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Free Speech and Compulsory Union Fees: An Analysis of Lehnert v. Ferris Faculty Association

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Free speech and compulsory union fees

by Barbara J. Fick

James P. Lehnert, et al.
v.
The Ferris Faculty Association-MEA-NEA, et al.
(Docket No. 89-1217)

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ISSUE

The collective bargaining agreement between the Ferris Faculty Association (FFA) and Ferris State College (Ferris), a four-year public institution of higher education in Michigan, requires all employees covered by the terms of the contract to pay a service fee to the FFA equal to the amount of dues paid by union members, less any amounts not permitted by law. Several faculty members objected to the amount of the fee collected, alleging that some of the money was being used for purposes other than collective bargaining, which use they claimed is not permitted by law.

The Supreme Court is being asked to draw the line between those types of union activities which effectuate the union's duties as collective bargaining representative and thus can be charged to non-members, and those activities that are not related to collective bargaining and therefore are not chargeable to objecting non-members.

FACTS

The FFA represents all faculty employed by Ferris. Under the terms of the collective bargaining agreement, all faculty must pay a service fee to the union. The FFA is affiliated with both the Michigan Education Association (MEA) and the National Education Association (NEA), labor organizations which represent employees employed by educational institutions located both in Michigan and throughout the United States. Part of the service fee collected by the FFA is remitted to the MEA and the NEA.

Several Ferris faculty who were not members of the FFA objected to paying any amount of service fee over and above the amount necessary to fund the FFA's performance of its duties as collective bargaining representative for Ferris faculty. They filed a lawsuit in federal court alleging that to the extent their service fee monies were being used for purposes other than FFA's collective bargaining duties, their rights to free speech and association as guaranteed by the First and Fourteenth Amendments were violated.

The trial court, after reviewing the expenditures of the FFA, held that the non-members were required to pay for certain types of services provided by the FFA, the MEA and the NEA including: 1) bargaining and litigation activities provided to employees in other bargaining units; 2) lobbying and electoral activities related to public education issues; 3) public relations activities related to contract negotiations specifically and education issues generally; 4) union conventions and meetings; and 5) expenses incurred during negotiations involving the tactic of threatening an illegal strike. 643 F. Supp. 1306.

The non-members appealed the trial court's decision, arguing that the above enumerated activities were not directly related to FFA's performance of collective bargaining duties for the Ferris faculty unit and therefore could not be charged to them. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court (881 F.2d 1388 (1989)), and the Supreme Court granted the non-members' petition for a writ of certiorari.

BACKGROUND AND SIGNIFICANCE

Although this case involves public sector unions and issues arising under the First and Fourteenth Amendments, the decision will affect private sector labor organizations as well. The debate over forcing non-members to pay for union services has been waged under the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA) (both of which regulate private sector employment as well as public sector labor laws).

Both the RLA and the NLRA contain provisions authorizing union shop clauses in contracts, whose literal terms require all employees in a bargaining unit to become members of the union. A broad reading of these statutory provisions could raise constitutional problems, as the federal government would be permitting unions to force individuals to join the union in contravention of their right to freedom of association. The Supreme Court has interpreted these statutory provisions narrowly, however, in light of the problem which Congress sought to address in authorizing the union shop.

Congress' intent in providing for a union shop was to deal with the "free rider" problem, not to infringe on free speech. Since unions are legally required to represent the interests of all workers in the bargaining unit, whether union members or not, the unions are entitled to be reimbursed for their services. Employees who get the benefits

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of union representation can be required to pay for it. But Congress did not intend that the union shop be used by unions to force non-members to support political or other activities to which they might be opposed. *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

In cases where employees are employed by governmental entities, such as Ferris State College, the guarantees of the First and Fourteenth Amendments act as a restraint on the ability of public sector employers and unions to require workers to support unions financially. The government may infringe on employees' rights to free speech only to the extent necessary to achieve a compelling state interest. The Supreme Court has recognized such a compelling state interest in preventing the free rider problem, thereby permitting the government to require non-member employees to support financially those union services that are related to collective bargaining, even though such compelled support infringes on the non-members' free speech right not to support activities they oppose. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

This case presents the Supreme Court with the problem of drawing the line between those union activities that address the free rider problem and those activities that unnecessarily infringe on free speech. The Court has already provided some guidance on this issue. In *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), a case decided under the RLA, the Court held that the line must be drawn where "the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." These expenditures include "not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." Id. at 448.

