either party to a disagreement presses its position, so that unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary.

3. In 1973, a public sector bargaining unit representative became certified by complying with the provisions of Minnesota Statutes section 179.67. If the organization represented over fifty percent of the employees in a unit and the organization so requested, it could become the exclusive representative for the unit. Otherwise, a representative stating that the organization represented at least thirty percent of the employees of the proposed unit could petition for a certification election. Upon receiving a majority of the votes cast in a certification election, the representative was certified as the exclusive representative of that unit. Once certified, the representative could become the exclusive representative of the bargaining unit. Act of May 24, 1973, ch. 635, §§ 18-20, 1973 Minn. Laws 1526, 1531 (codified at MINN. STAT. §§ 179.67, subds. 7, 11, 12 (1982)). The present provisions re-
against nonunion bargaining unit members. Certified bargaining unit representatives still possess this assessment power. Nonunion bargaining unit members can be required to support a union financially whether they favor or oppose unionism within their bargaining unit. Mandatory union support, regardless of union membership, is typically called a union security agreement.

Arguably, Minnesota's position on fee requirements for nonunion bargaining unit members in public employment is unfair to the nonunion members. The standards for mandatory nonmember fee use by public sector unions as set forth in statutory and case law are ambiguous and vulnerable to union exploitation. The constitutionality of the fee use provision in PELRA is also suspect. The following is a discussion of why the PELRA nonunion member fee provisions are unfair and an examination of the Minnesota Supreme Court's treatment of the issue.

4. In 1973, Minnesota Statutes section 179.65, subdivision 2 provided that “all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative . . . .” Id.

5. See id. § 179.65, subd. 2.

6. See id. But see N.J. STAT. ANN. § 34.13A-5.3 (West Supp. 1983) (“public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity . . . .”) (emphasis added).

7. Five basic types of union security agreements are legally recognized: the union shop, which requires that an employee, as a condition of employment, join the union after a stipulated time period; the maintenance of membership, which provides that once an employee joins a union, membership must continue as a condition of employment; the agency shop, which requires that nonunion bargaining unit employees pay the equivalent of union fees, but may retain nonmember status; the fair share or service fee, which requires that nonunion employees pay a pro rata share of collective bargaining costs, but not the costs of union only benefits; and the dues checkoff, which allows an employee to discharge union obligations by authorizing the employer to deduct a fee from the employee’s wages and remit it directly to the union. See H. Edwards, R. Clark & C. Craver, Labor Relations Law in the Public Sector 443-44 (1979) [hereinafter cited as H. Edwards]; T. Haggard, Compulsory Unionism, the NLRB, and the Courts, A Legal Analysis of Union Security Agreements 4-5 (1977) (definitions of union security agreements); see also H. Wellington & R. Winter, The Unions and the Cities 93 n.49 (1971) (brief discussion of agency shop); Labor Relations Law in the Public Sector 146 (A. Knapp ed. 1977) (degrees of union security). For a union perspective on public sector union security agreements, see Zwerdling, The Liberation of Public Employees: Union Security in the Public Sector, 17 B.C. Indus. & Com. L. Rev. 993 (1976).

8. For a discussion of the Minnesota position, see infra notes 83-127 and accompanying text.

9. See infra notes 146-48 and accompanying text.

10. See infra notes 123-27 and accompanying text.

11. See infra notes 115-18 and accompanying text.

12. See infra notes 83-127 and accompanying text.
The United States Supreme Court’s position is set forth, as well as other jurisdictions' treatment of the issue. These positions are compared with Minnesota’s stance. Finally, suggestions are offered to improve the situation in Minnesota and to reduce the unfairness experienced by Minnesota nonunion public employees.

II. BACKGROUND

By law, a certified union is permitted to act as the exclusive representative for all employees within a particular bargaining unit. As the exclusive representative, the certified union must represent all bargaining unit employees in the negotiation and administration of the collective bargaining agreement. Benefits obtained by the representative through collective bargaining extend to all members of the bargaining unit, whether or not they are members of the union.

Since every bargaining unit member may share in union gains, union members often fear that nonmembers may be receiving benefits at the union’s expense. Bargaining unit representatives are financed in their
collective bargaining activities through union membership dues and fees. Union advocates argue that nonunion members of a bargaining unit, who would otherwise receive free benefits at union members’ expense, should be required to contribute to the cost of collective bargaining. Without the financial support from every employee in a bargaining unit, the representative may be unable to pursue meaningful collective bargaining. Hence, a financially troubled and dissatisfied union may be forced to resort to more drastic, perhaps even violent, means to achieve its objectives.

Anti-union forces, on the other hand, argue that an employee has a right to work without being forced to join a union and support its ideological views or accept the benefits it may achieve. Union opposition argues that forced union support abridges fundamental rights such as the freedoms of association, religion, and speech.

Typically, unions deal with the problem of lack of support by negotiat-

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benefits on his behalf; security agreements give unions too much power; and because union members cannot be discriminated against by law, nonmember discrimination should likewise be prohibited. See id.; see also LABOR RELATIONS LAW IN THE PUBLIC SECTOR, supra note 7, at 145-72 (pros and cons of union security in public sector).

