

11-2012

Teacher Unions, the Right to Work, and Fair Share Agreements


Charles J. Russo

University of Dayton, crusso1@udayton.edu

C. Daniel Raisch

University of Dayton

Follow this and additional works at: https://ecommons.udayton.edu/eda_fac_pub

 Part of the [Educational Assessment, Evaluation, and Research Commons](#), [Educational Leadership Commons](#), [Elementary and Middle and Secondary Education Administration Commons](#), and the [Labor and Employment Law Commons](#)

eCommons Citation

Russo, Charles J. and Raisch, C. Daniel, "Teacher Unions, the Right to Work, and Fair Share Agreements" (2012). *Educational Leadership Faculty Publications*. 140.

https://ecommons.udayton.edu/eda_fac_pub/140

This Article is brought to you for free and open access by the Department of Educational Leadership at eCommons. It has been accepted for inclusion in Educational Leadership Faculty Publications by an authorized administrator of eCommons. For more information, please contact frice1@udayton.edu, mschlangen1@udayton.edu.



Teacher Unions, the Right to Work, and Fair Share Agreements

By Charles J. Russo, J.D., Ed.D., and C. Daniel Raisch, Ph.D.

Statutes affecting the bargaining rights of teachers and their unions has the potential to affect school district finances.

The status of collective bargaining in public education is in flux. As a result of a movement that began in the early 1960s, more than 30 states now have laws that allow teachers and other public school employees to form unions in order to bargain collectively with their school boards over the terms and conditions of their employment.

Further, three jurisdictions prohibit public-sector unions, and in an overlapping tapestry, 23 states—most recently Indiana—have enacted right-to-work laws that bar contracts that require workers to join unions as a condition of employment.

Aware that unions derive their operating revenues from member dues, the Supreme Court, consistent with provisions in the National Labor Relations Act, has upheld the constitutionality of “fair share” agreements. “Fair share” or agency fee agreements are premised on the notion that because nonmembers benefit from the activities of unions, they can be required to pay a “fair share” or percentage of union costs associated with the collective-bargaining process in their districts.

Historical Overview

The history of American labor relations and unions in public education cannot be understood without at least a brief review of developments in the private and public sectors.

The National Labor Relations Act is the primary vehicle regulating labor relations in private employment. The NLRA, which was designed to protect laborers in industrial work settings, has had a significant effect on labor law in public employment and particularly education, now the most highly unionized workforce in the United States. According to the NLRA, “Employees shall

have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing . . .” (29 U.S.C. § 157).

To effectuate the NLRA, Congress enacted legislation creating the National Labor Relations Board, a model for state public labor relations boards, to administer the law. In protecting employees who elect not to join unions, the NLRA stipulates that “nothing in this [act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law” (29 U.S.C. § 164[b]). In other words, by acknowledging the legality of state right-to-work statutes in private employment, the National Labor Relations Board set the stage for developments in the public sector.

Connecticut’s highest court was the first judicial body to uphold the right of public school teachers to organize and bargain collectively (*Norwalk Teachers Association v. Board of Education of the City of Norwalk* 1951). The court also determined that the teachers could not go out on strike.

Public-sector bargaining received a bigger boost in 1958 when the then-mayor of New York City, Robert Wagner, promulgated an executive order permitting municipal employees to bargain collectively for the first time. In 1959, Wisconsin, which has since gone full circle in seeking to limit the practice, became the first state to mandate collective bargaining with public employees (Tyler 1976, pp. 19-20).

President John F. Kennedy’s Executive Order 10988 of January 17, 1962, establishing a federal policy of recognizing unions of government employees, served

as a harbinger of the thrust toward public school teachers unions. Less than three months later, the union movement took a dramatic turn when, on April 11, 1962, members of the United Federation of Teachers in New York City, recent victors in a representation election over the American Federation of Teachers, voted to strike.

