Non-Union Member Complaints to Calculation of Agency Shop Fees: Arbitration or Judicial Relief - Air Line Pilots Ass'n v. Miller

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Non-Union Member Complaints to Calculation of Agency Shop Fees: Arbitration or Judicial Relief?

Air Line Pilots Ass’n v. Miller

I. INTRODUCTION

"Free rider" problems plague any group or association that provides general benefits for its participants. Members may pay a fee, but nonmembers can reap the benefits without expenditure. Labor unions address this disparity through the use of agency shop fees contained in collective bargaining agreements. These fee agreements call for those employees who choose not to join the union to pay their share of the costs of collective bargaining. Labor unions have developed extensive mechanisms in order to calculate the amount of the fee. Employees, who do not want to subsidize activities they do not support, can file complaints with the union to protest the calculation and collection of the agency fee. In order to protect the interests of the objecting nonmember, the United States Supreme Court ordered unions to develop internal remedies, usually in the form of arbitration, to address these complaints. This Casenote addresses the effect of a union’s arbitration remedy for agency fee complaints on an employee’s right to pursue judicial remedies of his claim. The union argues that if it must develop the internal remedy, it should be allowed to insist that workers pursue it before seeking a judicial remedy. Prior to the instant decision, the Supreme Court had not taken up the issue. However, six federal circuits have addressed this question. Four circuits held that workers were not required to pursue the union remedy first. Two circuits sided with the union and required exhaustion of the union’s remedy before pursuit in court. Certiorari was granted in this case to provide a definitive answer to this issue.

II. FACTS AND HOLDING

The Air Line Pilots Association ("ALPA") is a private sector labor organization, which acts as exclusive bargaining agent for Delta Air Lines

In November 1991, the collective bargaining agreement ("CBA") between these two parties was amended to include an agency shop clause. In December 1991, five Delta pilots filed suit against ALPA and Delta in the United States District Court for the District of Columbia, claiming the agency shop clause was facially unlawful. The pilots sought an injunction to enjoin enforcement of the clause, which was denied. Beginning in January 1992, the agency fees were collected from nonmembers. The pilots amended their complaint in October 1992, to challenge the calculation of the agency shop fees. The pilots argued that "ALPA had overstated the percentage of its expenditures genuinely attributable to 'germane' activities." The facial challenge to the agency shop clause was decided in favor of the union on summary judgment, leaving the calculation of the fee as the sole issue in the suit.

Under ALPA's "Policies and Procedures Applicable to Agency Fees," any objectors to the fee calculation may request arbitration under procedures established by the American Arbitration Association ("AAA"). When the 1992 SGNE was published, 174 Delta pilots filed objections with the union. The union forwarded the objections to the AAA; and in October 1993, the AAA assigned an arbitrator to resolve all of the objections in a consolidated action. The respondent-objectors preferred to challenge the agency fee calculation in federal court and asked the AAA to suspend the arbitration proceeding. The arbitrator declined to suspend the proceedings; the district court rejected a motion to enjoin the arbitration; and the objector's counsel entered a conditional appearance in the arbitration. The arbitrator substantially upheld the agency fee calculation.

Based on the arbitrator's decision, ALPA moved for summary judgment in the district court action. The district court granted the motion, ruling that the pilots

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4. Miller, 523 U.S. at 869.
5. Id. The agency shop clause required each pilot not belonging to ALPA "to pay the [u]nion a monthly service charge as a contribution for the administration of [the collective bargaining agreement] and the representation of such employee." Id.
6. Id. One-hundred and fifty Delta pilots intervened in the action and Delta and two pilots were dismissed from the action. Thus, 153 Delta pilots were plaintiffs in the suit against the remaining defendant, ALPA. Id. at 869-70.
7. Id. at 870.
8. Id. Members of the union were required to pay monthly dues equal to 2.35 percent of their earnings. In calculating the fees owed by non-members, the union prepared a Statement of Germane and Nongermane Expenses ("SGNE"). The union concluded that "19 percent of ALPA's expenses for that year were not germane to collective bargaining. Accordingly, the union adjusted fees charged nonmembers to equal 81 percent of the amount members paid." Id.
9. Id.
10. Id.
11. Id. The pilots did not challenge the granting of the summary judgment motion on appeal. Id.
12. Id.
13. Id. Ninety-one of the 153 plaintiffs in the district court action filed objections with ALPA. Id.
14. Id.
15. Id. at 871.
16. Id.
17. Id. The arbitrator did conclude that "nongermane" expenses made up 21.49 percent of the union's budget, instead of 19 percent. Id.
18. Id.
were required to exhaust arbitral remedies before moving to federal court. The ninety-one plaintiffs involved in the arbitration were “qualified for clear-error review of the arbitrator’s fact findings and de novo review of all legal issues.” For these plaintiffs, the district court upheld the arbitrator’s decision. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the objectors were not required to arbitrate agency fee calculations unless they specifically agreed to do so, which they had not. Thus, the arbitrator’s decision had no bearing on this case, and the court of appeals remanded.

