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# The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes

By Hugh L. Reilly\*

## I. EARLY CASES

In 1977, the Supreme Court considered whether the first amendment prevents or limits forced union dues in the public sector. The issue arose in *Abood v. Detroit Board of Education*.<sup>1</sup> The Court's decision resolved several important issues, some unexpectedly, and left others for subsequent litigation. The Court rejected the claim that forced dues for public-sector employees are per se unconstitutional.<sup>2</sup> Instead, the Court determined that such fees are constitutional, but only to the extent that they defray the union's cost of "collective bargaining, contract administration, and grievance adjustment."<sup>3</sup> In the Court's view, a fee confined to the cost of those three activities is constitutionally permissible because an "important" governmental interest exists "to distribute fairly the cost of these activities. . . ."<sup>4</sup> In its discussion of this issue, the Court appears to have applied the "overbreadth-least restrictive alternative" test, a traditional type of first amendment analysis.<sup>5</sup>

The decision relies heavily upon past private-sector cases that decide similar issues. In *Railway Employees' Department v. Hanson*,<sup>6</sup> the Court

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1. 431 U.S. 209 (1977).

2. *Id.* at 226.

3. *Id.* at 225-226.

4. *Id.* at 222.

5. See *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972).

6. 351 U.S. 225 (1956). The Court in *Hanson* said: "The financial support required relates . . . to the work of the union in the realm of collective bargaining. . . . If 'assessments'

held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments."<sup>7</sup> Similarly, in *International Association of Machinists v. Street*,<sup>8</sup> the Court found that the use of dues "to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes."<sup>9</sup> *Abood*, *Hanson*, and *Street* establish, either by first amendment analysis or statutory construction, that both public and private employees are protected from the union's non-collective-bargaining use of their fees.

The definition of chargeable costs that emerged from *Hanson* and *Street* was based upon statutory construction. However, it was a construction forced by the constitutional difficulties evident in requiring employees to support any union activities.<sup>10</sup> Until *Abood* was decided, there was an open and debated question as to whether the first amendment itself prevented or imposed limits upon forced dues obtained by unions from private-sector employees, or whether such employees had only a statutory claim.<sup>11</sup> Answering those who perceived an operative difference between the rights of employees on this issue, the Court in *Abood* held that the rights in each sector are the same.<sup>12</sup>

Although this *per se* equation of employee rights in both sectors is his-

are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." *Id.* at 235.

7. *Id.* at 238.

8. 367 U.S. 740 (1961).

9. *Id.* at 768.

10. "The position taken by the Court in *Hanson* [and] *Street* . . . is strong medicine. It is not equivocal. Indeed, it contains constitutional overtones which appear to be foregone only by use of statutory construction to avoid First and Fifth Amendment issues." *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970).

11. Illustrative of the controversy is the sequence of decisions in *Evans v. American Fed'n of Tel. & Radio Artists*, 354 F. Supp. 823 (S.D.N.Y. 1973), *rev'd sub nom. Buckley v. American Fed'n of Tel. & Radio Artists*, 496 F.2d 305, *cert. denied*, 419 U.S. 1093 (1975). Especially noteworthy is the dissent of Mr. Justice Douglas, who would have granted certiorari, for the following reasons among others:

When Congress authorizes an employer and union to enter into union shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it had imposed them by statute. 419 U.S. at 1095.

12. "The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." 431 U.S. at 232. *See Id.* at 229-30. *See also Beck v. CWA*, 468 F. Supp. 87 (D. Md. 1979); *Beck v. CWA*, 468 F. Supp. 93 (D. Md. 1979). These two decisions of the District Court of Maryland involved the first private-sector case to explicitly follow *Abood* and so hold.

torically sound,<sup>13</sup> the Court does not offer any supporting explanation. Traditional analysis posits that the Constitution establishes the powers and limitations upon powers of government.<sup>14</sup> Conversely, it is held that the Constitution, without more, does not grant or limit the powers of private parties.<sup>15</sup> An all-important caveat to this analysis provides that the Constitution does operate on private parties if "governmental action" is involved.<sup>16</sup>