19. The United States Supreme Court has upheld the use of fee collecting from all who receive the benefit of collective bargaining. See, e.g., Oil, Chemical & Atomic Workers Int’l v. Union Mobil Oil Corp., 426 U.S. 407, 416 (1976) (union security agreement may provide that no employee receives benefits without paying for them); NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963) (employees sharing union benefits must pay); International Ass’n of Machinists v. Street, 367 U.S. 740, 768 (1961) (dissenting employee must pay for grievance adjustment and contract negotiations but not political activities of union). The Court has indicated that the rights of public sector nonunion bargaining unit members regarding union security are the same as in the private sector. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977).

20. See Robbinsdale Educ. Ass’n v. Robbinsdale Fed’n of Teachers Local 872, 307 Minn. 96, 105, 239 N.W.2d 437, 443 (1976), vacated on other grounds sub nom., Thelked v. Robbinsdale Fed’n of Teachers Local 872, 429 U.S. 880 (1976), reinstated, 316 N.W.2d 551 (Minn. 1982), appeal dismissed, 103 S. Ct. 24 (1982). For a further discussion of Robbinsdale, see infra notes 101-17 and accompanying text. See also Blair, Union Security Agreements in Public Employment, 60 CORNELL L. REV. 183, 189 (1975). Blair argues that union members in a bargaining unit may be unable to finance adequately the negotiation and administration of a collective bargaining agreement without some monetary contribution from the nonunion agents. The resulting financial instability of the duly-elected bargaining agent may jeopardize meaningful collective bargaining. The union may be encouraged to assume an unnecessarily militant attitude toward management in an effort to rally more employees to its financial support. Id. at 189.

21. See Blair, supra note 20.

22. See T. HAGGARD, supra note 7, at 278; see also H. EDWARDS, supra note 7, at 453. Forced support in public employment "has the potential of becoming a neat mutual back-scratching mechanism, whereby public employee representatives and politicians each reinforce the other's interests . . ." and individual employees and citizens have little control over the entrenched representatives and government officials. Id.

23. See T. HAGGARD, supra note 7, at 278-79.

24. See U.S. CONST. amend. I.
UNION SUPPORT BY NONUNION MEMBERS

III. THE UNITED STATES SUPREME COURT POSITION

An examination of the United States Supreme Court's treatment of the issue of public sector union security provides a better understanding of the problems with the Minnesota position. The United States Supreme Court set forth its position on public sector union security in *Abood v. Detroit Board of Education*. In *Abood*, the Court upheld a clause

25. For definitions of the basic types of union security agreements, see *supra* note 7.
26. This is the union shop security agreement. *See supra* note 7.
27. Such requirements are embodied in the agency shop and fair share or service fee agreements. *See id.*
28. *See Minn. Stat.* § 179.65, subd. 2 (1982). "Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. . . . All public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee. . . ." *Id.*
29. "Public employees shall have the right . . . not to form and join [labor or employee] organizations." *Id.*
in a security agreement that required payment of a fee by all members of a bargaining unit.\textsuperscript{32}

The \textit{Abood} case involved an agency shop agreement\textsuperscript{33} whereby every employee in the bargaining unit, even though not a union member, had to pay a fee equal to regular union member dues.\textsuperscript{34} State laws authorized such agreements.\textsuperscript{35} Nonunion employees in the bargaining unit challenged the assessment as a violation of their first and fourteenth amendment rights of freedom of expression and association.\textsuperscript{36} The Court upheld the fee assessment, but stated that nonmember fees could only be used for collective bargaining, contract administration, and grievance adjustment by the union.\textsuperscript{37} The Court held that use of nonmember fees for purposes unrelated to collective bargaining was unconstitutional.\textsuperscript{38}

The Court relied on past decisions in private sector cases for its result in \textit{Abood}.\textsuperscript{39} The Court first examined \textit{Railway Employes' v. Hanson}.\textsuperscript{40} In \textit{Hanson}, private sector employees sought to enjoin the enforcement of a union shop agreement\textsuperscript{41} which required periodic dues and assessments from all employees.\textsuperscript{42} The Court held that "the requirement for financial support of the collective bargaining agency by all who receive the benefits . . . does not violate either [the] First or the Fifth Amendments."\textsuperscript{43}

The \textit{Hanson} Court considered whether a bargaining unit member

\begin{thebibliography}{99}

\bibitem{Abood} 431 U.S. at 209. In \textit{Abood}, the plaintiffs were Detroit teachers. They sought a declaratory judgment on the constitutionality of an agency shop provision in Michigan's statutes. \textit{See infra} note 35. The teachers also challenged the validity of the collective bargaining agreement between the Detroit Board of Education and the representative teachers' federation.

\bibitem{agency-shop-agreement} For a definition of an agency shop agreement, see \textit{supra} note 7.

\bibitem{Hanson} 431 U.S. at 211.


\bibitem{collective-bargaining-agreement} \textit{Id.} Nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative . . . to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative . . . .

\bibitem{Railway-Employes-v.-Hanson} \textit{Id.} 351 U.S. at 225 (1956). The action in \textit{Hanson} arose in Nebraska. Employees of the Union Pacific Railroad claimed that a union shop agreement violated the state's right to work statute. The statute provided that no person could be denied employment for membership or nonmembership in a labor organization. \textit{See id.} at 228.