The United States Supreme Court granted certiorari to answer the question of “whether an objector must exhaust a union provided arbitration process before bringing an agency fee challenge in federal court.” The Supreme Court held that when objections are raised to the calculation of agency shop fees, the objectors cannot be compelled to exhaust arbitration remedies before bringing claims in federal court, unless the objector has specifically agreed to do so.

III. LEGAL BACKGROUND

Labor law history in the United States has focused on the protection of employees’ rights. “The primary protector of employees’ rights have been labor unions; and, as these unions have developed and grown, employees gradually have been able to attain better wages, hours, and working conditions.” Often, however, an employee will choose not to become a member of the union. The “free rider” problem arises in these instances because the union represents all employees in the field, regardless of whether they choose to join. The interests of both the union and the nonmember are legitimate. On the one hand, the union is concerned with the lack of support on the part of nonmembers who are able to enjoy the benefits of collective representation. On the other hand, “nonunion member employees are concerned with their rights in the context of being compelled to support the union.”

To address the problem of “free riders,” unions developed an agency shop arrangement. This arrangement provides that “a union which is the exclusive representative of a group of employees for the purposes of collective bargaining may charge employees who are not members of the union a fee to defray the costs of

19. Id. The 62 plaintiffs who were not a part of the arbitration were bound by the arbitrator’s decision. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id. at 871-72.
25. Id. at 879-80.
27. Id.
28. Id. at 349-50.
29. Id. at 350.
30. Id.
acting as their collective bargaining representative." Beginning in 1956, the United States Supreme Court took up the constitutionality of the agency shop fees charged by the union against nonmembers.

In *Railway Employees' Department v. Hanson*, nonmembers of a railroad union brought suit to enjoin enforcement and application of a union shop agreement under the Railway Labor Act ("RLA"). Their principal claim was that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." The Court rejected these First Amendment claims, finding there was no infringement or impairment of rights. "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." In *International Ass'n of Machinists v. Street*, the Court again took up the constitutionality of a union shop agreement authorized by the RLA. Investigations led to the discovery that fees paid by nonmembers had been used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." The Court recognized that this discovery presented serious constitutional problems; however, it decided the case upon other less controversial grounds.

More than fifteen years later, the Supreme Court took up the issue again in *Abood v. Detroit Board of Education*. In this public sector case, the union and the school board executed an agency shop agreement, where the union charged nonmembers a fee equal to the regular union dues. Union membership was not required, but failure to pay the non-member shop fee resulted in discharge from employment. The plaintiffs alleged that the union spent the money on programs "economic, political, professional, scientific and religious in nature of which [p]laintiffs do not approve and in which they will have no voice, and which are not and will not be collective bargaining activities." The Court drew a distinction, implicit in the earlier decisions of *Hanson* and *Street*, between permissible agency shop fees for expenses related to collective bargaining and impermissible agency shop fees for expenses related to political activity. Under the Court's decisions in

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33. *Id.* at 227.
34. *Id.* at 236.
35. *Id.* at 238.
36. *Id.*
38. *Id.* at 744.
39. *Id.* at 770.
41. *Id.* at 212.
42. *Id.*
43. *Id.* at 213.
44. *Id.* at 222-23.
Hanson and Street, the use of nonmember dues to finance collective bargaining, contract administration, and grievance adjustment is constitutional and a permissible use of agency fees. Likewise, a union is free to support any political causes of its own choosing, but the monetary support for these causes must come from employees that freely choose to join the union and who are not in any way compelled to become members. The Court also addressed remedies for disagreements stemming from agency shop fees. 

"It would be highly desirable for unions to adopt a 'voluntary plan by which dissenters would be afforded an internal union remedy.' " Such a remedy had been developed by the union in this case. The Court held that, under Michigan law, it might be appropriate to suspend judicial proceedings until internal remedies were pursued and completed. In Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, the Court undertook a detailed analysis of the chargeability of certain expenses under an RLA-controlled agency shop agreement. The plaintiffs in this case, nonmembers of the union, objected to six specific Union expenses they were forced to support under the agency fee. In considering the legality of various charges assessed to nonmembers, the Court set forth the test for union expenditures. "The test must be whether 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."

