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U.S. SUPREME COURT SETS OUT UNION DUES AND DON'TS

[by Martin Morgenstern]

Two recent decisions of the U.S. Supreme Court -- *Ellis vs. The Brotherhood of Railway and Airline Clerks* and *Hudson vs. The Chicago Teachers Union* -- require special procedures for the handling, accounting and spending of all money collected by a union from an involuntary member or fee-payer. The rulings are complicated, controversial, expensive to administer and, in the view of most practitioners, more than a little ambiguous.

On May 1, 1987 the Labor Center and the California Public Employment Relations Program (CPER) held a conference to discuss the constitutional and statutory obligations imposed on unions by the Ellis and Hudson decisions. This is the first of two LCRs discussing the issues raised at the conference.

Labor Relations Background of the Recent Decisions -- Under our collective bargaining system, a "recognized" union can require any non-member it represents to pay dues or fees to the union. In turn the union must provide the same benefits and representation to members and non-members alike. A union must demonstrate that a majority of workers in a particular workplace or craft want that union to represent them in negotiations with management on terms and conditions of employment **before** the union is recognized as the exclusive representative of those employees. Then, as in any democratic process, the will of the majority prevails; management can deal only with the duly elected union on employment matters. The union must represent everyone equally and fairly, in negotiations and in disputes at the workplace. It cannot lawfully discriminate on the basis of union membership, or non-membership.

Obviously a system that provides the same benefits for dues payers as those who decline to pay their share could cause economic hardship for union members if their dues had to be raised to pay for the services delivered to the non-payer. There are varying provisions in state and federal law designed to deal with this "**freeloader**" problem. Under a **union shop agreement**, all employees must join the recognized union, while **agency shop** rules require that all employees covered by the union contract pay a fee for union services. The Railway Labor Act (RLA) and many state laws (covering public workers or other employees not protected by federal statute) allow labor and management to include union or agency fee provisions in the labor management agreement. The National Labor Relations Act (NLRA) also allows such agreements, but under the Taft-Hartley amendments to the Act, any state can bar union security agreements within its borders. All public employees and those covered by the Railroad Labor Act are immediately affected by the recent decisions. Though neither case directly involves the jurisdiction that covers the great majority of unions, the National Labor Relations Act, one federal court of appeal has already applied the same rules in an NLRA case, while another has ruled in just the opposite manner.

Legal Background of the Recent Decisions -- Well over a hundred union and management officials and lawyers, members of the Public Employment Relations Board and the American Arbitration Association and other interested parties attended the Oakland conference which began with a presentation by the distinguished UCLA labor law professor, Reginald Alleyne. Professor Alleyne's task was to put *Ellis* and *Hudson* in historical perspective. He first pointed out that an 1888 statute had made the "yellow dog" contract -- an agreement by a worker never to join a union -- illegal, but that 1908 Supreme Court decision had **invalidated** the statute. Many employers continued to make the signing of such a contract a condition for being hired until 1936, when the court reversed itself and found the NLRA (which declared the yellow dog unenforceable) constitutional.

The 1908 decision was based on the sanctity of contracts. The 1936 ruling recognized that an individual worker did not deal with an employer as an equal, and thus could be coerced into agreeing to conditions that violated that individual's basic rights and essential interests. In holding that only when employees had the right to act collectively could they deal with their employer as an equal, the Court upheld the right of the majority to collective representation despite minority opposition.

The laws that allow a union to be reimbursed for representing even the minority who might prefer not to have a union, give meaning to the basic principle of collective bargaining -- the union speaks for every worker. In reminding us that efforts to ignore the right of the majority of workers to be represented collectively lead logically back to the days of the yellow dog agreement, Professor Alleyne underlined the historical and ideological importance of the issues in dispute. He went on to point out that while those who oppose unions and resist paying fees are often quite passionate, vigorous and persistent in claiming that their rights and property are being violated, the great majority of workers reject those arguments with equal vigor. In elections on the issue, workers consistently vote in favor of mandatory union or agency fees. Indeed the Taft-Hartley provision for separate de-authorization (of mandatory dues) elections, died of non-use well before it was finally repealed.

Problems Involved in the Recent Decisions -- Next, a panel of union lawyers discussed the difficulties imposed on their organizations by the Ellis and Hudson decisions, and how they were handling them. In *Ellis vs. the Brotherhood of Railway and Airline Clerks*, the court limited the expenditures that the union could charge non-members to those "necessarily or reasonably incurred for the purposes of performing the duties of an exclusive representative . . . [including] . . . not only the direct costs of negotiating and administrating a collective bargaining contract and of settling grievances and disputes, but also the expense of activities or undertakings normally or reasonably employed to effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."

Using this standard, the Court said that several union activities could not be charged to involuntary members or fee-payers. Organizing new members or workplaces was perhaps the most significant of the disallowed activities. Unions argued (here and in related cases) that the ability of the union to bargain effectively depends on its strength, both in the employers' workforce and elsewhere in the industry. The court found this to be less important than an individual's right to refuse to support a union.

The expenses for union publications were found chargeable only to the degree that they dealt directly with representational matters. For example, the cost of a newspaper article on insurance that only covers dues payers, or one on the need to organize new members, must apparently be somehow subtracted from the overall cost of the newspaper. Similarly, political contributions were disallowed, but lobbying for benefits that go to all employees was found to be permissible.

Equally difficult procedural problems are posed by the *Annie Lee Hudson vs. Chicago Teachers Union* decision. In that case the court found that before the union could legally take any involuntary monies, the employee must get an accounting of how the money is to be spent. If a non-member objects to these expenditures, the union is required to immediately lower that person's dues to reflect only legally allowed matters as determined by an independent audit. If the employee challenges that determination, a "reasonably prompt" and neutral adjudication must be held to determine the issue.

The Chicago Teachers Union, in fact, afforded the challenging members a hearing before a professional arbitrator. The panelists at the May 1 conference all read the decision as allowing arbitration (in lieu of more costly litigation) if the union does not have sole discretion in choosing the arbitrator. Most believe that the union can legally pay the full arbitrator fees and are willing to do so. Some unions offer the non-member a choice of whether to pay or not, and the Union of American Physicians and Dentists insists on payment of half of the arbitrator's fee by the challenger. For most employees, maybe even most doctors, that will far exceed the money saved on union dues.

The Chicago Teachers procedure provided for a rebate of any and all monies collected in excess of the amount that the arbitrator found appropriate, a procedure that appeared to be in line with a previous Supreme Court decision (Abood). Now the court finds that this represents an interest-free loan and thus violates the non-members' rights. Instead, *Hudson* requires not only an immediate fee reduction on objection to the audit figures, but for those who challenge the audit there must be a further accommodation of either an immediate further reduction of all amounts "reasonably" in question, or establishment of an interest-bearing escrow account for said amount. Some unions reported putting the full agency fee into escrow.

-- Martin Morgenstern

This article will be continued next month.