\bibitem{union-shop-agreement} \textit{Id.} For a definition of a union shop agreement, see \textit{supra} note 7.

\bibitem{street} 351 U.S. at 227.

\bibitem{street} \textit{Id.} at 238.

\end{thebibliography}
could be forced to pay dues to a union representative. The Court held in the affirmative, but was troubled by the unspecified use of the fees in question. In dictum, the Court indicated that using fees to advance union ideology unrelated to collective bargaining would present a different issue. Nonetheless, the Court refused to express an opinion on the issue because the record did not contain any allegations of such fee use.

The second major private sector case relied on by the Abood Court was International Association of Machinists v. Street. Street provided the Court with an opportunity to resolve the issue of whether a union could use dissenting employees' fees for ideological purposes unrelated to collective bargaining. The Court held that fees paid by dissenting union employees must be limited to "defray[ing] the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." The Court stated further that using fees "to support candidates for public office, and advance political programs, is not a use which helps defray" collective bargaining expenses. Thus, the issue which was raised but left unanswered in Hanson was resolved. The Street Court also indicated that a dissenting employee should not have to trace his fee to determine its use.

Two possible administrative remedies for reconciling the conflict over fee use for political expression were suggested in Street. The first was an injunction against using a portion of an employee's fee for political causes opposed by the employee. The second remedy required restitution of the objecting employee's fee used by the union for political purposes.

44. Id. at 227. The union sought to compel support under section 2 Eleventh of the Railway Labor Act which provided that carriers and a labor organization could agree that all employees join the union and be required to tender periodic dues and fees. See 45 U.S.C. § 152 Eleventh (1976) (current version). The Hanson Court determined that the Act authorized "the payment of 'periodic dues, initiation fees, and assessments,'" but did not authorize "fines and penalties." 351 U.S. at 235.

45. See 351 U.S. at 235-37. The Court stated that if fees were "imposed for purposes not germane to collective bargaining, a different problem would be presented." Id. at 235.

46. See id.

47. Id. at 238. The record only contained one union constitution setting forth the union's political objectives. See also International Ass'n of Machinists v. Street, 367 U.S. 740, 748 n.5 (1961).

48. 367 U.S. at 740.

49. Id. at 768. In Hanson, the Court did not resolve the issue of fee use for political purposes because the record lacked information on the extent of such fee use. See supra note 43 and accompanying text. In contrast to the Hanson record, the record in Street contained detailed information on the extent of the union's political expenditures. See 367 U.S. at 747-48.

50. Id. at 768.

51. Id.

52. See supra notes 46-47 and accompanying text.

53. 367 U.S. at 775.

54. Id. at 774.

55. Id.
The Court stated that neither remedy should require an employee to pay more than his proportionate share of the collective bargaining costs of the union.

After considering the private sector cases of *Hanson* and *Street*, the *Abood* Court held that fees assessed to nonunion bargaining unit members are constitutional only when used for collective bargaining, contract administration, or grievance adjustment. A union may not compel employees to subsidize ideological activity to which they object. The Court qualified its ruling on nonmember fee assessments, indicating that they must be allocated equally to each member assessed by the bargaining unit representative.

A problem appears in the reasoning of the *Abood* majority. The decision is based on the assumption that the affected rights of nonunion employees are the same in both the public and private sectors. Significant differences exist; private sector unions push their interests mainly through collective bargaining while public sector unions pursue their interests mainly through collective bargaining and politics. In the private sector, union representatives and management are at odds, and disputes are settled at the bargaining table. In the public sector, employers are elected officials, and a union can operate on both sides of the bargaining table.

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56. See *id.* at 775.
57. *Id.* The Court was aware that a union might allocate all of a dissenter's fee to collective bargaining costs, and then allocate a large portion of non-dissenting employees' fees toward political causes. This allocation would have the same effect as requiring a dissenting employee to pay for union political activity. *See id.*
58. See *supra* notes 40-57 and accompanying text.
59. 431 U.S. at 232.
60. *Id.* at 236.
61. *Id.* at 237 n.35. The Court noted an earlier case in which it had addressed the issue of fee inequality. *See Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963). In *Schermerhorn*, an agency shop agreement required nonunion employees to pay service fees equal to regular member dues. Union members often direct the union to use regular dues for non-collective bargaining purposes. If nonmember fees are allocated exclusively for collective bargaining expenses, nonmembers pay more than their pro rata share. "By paying a larger share of collective bargaining costs the nonmember subsidizes the unions' [non-collective bargaining] activities." *Id.* at 754.
62. 431 U.S. at 232.
63. *See H. Edwards*, *supra* note 7, at 34-39. The *Abood* majority also recognized the difference between public and private sector bargaining. *See 431 U.S. at 227 n.24 (lists sources distinguishing public and private sector bargaining).*
64. The fact that public employers are government officials was noted by the *Abood* majority. *See 431 U.S. at 228.* This is also recognized in PELRA. *See Minn. Stat. § 179.63, subd. 4 (1982) ("Public employer means . . . the state of Minnesota . . . and the governing body of a political subdivision . . . .").
65. *See H. Edwards*, *supra* note 7, at 450. "[S]trong public sector unions have . . . elected school board members whose first loyalty is to the union rather than to the school board, thereby undermining if not destroying the school board's ability to negotiate effectively." *Id.* In addition, strong public sector unions can bend the collective bargaining

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public sector union can influence management decisions and even affect management's constitution.