Two years later, the Court decided Chicago Teachers Union v. Hudson. In this public sector case, nonmember employees challenged the agency fee procedures adopted by the union. The question presented was whether the procedure set out in the agency shop agreement for making objections to the agency fee was adequate to protect the distinction, drawn in Abood, between permissible and impermissible chargeable expenses. In analyzing the procedures adopted by the union in this case, the Court set forth three procedural requirements for nonmember employees who object to the calculation of the agency fee. First, "the union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." The funds reasonably in dispute must be held in escrow while challenges to their calculation are being conducted. Second, potential objectors must be given information sufficient

45. Id. at 225-26.
46. Id. at 235-36.
47. Id. at 240 (quoting Brotherhood of Railway & Steamship Clerks v. Allen, 373 U.S. 113, 122 (1962)).
48. Id.
49. Id. at 242.
51. Id. at 439-40.
52. Id. at 448.
54. Id. at 297-98.
55. Id. at 302.
56. Id. at 305 (quoting Abood, 431 U.S. at 244).
57. Id. at 310.
to determine whether the fee charged is proper. 58 "Leaving the nonunion employees in the dark about the source of the figure for the agency fee--and requiring them to object in order to receive information--does not adequately protect the careful distinctions drawn in Abood." 59 The third requirement imposed by the court is one not flowing from any previous case. The union must "provide for a reasonably prompt decision by an impartial decision maker." 60 "The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." 61 Justice White, concurring with the majority opinion, wrote that once the union has complied with the procedural requirements set forth in the opinion, the employee should be required to pursue arbitration before suing in court. 62

Six years later, the Court had before it the case of Lehnert v. Ferris Faculty Ass' n. 63 The plaintiffs in this public sector case objected to certain uses of their agency fee by the unions. The agency fee charged to nonmembers was equivalent to that paid by union members. 64 Beginning with Hanson, the Court looked at its previous decisions in order to establish guidelines for determining which activities a union may compel nonmembers to subsidize. "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 65

One aspect of this area not addressed by the majority opinions of the United States Supreme Court is the effect of internal union remedies, such as arbitration, in the agency shop agreements and whether these remedies preclude bringing suit first or simultaneously in court. "The courts have had no small difficulty untying the Gordian knot binding the judicial and nonjudicial procedures for challenging the germaneness of agency shop assessments." 66 Six circuits have ruled on this issue. Four circuits, including the Third, Sixth, Ninth, and D.C. Circuits ruled that an objecting employee is not required to pursue the union's remedy first before proceeding in court. Two circuits, including the Seventh and Tenth Circuits, required exhaustion of the union's remedy.

In Hohe v. Casey, 67 nonmembers brought suit against a public union under 42 U.S.C. § 1983 ("§ 1983") challenging the union's fair share fee. 68 The provision allowing for the fee also contained a clause stating that disputes over the fee would

58. Id. at 306.
59. Id.
60. Id. at 307.
61. Id.
62. Id. at 311.
64. Id. at 512.
65. Id. at 519.
66. Lancaster v. Air Line Pilots Ass'n Int'l, 76 F.3d 1509, 1521 (10th Cir. 1996).
67. 956 F.2d 399 (3d Cir. 1992).
be resolved by an arbitrator whose decision was final and binding. The Third Circuit ruled that this clause was unconstitutional. It was inconsistent with the U.S. Supreme Court’s ruling in *Patsy v. Board of Regents*, which held that “exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.” The union argued that the *Hudson* provisions would not be needed if employees could first pursue judicial remedy, but the court rejected this argument. *Hudson* requires that the union must provide alternatives to litigation, “it did not conclude that states or unions could require nonmembers to arbitrate constitutional issues.”

The Sixth Circuit addressed the question in *Bromley v. Michigan Education Ass’n*. The plaintiffs in this public sector case were not members of the union which collectively represented public school teachers in Michigan. After an arbitrator rendered a decision in favor of the union’s calculation of the agency fee, the plaintiffs filed claims under § 1983. The question in this case was the effect of the arbitrator’s decision on the § 1983 action. First, the court recognized that “the statutory right to have an Article III court adjudicate suits brought pursuant to § 1983 for vindication of rights secured by the First Amendment of the Constitution cannot be foreclosed by non-statutory arbitration conducted by a privately appointed decision-maker.” Although the arbitration remedy provided for in the agency shop agreement is in compliance with the requirements set forth in *Hudson*, this does not preclude any remedies meant to be provided by § 1983. Under *Hudson*, the arbitrator’s decision is not given preclusive effect in a subsequent § 1983 action; however, that is not to say it should be accorded no weight at all. “The weight to be accorded such a decision depends, however, on the facts and circumstances of the particular case.” Second, the Sixth Circuit rejected any argument that plaintiffs must exhaust arbitration remedies before proceeding to federal court. “[O]ur own court has squarely rejected the proposition that it is constitutional for an agency shop agreement to require objecting employees to exhaust their arbitration remedies before going into court on their constitutional claims.”