As relevant here, "governmental action" is found in at least two areas. Section 9(a)<sup>17</sup> of the National Labor Relations Act<sup>18</sup> (hereinafter "the Act") grants to unions that are "exclusive representatives" the right to negotiate collective agreements binding upon all employees in a defined "bargaining unit" overriding even the contrary wishes of employees affected.<sup>19</sup> Section 8(a)(3)<sup>20</sup> of the Act works with section 8(a)(5)<sup>21</sup> to require employers to bargain over, and, as a practical matter, incorporate terms in those collective agreements which require employees to pay dues or fees to the union on penalty of employment termination.<sup>22</sup> At the same time, the Norris-LaGuardia Act<sup>23</sup> prevents employers from exacting an employee's agreement to refrain from union membership as a condition of employment.<sup>24</sup> Thus, powers not extended to other private parties are extended by legislation to unions. Further, with respect to the association of employees with unions, legislation allows otherwise private collective agreements to require union "membership", or, at least, payments from employees to unions. In both respects, "governmental action" is apparent,

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13. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring); *Syres v. Oil Workers Local 23*, 223 F.2d 739, 745 (5th Cir. 1955) (Rives, J., dissenting) *rev'd per curiam*, 350 U.S. 892 (1955).

14. *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

15. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

16. "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966). The "state action" referred to in *Evans* is the same as "governmental action."

17. 29 U.S.C. § 159(a) (1976).

18. The present National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), had its beginning with the National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935). The 1935 Act was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136. The Act was further amended by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519. The most recent amendment was Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395. All subsequent references will be to "the Act" unless otherwise specified.

19. See *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

20. 29 U.S.C. § 158(a)(3) (1976).

21. 29 U.S.C. § 158(a)(5) (1976).

22. See *NLRB v. General Motors*, 373 U.S. 734 (1963).

23. 29 U.S.C. §§ 101-115 (1976).

24. 29 U.S.C. § 103 (1976).

and constitutional analysis is therefore required.<sup>25</sup>

A number of cases subsequent to *Abood* have been decided in the public sector. They uniformly adopt the "collective bargaining, contract administration, and grievance adjustment" standard of *Abood*. These cases<sup>26</sup> utilize this standard to identify those union costs which can be imposed upon non-members, irrespective of the language used in collective bargaining agreements or the enabling language used to authorize agency shop agreements in the several statutes being considered.<sup>27</sup> This identification process takes place despite general union assertions that the "everything" they do is collective bargaining.

The question of the relief appropriate in such cases was a prime concern in *Brotherhood of Railway & Steamship Clerks v. Allen*.<sup>28</sup> In that case the Supreme Court determined that a blanket injunction against collection of full forced dues would be improper,<sup>29</sup> as a denial to the union of monies to which it was entitled. The Court in *Allen* suggested, as appropriate relief, a practical decree that would order a refund of past dues and a reduction of future dues, both for the proportion of dues represented by non-bargaining expenditures.<sup>30</sup> The union that is in possession of the records has the burden of proof.<sup>31</sup>

In dictum, the Court in *Allen* suggested the possibility that unions consider a "voluntary" plan as an "internal union remedy" for such claims.<sup>32</sup> This suggestion was reiterated in *Abood*.<sup>33</sup> These plans, when promulgated, are commonly referred to as "internal rebate plans." As this label suggests, these plans contemplate only a post-spending return of monies

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25. See *Beck v. CWA*, 468 F. Supp. 93, 96 (D. Md. 1979).

26. *Greenfield School Comm. v. Greenfield Educ. Ass'n*, 3 PUB. BARG. CAS. (CCH) ¶ 37,023 (Mass. Super. Ct. July 31, 1980); *California School Employees Ass'n v. Bowen*, 100 L.R.R.M. 2050 (Cal. Super. Ct. 1978); *Ball v. City of Detroit*, 84 Mich. App. 383, 269 N.W.2d 607 (1978).

27. Illustrative of the application of the *Abood* standard by the courts over contrary statutory language is *Greenfield*, *supra* note 26. In that case the statute, MASS. ANN. LAWS ch. 150E, § 12 (Michie/Law Co-op Supp. 1980), facially provides that non-members pay a dues-equivalent fee to the union, coupled with the requirement that the union rebate the costs of a limited number of identified non-bargaining activities. Nevertheless, the court in *Greenfield* applied the *Abood* collective bargaining costs standard.

28. 373 U.S. 113 (1963).

29. "And no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities." *Id.* at 122.