The objecting non-members in the present case emphasize and focus on that aspect of the *Ellis* test which states that permitted expenditures must relate to union representation of employees *in the bargaining unit*. Thus, any activities which are directed to non-bargaining unit employees or which are not *directly* related to union *representation activity* of bargaining unit employees are not chargeable. The union, on the other hand, focuses on the *Ellis* language allowing expenditures that are normally or reasonably employed to *implement or effectuate* the union's duties as exclusive representative. Thus, activities engaged in by the union which redound to the benefit of the employees in the bargaining unit, even though not performed directly for them, can be charged to non-members.

How the Court clarifies and applies its *Ellis* test to the activities involved in this case will determine not only what services public sector unions may charge to non-members, but also those services for which private sector unions may be reimbursed.

ARGUMENTS

For James P. Lehnert, et al. *(Counsel of Record, Raymond J. LaJeunesse, Jr., National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Springfield, VA 22160; telephone (703) 321-8510):*

1. Because of the First Amendment rights implicated in this case, charging objecting non-members for the cost of union services must directly relate to a compelling state interest. The only compelling state interest is the elimination of the free rider problem. The free rider problem arises when employees who are not union members receive the benefit of the collective bargaining services the union is statutorily required to provide for all employees. These statutorily required services are the negotiation and administration of contracts, and grievance adjustment. These are the only services the union is required to provide for non-members and therefore these are the only services for which non-members can be required to pay.
2. Activities related to persons not in the bargaining unit in question cannot be charged to objecting non-members. Several of the MEA and NEA expenditures in this case were not related to the Ferris bargaining unit.
3. Lobbying for funds for public education generally, or engaging in political campaigning on education issues do not involve issues relating directly to Ferris. Much of the education funds were spend on grade schools and high schools, not even at the college level at which Ferris operates. Coercing subsidies for lobbying and political activities clearly implicates First Amendment political speech and is not justified where the activity is not directly related to the objectors' specific labor-management issues. Moreover, unions are not statutorily required to engage in lobbying.
4. Public relations activities are not part of dealing with the employer on labor-management issues. Rather, such activities deal with the public and constitute public discussion of matters of public interest. Creating public support for a union is not necessary for collective bargaining. Similarly, activities related to professional development of teachers are not necessary for bargaining.
5. The union conventions for which the objectors were charged did not discuss issues related to Ferris. Neither were they mainly concerned with the business of running the union as an institution. Rather, the majority of the convention and meeting activity was political or ideological, relating, for example, to the Equal Rights Amendment, the arms race and opposition to the Reagan administration. Such activity is of a purely political, non-collective bargaining nature and cannot be charged to objectors.

6. Public sector strikes are illegal under Michigan law. The expenses generated by the FFA during negotiations related to preparing for an illegal strike cannot be charged to objectors. That these activities were merely tactical and no strike actually occurred is irrelevant. There is no compelling government interest in requiring individuals to support conspiracies.