Siding with the Sixth and Third Circuit is the Ninth Circuit in *Knight v. Kenai Peninsula Borough School District*. Plaintiffs, public school teachers, were nonmembers challenging the union’s compliance with the *Hudson* requirements under § 1983. The Ninth Circuit had not previously ruled on the issue of whether...
nonmembers must exhaust their arbitration remedies under the agency shop agreement before seeking relief in federal court. The court, therefore, focused on the circuits that have adopted an exhaustion requirement and found three reasons those circuits adopted such a requirement. First, if the union complies with the requirements in Hudson and provides for arbitration, it should be allowed to insist that the arbitration remedy be pursued first. Second, without an exhaustion requirement, the Hudson guidelines would be a waste of time and money. Third, "requiring exhaustion would lead to federal courts being 'forced to micromanage the fee calculation in every case challenging a union assessment.'" The court also looked at Congressional intent in the passage of § 1983. Although the Ninth Circuit lends some credence to these three public policy arguments for an exhaustion remedy, it gives more weight to Congressional intent. Congress imposed an exhaustion requirement for only one class of cases brought under § 1983, specifically those brought by prisoners. Focusing on Congress' intent not to require exhaustion in other cases, the Ninth Circuit refused to recognize such a requirement in this case.

Likewise, the District of Columbia Circuit was faced with the exhaustion of remedies requirement in Miller v. Air Line Pilots Ass'n, the predecessor of the instant decision. Nonmembers of the union challenged the agency fee calculation, and the union submitted their claim to arbitration. The pilots preferred to have their disputes aired in federal court and appealed when the district court ruled that they had to exhaust the arbitration remedy provided before seeking judicial relief. The union argued that since it had developed procedural safeguards according to Hudson, including an arbitration provision, it was inconsistent to make the union defend itself both in arbitration and in court. After analyzing the progeny of cases since Hanson, the Court opted against an exhaustion requirement. "[W]e simply see no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process." An employee is free to bring a judicial action in federal court without first pursuing arbitration as set out in the agency fee agreement.

The minority circuits, including the Seventh and Tenth, required exhaustion of the union’s internal remedy before an objecting employee could proceed in court. On remand from the United States Supreme Court, the Seventh Circuit was presented

84. Id. at 816.
85. Id. (citing Hudson, 475 U.S. at 311).
87. Id. (quoting Lancaster, 76 F.3d at 1522).
88. Id.
89. Id.
90. Id.
91. 108 F.3d 1415 (D.C. Cir. 1997).
92. Id. at 1416-17.
93. Id. at 1417.
94. Id. at 1418-19.
95. Id. at 1421.
96. Id.
97. Id.
with *Hudson v. Chicago Teachers Union*. Plaintiffs were nonmember teachers who challenged the agency fee calculation and collection. The plaintiffs argued that they should be able to pursue judicial relief before submitting to the union’s arbitration process. The court rejected this argument as burdensome and overwhelming. The Seventh Circuit, quoting the Supreme Court in *Hudson*, noted that some First Amendment contexts require “swift judicial review of the challenged government action. In this context, we do not believe that such special judicial procedures are necessary.” Thus, the Seventh Circuit held that a dissenting employee must exhaust all available non-judicial remedies that are in accord with the *Hudson* requirements announced by the U.S. Supreme Court.

The Tenth Circuit sided with the Seventh Circuit in *Lancaster v. Air Line Pilots Ass’n International*. The plaintiff brought suit against ALPA and United, his employer, for violations of the RLA. In addressing the exhaustion requirement, the Tenth Circuit focused heavily upon *Hudson* and found that its procedural scheme necessarily implies that agency fee challenges will first be brought to the arbitrator. The court cited three reasons for requiring exhaustion. First, although the court was not bound by the concurring opinion of Justice White in *Hudson*, it found the opinion carried “the same precedential weight as Supreme Court dicta to the extent it is consistent with the majority opinion.” Thus, according to White, if the union uses arbitration as an internal remedy and the other requirements of *Hudson* are met, the union should be allowed to require that the employee pursue arbitration before seeking judicial relief. Second, the court was concerned that not requiring exhaustion would render *Hudson*’s procedural requirements a waste of time and money and would force the court to “micromanage the fee calculation in every case challenging a union assessment.” Finally, the court did not want to place itself in a position where it was entangled in union disputes that were entirely capable of being resolved outside of the courtroom.

