8/31/71 FF

STATE OF MICHIGAN

DEPARTMENT OF LABOR

251.

Before Harry T. Edwards, Fact Finder,

Appointed By The Michigan Employment Relations Commission

Michigan State University
LABOR AND INDUSTRIAL
RELATIONS LIBRARY

In the Matter of Fact Finding between:	
MICHIGAN STATE EMPLOYEES UNION, LOCAL UNION NO. 1609, COUNCIL 7, AFSCME, AFL-CIO	Fact Finding Pursuant to Section 25 of the Labor Mediation Act, M.S.A. 17.454(27); M.C.L. 423.25
-and-	
FERRIS STATE COLLEGE	

Harry T. Edwards

Ferris State College

INTRODUCTION

A hearing in the above matter was held on August 16, 1971 at Ferris State College, Big Rapids, Michigan.

APPEARANCES

For the College: James L. Stokes, Esq., Attorney, Miller, Johnson, Snell & Cummiskey, Grand Rapids, Michigan

For the Union: James J. Miller, Staff Representative, Michigan State Employees Union, Lansing, Michigan

BACKGROUND

The instant dispute is the product of a bargaining impasse between the parties on the sole issue of "union security."

Local 1609 of the Michigan State Employees Union presently represents all of the service and maintenance employees at Ferris State College. The College and the Union are presently the parties to a collective bargaining agreement, dated October 23, 1970, which is due to expire on June 30, 1972. The agreement includes a limited reopener clause which provides that the:

> "Agreement...shall continue in full force and effect only until June 30, 1972; except that with respect to the Article regarding Union Security only, negotiations may be reopened on May 1, 1971. If agreement is not reached on this matter by June 1, 1971, this matter only will be submitted to a fact finder. Any change in the Union Security Article will be effective July 1, 1971. ..."

Pursuant to the above reopener provision, the parties attempted, without success, to resolve their differences over union security by voluntary negotiations in May and June of 1971. Subsequently, on June 24, 1971 and June 29, 1971, the College and then the Union, respectively, petitioned the Michigan Employment Relations Commission for the appointment of a Fact Finder.

On July 16, 1971, the undersigned was appointed by the MERC to make findings of fact and recommendations with respect to the issues here in dispute.

APPLICABLE CONTRACT PROVISIONS

The union security provision in the parties' existing agreement, which may be aptly described as a "modified agency shop" provision with a "grandfather clause" added, reads as follows (Ex. 14, p. 3):

> "To the extent that the laws of the State of Michigan permit, it is agreed that:
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> (a) Employees covered by this Agreement at the time it becomes effective and who were members of the Union on July 1, 1969, shall be required as a condition of continued employment to continue membership in the Union for the duration of this Agreement to the extent of tendering uniform dues and assessments hereafter levied by the Union of all members.
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> (b) Employees who are hired into the bargaining unit on or after November 19, 1969, may or may not become members of the Union as they may choose. If they elect to become members it shall be a condition of continued employment for them to continue membership in the Union for the duration of this Agreement, to the extent of tendering uniformly levied dues and assessments. If they do not so elect

these newly hired employees must contribute to the Union an amount equal to the uniform dues of the Union.

(c) No employee within the bargaining unit who is not a Union member and who was hired prior to November 19, 1969, shall be subject to any payment to the Union, nor to any discipline for failing to do so."

"Supplement II" of the parties' agreement (Ex. 14), adds the following pertinent provisos:

"(6) Robert Elkins, Donald Hall, Frederick Kehr, and Martha Porter will be allowed to join the Union or not join the Union as they so choose. If they do not join the Union they will not be required to pay any agency fee to the Union.

Elma Coon, Marion Hillis, Mary Hutchings and Johannes Quast will be required to join the Union or pay an agency fee to the Union.

(7) Any employee not referred to in #6 above who worked during the work stoppage and was a Union member prior to the work stoppage will be allowed to maintain full membership in the Union or instead to pay a representation fee to the Union equal to two-thirds (2/3) of the normal Union dues."

