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AGENCY FEES IN EDUCATIONAL EMPLOYMENT: REALITY OR MIRAGE?

Joseph G. Schumb, Jr.*

INTRODUCTION

In 1976, the Educational Employment Relations Act, commonly known as the Rodda Act or EERA,1 became effective in California, replacing the Winton Act,2 which had been severely criticized for not providing an effective means of conducting employer-employee relations.3 For the first time, employees of the California public schools, including the community colleges, can select their own exclusive representative who has the authority to negotiate a collective bargaining agreement with the school district employer on their behalf.

The Rodda Act is patterned after the National Labor Relations Act4 (NLRA). It established an administrative agency formerly known as the Educational Employment Relations Board and now called the Public Employment Relations Board [PERB],5 which has exclusive jurisdiction to determine appropriate units, conduct elections, and certify exclusive representatives.6 The Act makes certain conduct of the employer and employee organization an unfair practice and gives PERB the authority to hear and determine unfair practice charges.

The Act also authorizes the inclusion of provisions for organizational security in collective bargaining agreements.7 This article will explore the legality of organizational security arrangements, specifically the enforceability of the agency or service fee under California law and the recent decision of the United States Supreme Court upholding agency fees in the public sector.8 It is the author's conclusion that although such

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5. CAL. GOV'T CODE §§ 3513(g), 3540 (West Supp. 1978).
8. Abood v. Board of Educ., 431 U.S. 209 (1977). An agency fee is an arrangement which provides that "as a condition of employment for the duration of the contract,
agency fees have been held legal, the problems in determining the amount of fees which may be properly charged to non-members and in collecting them weaken their effectiveness as a method of providing union security. Although this article will deal primarily with the agency fee as applied to public school teachers in California, many comments will apply generally to all public employees covered by similar laws elsewhere.

Organizational security is obviously a matter of great concern to employee organizations because it provides needed revenue and eliminates "free riders," those employees who obtain the benefits of the union's representation without financially supporting the union. The Rodda Act provides for two forms of organizational security. First, the statute permits a maintenance of membership provision which specifies that an employee who is a member of the union when the collective bargaining agreement is signed or becomes a member thereafter must "maintain his membership in good standing for the duration of the written agreement." Second, the law authorizes an agency or service fee which permits the exclusive representative to charge non-members a fee "not to exceed the standard initiation fee, periodic dues, and general assessments" levied on members. To be effective the organizational security provi-

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an employee is required to pay a fixed sum every month to defray union costs whether or not he is a member of the union." Hopfl, The Agency Shop Question, 49 CORNELL L. REV. 478, 480 (1964). Similar to the agency fee is a "fair share" agreement according to which the employee is free to not join the union, but must pay a pro rata share of the cost of representation. See, e.g., OR. REV. STAT. § 243.650 (1977-1978).

11. Id. § 3540.1(i)(1). This section authorizes:
   An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him, as a condition of continued employment, if he does join, to maintain his membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his obligation to the employee organization within a period of 30 days following the expiration of a written agreement . . .
12. Id. § 3540.1(i)(2), which provides for
   An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

State employees who have been brought under the jurisdiction of the PERB are not covered by EERA, and the organizational security provisions of section 3540.1(i) are not applicable to them. Recent amendments only authorize a maintenance of membership provision. CAL. GOV'T CODE § 3513(h) (West Supp. 1978).
sion must be agreed to by the employer and included in the collective bargaining agreement.\textsuperscript{13}

The widespread use of the agency fee is a rather recent development. Prior to 1935 and the adoption of the National Labor Relations Act, there was no limitation on the right to bargain for union security under federal law and hence more restrictive forms of union organization such as the union shop and closed shop were legal.\textsuperscript{14} With the adoption of the National Labor Relations Act,\textsuperscript{15} the right to negotiate union security provisions remained so long as the union was not company dominated and represented a majority of the members in an appropriate unit.\textsuperscript{16}

In 1947, Congress passed the Labor Management Act which amended section 7 of the Wagner Act and guaranteed the right of employees to refrain from union activities,\textsuperscript{17} but permitted provisions for union shop and maintenance of membership arrangements in collective bargaining agreements.\textsuperscript{18} Of course, any such arrangements required the agreement of the employer, which was not always forthcoming because of the reluctance to force non-members to join the union. The agency shop became used increasingly as a compromise provision because it did not require non-members to join the union, but did require them to pay their share of the costs of union activities.\textsuperscript{19} Since the law imposed upon the exclusive representative the duty to represent all members of the unit whether union members or not,\textsuperscript{20} it was reasonable to argue that they should pay their "fair share."\textsuperscript{21}

The Labor Management Act amendments did not mention the agency shop as a permissible form of union security, and

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\textsuperscript{13} Cal. Gov't Code § 3546(a) (West Supp. 1978).
\textsuperscript{14} In a closed shop the employer agrees to hire only union members, and further agrees that all employees will continue to be union members as a condition of employment. A union shop differs only in that the employer may hire non-union persons, but within a specified period the employee must become a member. Blair, \textit{Union Security Agreement in Public Employment}, 60 \textit{Cornell L. Rev.} 183, 185 (1975).
\textsuperscript{20} Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945); Wallace Corp. v. NLRB, 323 U.S. 248 (1944). See also Cal. Gov't Code § 3544.9 (West Supp. 1978).
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therefore its legality under the NLRA was in doubt\(^\text{22}\) until 1963, when the Supreme Court held it was lawful in *NLRB v. General Motors Corp.*\(^\text{23}\) In upholding the agency shop, the Supreme Court pointed out that the distinction between an agency shop and a union shop, which was specifically authorized by the NLRA, was "more formal than real" because the union shop is enforceable only to the extent that it requires the payment of dues and fees. The Court said "[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues."\(^\text{24}\)

Prior to the decision in *General Motors* the Supreme Court had upheld against constitutional attack a provision of another federal law, the Railway Labor Act, which specifically authorized the agency shop in the private sector.\(^\text{25}\) The question whether public employees could be compelled under our federal constitution to pay an agency or service fee remained an open question until last year.\(^\text{26}\)

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\(^\text{22}\) General Motors Corp., 130 N.L.R.B. 481, 47 L.R.R.M. 1306 (1961), in which the NLRB initially held the agency shop unlawful.