It is with this extensive background of United States Supreme Court decisions and the split of the circuits on the imposition of an exhaustion requirement that the highest court in the land granted certiorari in *Air Line Pilots Ass’n v. Miller*.

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99. Id. at 1307.
100. Id. at 1314.
101. Id. (quoting *Hudson*, 475 U.S. at 307).
102. 76 F.3d 1509 (10th Cir. 1996).
103. Id. at 1514.
104. Id. at 1522.
105. Id.
107. *Lancaster*, 76 F.3d at 1522.
108. Id.
IV. INSTANT DECISION

A. Majority Opinion

The majority opinion was written by Justice Ginsburg. The case arose as a private sector dispute governed by the RLA.\textsuperscript{109} The RLA provides for agency shop agreements whereby "nonmembers must pay their fair share of union expenditures '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.'"\textsuperscript{110}

The Court reviewed its previous rulings in the area of agency shop fees. Previous decisions of the Court found that costs which are "unrelated to ... representative duties may not be imposed on objecting employees."\textsuperscript{111} In \textit{Abood v. Detroit Board of Education}, the Court stated that the agency fees could be used to cover costs of collective bargaining, contract administration, and grievance adjustment but not for the expression of political views.\textsuperscript{112}

The Court noted that in \textit{Lehnert v. Ferris Faculty Ass'n},\textsuperscript{113} it set out three requirements for agency fees assessed by public unions. The fees must:

\begin{itemize}
  \item [(1)] be germane to collective bargaining activity;
  \item [(2)] be justified by the government's vital policy interest in labor peace and avoiding "free riders";
  \item [(3)] not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.\textsuperscript{114}
\end{itemize}

In \textit{Chicago Teachers Union v. Hudson},\textsuperscript{115} the U.S. Supreme Court set forth three procedural protections for nonunion workers who object to the agency fee calculation.\textsuperscript{116}

\begin{itemize}
  \item [(1)] Employees must receive "sufficient information to gauge the propriety of the union's fee"\textsuperscript{117};
  \item [(2)] the union must give objectors "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker"\textsuperscript{118};
  \item [(3)] any amount of the objector's fee "reasonably in dispute" must be held in escrow while the challenge is pending.\textsuperscript{119}
\end{itemize}

\textsuperscript{110} Id. at 873 (quoting Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435, 448 (1984)).
\textsuperscript{111} Id. (quoting Ellis, 466 U.S. at 448-55).
\textsuperscript{112} Id. at 873-74 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225-26, 234 (1997)).
\textsuperscript{114} Miller, 523 U.S. at 874 (quoting Lehnert, 500 U.S. at 519).
\textsuperscript{115} 475 U.S. 292 (1986).
\textsuperscript{116} Miller, 523 U.S. at 874 (citing Hudson, 475 U.S. at 306-10).
\textsuperscript{117} Id. (quoting Hudson, 475 U.S. at 306).
\textsuperscript{118} Id. (quoting Hudson, 475 U.S. at 310).
\textsuperscript{119} Id. (quoting Hudson, 475 U.S. at 310).
In the instant decision, the U.S. Supreme Court observed that the parties had not challenged the determination of the Court of Appeals for the District of Columbia Circuit, which held that the requirements set forth in *Hudson*, a public sector case, transfer fully to relations governed by the private sector RLA.\(^\text{120}\)

In support of its position that the objectors should be required to pursue internal union remedies prior to suing in court, ALPA advanced two arguments. First, ALPA argued that the doctrine of discretionary exhaustion of remedies should be applied to agency fee arbitration.\(^\text{121}\) Under this doctrine, the worker would be required to pursue the union remedy before going to court. This doctrine applies when Congress delegates authority to a coordinate branch and "recognizes the notion . . . that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer."\(^\text{122}\)

The Court rejected this argument, finding the doctrine inapplicable to the instant dispute because ALPA sought exhaustion of an arbitral remedy provided by a private party and not an administrative remedy established by the United States Congress.\(^\text{123}\) Further, the Court found that *Hudson*’s requirement of a swift remedial process weighs against an exhaustion doctrine, which would increase the amount of time between a complaint and its resolution.\(^\text{124}\)

The second argument advanced by ALPA was an efficiency argument. The union argued that it would be difficult to hold a court hearing without a preceding arbitration proceeding, which would flush out the specifics of the employee’s complaint.\(^\text{125}\) The union, citing *Hudson*, argued that the only burden on the nonmember is to make his objection known without specifying what was objectionable.\(^\text{126}\) The union was concerned with having to defend general claims in court without specific notice about what expenditures the employee found to be nongermane.