THE ISSUES IN DISPUTE

At the hearing before the Fact Finder, the Union advanced the following possible solutions to the existing impasse:

(1) The present union security provisions should be deleted from the contract and replaced by a "union shop" clause (Ex. 13) which would require all unit employees to "become members of the Union within sixty (60) days after the effective date of this Agreement or their employment, whichever is later, and shall continue such membership in good standing as a condition of continued employment."

(2) Recognizing that a "union shop" clause may be subject to legal challenge, under the precedent of Oakland County Sheriff's Dept., 1968 MERC Op. 1, 32-33, the Union proposed, as an alternative, that the existing "modified agency shop" clause

(Ex. 14, p. 3) be deleted and replaced by a traditional "agency shop" provision with no "grandfather clause" added.

(3) The Union expressed a willingness to include an "indemnity clause" in the Agreement, whereby the Union would agree to hold the College harmless against and assume the responsibility for suits, claims, or other liability arising by virtue of the enforcement of a "union ship" or a complete "agency shop" clause.

(4) With respect to Paragraph #6 in "Supplement II," the Union (by the testimony of its President) objected only to the listing of specific employee names in the Agreement. (The Union did not seemingly object to the fact that the four employees presently named in the first portion of Paragraph #6 are not now and might not later be covered by a union security provision.)

(5) With respect to Paragraph #7 in "Supplement II," the Union urged that the employees presently covered by this clause should be required to pay a full (rather than a two-thirds) representation fee.

The City argued that the existing union security provisions should continue in effect without modification.

At the conclusion of the hearing, both parties agreed that the "agency shop" formula proposed in Smigel v. Southgate Community School District, 24 Mich. App. 179, 186, 180 N.W. 2d 215 (1970), was not a viable solution to issues here raised.1/

ARGUMENTS

In support of its position herein, the Union argued that the Smigel case (see Footnote No. 1) is not dispositive of the instant dispute because the case is presently on appeal to the Michigan Supreme Court; it is unfair to permit all of the employees in the bargaining unit to enjoy the fruits of the contract and at the same time to exclude certain of these same employees from coverage under the union security provisions; there should be no "free-riders" in the bargaining unit--all employees alike should share the cost of negotiating and ad-

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1/ In Smigel, the Michigan Court of Appeals held that the validity of an agency shop clause "hinges on the relationship between payment of a sum equivalent to the dues of...[The Union] and a non-member's proportionate share of the cost of negotiating and administering the contract involved." The Court further held that if the "payment is greater than or less than the proportionate share, the agency shop provision is in violation of" the Michigan Public Employment Relations Act. (Emphasis added.)

ministering the collective agreement; the Union membership has strongly pressed for the inclusion of a complete agency shop clause in the Agreement; a "modified agency shop" clause creates hard feelings between those employees required to pay Union fees and those exempted therefrom; and the principle of majority rule means that once the Union is selected as the exclusive agent for the employees, all employees subsequently benefit from Union representation and, therefore, all should share in the cost of such representation.

The College, in support of its position herein, argued that under the doctrine enunciated in Smigel, neither the "union shop" nor the complete "agency shop" clauses are legally viable alternatives in this matter; the employees covered by the "grandfather clause" should not, in an ex post facto manner, be required to contribute to the Union; those employees covered by the "grandfather clause" represent such a small population in the total unit that the preservation of their rights of free choice is more important than the economic gains that might flow to the Union by virtue of their being covered by the agency shop clause; and the people named in "Supplement II" should have their status protected because many of them withdrew from the Union at considerable personal risk.

CURRENT STATUS OF THE LAW

As a preliminary matter, the College has urged that the Fact Finder, under existing law, must deny the legal validity of both the proposed union shop and full agency shop provisions and must "substantially reaffirm the modified agency shop provision in the 1970 contract."2/ In this regard, the College has relied primarily on the holding of the Michigan Court of Appeals in Smigel v. Southgate Community Schools (see Footnote No. 1, supra).