\(^\text{23}\) *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

\(^\text{24}\) *Id.* at 742.


\(^\text{26}\) *Abood v. Board of Educ.*, 431 U.S. 209 (1977). The constitutional provisions discussed in this article deal with the United States Constitution. Whether public employees can be compelled to pay an agency fee under state law will not be discussed in detail in this article. Although there is no California case to uphold the imposition of agency fees in the public sector, it is well established in the private sector that a closed shop is legal and a proper objective of union activity. See *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027 (1908); *McKay v. Retail Auto Salesmen’s Local Union*, 16 Cal. 2d 311, 106 P.2d 3 (1940); *C.S. Smith Metropolitan Mkt. Co. v. Lyons*, 16 Cal. 2d 389, 106 P.2d 414 (1940). One California Supreme Court case held against a claim of constitutional violation when a union member was compelled to pay a special assessment to defray the cost of an "educational" program to oppose an initiative designed to outlaw the union shop which he supported. *DeMille v. American Fed’n of Radio Artists*, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876 (1948). And, although under California law public employees have no common law right to bargain collectively, or to contract for an agency shop in the absence of statutory authority to do so, it does not appear that once the right is statutorily granted that it would be unconstitutional. *City of Hayward v. United Pub. Employees*, 54 Cal. App. 3d 761, 126 Cal. Rptr. 710 (1976). Other public employees in California are seeking agency fee type agreements. *See 34 Cal. Pub. Employee Relations* 2 (Sept. 1977). Since *Abood* was decided, a federal district court has upheld on its face Hawaiian legislation which requires non-members to pay a service fee. *Jensen v. Yonamine*, 437 F. Supp. 368 (D. Hawaii 1977).
THE LEGALITY OF AGENCY FEES IN THE PUBLIC SECTOR—ABOOD AND ITS PRECEDENTS

In May, 1977, the United States Supreme Court held in Abood v. Board of Education that it was constitutionally permissible to charge public employees an agency fee to the extent that it was used to defray the costs of collective bargaining. The Court held, Mr. Justice Stewart writing the opinion, that an agency fee equal to the amount of regular fees and dues of members of the union was permissible, but that objecting non-members were entitled to a refund of any portion of the fee that was used for political or ideological purposes. Justices Rehnquist and Stevens wrote separate concurring opinions, and Justice Powell, joined by the Chief Justice and Justice Blackmun, concurred in the judgment insofar as it held that a state cannot constitutionally compel public employees to contribute to union political activities which they oppose. From the remainder of the decision they dissented.

In Abood, the Supreme Court had before it a Michigan statute which provided in relevant part as follows:

[N]othing 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 representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative . . . 

In the state court, teachers sought declaratory relief challenging the constitutionality of this provision and alleged that they had been threatened with dismissal. The Michigan Court of Appeals interpreted the statute as not limiting "the non-member's contribution to his proportionate share of the costs of collective bargaining," and concluded that "it is clear that the amendment sanctions the use of non-member's fees for purposes other than collective bargaining."

On the authority of International Association of Machinists v. Street, the Michigan Court held that the statute "could

28. Id. at 232-42.
31. Id. at 326.
violates plaintiffs’ First and Fourteenth Amendment rights” but denied relief on the ground that Street had held that remedies need only be granted to employees “who have made known to the union officials that they do not desire their funds to be used for political causes to which they object.” Since there was no specific allegation in the complaint that plaintiffs had protested the expenditure of funds for political purposes to which they objected, plaintiffs were not entitled to any relief. If such an allegation were made, the appropriate relief would have been “restitution to the employee of that portion of his money expended by the union over his objection.”

The case reached the Supreme Court on the pleadings, and because it was not tried on the merits, there was no evidence of any particular expenditures. However, it is clear that the complaint alleged that the union used, or would use, a substantial part of these funds for “various social activities for the benefit of its members which are not available to non-members as a matter of right” and to support various “activities and programs which are economic, political, professional, scientific, and religious” which plaintiffs did not approve and which were not related to collective bargaining activities.

The Private Sector Precedents

In upholding the agency fee as applied to public employees, Justice Stewart relied on two earlier decisions of the Court which he quite correctly concluded “on their face go far towards resolving” the issues raised. In the first case, Railway Employees’ Dept. v. Hanson, the Court held that a union shop provision in a collective bargaining agreement authorized by the Railway Labor Act was constitutional and rejected the challenge of employee non-members who did not desire to join the union and who sought to enjoin the application and enforcement of such an agreement. In Hanson, the Nebraska Supreme Court had held that the union shop agreement violated the First Amendment of the United States Constitution because it deprived the employees of their freedom of associa-

33. 230 N.W.2d at 327.
34. Id. (quoting 367 U.S. at 774).
35. 230 N.W.2d at 327.
37. Id. at 217.
tion and violated the Fifth Amendment. The United States Supreme Court reversed, stating "that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments."40 Emphasizing that the Railway Labor Act, as construed, limited the required financial support to only payment of periodic dues, initiation fees, and assessments for purposes germane to collective bargaining, Justice Douglas, writing the opinion of the Court, said:

To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more has been attempted here. The only conditions to union membership authorized by § 2, Eleventh of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments." The assessments that may be lawfully imposed do not include "fines and penalties." The financial support required related, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary. The prohibition of "fines and penalties" precludes the imposition of financial burdens for disciplinary purposes. If "assessments" are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.41

Thus, in Hanson the Supreme Court dealt only with the question whether non-members could be constitutionally compelled to pay the costs of collective bargaining. However, the Court did not define what it meant by the "costs of collective bargaining."

In the other case relied on by Justice Stewart, International Association of Machinists v. Street,42 the Court was faced with whether employees could be compelled to contribute to the cost of political campaigns of candidates whom they opposed and to promote political and economic ideologies with which they disagreed. The Court held that when the Railway Labor Act was properly construed, it authorized only the

40. 351 U.S. at 238.
41. Id. at 235.
recovery from non-members of expenditures relating to collective bargaining and adjusting grievances and denied authority to a union, over the employee's objection, to spend his money for political causes which he opposes. Accordingly, the imposition of a compulsory agency fee to be used for political purposes over the objection of non-members violated the Act. Thus, the Court avoided the constitutional issue.