When a public sector union seeks to improve conditions within a bargaining unit, it often does so by promoting favorable legislative policy toward that unit. Such actions are at the heart of collective bargaining in the public sector union and have prompted one commentator to compare public sector unions with political entities. Justice Rehnquist, concurring in *Abood*, stated that he was "unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union." Justice Powell, also concurring, indicated that in several respects "the public sector union is indistinguishable from the traditional political party in this country." Thus, when an employee is compelled to contribute to the collective bargaining efforts of a public sector union, the contribution effectively becomes a compelled political donation. Forced political support is a first amendment violation of an individual's freedom of speech.

The majority in *Abood* indicated that a dissatisfied employee should raise an objection to fee use. The objection need not be specific. The burden is then on the union to justify the assessed amounts. The Court process in their favor by applying political pressure through laws affecting their bargaining units. Affected laws include minimum pay increases and mandatory benefit levels. *Id.*

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66. See Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 672 (1975). In comparing public sector unions with political entities, Summers points out that in public employment the employer is the government and the collective bargaining process is a political process. *See id.* at 670. Union representatives bring policies to the bargaining table which, if accepted, will become governmental policies. *See id.* Decisions reached at the bargaining table are political decisions. *See id.* at 672.

Summers is unsure of the effect public sector unions have on political decisions. Public sector unions have better access to the political process and are more dedicated to their interests. The public sector union, however, is greatly outnumbered by the voting public. *See id.* at 673.

67. 431 U.S. at 243-44.
68. *Id.* at 257.
69. *See id.* at 234-35.

70. *See id.* at 238. The *Abood* Court followed the reasoning of the *Street* Court which held that "dissent is not to be presumed." 367 U.S. at 774. An employee must affirmatively notify a union of objections to fee use before being entitled to relief. *See id.*

71. *See 431 U.S.* at 241. The Court was following the holding in *Railroad Clerks v. Allen*, 373 U.S. 113 (1963). The *Allen* Court held "[i]t would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition . . . ." *Id.* at 118. "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such a proposition." *Id.* at 122.

72. *See supra* note 71.
acknowledged that "[t]here will . . . be difficult problems in drawing lines between collective-bargaining activities . . . and ideological activities . . . ."73 Significantly, an employee will not receive relief unless he first initiates proceedings against the representative.

Justice Powell disagreed with the majority’s remedy.74 Powell would place the burden of proving the legitimacy of the fees, before they were assessed, on the state that initially negotiated and enforced the assessment.75 Powell suggested that each expenditure supported by nonunion employees meet an "overriding governmental objective" test.76 Powell would have the state come forward and demonstrate that each expenditure served an overriding governmental objective.77

Under Powell’s remedy, fee use would be prejudged according to constitutional fairness. In contrast, the remedy of the Abood majority requires a public employee to pay fees despite possible unfairness, with a fee legitimacy determination possible only after the burdened employee raises the issue of unfairness.78 Thus, a nonunion employee’s fees can be used for political purposes under the guise of collective bargaining if no objection is raised. Powell’s remedy would prevent any fee abuse, as nonunion employee fee use would be monitored from the start. Consequently, Powell’s remedy is fairer to nonunion employees than the solution offered by the Abood majority.

Thus far, the United States Supreme Court’s decisions in this area have addressed only the issue of nonunion employee fee use. The Court reserved regulation of union security agreements for the state legislatures.79 Furthermore, "agreements requiring membership in a labor organization" are specifically excluded from the National Labor Relations Act80 (NLRA). Thus, the NLRA leaves open the opportunity for states to fashion right-to-work laws permitting or denying the formation of union security agreements.81 The Act applies only to private sector unions and thus "leaves regulation of the labor relations of state and local governments to the states."82

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73. 431 U.S. at 236.
74. See id. at 255 (Powell, J., concurring). Chief Justice Burger and Justice Blackmun joined in Justice Powell’s concurrence. See id.
75. See id. at 264.
76. See id.
77. See id.
78. See supra notes 70-73 and accompanying text.
81. See supra note 79; see also Associated Gen. Contractors v. Otter Tail Power, 457 F. Supp. 1207, 1217 (D.N.D. 1978) ("states may forbid the union shop and the agency shop, and they may enforce the prohibition").
82. 431 U.S. at 223.
IV. THE MINNESOTA POSITION

The 1971 Minnesota Legislature sought to regulate public sector labor relations with the enactment of PELRA.83 The Act allows an exclusive representative84 to require all nonmember employees in a bargaining unit to contribute a fair share fee.85 The amount of the fee may be equal to regular membership fees, less the cost of benefits available only to union members.86 The fee may not exceed eighty-five percent of regular membership fees.87 Notice of the assessment must be provided to the employee,88 and the assessment may be challenged.89 PELRA has not been accepted without controversy, however, and the Minnesota Supreme Court has reviewed the constitutionality of the fee assessment provisions.90