At p. 5 in its brief, the College argues that "Southgate ...is binding upon the fact finder and will not permit an alteration of the contract which is inconsistent with its holdings." Needless to say, this is a curious argument because the existing "modified agency shop" clause in the parties' 1970 contract is already "inconsistent" with the holding

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2/ As noted above, the MERC decision in Oakland County Sheriff's Dept., 1968 MERC Op. 1, 32-33, raises serious questions regarding the legality of a "union shop" provision under the Michigan Public Employment Relations Act. However, since it is clear, both from the testimony given at the hearing and from the arguments advanced by the Union in its post-hearing brief, that the Union is primarily concerned with a full "agency shop" and not a "union shop," the Fact Finder finds it unnecessary to consider the question of the legality of "union shop" in this matter.

of the court in Smigel. It is clear from the evidence that non-union members covered by the "modified agency shop" clause here do not pay a fee which is not "greater than or less than the proportionate share" of the cost of negotiating and administering the contract involved. In essence, if Smigel is the law of this state, then the College's argument here is that one illegal clause (which it prefers) should not be deleted and replaced by another illegal clause (which the Union prefers). This is a novel argument, but it obviously cannot carry the day.

There is also the more serious question of the binding quality of the holding in Smigel. Surely there is every reason to question whether Smigel was even correctly decided. It is one thing to urge that non-members may not be required to pay more than their proportionate share of the cost of negotiation and administration of the agreement; but the proposition advanced by Smigel, that there is unlawful discrimination under PERA if non-members are required to pay "less than" their proportionate share of the cost of negotiation and administration of the contract, is a bit strained to say the least. Cf. Retail Clerks, Local 1625 v. Schermerhorn, 373 U.S. 746 (1963).

To be sure, Smigel is the highest state court authority to date to rule on the issue of the legality of "agency shop" under PERA; however, there is other noteworthy precedent which casts a shadow of doubt about the wisdom of the judicial expression in Smigel. For one, the United States Supreme Court, in 1963, upheld the validity of the "agency shop" form of union security under the proviso to Section 8(a)(3) of the National Labor Relations Act. NLRB v. General Motors Corp., 373 U.S. 734 (1963).3/ For another, the MERC, both before and after the decision in Smigel, has consistently upheld full "agency shop" provisions (requiring payment of a fee which is the equivalent of union dues) as a valid form of union security under PERA. See, e.g., Southgate Community School District, 1970 MERC Lab. Op. 161; Oakland County Sheriff's Dept., 1968 MERC Op. 1; Swartz Creek Community Schools, Case No.C69 G-80, GERR No.414, at E-1 (1971).

Arbitrators and fact finders, too, have upheld the validity of full "agency shop" clauses in cases arising under PERA and Act No. 312, Public Acts of 1969 (The compulsory arbitration act for policemen and firemen in Michigan). The College has cited the decision by Theodore St. Antoine in City of Birmingham, 55 LA 671 (1970), as contra authority; but it is of note that in a later fact finding case, Reese Teachers Education Association and Reese Public Schools Board of Education,

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3/ The significance of the relevant portions of the NLRA vis-a-vis PERA is amply drawn in Oakland County Sheriff's Dept., 1968 MERC Op. 1, and therefore it is unnecessary to restate these points here.

dated February 8, 1971, Theodore St. Antoine recommended the inclusion of a full agency shop clause in the parties' agreement and commented that:

> "I conclude that the Association is entitled to a carefully drafted agency shop clause. In private industry the ethical and labor relations questions have largely been resolved in favor of some form of union security: union security fairly distributes the expense of collective bargaining; it helps avoid divisiveness among the work force; and the encroachment on individual rights, essentially a financial obligation, is minimal. The trend would suggest that the agency shop will become the accepted form of union security among Michigan teachers. While some legal questions remain, the view of the Michigan Employment Relations Commission is likely to win ultimate approval...."

In Police Officers Association of Dearborn and City of Dearborn, (Arbitration Proceeding pursuant to Act No. 312, Chairman Russell A. Smith, award dated June 22, 1971), it was held that:

> "It is not the function of the Panel to attempt to assess the merits of the Commission's decision, or of the Smigel decision, or to forecast the result of the pending appeal of the Smigel decision. Since the Panel regards agency shop provisions as justifiable, the proper approach in this case is to require their inclusion in the parties' agreement. However, in view of the serious question of legality posed by the Smigel decision, and the prospect that this question will shortly be resolved finally by the Supreme Court, it is appropriate that the agreement provide that the agency shop article shall not become operative until and unless its legality is clearly established. The provision should also include an indemnification clause of the kind proposed by the City."