Justice Brennan, writing for the Court, detailed the history of labor legislation in the railroad industry and specifically the arguments made by the unions in 1950 to support the amendment authorizing the union shop. The principal argument, he concluded, was that the cost of collective bargaining and administering collective bargaining agreements should be spread "to all employees who benefited," thus eliminating the 'free riders'—those employees who obtained the benefits of the unions' participation in the machinery of the [Railway Labor] act without financially supporting the unions." The Court again did not attempt to delineate the precise limits of permissible expenditures, but said:

We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions unlimited power to spend exacted money. We are not called upon to delineate the precise limits of that power in this case. We have before us only the question whether the power is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political programs which he opposes. Its use 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. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified. On the other hand, it is equally clear that it is a use to support activities within the area of dissenters' interests which Congress enacted the proviso to protect. We give § 2, Eleventh, the construction which achieves both congressional purposes when we hold, as we do, that § 2, Eleventh, is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.

43.  Id. at 768-69.
44.  Id. at 761.
We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes.\textsuperscript{45}

Since the Court held that fees were used for purposes not authorized by law, it had to decide on the appropriate remedy. The Court held that an injunction restraining the enforcement of the union-shop agreement was plainly not appropriate because the agreement itself was not unlawful. The non-members' grievance stemmed not from the agreement but from the spending of their funds for purposes not authorized by the Railway Labor Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds.\textsuperscript{44} The Court concluded that if their money were used for the purposes contemplated by the Act, the appellees would have no grievance at all.

Furthermore, the Court maintained that restraining the collection of any funds from the non-members might interfere with the union's duty of representation and that forbidding all expenditures for the political purposes objected to might violate the first amendment rights of the majority. Any remedies should be granted only "to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object . . . [D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employees."\textsuperscript{47} The Court then suggested a remedy, stating:

One remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those monies to be spent by the union for political purposes which is so much of the monies exacted from him as is the proportion of the union's total budget. The union should not be in a position to make up such sum from money paid by a nondissenter, for this would shift a disproportionate share of the costs of collective bargaining to the dissenters and have the same effect of applying his money to support such political activities. A second remedy would be restitution to each individual employee of that portion of his money which the union expended, de-

\textsuperscript{45} Id. at 768-69.
\textsuperscript{46} Id. at 771.
\textsuperscript{47} Id. at 774.
spite his notification, for the political causes to which he had advised the union he was opposed. There should be no necessity, however, for the employee to trace his money up to and including its expenditure; if the money goes into general funds and no separate accounts of receipts and expenditures of the funds of individual employees are maintained, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.48

In Railway Clerks v. Allen,49 the Supreme Court amplified Street, stating that the lower court would have to determine (1) the expenditures disclosed by the record which are political and (2) the percentage of total union expenditures which are for political expenditures. The burden of proving these matters was placed on the union.

Abood — A Plurality Decision

These cases provided the underpinning for Abood, in which Justice Stewart initially recognized the strong public interest in promoting collective bargaining through an exclusive bargaining agent. The existence of a single representative promotes more efficient and effective bargaining relationships by reducing interunion rivalries50 and conflicting union demands. It also avoids negotiating more than one contract to cover the same unit. Justice Stewart, relying on often repeated arguments, pointed to the cost and expense of collective bargaining and representation duties as well as the existence of the union's duty to represent all employees in the unit whether or not they are union members.

He acknowledged, however, that requiring involuntary support of the collective bargaining representative has an impact on first amendment rights. Nevertheless, he concluded that Hanson and Street had already decided that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shops to the system of labor relations established by Congress."51

48. Id. at 774-75.
49. 373 U.S. 113 (1963).
51. 431 U.S. at 222.
AGENCY FEES

Justice Stewart then reviewed the Michigan scheme for regulating public sector labor relations and found that it was directed at "no different kinds of evil" and that "the desirability of labor peace is no less important in the public sector, nor is the risk of free riders any smaller." He concluded that Hanson and Street appear to require the Court to validate the agency shop in the public sector "insofar as the service charge is used to finance expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment . . . ."

Justice Stewart rejected two arguments advanced by non-member employees to distinguish Hanson and Street. First, they argued that in public employment constitutional guarantees are more directly implicated. Second, they contended that collective bargaining in the public sector is inherently political and prohibition against forced political association is a fundamental constitutional right. The Court acknowledged that the actions of public employers are state action, but said that plaintiff's claims failed in Hanson not for lack of state action but rather for lack of a constitutional violation. While noting differences between the public and private sector, the Court found that the uniqueness was not in the employees, but rather in the employer and, in any event, that the difference did "not translate into differences in First Amendment rights." The Court concluded that the union was prohibited "from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher," and that employees cannot be coerced into financing ideas they oppose "by the threat of loss of governmental employment."

The Court recognized that there would be "difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining . . . ," and that the line would be "somewhat hazier" in the public sector because approval of a legislative body may be involved in order to effectuate the collective bargaining agreement. Nevertheless the Court refused to define the dividing line because the case came

52. Id. at 224.
53. Id. at 225.
54. Id. at 232.
55. Id. at 235.
56. Id. at 236.
57. Id.
before it on the pleadings and lacked the "factual concreteness" necessary to make such a decision. The Court reaffirmed the remedies suggested in *Street* and approved in *Allen*, but indicated that it would be highly desirable for unions to develop a voluntary plan to allow non-members to object to and be relieved of that portion of the service charge which is expended for political purposes. In that manner, a dissenting employee could object to that portion of the agency fee spent "for activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment." The employee would be entitled to a refund of his service charge in an amount equal to the proportion that the cost of the specified purpose bears to total union expenses. The union would then refund that portion of his service charge, and its calculations would be subject to review by an impartial board.