30. *Id.*

31. *Id.*

32. *Id.*

33. 431 U.S. at 242. The Court there again emphasized the voluntary character of any such procedure and expressed no view as to its "constitutional sufficiency."

and no future relief. Between *Allen* and *Abood*, courts held differing views upon the effect that the existence of such a rebate plan had on employee claims against the union for non-bargaining spending. In *Reid v. UAW*,<sup>34</sup> the court went so far as to hold that the mere existence of a rebate procedure was, by itself, a defense to a claim brought on a "fair representation"<sup>35</sup> theory. *Seay v. McDonnell Douglas Corp.*<sup>36</sup> is precisely to the contrary.

More generally, unions have sought to have the "exhaustion" doctrine applied to their rebate plan. The claim is that employees with non-bargaining spending claims must first exhaust the rebate before filing suit in court. *Reid* declined to address this issue. Two subsequent cases have not required exhaustion for a variety of reasons,<sup>37</sup> while *Abood*, after remand, has required it.<sup>38</sup> In any event, to require exhaustion for claims of this nature would appear to be contrary to the holding in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*<sup>39</sup> as the claims do concern public policy questions, rather than internal union issues. In that case, the Court pointedly said, "[i]f the member becomes exhausted, instead of the remedies, the issues of public policy are never reached. . . ."<sup>40</sup>

An examination of the structure and operation of rebate plans is beyond this paper. It is accurate to state that unions use a rebate standard at variance with case law. Typically, such plans return monies for "partisan political or ideological purposes"<sup>41</sup> or "activities or causes primarily

34. 479 F.2d 517, 520 (10th Cir. 1973).

35. "Fair representation" is the duty of the union to represent all bargaining unit employees fairly, honestly and in good faith, and without malice or hostility. First established in *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), it is equated with "fiduciary" and "agency" duties, the full application of which has not yet been found. See *Beriault v. Local 40, Super Cargoes & Checkers*, 501 F.2d 258 (9th Cir. 1974).

36. 533 F.2d 1126, 1130-32 (9th Cir. 1976). This Ninth Circuit decision is part of the history on remand of the case cited in note 10 *supra*.

37. The court in *Beck v. CWA*, 468 F. Supp. 88, 90 (D. Md. 1980) says simply, "exhaustion would not promote settlement of the dispute and would cause unnecessary delay." Further, the court in *Greenfield*, 3 PUB. BARG. CAS. (CCH) at 37,932 states:

It has been held that employees, such as non-member teachers, are not bound by the union-member contract to exhaust internal union appeals before resorting to a judicial forum [citing *Soto Segarra v. Sea-land Serv. Inc.*, 581 F.2d 291, 295 (1st Cir. 1978)]. Moreover, not even union members are required to exhaust internal union procedures in a case which concerns fundamental constitutional rights.

38. *Abood v. Detroit Bd. of Educ.*, No. 70-15525 GC (Mich. Cir. Ct. August 16, 1978). This result is contrary to the decision of the Michigan Court of Appeals in *Ball v. City of Detroit*, 84 Mich. App. 383, 269 N.W.2d 607 (1978).

39. 391 U.S. 418, 428 (1968).

40. *Id.* at 425.

41. CONST. OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, art. IX, § 10 (1978).

political in nature."<sup>42</sup> The author has not seen any rebate plan that utilizes the *Abood* "non-collective bargaining" standard. In general, these rebates are used by unions to delay litigation, on the "exhaustion" theory,<sup>43</sup> and not to provide full relief for asserted claims.<sup>44</sup>

The first amendment determination in *Abood* raised a substantial "prior restraint" issue the Court did not resolve. Mr. Justice Stevens filed a separate concurring opinion solely to announce his concern for its importance.<sup>45</sup> Not all speech is first amendment protected.<sup>46</sup> Determinations must be made as to whether given speech is protected or unprotected.<sup>47</sup> The "prior restraint" concern is that protected speech will be suppressed, or restrained, pending the outcomes of these determinations, for the "value" of speech to the speaker or listener can be lost, at least temporarily, with simple lapse of time and, consequently, with attendant irreparable harm. In the context of the forced dues issue, the significance of the "prior restraint" problem has been underscored by one knowledgeable commentator: "political and ideological viewpoints once promulgated, and political influence once applied, cannot be withdrawn from the marketplace of ideas, the legislative chamber, or the polling booth."<sup>48</sup> But, as indicated, in *Abood*, for reasons not explained, only Justice Stevens confronted the issue.