The quoted portion of the decision in Police Officers Association of Dearborn above is particularly appropriate here. Plainly, the existing law does not divest the fact finder of his authority in this matter, for the "existing law" is at best unsettled. Furthermore, since the College has already agreed to abide by a "modified agency shop" provision which is not faithful to the principle of Smigel, the challenge here grounded on that authority must be rejected.

FINDINGS OF FACT

The collective bargaining relationship between the College and the Union commenced in 1966. Ever since the first negotiations between these parties, it is conceded that union security has been a vitally important issue to the Union adherents.

Up until 1969, the parties agreed to a "maintenance of membership" union security provision. During the 1969 negotiations, union security was one of the significant issues in dispute between the parties. When the parties were finally unable to resolve their differences, the matters still unsettled were submitted to fact finder Thomas V. LoCicero.

During the course of the hearing before Mr. LoCicero, the Union pressed for a full "agency shop" provision. The fact finder, in his decision dated September 22, 1969, recommended the "modified agency shop" provision with a "grandfather clause" (as presently appears on p. 3 of the parties' current agreement). In so doing, Mr. LoCicero observed that (Ex. 15):

> "Public employees are permitted by Act 379, P.A. 1965 to organize and select their representative, by majority vote, as their exclusive bargaining agent. It follows that such a bargaining agent must be permitted to do its job and it cannot do so unless it is financially supported. Thus, the issue is one of economics, not whether an employee must join the Union; because the law does not compel him to join if he doesn't want to do so. The economic issue, whether or not a non-member should be required to contribute to the cost of obtaining employment benefits, in my judgment, must be answered in the affirmative. It is not economically fair to his fellow-employees who vigorously and to the full extent of their legal rights labor to obtain such benefits should alone bear not only the effort, but the cost of obtaining such benefits for all the employees in the bargaining unit. Such inequality does create resentment and discord and is sure to adversely affect morale among the employees. How many employees would remain out of the Union if it were possible to extend the benefits to Union members, but not to non-members?
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> At the same time, I must also respect the rights and wishes of those employees who came into the service prior to the time when any such payment or contribution was a condi-

> tion of employment. No such condition should be imposed retroactively to an employee who became employed in the College without knowing that he would be required to contribute money to an organization he did not care to join. For those who apply after such a condition is established no valid argument can be made. He knew before hand just what he would be required to do, to the same extent as he knew what kind of work, what hours and what pay he would work under. My recommendation is therefore based upon these premises."

At the time of the LoCicero decision, approximately 82% of the total eligible employees in the unit were Union members; at the time of the hearing in the instant case approximately 86% of the unit employees were either members or non-members paying a fee to the Union pursuant to the agency shop provision.

Following the issuance of the LoCicero decision, the parties executed a new one-year agreement on November 19, 1969.

Sometime between the expiration of the old agreement and the execution of the 1969 contract, and before the LoCicero decision was issued, employees Robert Elkins, Frederick Kehr and Martha Porter resigned from the Union. The evidence is not entirely clear on this point, but the dispute surrounding the status of these employees was not resolved by either the LoCicero decision or by the signing of the 1969 agreement.

In 1970 the agency shop question became a burning issue in negotiations. During the course of negotiations the Union pressed vigorously for a full agency shop provision. After most of the other issues had been resolved in 1970, the question of agency shop lingered in dispute.

The parties negotiated off and on for nearly six months in 1970 up until October 14, 1970, and the College persisted in its refusal to relent on the agency shop issue. When an impasse was finally reached, with union security as the sole remaining issue, a large number of the unit employees struck the College on October 14, 1970. The College secured a restraining order from the Mecosta County Circuit Court on October 16, 1970, in an effort to halt the strike; however, the dispute was not finally resolved until October 23, 1970, after the parties had negotiated all night in the judge's chambers.

The product of the 1970 settlement was the present contract (Ex. 14). The only change in the union security language was written into "Supplement II" and the "Term of the Agreement" clause (Ex. 14, p. 28), the latter of which provided for a reopener on union security on May 1, 1971.