Since the Michigan appellate court had denied relief because the employee had not specified the particular expense to which he objected, the Supreme Court reversed, relying on *Allen*, holding that a cause of action was stated and that it was sufficient that plaintiffs alleged they opposed ideological expenditures of any kind without any greater specificity. The Court said that to compel an employee to disclose his own beliefs more specifically would itself place an unreasonable burden on the employee's first amendment rights.

Only three other justices joined in the opinion of Justice Stewart. Justices Stevens and Rehnquist concurred. Justice Stevens stated his understanding that the opinion of the Court did not preclude a requirement that the union establish a procedure to insure that funds of dissenters will not be used even "temporarily" to finance ideological activities unrelated to collective bargaining before requiring any service fee to be charged dissenters. Justice Powell concurred in the judgment only and was joined by the Chief Justice and Justice Blackmun. In his view,

the Court apparently rules that public employees can be compelled by the State to pay full union dues to a union with which they disagree, subject only to a possible rebate or deduction if they are willing to step forward, declare their opposition to the union, and initiate a proceeding to

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58. *Id.* at 240 n.41.

59. The Court was careful to point out that it expressed no view on the constitutional sufficiency of the procedure. *Id.* at 242 n.45.
establish that some portion of their dues has been spent on "ideological activities unrelated to collective bargaining." Justice Powell concluded that even expenditures for collective bargaining purposes would be objectionable if there were a sufficient degree of ideological protest from the employees and the public at large. He suggested that the case should be remanded for trial to require the state to demonstrate that each particular expenditure was necessary to serve an overriding governmental objective.

The decision of the plurality attempts to balance the commands of the first amendment rights of association and speech with the governmental interest in advancing labor peace and stability through the collective bargaining process and, more specifically, insuring a viable and effective labor organization supported by all of the persons who benefit from its activities. The opinion of Justice Stewart and the decision of the Court is consistent with and follows from the earlier decisions in Hanson, Street, and Allen. It provides a reasoned and rational resolution to accommodating a strong public policy with a constitutional mandate. It permits the union to maintain its financial basis and yet protects the rights of dissenters. Permitting the union to collect the entire fee in the first instance is not unreasonable since the dissenter merely has to make a general objection and the burden falls on the union to justify the charge.

**The Distinction Between Permissible and Impermissible Union Expenditures — An Unmarked Boundary**

Precisely what constitutes a proper use of the service fee is an important issue left unresolved by Abood. It is clear that expenditures for political and "ideological activities unrelated to collective bargaining" are improper. It is equally clear that expenditures for the cost of "exclusive union representation" and for "the purposes of collective bargaining, contract administration and grievance adjustment" are proper. This leaves

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60. *Id.* at 245.
62. 431 U.S. at 236.
63. *Id.* at 229.
64. *Id.* at 225-26.
in doubt expenditures for political or ideological purposes related to collective bargaining and representation and all other expenditures which fall into none of these categories.

The opinion in *Abood* and its predecessors have been discussed at some length because Justice Stewart's opinion was joined in by only three other justices and the earlier decisions may be of some guidance in drawing the proper line between permissible and impermissible expenditures. In *Hanson*, Justice Douglas said expenses "not germane to collective bargaining" would present "a different problem."65 In *Street*, Justice Brennan said unions did not have unlimited power to spend exacted money, but only decided that funds could not be used over a dissenter's objection to "political causes" and specifically stated "no view" as to other union expenditures.66 In *Abood*, the Court held that an employee could not be compelled to contribute to the support of an ideological cause he may oppose.67 It would appear then that since the basis for denying the union power to spend the entire service fee in any fashion it deems proper to meet its objectives is the forced contribution to support political or ideological activities which non-members oppose, that only those expenditures that are for purposes unrelated to collective bargaining should be proscribed.

The primary objective of a labor organization is to advance the economic interests of the persons it represents in relation to their employment. In reaching that objective the use of the political process is significant, as the history of the development of labor relations in this country over the past fifty years demonstrates. Lobbying in the legislature and bargaining at the table are practically inseparable. Contributions to particular candidates and supporting or opposing legislation favorable or unfavorable to labor may be more important than negotiations at the table in reaching the proper objectives of the organization. As Justice Douglas said in *Street*, "[t]he furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot

65. 351 U.S. at 235.
66. 367 U.S. at 768-69.
67. 431 U.S. at 236.
68. Although non-members may oppose the union itself on ideological grounds, such opposition is not within the ambit of the proscription against forced contributions which support political activities.
withdraw his financial support merely because he disagrees with the group's strategy. 69 Furthermore, under laws such as EERA, the exclusive representative plays a central role in the overall legislative plan designated "to promote the improvement of personnel management and employer relations" within the public school systems of the State of California 70 and defining permissible expenditures in line with its statutory duties should be appropriate.

Expenditures for social activities enhance the morale of the membership and may strengthen resolve at the bargaining table. Other expenditures which may not be readily categorized as a representation expense but which do not have political or ideological objectives—for example, social programs, group legal service programs, and health and welfare benefits, if available to non-members—should be proper expenditures. As previously observed, the Supreme Court has upheld the imposition of liability on non-members because they benefit from union activities. 71

It is obvious that the line between permissible and impermissible expenditures should be drawn to ensure that the union can effectively carry on its collective bargaining function; otherwise the decision in Abood is meaningless. To require a labor organization to justify each and every expenditure could interfere with the effectiveness of the labor organization and involve considerable expense.

It has been suggested that the line should be limited to those expenditures which are "essential" to that function, not merely "helpful." 72 Accordingly, it has been proposed that those expenditures related to the negotiation and administration of a particular contract are permissible, while those incident to negotiating or administering contracts in general or to influencing the framework in which a particular contract is negotiated are not. 73 This proposal seems too restrictive and if adopted could impair the union's ability to carry out its statutory duties. It would also appear to require a detailed analysis of each and every expenditure.