In the 1976 case of Beckman v. St. Louis County Board of Commissioners,91 the Minnesota Supreme Court specifically addressed the issue of union fees assessed against nonunion public employees. In Beckman, nonunion county employees of a certified bargaining unit sought to enjoin a fee deduction from their paychecks.92 The fee was deducted by the plaintiffs' employer pursuant to an agreement negotiated with the union representative.93 The defendant union used the fees for conducting negotiations and grievance procedures.94 The petitioning county employees had never authorized the fee deduction.95 Based on the lack of employee authorization, the court held that the fees were illegal as an unfair labor practice.96

83. The legislative purpose of PELRA is set forth supra note 2.
84. For a discussion of exclusive representation in Minnesota public employment, see supra note 2. See also Schatzki, supra note 15 (discussion of merits of exclusive representation).
85. See MINN. STAT. § 179.65, subd. 2 (1982). "All public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee . . . ." Id.
86. See id. The fee may be "an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative . . . ." Id.
87. See id. § 179.65(2).
88. See id. The notice must be written and distributed thirty days before the assessment begins to be deducted from the employee's earnings. Id.
89. Id. The employee has thirty days in which to initiate the challenge. Id.
91. 308 Minn. 129, 241 N.W.2d 302 (1976).
92. The deduction was four dollars per month. Id. at 130, 241 N.W.2d at 303.
93. Id. at 131, 241 N.W.2d at 304.
94. Id. at 130, 241 N.W.2d at 303.
95. Id. at 132, 241 N.W.2d at 304. There were ninety-seven named plaintiffs, none of whom had authorized the monthly fee deductions. Id.
96. Id. The court was "persuaded that [the fee deduction] was illegal because it de-
Prior to the decision in *Beckman*, PELRA provided public employees with “the right to request and be allowed [a] dues checkoff.”97 In reaching its decision, the *Beckman* court reasoned that “the right of every public employee to request a dues checkoff carries with it by necessary implication the right to refuse such checkoff.”98 After the action was commenced in *Beckman*, the state legislature amended PELRA.99 The amended act provided that “[a]ll public employees who are not members of the exclusive [bargaining unit] representative may be required . . . to contribute a fair share fee for services rendered by the exclusive representative.”100 Thus, nonunion bargaining unit members’ implied right to refuse a fee assessment was statutorily revoked.

The constitutionality of the amended PELRA was challenged, however, in the case of *Robbinsdale Education Association v. Robbinsdale Federation of Teachers Local 872*.101 In *Robbinsdale*, the defendant union representative voted to require a fair share fee from all employees within the bargaining unit.102 Nonunion employees in the bargaining unit objected to the assessed fees and challenged the validity of the fee assessment provision of the Act.103 The petitioners claimed that the statute was unconstitutional because they were not given an opportunity for a hearing on their objections to the fees.104 The trial court held that the statute vio-

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97. Minnesota Statutes section 179.65, subdivision 5 formerly provided that, “Public employees shall have the right to request and be allowed dues check off for the employee organization of their selection, provided that dues check off and the proceeds thereof shall not be allowed any employee organization that has lost its right to dues check off . . . .” *Id.*

98. *See* 308 Minn. at 132, 241 N.W.2d at 305.

99. *See id.* at 131, 241 N.W.2d at 304.

100. *See* Act of May 24, 1973, ch. 635, § 10, 1973 Minn. Laws 1526, 1529 (codified at MINN. STAT. § 179.65, subd. 2 (1982)). The 1973 amendment further provided that “the employer upon notification by the exclusive representative of such [nonmember] employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative.” *Id.*

101. 307 Minn. 96, 239 N.W.2d 437 (1976), vacated on other grounds sub nom., Threlkeld v. Robbinsdale Fed’n of Teachers Local 872, 429 U.S. 880 (1976), reinstated, 316 N.W.2d 551 (Minn. 1982), *appeal dismissed*, 103 S.Ct. 24 (1982). On first appeal to the United States Supreme Court, *Robbinsdale* was vacated and remanded for consideration in light of a 1976 amendment to PELRA. The amendment provided that an employee must receive advance written notice of the amount of the fair share fee assessment and shall be allowed to challenge that assessment within thirty days after receipt of the notice. *See Act* of March 31, 1976, ch. 102, § 2 1976 Minn. Laws 249. On rehearing, the Minnesota Supreme Court reinstated its prior decision, reasoning that even though the Act had been amended, it previously was constitutional on its face despite the new specificity of the 1976 amendment. *See* Threlkeld, 316 N.W.2d at 552.

102. *See* 307 Minn. at 99, 239 N.W.2d at 440. The representative required the fee pursuant to the 1973 amendment of PELRA. *See supra* note 100 and accompanying text.

103. 307 Minn. at 99, 239 N.W.2d at 440.