The Court gave little credence to ALPA’s efficiency argument. Although the union carries the burden of proving that its expenditures in the agency fee calculation are germane, the federal court plaintiff must specify which of the figures he opposes.\(^\text{127}\) *Hudson*’s requirements that employees be provided with notice of how the fees are calculated, coupled with the opportunity for reasonable discovery at trial, will give the employee a sufficient opportunity to specify his objections.\(^\text{128}\) In addition, the Court stated it was uncertain if an exhaustion requirement would lessen the burden on the court.\(^\text{129}\) An adverse ruling in the arbitration proceeding would still lead the employee to the courthouse.\(^\text{130}\) Furthermore, an employee may still pursue arbitration if it is swifter and cheaper even if not required to do so.\(^\text{131}\) Thus,

\(^{120}\) *Id.* at 874-75 (citing Miller v. Air Line Pilots Ass’n, 108 F.3d 1415, 1419 (D.C. Cir. 1997)).
\(^{121}\) *Id.* at 875.
\(^{122}\) *Id.* at 876 (quoting McCarthy v. Madigan, 503 U.S. 140, 145 (1992)).
\(^{123}\) *Id.*
\(^{124}\) *Id.* at 877.
\(^{125}\) *Id.*
\(^{126}\) *Id.* at 878 (citing *Hudson*, 475 U.S. at 306).
\(^{127}\) *Id.*
\(^{128}\) *Id.*
\(^{129}\) *Id.*
\(^{130}\) *Id.* at 878-79.
\(^{131}\) *Id.* at 879.
the Court found that an exhaustion remedy would not relieve the burden on the courts.\textsuperscript{132}

Finally, the Court recognized the union’s interest in not having to defend the agency fee calculation in two different forums, conceivably at the same time.\textsuperscript{133} The Court, however, suggested that the union can control costs by consolidating proceedings both at the arbitration and judicial stages.\textsuperscript{134} Although this concern may be genuine, the employee’s interest in pursuing the remedy of his choice, especially when he has not specifically agreed to arbitrate, overrides the union’s interests.\textsuperscript{135} The majority opinion concluded that unless the employee agrees to arbitrate his agency fee complaint, he may not be required to submit to arbitration before pursuing a judicial remedy.\textsuperscript{136}

\textbf{B. Dissenting Opinion}

The dissenting opinion in this case was authored by Justice Breyer and joined by Justice Stevens. The dissenting justices felt the correct reading of \textit{Hudson} implied approval of a union rule requiring employees to first pursue the non-binding arbitration remedy.\textsuperscript{137} The dissent discussed the \textit{Hudson} opinion’s balancing of two interests. One interest is the union’s concern that nonmembers share in the cost of collective bargaining.\textsuperscript{138} The other interest is the nonmember’s interest in not paying for union activities that do not advance collective bargaining.\textsuperscript{139}

Breyer next discussed the various reasons that the union and the non-member employees would prefer an arbitration first rule. For the union, an arbitration first rule would lead to lower costs and would make resolution of the dispute more manageable.\textsuperscript{140} Also, if the judicial and arbitration proceedings occur simultaneously, the judge and arbitrator could come to differing conclusions which would itself be expensive and burdensome.\textsuperscript{141} On the part of the objecting employee, there are many reasons to encourage an arbitration first rule including: the unlikely chance that serious delay will occur, the opportunity of a favorable result in arbitration, the non-binding nature of the decision if it is unfavorable, and the escrow holding of any fees collected while arbitration is occurring so the employee does not lose any money.\textsuperscript{142} From the viewpoint of the dissent, arbitration first is resourceful. “Insofar as it settles matters to the parties’ satisfaction, it avoids unnecessary, perhaps time consuming, judicial investigation of highly complex union accounts and expense allocations.”\textsuperscript{143}
Finally, Breyer focused on problems he found in the majority opinion. First, the subject of consent to arbitration has no place in the resolution of this issue. The arbitration first rule is grounded, not in consent, but in the *Hudson* opinion, which authorizes and requires internal procedures be developed to collect agency fees. This is not unlike local court rules which require parties to attempt non-binding arbitration before their case proceeds in court. This is not an issue of consent but rather of a mandate from a prior decision of the U.S. Supreme Court. Second, arbitration first is not equivalent to the exhaustion of remedies doctrine but is rather an extension of the holding in *Hudson*. Breyer questions why exhaustion of remedies should prevent the court from elaborating on *Hudson*’s requirements by establishing an arbitration first rule, when exhaustion did not factor into *Hudson*’s initial requirement of a speedy resolution of objections to the agency fee. Third, Breyer addressed a partial solution to the problem which the majority failed to consider. If courts were to defer until the rendering of an arbitration decision, the court could “take advantage of any settlement or narrowing of the issues that the nonmandatory arbitration proceeding produced.” For the dissenting justices, the arbitration first rule is a reasonable extension of the Supreme Court’s decision in *Hudson*.