69. 367 U.S. at 778 (Douglas, J., concurring).
71. EERA, unlike NLRA, provides non-members with the opportunity to vote indirectly on these matters because even though they have no right to participate in internal union matters, they do have the right to vote on the agency fee if the employer requests an election. Cal. Gov't Code § 3546(a) (West Supp. 1978).
73. Id.
Limiting the proscribed expenditures to those for political candidates, political campaigns, and lobbying purposes unrelated to collective bargaining should satisfy the first amendment interest vindicated in \textit{Abood} and would avoid a wholesale examination of every expenditure.\textsuperscript{74} It is significant to note that in using such a standard, the amount of rebate as determined by the California Teachers Association for 1976-77 was only 1.15\% and for the National Education Association was 2.9\%.\textsuperscript{75}

\textbf{The Expenditure Distinction in Other States}

An examination of the law in other states which permit the agency or fair share fee agreement reveals no uniformity but does indicate an awareness of the problem involved in charging non-members for political and ideological expenditures. In the fifteen states (including the District of Columbia) in addition to California which authorize the agency fee or fair share agreement either by statute\textsuperscript{76} or by case decision\textsuperscript{77} for some or all

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\textsuperscript{74.} In September 1977, the Board of Directors of the California Teachers Association, which represents the majority of California public school teachers, adopted a “Political Activity Rebate Procedure,” according to which notice is given to all non-members who are subject to an agency fee charge, informing them that they are entitled to a refund of a percentage of the fee spent by the local chapter and CTA “for political purposes not related to a labor organization’s function.” Letter from CTA President Stephen H. Edwards, Jr., to Chapter Presidents (Sept. 20, 1977) (on file at Santa Clara L. Rev.). The non-member is required to make a written request for refund. An independent auditing firm determines what expenditures are for political activities, and this determination is subject to review by referral to an impartial hearing conducted under American Arbitration Association Rules. As an example, the Ocean View Educator’s Association defines “political activity” as “(1) the administration of the CTA’s independent political action affiliate (ABC, The Association for Better Citizenship), (2) the determination and/or publicizing of OVEA or CTA’s preference for a candidate for political office, or (3) efforts to enact, defeat, repeal, or amend legislation which is not related to the working conditions (legislation regarding collective bargaining is deemed related to working environment of employees represented by OVEA and CTA).” \textit{Ocean View Educators Ass’n, Notice of Political Activity Rebate Procedure} (Feb. 1978) (on file at Santa Clara L. Rev.).

\textsuperscript{75.} \textit{Ocean View Educators Ass’n, Notice of Political Activity Rebate Procedure, supra note 74.}

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public employees, there is no uniform pattern in describing what the agency fee covers, but none permit a charge in excess of regular dues charged members and most limit the charge to a lesser figure. Several states specifically limit the charge to the cost of representation, the "cost of collective bargaining," or the cost of collective bargaining and representation and/or contract administration. Rhode Island limits the amount to the cost of benefits received. Minnesota provides that the amount shall not exceed the cost of regular dues less benefits which non-members do not receive but in no event more than 85 percent of regular dues. Several states limit fees to an amount equal to the regular dues and two states besides California do not specify what the fee covers but do provide that it shall not exceed regular dues.

Four states permit employees to contribute the fee to a charitable organization if their religious convictions preclude them from joining or supporting a labor organization.

In Oregon, the PERB decides on the amount of the fee if the parties cannot agree. In Minnesota, the law requires that the exclusive representative must give advance notice of the amount of the "fair share" fee to the Director of PERB, the employer, and the employees of the unit. This amount can be challenged by giving timely notice, and the burden falls on the exclusive representative to establish that the amount is appropriate. In Massachusetts, the legislature has detailed those costs which are not related to collective bargaining and contract administration as follows: a) contributions to political

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78. Alaska, the District of Columbia, North Dakota, and Wisconsin. ALASKA STAT. § 23.40.110 (1977); DIST. PERS. MANUAL [1977] PUB. EMP. BARGAINING (CCH) ¶ 14117; N.D. CENT. CODE § 34-12-03(b), (f) (1972); Wis. STAT. ANN. § 111.81(6) (West 1974).
80. MINN. STAT. ANN. § 179.65 (West Supp. 1978).
81. Michigan, Montana, Washington, and New York City (City employees only).
82. Connecticut and Vermont.
84. OR. EMPLOYMENT RELATIONS BD. RULE 15-030, [1977] 2 PUB. EMP. BARGAINING (CCH) ¶ 26966.
85. MINN. STAT. ANN. § 179.65 (West Supp. 1978).
86. Id.
parties or candidates for or holders of public office, b) contributions to charitable, religious or political organizations or causes, c) fines, penalties or damages arising from the unlawful activities of a bargaining agent or a bargaining agent’s officers, members or agents, d) social or recreational activities, e) costs of educational activities unrelated to collective bargaining and contract administration, f) costs of medical insurance, retirement benefits or other benefit programs and, g) costs incurred by the bargaining agent to organize employees who are not included in the bargaining unit. 87

Two states, Massachusetts 88 and Wisconsin, 89 require an election before a service fee can be implemented. Montana deems it an unfair practice to use any portion of the agency shop fees for contribution toward political candidates or parties 90 and Vermont law specifically provides that it is unfair to charge a fee which is “excessive or discriminatory.” 91

Service Fees in California: Is an Abood Violation an Unfair Practice?

Under California law, organizational security is permitted but not mandated. Both parties, the employer and the employee organization, must agree to include such a provision in the collective bargaining agreement. 92 Furthermore, the employer can require that the organizational security provisions of the contract be severed from the other provisions and submitted to unit members for separate approval by a majority vote. 93 Even after they have been adopted, organizational security agreements may be rescinded by majority vote. 94 In addition, the amount of the service fee may not exceed “the standard initiation fee, period dues, and general assessments of the organization.” 95

PERB has not decided whether or not an unfair practice is committed if the service fee charge is expended for impermis-

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87. Massachusetts Labor Relations Code, art. IX, § 3, [1977] 2 PUB. EMP. BARGAINING (CCH) ¶ 19547.
88. MASS. GEN. LAWS ANN. ch. 150E, § 12 (West Supp. 1978).
89. WIS. STAT. ANN. § 111.81(6), .81(13) (West 1974).
93. Id. § 3546(a).
94. Id. § 3546(b).
95. Id. § 3540.1(i)(2).
There appear to be several theories on which an unfair charge could be predicated but it is far from clear that any would be successful. Government Code section 3543.6, which specifies the conduct which constitutes an unfair charge for an employee organization, reads as follows:

It shall be unlawful for an employee organization to:
(a) Cause or attempt to cause a public school employer to violate Section 3543.5.
(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to coerce employees because of their exercise of rights guaranteed by this chapter.
(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.
(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

The only subsections upon which such an unfair practice could be predicated are subsections (a) and (b). Neither has been construed by PERB in this context.