104. *Id.*
lated due process, because there was no provision for notice or hearing before the fees were determined and assessed by the representative of the bargaining unit.\textsuperscript{105}

On appeal, the Minnesota Supreme Court held that the statute was constitutional.\textsuperscript{106} The court admitted that the statute did not specifically provide for notice or a hearing prior to the assessment of the fair share fee.\textsuperscript{107} Still, the court held the Act complied with the requisites of due process.\textsuperscript{108} By considering the provisions that outlined procedural remedies, the court found that PELRA provided for notice of the amount of the fee assessment.\textsuperscript{109} The court also determined that pursuant to the Act, the assessment of the fee could be enjoined and the validity and use of the fees could be contested in court.\textsuperscript{110}

On rehearing, the \textit{Robbinsdale} court stated that "the financial stability of exclusive representatives was of such importance as to override the need to determine the 'fair share' fee's validity \textit{prior} to its imposition."\textsuperscript{111} An employee must initiate a challenge before fee validity will be ex-

\begin{itemize}
\item \textsuperscript{105} \textit{Id.} The Act has since been amended to specifically provide for prior notice and a validity hearing upon a timely challenge. See Act of March 31, 1976, ch. 102, § 2, 1976 Minn. Laws 249-50 (codified at MINN. STAT. § 179.65, subd. 2 (1982)).
\item \textsuperscript{106} See 307 Minn. at 109, 239 N.W.2d at 445. Prior to \textit{Robbinsdale}, in \textit{Schleck v. Freeborn County Welfare Bd.}, 88 L.R.R.M. (BNA) 3525 (Minn. 1975), the county court advised that "this Court would not hesitate to hold that [MINN. STAT. § 179.65, subd. 2] is unconstitutional as violative of the due process clause of the state and federal constitutions." 88 L.R.R.M. (BNA) at 3531. In \textit{Schleck}, a nonunion county employee had a fair share fee deducted from his salary that was ten cents less than regular member dues. \textit{Id.} at 3527. The statutory provision in question stated that "[i]n no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures." \textit{Id.} The \textit{Schleck} court indicated that the union failed to show that the amount deducted from the objecting employee's salary was a pro rata share for the services of negotiations and administration of grievance procedures, and the court ordered judgment for the employee for the amount deducted from his salary. \textit{Id.}
\item \textsuperscript{107} \textit{Id.} 316 N.W.2d 551, 552 (Minn. 1982) (emphasis in original).
\end{itemize}
amined. This is essentially the same remedy adopted by the Abood majority.112 PELRA currently incorporates this view, providing for a fee validity determination only upon a challenge by an employee.113

In dispensing with a prior validity determination, the Robbinsdale court reviewed past Supreme Court due process decisions requiring prior hearings.114 The court concluded that "the individual property interest in this case [Robbinsdale] is of a much lesser magnitude than was involved in those cases, and the state's interest in the collection of the fair share fee is clearly more substantial . . . ."115 The court added that "since . . . the individual's interest is less significant and the state's interest is more substantial, the demands of procedural due process are correspondingly reduced."116 Although the Abood court gave no clear indication, apparently no prior validity determination is required.117

The reasoning behind the Robbinsdale decision and the PELRA provision on fee assessment fails to consider the contributions of all the nonunion bargaining unit members. While an individual employee's fee might be insignificant, when multiplied by all the nonunion employees in a bargaining unit the significance becomes clear. "If every public employee [in the United States, union and nonunion] were under compulsion to pay union dues of $5 a month, the take would amount to $700 million a year . . . ."118 A representative can demand fees from all nonunion members of a bargaining unit and, with the potential for such funds at its disposal, become a potent political and ideological force. PELRA's provisions should reflect the total power a representative can derive by forcing support from nonmembers.119

Several other provisions of PELRA may also be questioned. The Act provides that a fee challenge must be made within thirty days after receipt of the assessment notice.120 Such short notice is unduly harsh to

112. See supra note 70 and accompanying text.
113. See Minn. Stat. § 179.65, subd. 2 (1982). The statute states in pertinent part: The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision . . . . Id. (emphasis added).
115. 307 Minn. at 109, 239 N.W.2d at 444.
116. Id. at 108-09, 239 N.W.2d at 445.
117. See supra notes 66-69 and accompanying text.
118. See H. Edwards, supra note 7, at 451. This statistic was provided by Reed Larson of the National Right to Work Committee, which is dedicated to promoting nonunionism. Larson further stated that, "[i]t is obvious to us that union officials, with the help of some politicians who receive campaign support from union treasuries," are seeking to lock every public employee into paying dues into union treasuries. Id.
119. See supra note 118.
120. See Minn. Stat. § 179.65, subd. 2 (1982).
new employees who feel uncomfortable or insecure in their positions during the time allotted to challenge the fee. In addition, the representative's needs for collective bargaining funds may fluctuate.\textsuperscript{121} During periods of stability and decreased bargaining activity, the exclusive representative may require only a portion of the assessed amount. At such times, if the thirty day limit for challenges has expired, collected fees could be used for non-collective bargaining activities and the nonunion employee would have no recourse. Beyond requiring the original notice of the fee amount, the Act is silent regarding notice of fee use changes after the thirty day challenge period.\textsuperscript{122} Presumably, the internal challenge remedy will be denied after the thirty day period and the employee will be left to seek a determination of the fee use validity through the courts.

Though PELRA requires no prior validity determination,\textsuperscript{123} it does require specificity upon fee use challenge by an employee.\textsuperscript{124} The Act states that “[a]ll challenges shall specify those portions of the assessment challenged and the reasons therefor . . . .”\textsuperscript{125} According to \textit{Abood}, such a requirement is unconstitutional.\textsuperscript{126} Compelling specificity violates an individual’s freedom to maintain his beliefs without public disclosure.\textsuperscript{127} The specificity requirement of PELRA should be deleted so that an aggrieved employee can simply object to fee use without having his convictions aired in public.