Subsequent public-sector forced dues cases have considered the "prior restraint" aspect of the first amendment violations involved. One case, brought by employee plaintiffs to contest the fee, resulted in an order for the pendente lite escrow of the fee.<sup>49</sup> In another case,<sup>50</sup> brought by the union against an employee to collect the fee, payment of the fee into the

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42. 468 F. Supp. at 92 (Appendix; Partisan Politics Policy of the Communications Workers of America, adopted June 19, 1974).

43. The affidavit of Raymond J. LaJeunesse, filed with the *Beck* Plaintiffs' Opposition to Defendant Communications Workers of America's Motion to Dismiss or Stay, served August 26, 1977 and on file with the court clerk, recites the invocation of one union's rebate in October of 1974, with no conclusion of proceedings as of the date the affidavit was signed, August 26, 1977.

44. Rebate checks were sent by CWA to plaintiffs in *Beck*, on September 12, 1977 for \$2.95 as the rebate for one year. See 468 F. Supp. at 91 n.8. As the appendices to the report of the Special Master in *Beck* indicate, the plaintiffs' claims have considerably greater monetary value. 166 DAILY LABOR REPORT (BNA) D-1, D-17 (August 25, 1980) (Report of Special Master for U.S. District Court for Maryland in *Beck v. CWA*).

45. 431 U.S. at 244 (Stevens, J., concurring).

46. *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949).

47. See *Miller v. California*, 413 U.S. 15 (1973).

48. Merrill, *Limitations Upon the Use of Compulsory Union Dues*, 42 J. AIR L. & COM. 711, 772-73 (1976).

49. *Ball v. City of Detroit*, 84 Mich. App. 383, 269 N.W.2d 607, 613 (1978).

50. *Central Mich. Univ. Faculty Ass'n v. Stengren*, No. 76-006456-C2, (Mich. Cir. Ct., filed May 7, 1976).

escrow was ordered.<sup>51</sup> In yet another case, involving a form of interpleader action by an employer against the union and employees, the fees were ordered to be paid into the registry of the court.<sup>52</sup> These cases evidence considerable sensitivity to the "prior restraint" problem that the Supreme Court in *Abood* ignored.

*Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*<sup>53</sup> was filed between the *Allen* and *Abood* decisions. The case concerns the rights of Western Airlines employees under Section 2, Eleventh<sup>54</sup> of the Railway Labor Act. The claims against the union were framed on a "fair representation"<sup>55</sup> theory, seeking relief from the union's non-bargaining spending. The plaintiffs and the union filed cross motions for summary judgment. The union's was denied. Plaintiffs' was granted as to liability. The court held that the spending of dues and fees<sup>56</sup> for identified non-bargaining activities violates the duty of fair representation.<sup>57</sup>

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51. *Id.* (Order of January 30, 1979).

52. *Greenfield*, *supra* note 26, at 37,933.

53. 91 L.R.R.M. 2339, *modified*, 93 L.R.R.M. 2976 (S.D. Cal. 1976).

54. 45 U.S.C. § 152, Eleventh (1976).

55. The duty of fair representation is described more fully *supra* note 35.

56. The consolidated cases contain both union member and non-member plaintiffs.

57. 91 L.R.R.M. at 2343. Those activities in *Ellis* were:

(1) Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.

(2) Operation of a death benefit program.

(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.

(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:

(a) employees not employed by Western Airlines;

(b) employees not employed in the air transportation industry;

(c) employees not employed in other transportation industries.

(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons.

(6) Contributions to charities and individuals.

(7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such program secured for its salaried officers and employees.

(8) Conducting and attending conventions of BRAC.

(9) Conducting and attending conventions of other organizations and/or labor unions.

(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC.

(11) Support for or opposition to proposed, pending, or existing legislative measures.

(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions. *Id.* at 2342.