**V. COMMENT**

Beginning in 1956, the United States Supreme Court began addressing the issue of agency shop agreements and has continually upheld their constitutionality. Each decision of the court builds on prior decisions, attempting to fill in gaps or uncertainties in this area of the law. Important issues in the early history of the agency shop agreement centered around the use of nonmember fees for political activities, such as supporting a candidate, a political party, or a particular issue. This led the Court to draw a distinction between permissible and impermissible uses of the agency shop fees. Conflicts between nonmember employees and unions arose often over the classification of expenses as “germane (or not germane) to collective bargaining.” This encouraged the Court to develop tests to determine which expenses could be assessed to nonmember employees. In the landmark case of *Chicago Teachers Union v. Hudson*, the Court laid out three procedural requirements to be used to protect nonmembers objecting to an agency shop fee. The third requirement forced the union to provide an internal remedy for the settlement of these disputes. The majority in *Hudson*, however, failed to discuss the question of whether an employee must first pursue this internal remedy or if he could immediately file suit in court. In his concurring opinion, Justice White called for an

144. Id.
145. Id.
146. Id. at 885.
147. Id.
148. Id.
149. Id.
150. Id. at 886.
exhaustion requirement, but the issue was left open for resolution in a future case. The federal appellate courts split on an exhaustion requirement, making it virtually necessary for the Supreme Court to revisit the issue again.

When the Court granted certiorari in *Air Line Pilots Ass'n v. Miller*, the issue of exhaustion was ripe for consideration. The Court's decision affirmed the employee's right to pursue a judicial remedy without first participating in union controlled arbitration proceedings. The Court's holding in *Miller* recognized that nonmember employees who have not agreed to arbitrate their agency fee disputes cannot be compelled to do so by the union.

The agency shop agreement itself is a compromise between competing values of the union as collective representative and the employee. Because of its basic structure, the union represents every employee within a particular line of work, regardless of whether the employee chooses to join the union. In order to address the problem of "free riders," the unions use the agency shop agreement to insure that all who receive the benefit of collective representation provide financial support. However, the employee is concerned about being forced to support causes in which he does not believe. In fact, the employee may have chosen not to join the union because of the views it espouses. As Thomas Jefferson once said, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."  

The *Hudson* procedural requirements were instituted to protect the worker's rights and interests while at the same time allowing the union to collect these fees. The requirement that the union provide objectors with "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker" created problems when employees instead wanted to pursue their rights in federal court. Competing policy interests for both employees and unions have played a substantial role for the federal courts when trying to determine whether to require exhaustion of the union's arbitral remedy before an employee can bring suit.

There are five major policy arguments in favor of an exhaustion requirement. First, if employees were not required to arbitrate first, "the procedure spawned by the Supreme Court [in *Hudson* would be] largely a waste of time and money." Second, the federal courts would be forced to "micromanage" fee calculations, placing a tremendous burden on the courts. Third, the court would be involving itself in disputes that very easily could have been resolved by the union on its own without judicial intervention. Fourth,
[t]he possibility that corrective action within the union will render a member's complaint moot suggests that, in the interest of conserving judicial resources, no court step in before the union is given its opportunity. Moreover, courts may find valuable the assistance provided by prior consideration of issues by appellate union tribunals. 158

Finally, the union may find itself forced to defend its calculation in both a judicial and an arbitral forum, quite possibly at the same time, if it institutes arbitration proceedings upon receiving a complaint and another employee immediately sues in court. 159 This could be expensive, time-consuming, and wasteful for the union, and it can also lead to quite different decisions by the arbitrator and judge.