\section*{V. Treatment in Other Jurisdictions}

The problems raised with the Minnesota position are not unique to the state.\textsuperscript{128} Other jurisdictions have encountered similar difficulties and

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  \item \textsuperscript{121} See \textit{Ball v. City of Detroit}, 84 Mich. App. 383, 396, 269 N.W.2d 607, 613 (1978). For a further discussion of \textit{Ball}, see infra notes 135-43 and accompanying text.
  \item \textsuperscript{122} See generally MINN. STAT. §§ 179.61-.76 (1982) (Public Employment Labor Relations Act).
  \item \textsuperscript{123} Since PELRA does not provide for validity determination upon an assessment, an employee must initiate a challenge or risk paying an unfair or invalid fee. The \textit{Abood} majority also dispensed with a prior validity determination of an assessment. See supra notes 70-73 and accompanying text. In the interests of administrative economy, one prior validity determination would be more efficient than many subsequent challenges.
  \item \textsuperscript{124} See MINN. STAT. § 179.65, subd. 2 (1982). “All challenges shall specify those portions of the assessment challenged and the reasons therefor . . . .” Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} See 431 U.S. at 241.
  \item \textsuperscript{127} See id.
  \item \textsuperscript{128} Other states have legislated that nonunion public employees can be forced to pay fees to a representative. See, e.g., \textit{CONN. GEN. STAT. ANN. § 5-280} (West Supp. 1982); \textit{HAWAII REV. STAT. § 89-4} (1981 Supp.); \textit{MASS. GEN. LAWS ANN. ch. 150E, § 12} (West 1982); \textit{MICH. COMP. LAWS ANN. § 423.210(1)(c)} (1981); \textit{WASH. REV. CODE ANN. § 28B.16.100(11)} (West Supp. 1983-1984); \textit{WIS. STAT. ANN. § 111.70(1)(h), (2)} (West 1981).
\end{itemize}
Minnesota can refer to them for guidance in shaping its law.

A. The Wisconsin Approach

Wisconsin has enacted fair share fee legislation, and in *Browne v. Milwaukee Board of School Directors* the state supreme court reviewed its provisions. In *Browne*, the court held that the fair share legislation was constitutional because it "forbids the use of fair share funds for purposes unrelated to collective bargaining or contract administration." The court also stated that the "statute cannot require [nonmembers] to contribute to political purposes in violation of their first amendment rights." According to the court, unfair labor practices would result if nonunion employees were required to "pay for anything more than their proportionate share of the cost of collective bargaining and contract administration."

In *Browne*, the Supreme Court of Wisconsin explicitly stated the types of fee use permissible under the fair share fee assessment statute. In Minnesota, these issues have not yet been addressed and the opportunity still exists for fee use exploitation.

B. The Michigan Approach

The problem of fee assessment to nonunion bargaining unit members in the public sector was also raised in Michigan. The Michigan court's most significant encounter with the issue was *Abood v. Detroit Board*
of Education. The Michigan court heeded the guidance set forth in Abood and applied it in Ball v. City of Detroit.138 Ball involved essentially the same problem as Abood.139 In Ball, nonunion employees challenged the amount of a fee assessed by a representative under an agency shop agreement.140

The Ball court applied the standard set forth in Abood and held that, when challenged, a union must establish the cost of the three types of permissible expenditures for nonmember fees.141 For the establishment of a prima facie case, Ball only requires "sufficient indication that a nonmember objects to the use of any portion of the service fee for purposes unrelated to collective bargaining, contract administration and grievance adjustment..."142 The court emphasized that dissenting employees do not have to prove fee objections.143 The court also advised that if the fee is excessive, future fees must be reduced by the percentage unrelated to legitimate fee use, and the union must make adjustments according to future fluctuations.144

To protect nonmembers' first amendment rights prior to a judicial determination of the validity of a fee assessment, the Ball court required that nonmembers pay the fees into an escrow account.145 The court acknowledged that this remedy may be a hardship for the union, but the hardship is outweighed by the possible violation of nonmembers' first amendment rights.146 After the judicial determination on the fee amount, the union has prompt access to its entitled portion and the remaining portion can be refunded to the objecting employees.147

VI. CHANGES NEEDED IN MINNESOTA

Minnesota can benefit from the decisions in Michigan and Wisconsin in several ways. Both states offer reasoned judicial precedent on approaches to the issue of fair share fee assessment. Given the opportunity,

136. 60 Mich. App. 92, 230 N.W.2d 322 (1975); see supra notes 31-78 and accompanying text.
137. See 60 Mich. App. at 92, 230 N.W.2d at 322.
139. See supra notes 29-36 and accompanying text.
140. See 84 Mich. App. at 387, 269 N.W.2d at 609.
141. The three types of permissible expenditures are collective bargaining, grievance and adjustment, and contract administration. See id. at 396, 269 N.W.2d at 613.
142. Id. at 395, 269 N.W.2d at 612-13.
143. See id. at 395, 269 N.W.2d at 612. The Ball court stated that "[b]ecause the union is in possession of facts and records documenting union expenditures, basic fairness requires the union to carry the burden of proof to establish the cost of [the] legitimate uses of an objecting nonmember's service fee." Id.
144. See id. at 396, 269 N.W.2d at 613.
145. See id.
146. See id.
147. See id.
the Minnesota Supreme Court should specify the permissible uses for fair share fees. The court must take the initiative because, as demonstrated in Robbinsdale, the legislature depends on the court for guidance in this area.148 Strong political pressures may prevent the legislature from taking the first step.149