Subsection (b) is identical to section 3543.5(a) which applies to employers and has been interpreted by PERB to require an unlawful intent or improper motivation as an element of an unfair practice charge. If the same interpretation is adopted for section 3543.6(b), then an unlawful intent or improper motivation would have to be established in proving an excessive service fee. PERB would have to determine first that an excessive fee was charged. If section 3540.1(2) is interpreted as limiting the permissible amount of the service fee to only those costs which are constitutionally permissible, then PERB would have to interpret the decision in *Abood* and define the constitutional limitation on a case by case basis. The disadvantage of adopting a dividing line which is dependent upon constitutional construction is the uncertainty which may exist

96. King City Joint Union High School Teachers Ass'n, No. SF-CO-5 (PERB, filed Oct. 12, 1976) (currently pending before Hearing Officer).
97. CAL. GOV'T CODE § 3543.6 (West Supp. 1978).
99. This should not prevent PERB from considering unfair practice charges based upon discrimination alleged to exist because service fees in differing amounts are charged members of the same unit.
until the constitutional line is finally drawn by the Supreme Court. This consideration may militate against PERB holding that an excessive service fee is an unfair practice until a more definitive rule has been announced by the Supreme Court.100

The refusal of PERB to entertain unfairs on Abood-type allegations does not leave non-members without a remedy. The types of conduct which the EERA deems unfair are those for which there are no other remedies available at law. Because the state or federal courts are available to enforce Abood-type violations, the refusal of PERB to entertain that type of case as an unfair practice charge would not leave non-members without a remedy. In view of the necessity of establishing an improper motivation as an element of an unfair practice it could be further argued that if an employee organization has adopted an internal procedure, similar to the one mentioned in Abood and adopted by the California Teachers Association, and if that procedure included a determination by an impartial arbitrator, then PERB could rule that no unfair practice was committed if the employee organization complied with the decision of the arbitrator.

Under the NLRA and some other state laws which make it an unfair practice to charge excessive fees, there is a statutory standard for the administrative body to follow. It is the author’s opinion that in the absence of legislation expressly making an Abood-type violation an unfair practice, PERB should not entertain this type of case as an unfair.

PROBLEMS IN ENFORCING THE COLLECTION OF SERVICE FEES

In addition to the problem of determining permissible expenditures for which the service fee may be used, the enforcement or collection of the fee may create certain difficulties, especially in the field of educational employment. The EERA states that both the maintenance-of-membership and service fee arrangements shall constitute “a condition of continued employment,”101 but it is doubtful that a teacher could be dismissed for failure to pay either fee.

In the private sector, under the NLRA, it is well established that the failure to pay the fee is grounds for dismissal.102

However, unlike the private sector, many public employees have established rights under civil service or tenure laws which predated the current era of collective bargaining. These rights are well defined and long standing. The inter-relationship between the collective bargaining laws and tenure laws is a very important and as yet unresolved area of law. Consequently, it is far from clear that a teacher can be dismissed from employment for non-payment of the agency fee.

In the only two reported cases involving the conflict between other statutes and collective bargaining laws, both state courts have held that an employee could not be dismissed. The Maine Supreme Judicial Court held that a school district employer could not be compelled to negotiate a contract provision giving probationary teachers the right to grieve their termination because "[i]n providing a process for dismissal and non-renewal of contract, the legislature has balanced the various interests involved in order to protect not only teachers but the public interest in insuring the children are well taught."\textsuperscript{103} Thus, since the law vested in the district the power to terminate probationary teachers without cause, such a provision was not subject to collective bargaining.\textsuperscript{104}

A Pennsylvania court set aside an arbitration award which directed an employer to dismiss a teacher for failure to pay dues under a maintenance-of-membership agreement.\textsuperscript{105} Pennsylvania, like California, has a statute which provides that tenured teachers can be terminated only for specific grounds enumerated in the statute.\textsuperscript{106} The arbitrator ruled that this statute did not apply, but the court reversed the ruling on the grounds that the collective bargaining law provided that a collective bargaining agreement shall not violate, be inconsistent with, or conflict with any other statute.\textsuperscript{106.1} The court held that the

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\item \textsuperscript{104} \textit{Id.} ME. REV. STAT. tit. 20, § 161(5) (Cum. Supp. 1977) was amended to provide that "just cause" for dismissal was a proper subject of negotiation for tenured teachers.
\item \textsuperscript{106} PA. STAT. ANN. tit. 24, § 11-1122 (Purdon 1962).
\item \textsuperscript{106.1} PA. STAT. ANN. tit. 43, § 1101.703 (Purdon Supp. 1978) reads as follows: The parties to the collective bargaining process shall not effect or implement a provision of a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of
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provision for maintenance-of-membership in the agreement was inconsistent with the tenure law. The court distinguished an earlier case which upheld a collective bargaining agreement in which a school district agreed to submit to arbitration the propriety of dismissing a non-tenured teacher. 107 These cases indicate a reluctance on the part of the courts to interfere with established tenure systems in the absence of a clear mandate from the legislature to do so.

The California Tenure System

In California, the legislature has specifically stated in the EERA that the Act shall not supersede "other provisions of the Education Code . . . which establish and regulate tenure . . . ." 108 In California, the grounds for dismissal of tenured teachers are enumerated in the tenure law, and those grounds do not include dismissal for non-payment of an agency or service fee. 109 The California Education Code provides 110 and our

the Commonwealth of Pennsylvania or the provisions of municipal home rule charters.