At the hearing before this Fact Finder, several Union witnesses indicated that the only reason why the Union settled without a full agency shop clause in 1970 was because it was assumed that the changes could be won later pursuant to the reopener in 1971. In this regard, Union officers were apparently under the impression that the reticence expressed by the College negotiators was simply a reflection of the attitudes of Messrs. Spathelf and Smith, who were then President and Vice President for Business, respectively, of the College. These Union officials assumed that since Mr. Spathelf and Mr. Smith were scheduled to retire in 1971, a change in the College's position on union security would surely follow. However, the Union witnesses at the fact finding hearing did admit that these suppositions on their part were not based on any explicit assurances given to them by the College negotiators in 1970.

During the course of the strike in 1970, a number of unit employees crossed the picket line and worked. At the "last minute" in negotiations, special provision was made for these employees by the adoption of the reduced (two-thirds) agency shop fee schedule found in Paragraph (7) of "Supplement II."

The pending cases involving the status of employees Elkins, Kehr, and Porter were settled by the adoption of Paragraph (6) in "Supplement II." Donald Hall was added to the list of names in Paragraph (6) because after the court restraining order was issued in 1970, Hall (then a member of the Union bargaining team) abandoned the strike and returned to work. College negotiators apparently expressed concern about Hall's safety and insisted that he not be compelled to return to the bargaining unit.

Several Union witnesses testified that subsequent to the 1970 settlement, there was increased divisiveness between those employees covered by the agency shop clause and those excluded by the "grandfather clause." In this regard, the Union alleged that several non-paying unit employees have indicated that they have no objection to the Union but are unwilling to pay unless compelled to do so. The specific instances cited were, according to the testimony given, limited to a handful of employees.

The Union also claimed that at least two persons who had formerly been "friends" before the 1970 strike, no longer speak to one another. But, as the evidence plainly revealed, the lost friendship resulted from the refusal by one of the men involved to cross the picket line and not from the existence of the modified agency shop clause.

The Union introduced evidence to show that it was required to and did in fact represent the interests of all persons in the unit in grievance disputes, whether or not they pay dues. This was not disputed by the College, however it was pointed out that Union stewards are paid by the College when processing grievances during working hours.

The Union gave some testimony to suggest that the College gives favored treatment to non-Union members over Union members. The Fact Finder is satisfied that the evidence offered did not establish the point intended and that there is nothing in the record to substantiate a finding of discrimination or favoritism against the College.

The Union's president testified that the problem of union security has been foremost in the minds of Union members ever since the strike in 1970, and that the subject has been raised and discussed at numerous Union meetings throughout the year in 1971.

The following chart outlines the existing practices followed by other public colleges in Michigan with respect to the adoption of union security provisions in contracts covering service and maintenance employees:

SURVEY OF "UNION SECURITY" PROVISIONS IN CONTRACTS COVERING SERVICE AND MAINTENANCE EMPLOYEES AT STATE COLLEGES IN MICHIGAN

College	Type of Union Security	Provisos
Ferris State (Ex. 14)	Modified agency shop	Grandfather clause
Central Michigan (Ex. 1)	Modified union shop	Grandfather clause
Eastern Michigan (Ex. 2)	Modified union shop	"Strong religious convictions"
Grand Valley (Ex. 3)	Agency shop	- - - - - - -
Lake Superior (Ex. 4)	Agency shop	- - - - - - -

College	Type of Union Security	Provisos
Michigan State (Ex. 5)	Agency shop	- - - - - - -
Michigan Tech (Ex. 6)	Agency shop	- - - - - - -
Oakland (Ex. 8)	Agency shop	- - - - - - -
Northern Michigan (Ex. 7)	Modified union shop	"Strong personal convictions or beliefs"
Univ. of Michigan (Ex. 9)	Agency shop	- - - - - - -
Western Michigan (Ex. 10)	Agency shop	- - - - - - -
Wayne State (Ex. 11)	Union shop	- - - - - - -

Totals

Colleges with "union shop" - 1

Colleges with "modified union shop" - 3

Colleges with "agency shop" - 7

Colleges with "modified agency shop" - 1

RECOMMENDATIONS

In light of all of the above, the Fact Finder hereby recommends the following:

(1) It is recommended that the "two-thirds" fee prescribed by Paragraph (7) in "Supplement II" should be deleted and that the last phrase in Paragraph (7) should be changed to read "...or instead to pay a representation fee to the Union equal to the normal Union dues."