Both the Michigan and Wisconsin courts indicated that nonunion bargaining unit members can only be assessed fees for purposes unrelated to collective bargaining.150 The Minnesota Supreme Court should follow these precedents. Presently, PELRA provides that nonunion bargaining unit members may be assessed fees for a representative's services.151 A representative could interpret "services" to include political or ideological activity. Nevertheless, according to Abood, an individual cannot be compelled to subsidize such activity.152 By clearly defining permissible fee uses, the Minnesota Supreme Court can minimize the potential for fee misuse. Minnesota could adopt the Michigan and Wisconsin approaches, strengthened further by a clear definition of permissible collective bargaining purpose.

The exclusive bargaining unit representative cannot be allowed to misuse nonmember fees. In Ellis v. Railway Clerks,153 a California court attempted to accomplish this objective by providing a laundry list of non-permissible uses for dissenting employees' fees.154 The Michigan and

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148. See 316 N.W.2d at 552 n.1.
149. See H. Edwards, supra note 7, at 451. In a National Right to Work Committee excerpt it is stated that there is an "inordinate influence of union political power on public officials charged with the responsibility of setting employee policies." Id. Thus, the courts would provide a better avenue for changing PELRA.
150. See supra notes 131-34, 141 and accompanying text.
151. See Minn. Stat. § 179.65, subd. 2 (1982). PELRA states that an exclusive representative may be designated "for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit." Id. The language of PELRA, however, does not limit "services" of a representative to "negotiating grievance procedures." Hence, under the heading of "services" a representative can use fees for ideological purposes.
152. See supra note 60 and accompanying text.
153. 91 L.R.R.M. (BNA) 2339, modified, 93 L.R.R.M. (BNA) 2976 (S.D. Cal. 1976), modified, 108 L.R.R.M. (BNA) 2648 (S.D. Cal. 1980), rev'd in part, 685 F.2d 1065 (9th Cir. 1982). Ellis was a private sector case in which the court held it was an unfair labor practice for a union to use dissenting employee's fees for non-collective bargaining purposes. See 91 L.R.R.M. (BNA) at 2343. The unique aspect of Ellis arose because the court listed fee uses that did not fall under collective bargaining purposes and thus were unfair. See id. at 2339. Some of the union activities found by the Ellis court as non-collective bargaining in nature included conducting and attending union conventions, recruiting new bargaining unit members, and supporting and opposing legislative measures and policies. See id.
154. The non-collective bargaining uses listed by the Ellis court were:
   (1) recreational, social, and entertainment activities not attended by management personnel;
   (2) operation of death benefit program;
   (3) organizing and recruiting new members for airline unit and seeking bargaining authority for (a) employees not employed by airline, (b) employees
Wisconsin courts also mentioned permissible areas for fee use.\textsuperscript{155} PELRA provides simply that nonmember fees may not be used for benefits available only to members.\textsuperscript{156} The Minnesota Supreme Court could reduce the ambiguity in PELRA by listing constitutionally permissible and non-permissible uses for nonmember fees.\textsuperscript{157}

A second area deserving examination is the PELRA provision on fee validity determination.\textsuperscript{158} In Minnesota, a validity determination of a fee assessment to a nonunion employee is made only upon a challenge by the employee.\textsuperscript{159} The Minnesota Supreme Court has indicated that a union's interest is more compelling than an individual employee's and that a prior fee validity determination is unnecessary.\textsuperscript{160} In \textit{Abood}, Justice Powell set forth the opposing view, indicating that a prior validity determination is needed when individuals' first amendment rights are threatened.\textsuperscript{161} Placing the burden of litigation on the union is the appropriate method of protecting public employees' first amendment rights.\textsuperscript{162}
Justice Powell's remedy of prior fee validity determination deserves consideration by the Minnesota Supreme Court and the state legislature.

VII. CONCLUSION

In Minnesota, public sector nonunion employees are at the mercy of the public sector union. An exclusive representative can demand support from nonunion bargaining unit employees. The standards for permissible uses of nonmember fees are unclear. Assessments can be collected without question unless an aggrieved employee initiates proceedings to determine the validity of the fee assessment.

Change clearly is needed in Minnesota's statutory treatment of public sector nonunion bargaining unit members. Forced support of the public sector union borders on forced political support. Also, "[b]y virtue of the coerced unanimity of the workforce, the union obtains a bargaining power that it would not have if it merely represented a segment of the workforce." 163 Although nonunion employees derive benefits from union representation, the union derives equal benefit from the employee's support. A requirement for a prior validity determination upon demand by a union for nonmember support would decrease the potential for fee misuse. Moreover, forced support of public sector unions may violate constitutional freedoms. The burden should be on the union to justify that support, and the types of permissible and non-permissible support should be strictly defined.

163. T. HAGGARD, supra note 7, at 281.