The damages aspect of the case was tried with the burden of proof assigned to the union. The union was not required to prove its collective bargaining costs, but merely the costs of the non-bargaining activities.<sup>58</sup> The trial was non-jury, and the Judge's *findings* awarded the plaintiffs 40 percent of national union expenditures for the year 1976, and 37.8 percent in the year 1977, with nominal damages at the intermediate and local levels.<sup>59</sup> The case is on appeal to the United States Court of Appeals for the Ninth Circuit.<sup>60</sup>

## II. GENERAL RELEVANT CONSTITUTIONAL PRINCIPLES

An exhaustive survey of the constitutional principles relevant to the kind of case under discussion is well beyond the scope of this paper.<sup>61</sup> To provide a framework for consideration of the Special Master's Report in *Beck*,<sup>62</sup> brief mention will be made of Supreme Court cases that establish recognized principles. The Supreme Court has been extremely solicitous of first amendment rights. The cases, which establish the required analysis in which the infringement of constitutional rights is at issue, are well known. The precedents establish a right to speak *and* a right *not* to speak.

*West Virginia State Board of Education v. Barnette*<sup>63</sup> set forth the right to refrain from saluting the United States flag. *Wooley v. Maynard*<sup>64</sup> affirmed the right to decline to display the state's license plate legend "live free or die." *Carroll v. President & Commissioners of Princess Anne*<sup>65</sup> recognized the right to speak at a public forum. In cases that concern the right to speak or the right to refrain from it, the decision is achieved through a stringent analysis of the relation between the action compelled or prevented and the governmental interest suppression is claimed to serve. The analysis begins with determining whether the statute, regulation, or policy under scrutiny was designed or implemented to suppress speech, or has some other purpose and incidentally impinges

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58. Transcript of Proceedings at 4-5, *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, Nos. 73-113-N, 73-118-N (S.D. Cal., Nov. 15, 1976).

59. *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 88 Lab. Cas. 24,031-033 (1980) (Findings of Fact and Conclusions of Law).

60. *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, No. 80-5603 (9th Cir. August 6, 1980).

61. See Vieira, *Of Syndicalism, Slavery And The Thirteenth Amendment: The Unconstitutionality of "Exclusive Representation" In Public-Sector Employment*, 12, WAKE FOREST L. REV. 515 (Fall, 1976).

62. See note 44 *supra*.

63. 319 U.S. 624 (1943).

64. 430 U.S. 705 (1977).

65. 393 U.S. 175 (1968).

upon speech. In instances in which the effect upon speech was intended, the Court has applied the "clear and present danger" test.<sup>66</sup> In cases in which the impact upon speech is an unintended byproduct of the statute, regulation, or policy, the Court applies the "overbreadth-least restrictive alternative" test.<sup>67</sup>

The quality and convincing character of the evidence required of the party with the burden of proof in first amendment cases has received less frequent attention than that concerning the "test" to be applied in the first instance. Nonetheless, the kind of evidence required has been fixed in first amendment jurisprudence. It requires that the party accorded the burden of proof (generally the party seeking to impinge upon the constitutionally protected interest and affect freedom of speech) prevail only upon presentation of "clear and convincing proof."<sup>68</sup>

### III. BECK v. COMMUNICATIONS WORKERS

*Beck v. Communications Workers of America* is the first private-sector case to directly apply first amendment principles to the kind of case under discussion. Plaintiffs in that case were subject to an agency shop arrangement that the Bell System employer had with the Communications Workers.<sup>69</sup> This arrangement was reached under color of section 8(a)(3) of the Act. The employees' obligation to the union (hereinafter CWA) on the face of the arrangement was to pay CWA the equivalent to dues.<sup>70</sup>

66. *Dennis v. United States*, 341 U.S. 494 (1951). That test is satisfied only if the speech involved is directed to "inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

67. *See Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972). In such cases, the governmental purpose served by the activity, regulation, or statute is identified. Only the means least restrictive upon speech can be used to implement it, and more expansive means fail as overly-broad. As suggested at the outset, this appears to be the test the Court used in *Abood*.

68. This test has been applied in first amendment civil cases in which "malice" is an element of the plaintiff's proof in a defamation action. "Clear and convincing proof" of malice is required to establish that the case is one of unprotected defamation, rather than one of speech protected by the first amendment. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971) (Brennan, J.); *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964).

69. Article 4, Section 3 of the Agreement of July 18, 1974 between the parties provides: Effective January 1, 1976, all employees except occasional employees shall become members of the Union or pay or tender to the Union amounts equal to periodic dues as a condition of employment except that this condition shall not apply to employees who are hired or who enter the bargaining unit after December 1, 1975, until on or after the thirtieth day after such hire or entrance, whichever of these dates is later, until the termination of this contract.