There is little logic to an agency shop fee schedule which requires employees who engaged in a "work stoppage" to pay the full amount due and favors those who crossed the picket line during the work stoppage by providing that they pay at the rate of two-thirds of the total amount due. The existing Paragraph (7) is patently unjust and it surely does violence to the recommendations contained in the LoCicero decision (which the College concedes it is willing to follow). Furthermore, according to the testimony given at the hearing, Paragraph (7) was included in the parties' contract at the "last minute" in 1970 and the "two-thirds" figure is an arbitrary one. Even admitting that the 1970 work stoppage was clearly unlawful, still this clause serves only to reward those who chose not to violate the law, rather than to punish those who allegedly violated it. If a strike is indeed unlawful, then there are adequate means by which the College can deal with wrongdoers; the question of union security is really a different matter. It appears particularly inappropriate, especially in a collective bargaining agreement, to give special treatment to employees who (albeit lawfully) crossed a picket line. In effect, Paragraph (7) in "Supplement II" as presently written says that employees who had no claim to settle (as did the employees listed in Paragraph (6) in "Supplement II"), who simply did that which the law presumably required, and who otherwise would be required by contract to pay a full agency shop fee, will nevertheless be favored by a reduced fee schedule. Such a clause seems plainly discriminatory and unreasonable. It does not protect against unlawful strikes; it is not necessary to insure the presence of strike-breakers (because the employees involved were willing before and presumably would be willing again to work); and it can only serve to intensify, not diminish, divisiveness between those who will and those who will not work during a strike.

(2) Paragraph (6) in "Supplement II" should be retained but the substance of this provision should be removed from the body of the contract and incorporated in a separate side letter of understanding. The Union voiced objection only to the appearance of the specific employees' names in Paragraph (6) in the current contract, and did not request a revision of the substantive terms of this provision. The College, at p. 16 in its post-hearing brief, indicated a willingness to have the terms of

Paragraph (6) covered by some other document "outside the collective bargaining agreement itself." Since the parties do not appear to be apart on this issue, the matter should be easily resolved by the recommendation given.

(3) The existing "modified agency shop" clause (Ex. 14, p. 3) should be deleted from the parties' contract and replaced by a "full agency shop" provision, with no "grandfather clause," and coupled with a full indemnity provision. After having reviewed all of the evidence in the record with care, the Fact Finder can see no justification whatever for the continued refusal on the part of the College to grant a full agency shop provision. The College has argued that the employees presently covered by the "grandfather clause" should not be required in an ex post facto manner to contribute to the Union; it is contended that these employees cannot so easily be denied their rights of free choice. Whether or not the alleged "ex post facto" argument has any merit, it is clear that there is no claim being made that the College itself, as an institution, will be adversely affected by the adoption of a full agency shop provision. In effect, the College argues only that the rights of some persons in the bargaining unit may be diminished by the adoption of a full agency shop provision.

With all due respect to the opinions voiced in the LoCicero decision, the rationale behind the so-called "ex post facto" argument has always appeared suspect to this Fact Finder. The basic fallacy with this argument is that it assumes that all conditions existent at the time when an employee is hired will remain static. Thus, the LoCicero decision argues that the agency shop condition should not:

> "be imposed retroactively to an employee who became employed in the College without knowing that he would be required to contribute money to an organization he did not care to join. For those who apply after such a condition is established no valid argument can be made. He knew before hand just what he would be required to do, to the same extent as he knew what kind of work, what hours and what pay he would work under." (Ex. 15, p. 6) (Emphasis added)

But of course it is clear that neither a worker nor an employer typically assumes that the "kind of work" or the "hours" or the "pay" of the worker will remain unchanged with time after the employee is hired. Why then should a worker assume that union security, which is also a condition of employment, might not be instituted or changed in form during the course of his employment?