108. CAL. GOV'T CODE § 3540 (West Supp. 1978) provides, in relevant part: Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of public school employer do not conflict with lawful collective agreements.
109. CAL. EDUC. CODE §§ 44932, 87732 (West Special Pamphlet pts. I & II 1978). Duplicate reference is made because the Education Code has been recently revised separating provisions for the districts maintaining grades K-12, id. §§ 33000-60672, and the Community Colleges, id. §§ 66000-99127.
110. Id. § 44932 provides: No permanent employee shall be dismissed except for one or more of the following causes: (a) Immoral or unprofessional conduct. (b) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188, Statutes of 1919, or in any amendment thereof. (c) Dishonesty. (d) Incompetency. (e) Evident unfitness for service. (f) Physical or mental condition unfitting him to instruct or associate with children. (g) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him. (h) Conviction of a felony or of any crime involving moral turpitude. (i) Violation of Section 51530 of this code or conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947. (j) Violation of any provision in Sections 7001 to 7007, inclusive, of this code. (k) Knowing membership by the employee in the Communist Party.
courts have held\textsuperscript{111} that tenured teachers may be dismissed only for specified statutory grounds. The California Supreme Court has held that if dismissal is based on “immoral or unprofessional conduct” and “evident unfitness for service,” the determinative test is “fitness to teach.”\textsuperscript{112} In addition to the procedures for dismissal, the legislature has required every school district to have a uniform system of evaluation of all professional personnel.\textsuperscript{113}

Moreover, both tenured\textsuperscript{114} and non-tenured\textsuperscript{115} teachers are entitled to an administrative hearing to determine whether grounds exist for their dismissal. The decision of the Commission on Professional Competence which hears tenured dismissal cases is final and binding on the school district.\textsuperscript{116} The decision of the administrative law judge in non-tenured dismissal is not binding but is subject to the provisions of the Administrative Procedure Act.\textsuperscript{117} Finally, tenured teachers are entitled to an independent review in the superior court.\textsuperscript{118}

It appears, therefore, that Government Code section 3540 manifests a legislative intent not to change or modify the existing comprehensive tenure system. Thus, although the tenure system is a creation of the legislature and may be modified by the legislature,\textsuperscript{119} that body has shown no intent to do so. While it could be argued that failure to pay the agency fee constitutes insubordination and a persistent violation or refusal to obey school laws (a statutory ground for dismissal),\textsuperscript{120} it is probable

\textsuperscript{111} Governing Bd. of Oakdale Union School Dist. v. Seaman, 28 Cal. App. 3d 77, 104 Cal. Rptr. 64 (1972).
\textsuperscript{113} CAL. EDUC. CODE §§ 44660 and 87660 (West Special Pamphlets I & II 1978).
\textsuperscript{114} Id. § 44944.
\textsuperscript{115} Id. § 44949.
\textsuperscript{116} Id. § 44944.
\textsuperscript{117} Id. § 44949.
\textsuperscript{118} Id. § 44945.
\textsuperscript{119} Taylor v. Board of Educ., 31 Cal. App. 2d 734, 89 P.2d 148 (1939). Cf. Governing Board of the Chaffey Union High School District v. Commission on Professional Competence, 72 Cal. App. 3d 447, 140 Cal. Rptr. 206 (1977). In Taylor the court said, “In California... , the legislature still has plenary power over teacher tenure, there being no constitutional provisions in any way limiting that power.” Id. at 744, 89 P.2d at 153. It has been held under one state law that adding additional grounds for dismissal that changed the tenure law impaired a contract protected by the federal constitution. Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).
\textsuperscript{120} Cf. CAL. EDUC. CODE §§ 44932(g) and 87732(g) (West Special Pamphlets I & II 1978) (statutory grounds for dismissal of permanent school district and community college district employees). See also Stuart v. Board of Educ., 161 Cal. 210, 118 P. 712 (1911); Governing Bd. of Oakdale Union School Dist. v. Seaman, 28 Cal. App. 3d 77, 104 Cal. Rptr. 64 (1972).
that California courts will hold, in view of the specific language of section 3540, that the legislature did not intend to include non-payment as a basis for dismissal on that statutory ground.

Probationary teachers do not have a vested right to employment.121 There are no enumerated grounds for dismissal, but the cause must relate solely "to the welfare of the schools and the pupils thereof."122 Whether probationary teachers can be dismissed for non-payment is less clear. In the cases cited from other states, a distinction was made between tenured and non-tenured employees,123 but in both Maine and Pennsylvania, there apparently was no statutory restriction on terminating non-tenured teachers. This is not true in California.

In California, non-tenured teachers can be terminated "for cause only." It has been held that whether particular conduct established cause for dismissal of a non-tenured teacher is a "pure question of law."124 Thus, although the language of section 3540 refers to "tenure or a merit or civil service system" and arguably not to non-tenured employees,125 the substantial protections that the legislature has given non-tenured teachers may be sufficient to convince a court that the legislature did not intend to give districts the authority to terminate non-tenured teachers for non-payment of dues.

In conclusion, it appears probable that neither tenured nor non-tenured employees may be dismissed for non-payment of a service fee or a maintenance-of-membership fee. Even if it were held otherwise, the exclusive representative has no legal authority to commence a dismissal proceeding. Since this authority is vested in the exclusive control of the school district, the employee organization would probably have to bring a suit in superior court128 or perhaps file an unfair practice charge against the district.127

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122. CAL. EDUC. CODE § 44949(d) (West Special Pamphlet I 1978).
123. See note 105 supra.
126. PERB does not have jurisdiction to enforce collective bargaining agreements, but may consider the same conduct if it also constitutes an unfair practice. CAL. GOV'T CODE § 3541.5(b) (West Supp. 1978).
127. One employee organization filed an unfair practice charge against a school district employer for failure to discharge non-paying members, but the court held there was no unfair because dismissal for non-payment was not lawful. Commonwealth Labor Relations Bd. v. Unionsport Area School Dist., 28 Pa. Commonw. Ct. 61, 367 A.2d 738 (Pa. Commw. Ct. 1977).
Alternative Methods of Enforcement of Service Fees