Successor agreements have essentially duplicate provisions.

70. 468 F. Supp. at 88.

Plaintiffs' claims in *Beck* were asserted on statutory and first amendment grounds. In response, CWA put forth its rebate as a defense and sought a stay or dismissal pending plaintiffs' exhaustion of it.<sup>71</sup> The motion was denied on grounds that exhaustion would not assist in resolution of the dispute and would cause unnecessary delay.<sup>72</sup> The Court took the existence of CWA's rebate as an admission of non-bargaining spending<sup>73</sup> and entered a judgment that the collection and spending of fees for such purposes violates plaintiffs' first amendment rights.<sup>74</sup> In doing so, the Court adopted the *Allen* burden of proof and the *Abood* "collective bargaining, contract administration, and grievance adjustment" standard.<sup>75</sup> With those parameters set for the course of the case, the Court referred the matter to a Special Master for recommended findings of fact and conclusion of law.<sup>76</sup>

Plaintiffs anticipated CWA's claim that its activities, no matter what their character, "benefitted" plaintiffs. The "benefit" concept is mentioned in *Hanson*.<sup>77</sup> They, therefore, submitted interrogatories to CWA addressed to the issue. CWA declined to answer them, and plaintiffs' subsequent motion to compel was denied.<sup>78</sup> However, plaintiffs' motion *in limine*, to prevent the injection of an issue for which discovery had been denied, was granted.<sup>79</sup> In effect, this precluded CWA from one argument that is usually made without proof.<sup>80</sup>

Significant to the course of the case, a motion by CWA to prevent the discovery of documents was denied.<sup>81</sup> That order permitted plaintiffs to assemble the documentary record described in the Special Master's Report.<sup>82</sup> The discovery obtained revealed those activities in which CWA engages.<sup>83</sup> To catalogue them fully here is beyond the scope of this discussion. A partial list of discovered activities includes of course the negotia-

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71. Motion of the Communications Workers of America to Dismiss or Stay Proceedings, *Beck v. CWA*, No. B-76-839 (D. Md., served July 13, 1977).

72. 468 F. Supp. at 90.

73. *Id.* at 97.

74. *Id.*

75. *Id.*

76. *Beck v. CWA*, No. B-76-839 (D. Md., May 3, 1979) (order of reference to Special Master).

77. See text accompanying note 7.

78. *Beck v. CWA*, No. B-76-839 (D. Md., Aug. 16, 1979) (Order denying motion).

79. 166 DAILY LABOR REPORT (BNA) D-1, D-2 (August 25, 1980) (Report of Special Master for U.S. District Court for Maryland in *Beck v. CWA*).

80. See, Bradley, Constitutional Limits to Union Power (Council on American Affairs, Washington, D.C., 1976).

81. *Beck v. CWA*, No. B-76-839 (D. Md., Aug. 16, 1979) (Order denying motion).

82. 166 DAILY LABOR REPORT (BNA) at D-2.

83. *Id.* The more than 2,000 exhibits mentioned are on file in the Office of the Clerk of the District Court.

tion of collective bargaining agreements, their administration, and the adjustment of grievances pursuant to their provisions.

However, and more to the point in first amendment analysis, because of the bargaining/non-bargaining dichotomy, a listing also includes political party activity of every kind and description, from influencing convention delegate selection, through preparation of party platform content, to delegate management on the convention floor. Following the 1976 Democratic Convention, the *Beck* evidence shows, CWA was active in voter registration, get-out-the-vote drives, creation of the "presidential debates," the design and distribution of campaign bumper stickers, and events for union delegates at the Presidential Inauguration. Legislatively, CWA lobbies with respect to various items through "grassroots" campaigns and utilization of its paid staff. These efforts have included such topics as "labor law reform," situs picketing, deregulation of natural gas, minimum wages, postcard voter registration, national health insurance, strip mining, food stamps, hospital cost containment, the observance of International Women's Year, the Clinch River breeder reactor, and copyright revision.