Four arguments can be made against an exhaustion requirement. The first, and probably weakest, argument is that the burden on the court system will not necessarily be reduced. "To the extent that the arbitrator does not sustain an objection to the union's fee calculation, exhaustion would require the objector to traverse two layers of procedure rather than one." 160 Second, if the union's internal remedy is indeed "an inexpensive, swift, and sure remedy for agency-fee errors, dissenting employees may avail themselves of that process even if not required to do so." 161 In response to the two-fora argument for an exhaustion requirement, the third argument against an exhaustion requirement suggests that unions can reduce the expense of multiple fee calculation complaints by consolidating both the arbitration and judicial proceedings into one action. 162 Finally, and perhaps most importantly, an employee should not be required to arbitrate a dispute that he never agreed to arbitrate. 163

The policy arguments both for and against an exhaustion requirement are strong. However, the Supreme Court in Miller presented persuasive reasoning for preserving an employee's right to pursue a judicial remedy before seeking an arbitral remedy. This decision is a natural extension of the Court's holding in Hudson. Hudson's internal remedy requirement is meant to protect objecting employees by offering them an opportunity to air their grievances in a timely fashion in front of a neutral decision-maker. It is not meant to compel them to do so. The Court recognized the Union's interest in an arbitration first rule, but it found that this interest does not outweigh the nonmember's interest (1) in avoiding arbitration of disputes they didn't agree to arbitrate and (2) in "electing to proceed immediately to court for adjudication of their federal rights." 164

Justice Breyer's dissent attempts to point out flaws in the majority opinion; however, his argument boils down to two main points. First, an arbitration first rule is good for both the nonmember employee and the union. 165 Second, if the Court is going to mandate union compliance with the intricate requirements of Hudson, it

158. Detroy, 286 F.2d at 79.
159. Miller, 523 U.S. at 879.
160. Id. at 878-79.
161. Id. at 879.
162. Id.
163. Id. at 879-80.
164. Id. at 879.
165. Id. at 881-84.
should accord a union the right to insist upon the employee’s compliance with them as well. Although there is some merit in these arguments, the overriding purpose behind the Supreme Court’s opinion in *Hudson* is to protect the rights and interests of the dissenting employee who objects to the agency fee calculation. This includes the employee’s right to pursue the remedy of his choice, especially when he has not consented to arbitrate that particular dispute.

The effect of the Supreme Court’s opinion in *Miller* is to dispel any doubt as to the proper method of objecting to agency fee calculations. While the union is still required to provide internal remedies, such as arbitration, the nonmember employee has the option of choosing a judicial or an arbitral remedy. Employees can decide for themselves which forum will best meet their needs and which will produce the best results. Unions will have an incentive to install internal remedies that are inexpensive, quick, and fair in the hope that employees will willingly choose that course of action. This rule is also consistent with policy espoused in other areas of arbitration, specifically in the realm of mandatory arbitration provisions for employment disputes in CBAs. While there is a strong federal policy in favor of arbitrating employment disputes, the courts will not force employees to arbitrate those disputes that they have not voluntarily and expressly agreed to arbitrate. This bright line rule clears up confusion not only within the lower federal courts, but also within the workplace.

The United States Supreme Court’s decision in *Miller* clarifies much of the confusion that existed within this area of the law. While *Miller* does strike a balance between the interests of the employee and the union, the Court clearly favors the employee’s interests more heavily. From a policy standpoint, this decision is sound. First, the Court authorized the collection of agency fees from nonmember employees; none of these employees agreed to pay the fee. They pay the fee because it is required. These nonmembers have simply chosen employment that is represented by a union they do not want to join. In order to assist unions in combating the free rider problem, the Court has, in essence, ordered each of these employees to either pay the agency fee or quit their job. However, in not requiring the employees to pursue the arbitration remedy first, the Court is also protecting the nonmember employee. The employee is ordered to pay the fee but will not be forced to arbitrate his fee objections if he does not specifically agree to do so.

Second, the Court recognizes the unequal power distribution between a union and an employee. Under *Hudson*, a union is required to develop internal remedies to expeditiously settle fee disputes. While the remedy must be neutral, it is, nevertheless, developed for and operated by the union. The *Miller* decision is a triumph for the nonmember employee, who can now decide for himself which forum, the union’s home court or a court of law, will successfully resolve the dispute he has over the fee he is ordered to pay.

166. *Id.* at 885.
VI. CONCLUSION

The effect of the U.S. Supreme Court's ruling in *Air Line Pilots Ass'n v. Miller*, was to clear up an area of the law that had caused considerable disagreement among workers, unions, and the courts. Absent an express agreement to arbitrate agency fee disputes, an objecting employee will not be required to pursue arbitration first. Instead, if the employee objects to the calculation or collection of the agency shop fee, the employee may immediately proceed to a judicial resolution of the grievance.

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