Assuming that dismissal for non-payment is not legally permissible, an alternative method of enforcement would be to provide in the collective bargaining agreement that the employer withhold the agency fee on a monthly basis in the same manner as association dues are payroll-deducted. In Hawaii, the law specifically provides for automatic deductions once the exclusive representative is designated, with or without a collective bargaining agreement. It is uncertain whether such a provision is authorized in California. Government Code section 3543.1(d) provides that the exclusive representative has the right to dues deductions "pursuant to Sections 13532 and 13604.2 of the Education Code." These sections of the Education Code provide for voluntary authorization by the employee for dues deduction, which authorization is specifically made revocable upon written notice from the employee. In view of the specific reference to these provisions, it is doubtful that an employer can agree to deduct a service fee or dues without written authorization from the non-member. Presumably that authorization would not be forthcoming. Both the EERA and the Education Code sections referred to above speak only of dues and not of agency or service fees. It is unclear, therefore, whether service fees could be withheld by agreement without the consent of the non-member. Such an agreement is certainly not inconsistent with the EERA, and a bargained-for agreement would be in accord with the objective of enforcing the obligation of non-members to pay their fair share. On the other hand, it might seem anomalous that an agreement could require involuntary deductions for the service fee and not for dues. Involuntary deduction from wages does not appear to be a promising method of collecting service fees.

A third method of enforcement would be an action directly against an employee in the state court. Such actions would be time consuming and expensive. The theory on which such

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128. Under Hawaiian law, all members of the unit are charged a service fee and dues and assessments are treated separately. Upon a written statement from the exclusive representative, the employer must withhold the amount requested. Haw. Rev. Stat. § 89-13 (1976); Wash. Rev. Code § 41.56.122 (Supp. 1976).


actions could be based would be either the enforcement of a statutory obligation or unjust enrichment.\(^{131}\) While it is established that employees covered by a collective bargaining contract are entitled to sue as third party beneficiaries and that even a non-member may sue,\(^{132}\) neither the employee organization nor the employer are third party beneficiaries. A third party beneficiary is a person for whom the contract is made and who under our law can bring suit in his own name even though not a promisor. An action to enforce payment of a service fee presents the reverse situation.\(^{133}\)

**The Problem of Retroactivity in Collection of Service Fees**

There is still another issue that may arise in litigation to enforce the agency fee. If the collective bargaining agreement were not executed until some time after the beginning of the contract year, it may be argued that the agency fee cannot be made retroactive even if the contract benefits such as wages, are made retroactive. Under the NLRA, it has been held that the union dues cannot be collected retroactively,\(^{134}\) but this ruling is based on the particular language of the NLRA. The EERA does not specify whether the recovery of the service fee may be made retroactive. However, unlike the NLRA which specifies a thirty-day grace period, the EERA provides that the service fee shall be payable for the "duration of the agree-


\(^{134}\) Colonie Fibre Co., 69 N.L.R.B. 589, 18 L.R.R.M. 1256, modified, 71 N.L.R.B. 354, 18 L.R.R.M. 1500 (1946), enforced, Colonie Fibre Co. v. NLRB, 163 F.2d 65 (2d Cir. 1947) [hereinafter Colonie Fibre Co.]. This case involved the enforcement of a maintenance of membership agreement, but the rationale would apply at least as strongly to the agency shop. In Kress Dairy, Inc., 98 N.L.R.B. 369, 29 L.R.R.M. 1348 (1952), a representation case, the NLRB stated the purpose and effect of the thirty-day grace period:

In writing the 30-day grace period into Section 8 (a)(3), the Congress clearly intended to assure that all non-members of a union who were employed when a union-security contract was executed, and all employees employed thereafter, should have 30 days in which to join the union. It is fundamental, therefore, that the statutory 30 days must be counted prospectively from the date of execution of a union-security contract. A contrary holding would allow unions and employers to defeat the congressional purpose, at least in part, by pre-dating by 30 days every contract containing a union-security clause.

Id. at 370, 18 L.R.R.M. at 1348.
This fact is significant because the legislature was presumably aware of the NLRA and case law interpreting it. Furthermore, section 3540.1(i)(1), dealing with maintenance-of-membership agreements, refers to a thirty-day grace period after the expiration of the contract during which an employee may terminate membership. The failure to require the thirty-day grace period at the inception of the agreement surely established the legality of the imposition of the agency fee from at least the execution of the agreement.

A careful analysis of the case on which the NLRA rule of non-retroactivity is based indicates that membership retroactivity was applied during a period when there was no exclusive representative. It appears reasonable to preclude retroactivity in that situation because (1) an employee may be a member of the losing union and in effect may pay a service charge to both, and (2) the service charge is related to collective bargaining expenditures, and since there was no exclusive representative, there was no collective bargaining. On the other hand, where the union has been certified as the exclusive representative, it seems appropriate to apply retroactivity to the effective date of the teacher's contract unless the law specifically provides otherwise. As the authorities previously cited indicate, the principal purpose and justification for imposing the agency fee on non-members is to require all members of the bargaining unit to pay their fair share cost of union activities from which they benefit. When the collective bargaining agreement provides for higher wages and more extensive fringe benefits retroactive to the beginning of the contract year, there is no reason why the service fee should not also be retroactive. If the service fee can be charged only for the period from the date of execution of the collective bargaining agreement to its termination, there may be many cases in which non-members will not be paying their fair share. Some collective bargaining agreements have taken up to ten months to negotiate. School employees do not have the right to strike. Thus, an exclusive representative might be placed in the position of accepting an unfavorable agreement early to avoid losing substantial reve-

137. Colonie Fibre Co., supra note 134.
nue from service fees it would be entitled to collect if the execution of contract date is applicable.

**Conclusion**

Even though the agency fee, per se, is legal in the public sector, there are many unresolved issues, including the legality of expenditures from such fees and the difficulty in enforcing such provisions, especially in the field of education. Until these issues are resolved by the courts and the legislature, the utility of the agency fee depends largely upon the extent to which the non-members object to the fee and contest its payment. Nevertheless, the Supreme Court has provided a starting point in *Abood*, and in time workable solutions will undoubtedly be achieved, eliminating the "free-rider" once and for all.