CWA has also recommended people to the staffs of United States Senators, and for appointments to the office of United States Attorney General, the Department of Health, Education and Welfare, the United States Census Bureau, the Environmental Protection Agency, the United States Postal Service, the Consumer Product Safety Commission, and federal judgeships. It also has operating liaison with coalitions engaged in "issue politics." These include the Labor Coalition Clearinghouse,<sup>84</sup> ER-America, the A. Philip Randolph Institute,<sup>85</sup> Concerned Seniors for Better Government, the Full Employment Action Council, the Coalition for Progressive Tax Reform, the National Urban Coalition, the National Coalition for Lower Tuition in Higher Education, the National Coalition Against Domestic Violence, and the Coalition for a Democratic Majority. On international issues, CWA lobbied for the SALT II Treaty, the Panama Canal Treaty, and the lifting of sanctions against Zimbabwe. It urged support for "the tormented people of Northern Ireland," and the hostages in Iran.

Based upon the record and argument, the Special Master found that CWA expends 19 percent of its receipts from dues and agency fees for "collective bargaining, contract administration, and grievance adjustment." He found that 81 percent of dues and fees are "improperly

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84. This organization functioned prior to the 1976 Democratic Convention to secure delegates favorable to the candidacy of Jimmy Carter.

85. "The broad goals of the Institute are the integration of society and the elimination of poverty through full employment and social welfare programs." B. Rustin, *Bayard Rustin on Seniority*, in [1975] LABOR RELATIONS YEARBOOK (BNA) 194, 195.

charged [to] the Agency Fee Payors."<sup>86</sup> In reaching this result, the Special Master adopted the definition of "collective bargaining" from section 8(d) of the Act, the statute that furnishes the basis for plaintiffs' obligation to CWA and which provides that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement. . . ."<sup>87</sup>

In the Special Master's view, "expenditures not clearly embraced within collective bargaining, contract administration and grievance adjustment, as defined, will only be permissible if such expenditure *directly relates to* and is *reasonably necessary for the proper effectuation of* collective bargaining, contract administration and grievance adjustment."<sup>88</sup> That definition is consistent with case law<sup>89</sup> and commonly accepted sources.<sup>90</sup> It is a rejection of CWA's claim that "everything it does is collective bargaining."<sup>91</sup> It is against this definition that the Special Master assayed CWA's proof. He determined that collective bargaining activity must be established by "clear and convincing evidence."<sup>92</sup>

The 19 percent of CWA's expenditures held to meet the collective bargaining definition was derived by first classifying expenditures into four categories: (1) permissible, that is, collective bargaining; (2) impermissible, that is, other than collective bargaining; (3) partly permissible, a mixed class of expenditures apportioned into the first two categories; and (4) a category used when proof of the nature of an activity or its associated cost is not "clear and convincing." Chargeable agency fees represent the ratio that the total of permissible expenditures and the partly permissible expenditures allocated to the permissible category bears to the total of all union expenditures. That ratio, converted to percent, is the 19 percent found by the Special Master.<sup>93</sup> Based upon that ratio, the Special Master recommended a return of 81 percent of plaintiffs' past paid fees and a reduction of their future obligation to CWA by the same

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86. 166 DAILY LABOR REPORT (BNA) at D-12.

87. 29 U.S.C. § 158(d) (1976).

88. 166 DAILY LABOR REPORT (BNA) at D-4.

89. See *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872, 877 (4th Cir. 1955), cited in 166 DAILY LABOR REPORT (BNA) at D-4.

90. In WEBSTER'S NEW COLLEGIATE DICTIONARY 162 (7th Ed. 1979), collective bargaining is defined as "negotiation between an employer and a union representative usu. on wages, hours, and working conditions." This is referred to in 166 DAILY LABOR REPORT (BNA) at D-4.

91. CWA's lawyer is quoted in the *Baltimore Sun*, May 22, 1980, § A, at 9, col. 1 as saying, "But we believe that everything we do is related to collective bargaining."

92. 166 DAILY LABOR REPORT (BNA) at D-3.

93. *Id.* at D-12.

percentage.

#### IV. CONCLUSION

*Beck* represents the first private-sector case squarely applying time-tested first amendment principles. It applies those principles first to identify the constitutionally correct definition of "collective bargaining," and, then to define the quality of the evidence the union must introduce to prevail. In those respects, *Beck* reacquaints us with the proposition expressed in *Thomas v. Collins*,<sup>94</sup> that "[the] espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause."<sup>95</sup> It also reassures employees, regardless of their sector of employment, that under the first amendment, they *need* not "espouse labor's cause" by pure speech or financial support.

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94. 323 U.S. 516 (1945).

95. *Id.* at 538.