Although more than one-half of the city's teachers went out on strike, they returned to work a day later in response to an injunction ordering them to do so (Kerchner and Mitchell 1988, p. 1). This brief strike led to a wave of teacher activism that has resulted in more than 30 jurisdictions enacting statutes that granted teachers the right to organize and bargain collectively with their boards over terms and conditions of employment.

Right-to-Work Laws and Fair Share Agreements

In an attempt to preserve managerial prerogatives, 23 states have enacted right-to-work laws for public employees. Even though the language in right-to-work statutes varies from one state to the next, their purpose with regard to schools appears to be twofold: (1) to protect the freedom of employees to self-determination by not having to join unions or pay representation fees and (2) to safeguard states' rights to limit the cost of public education by restricting the reach of unions.

Attempts to enact a Federal Right to Work Act in Congress have been unsuccessful as versions of the national-right-to-work bill have stalled in both the House of Representatives (2011) and the Senate (2012).

Proponents of right-to-work laws maintain that they afford employees opportunities to decide freely whether to join unions. Supporters add that these laws safeguard their First Amendment rights, protecting employees from having to pay for union-backed politicians with whom they may disagree and from

compelled association with individuals or organizations against their wishes. Many supporters also believe that these laws increase competition in the marketplace, helping to spur economic growth.

Opponents of right-to-work laws respond that individuals should not be allowed to take advantage of benefits obtained by unions via the bargaining process unless they pay their fair share of costs. Moreover, critics point out that insofar as unions help keep wages up, these laws harm employees and weaken their job security by limiting the reach of organized labor. Union leaders also fear the loss of operating revenues, particularly for their political causes, if they are deprived of dues.

Right-to-work laws typically dictate that employees cannot be required to work in closed shops in which everyone must join unions. Some laws permit collective-bargaining agreements under which employees who elect not to join unions must pay "fair shares" in order to offset union costs associated with bargaining.

The Supreme Court addressed fair share arrangements in education on four separate occasions. In *Abood v. Detroit Board of Education* (1977), the Supreme Court held that the Constitution does not prohibit agency fee or fair share provisions in bargaining contracts as long as unions do not use those funds to support ideological activities opposed by members and nonmembers, as well as those unrelated to the process of negotiations. Later, in *Chicago Teachers Union, Local No. 1 v. Hudson* (1986, 1991a, 1991b), the Court invalidated a rebate system proposed by a union because the justices feared that funds contributed by nonunion members might have temporarily been used for improper union purposes.

The dispute in *Lehnert v. Ferris Faculty Association* (1991) arose in higher education. Here, the Supreme Court identified the specific activities

unions may charge to nonmembers, such as program expenditures, the cost of sending delegates to a national conference, and expenses preparing for a strike, while explaining that they were unable to charge nonmembers for public relations and litigation. Most recently, in *Davenport v. Washington Education Association* (2007), the Court unanimously found that "it does not violate the First Amendment for a State to require that its public-sector [teacher] unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes" (p. 191).

In a related matter, the Supreme Court, in *Ysursa v. Pocatello Education Association* (2009), reasoned that a local ban on public-employee payroll deductions for political activities was constitutional. The Court noted that the ban was acceptable because it furthered Idaho's interest in separating the operation of government qua public education from partisan politics as represented by union activities, noting that school officials were "under no obligation to aid the Unions in their political activities" (p. 359).

Concluding Reflections

The Supreme Court's placement of limits on how unions calculate and apportion fair share fees, coupled with its upholding of limits on payroll dues deductions, has restricted the power of teachers unions in public education. Moreover, although the conflicts in Ohio and Wisconsin are not directly linked to fair share agreements and payroll deductions, the way in which these disagreements are resolved will likely have a major impact on the future of collective bargaining and unions in public education as more states may seek to enact right-to-work laws.

Amid ongoing debate about the status of teachers unions and bargaining, there is considerable

disagreement among education leaders as to whether right-to-work laws allow those who are not union members to get free rides if they are excused from contributing to the costs of negotiations from which they benefit. Because these attitudes often reflect the interactions that individuals had with unions before entering their leadership positions, their experiences may well shape the way in which they help formulate board policies in response to changes in the law concerning teacher bargaining.