For the Ferris Faculty Association *(Counsel of Record, Robert H. Chanin; Bredhoff & Kaiser, 1000 Connecticut Ave., NW, Washington, DC 20036; telephone (202) 833-9340):*

1. The First Amendment does not prohibit unions from requiring objectors to pay for union activities reasonably employed to implement the union's duties as collective bargaining representative. Successful bargaining in the public sector requires more than just negotiating with the employer at the bargaining table. What can be agreed upon at the table may be dictated by statutory restrictions or executive, legislative or budgetary agency decisions which are determined away from the table. Moreover, since collective bargaining in the public sector inevitably affects the taxpaying public, community and voter sentiment concerning unionism and union demands may be a critical ingredient to successful bargaining.
2. In order to more effectively perform its collective bargaining duties on behalf of Ferris faculty, the FFA affiliated with the MEA and the NEA. This affiliation gives the FFA access to lawyers, negotiators, economists, and other experts whose services are necessary for effective collective bargaining and contract administration. To receive the benefits of affiliation, the FFA pays a fee to the MEA and the NEA. This fee pays for the costs incurred by the MEA and the NEA in maintaining this stable of experts and guarantees the FFA the service of these experts on demand. When their services are not in demand by the FFA, these same experts are serving the members represented by other affiliated unions in other bargaining units.

   But the fee paid by the objectors is not subsidizing other bargaining units; rather, much like insurance payments, this fee pays for the *availability* of the experts and the *use* of experts when needed. The decision to affiliate in order to ensure expert services on a cost-effective basis does not run counter to any First Amendment interest.
3. Lobbying and political activities related to public education on employment issues are germane to the union's duties as collective bargaining representative. Collective bargaining in the public sector is a political process whose outcome is often shaped by political forces and decisions made away from the bargaining table. Both the legislative and executive branches exercise significant decision-making authority which impacts on the terms and conditions of public sector employment. Thus the collective bargaining representative must lobby these officials if it is to obtain satisfactory results for the employees it represents.
4. Activities aimed at garnering public support for the union are necessary if the union is to negotiate contracts successfully. In the public sector, the public is the ultimate employer.
5. Professional development activities are designed to improve the skills of the employees, which is related to terms of employment. Programs concerning teacher effectiveness are mandatory subjects of bargaining. Such activities also help eliminate employer-employee friction.
6. The Court's holding in *Ellis* that the cost of holding union conventions is chargeable to non-members is dispositive in this case.
7. While strikes are illegal under Michigan law, threats to strike are not. Such threats are effective tactics in gaining satisfactory bargaining results. Therefore, paying for activities related to this tactical threat is directly related to collective bargaining and does not constitute support for illegal acts. Moreover, the same activities directed toward making the strike threat credible also serve tactical bargaining purposes unrelated to a strike—for example, informing members of bargaining progress and engaging in informational picketing.

AMICUS BRIEFS

In Support of James P. Lehnert, et al.

The Public Service Research Council, Inc. *(Counsel of Record, Edwin Vieira, Jr., 13877 Napa Drive, Independent Hill, VA 22111; telephone (703) 791-6780)*; Pacific Legal Foundation and H. Paul Lillebo *(Counsel of Record, Sharon L. Browne, Pacific Legal Foundation, 2700 Gateway Oaks Drive, STE 200, Sacramento, CA 95833; telephone (916) 641-8888)*; Center on National Labor Policy *(Counsel of Record, Michael E. Avakian, Center on National Labor Policy, 5211 Port Royal Road, STE 103, North Springfield, VA 22151; telephone (703) 321-9180)*; Landmark Legal Foundation *(Counsel of Record, Mark J. Bredemeier, Landmark Legal Foundation, 1006 Grand, 15th Floor, Kansas City, MO 64106; telephone (816) 474-6600).*

In Support of the Ferris Faculty Association

The American Federation of State, County and Municipal Employees Councils 1, 52, 71, 73, Communications Workers of America, New Jersey State Federation of Teachers, and Rutgers Council of A.A.U.P. Chapters *(Counsel of Record, James B. Coppess, 1925 K Street, NW, Washington, DC 20006; telephone (202) 728-2456)*; American Federation of Labor and Congress of Industrial Organizations *(Counsel of Record, Laurence Gold, 815 16th Street, NW, Washington, DC 20006; telephone (202) 637-5390).*