Once the majority of the unit employees vote for union representation, it can reasonably be assumed that the Union will thereafter press for a full union shop or agency shop provision. Thus, in 1966, when the Union here first commenced to actively represent the employees at Ferris State, all of the unit employees had notice of the fact that the Union was seeking to secure a strong union security provision. Consequently, if the "ex post facto" argument has any validity at all it should apply only to those employees hired before the representation election in favor of the Union, i.e. before 1966, not 1969 as prescribed by the LoCicero formula.

The "freedom of choice" sought to be preserved here by the College was exercised in 1966 when the Union was selected by a majority of the unit employees. It is a misnomer to declare now that the employees covered by the "grandfather clause" retain a freedom of choice. They cannot bargain individually for their wages; they are subject to the contract seniority clause; they must work under the same prescribed conditions applicable for other unit employees; and they are represented by the Union in all grievance matters and collective bargaining. This is so whether or not any of these particular employees favor or oppose the Union. Thus, their employment situation is, for all practical purposes, governed by the collective bargaining relationship. The gratuity of the "grandfather clause" is not really an exercise of any meaningful freedom of choice; it is in reality merely a contractual gimmick to allow a favored few to escape the small burden imposed by the payment of a representation fee.

It is a fairly well accepted principle of industrial democracy that those who share its benefits must assume the responsibility of securing them. This alone should answer the so-called "ex post facto" argument.

Beyond this though, the particular facts in this case plainly support the Union's proposed adoption of a full agency shop clause. The College has argued that those employees presently covered by the "grandfather clause" will eventually be eliminated by attrition. But the rate of attrition is agonizingly slow. When the LoCicero decision was issued, nearly 82% of the unit employees were dues paying members of the Union (Ex. 15, p. 3). At the present time, only 86% of the unit employees are paying union dues or a representation fee; this reflects an increase of but 4% in the almost two years since the parties adopted the "grandfather clause." The rate of attrition has averaged about eight employees per year. This means that, with 40 employees still covered by the "grandfather clause", it will take another five years before full agency shop coverage can be achieved.

That the "grandfather clause" is not a favored technique is made clear by the evidence of the practices followed by

other public colleges in the state of Michigan. Among the 12 colleges with collective bargaining contracts covering service and maintenance employees, only one college other than Ferris State has a "grandfather clause" in its union security provision. More than half of the colleges have full agency shop provisions. Two-thirds of these colleges have either a full agency shop or a full union shop provision. Ferris State is the only college with a "modified agency shop" provision.

A full agency shop provision serves to fairly distribute the cost of collective bargaining; it helps to avoid divisiveness among unit employees; and the infringement on individual rights, primarily financial, is meager. Although there are some legal questions still to be ironed out by the appeal of Smigel, this should not detract from the recommendation here advanced. In the unlikely event that the State Supreme Court should find the "agency shop" provision unlawful, in whole or in part, the College will be fully protected by the indemnity clause here recommended which the Union has agreed to concede.

With these considerations in mind, the Fact Finder recommends the adoption of the following (full "agency shop" and indemnity") clauses in place of the existing "modified agency shop" provision in the parties' present agreement:

> "(a) Any employee who is not a member of the Union in good standing or who does not make application for membership within sixty (60) days from his date of hire, or within sixty (60) days from the effective date of this agreement, whichever is later, shall as a condition of continued employment be required to pay to the Union a representation fee to be established by the Union in accordance with applicable law, and certified to the College by the Union. Such representation fee shall not exceed the total amount of membership dues payable to the Union.
>
> (b) The Union shall indemnify the College and hold it harmless against any and all suits, claims, demands, and liabilities that shall arise out of or by reason of the adoption of the foregoing agency shop provision, or that shall arise out of or by reason of any action that shall be taken by the College for the purpose of complying with the foregoing agency shop provision or in reliance on any notice or assessment which shall have been furnished to the College under the foregoing provision."

CONCLUSION

It is hoped that these recommendations will serve as the basis for a fair and satisfactory settlement of the instant dispute.

Respectfully submitted

by Harry T. Edwards

Harry T. Edwards,
Fact Finder
1043 Legal Research Building
Ann Arbor, Michigan 48104

Dated: August 31, 1971