As issues of right-to-work laws, fair share fees, and payroll deductions for union dues continue to evolve, school business officials and other education leaders must devise policies that clearly identify which official positions they and their boards will assume. An interesting consideration in right-to-work states in particular is the status of teachers who choose not to join the unions. Insofar as taking such a stance may be unpopular among unionized teachers, board policies should address what can be done to protect educators who are new to the profession or to a district from backlash by unionized peers who are critical of their nonmember status.

Of course, how collective bargaining proceeds depends on state laws and board policies. Regardless of whether states have right-to-work statutes in place, school business officials, their boards, and other education leaders would be wise to consult not just with their own attorneys but also with labor law specialists when preparing for collective bargaining in order to stay up-to-date.

In light of nuances and variations in different states relating to right-to-work laws, fair share fees, and dues collections, the transformation of statutes affecting the bargaining rights of teachers and their unions has the potential to increase costs to school boards significantly if negotiated contracts are not drawn up

carefully. As such, education leaders should check with legal counsel before reaching final agreements with their unions since doing so will serve as the proverbial ounce of prevention that is worth the pound of cure.

References

- Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).
- Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986), *on remand*, 922 F.2d 1306 (7th Cir. 1991a), *cert. denied*, 501 U.S. 1230 (1991b).
- Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007).
- Executive Order 10988, Employee-Management Cooperation in the Federal Service, 27 Fed. Reg. 551 (1962).
- Kerchner, C.T., and D. E. Mitchell. 1988. *The changing idea of a teachers' union*. London: Falmer Press.
- Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).
- National Labor Relations Act, 29 U.S.C. §§ 157, 164(b).
- National-Right-to-Work Bill, 2011th Cong. U.S. H.R. 2040, 112th Cong., 1st Sess. (May 26, 2011) [House of Representatives]; 2011th Cong. U.S. S. 2173, 112th Cong., 2nd Sess. S. 2173 (March 8, 2012) [Senate].
- Norwalk Teachers Ass'n v. Board of Educ. of the City of Norwalk*, 83 A.2d 482 (1951).
- Tyler, G. 1976. Why they organize. In *Education and collective bargaining: Readings in policy and research*, ed. A. M. Cresswell and M. J. Murphy, pp. 12-21. Berkeley, CA: McCutcheon Publishing Corp.
- Ysursa v. Pocatello Education Association*, 555 U.S. 353 (2009), *on remand sub nom. Pocatello Educ. Ass'n v. Heideman*, 561 F.3d 1048 (9th Cir. 2009).

Charles J. Russo, J.D., Ed.D., is Panzer Chair in Education and adjunct professor of law at the University of Dayton (Ohio), and chair of ASBO's Legal Aspects Committee. Email: crusso1@udayton.edu

C. Daniel Raisch, Ph.D., is an associate professor and director of the Office of Educational Services in the School of Education and Allied Professions at the University of Dayton (Ohio). Email: craisch1@udayton.edu

Boundary Changes?

Declining Enrollment?

Opening or Closing Schools?

Overcrowding?



Professional expertise and powerful DI System deliver solutions to enrollment challenges:

- Easy to use, web-based DI system makes analysis easy
- Reality-based 10 year district and school by grade enrollment projections
- Efficiency calculators instantly show the effects of enrollment on budgeting, staffing and facilities
- Boundary change / Closing school scenarios made easy
- Relevant community demographics to improve student support
- Integrated tools & strategies to increase student enrollment
- MySchoolLocator™ with bus stops and schedules for parents to look up assigned schools
- Projections for Pre-Kindergarten & Transitional programs optionally available

INCREASE EFFICIENCY
REDUCE COSTS

DECISION

INSITE

Enrollment Impact Specialists

877-204-1392

decisioninsite.com

