TON TEACHERS ASSOCIATION/MTA/NEA AND IRENE ROMAN, ET AL., MUPL-2685, 2687, 2688, 2689, 2690, 2695, 2701, 2708, 2742 (4/3/87).

72.3 agency service fee
91.8 standard of proof
92.33 rules of evidence
92.481 motion for judgment
92.482 motion for directed verdict

nissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

earances:

Brian A. Riley, Esq.	-	Representing the Newton Teachers Association/MTA/NEA
Irene L. Roman	-	Pro se
Alfred P. DiPoli	-	Pro se and representing Stanley Wolaszek
Edward J. Mulhern	-	Pro se
Maria L. Vallone	-	Pro se
Edward H. Sahagian	-	Pro se
E. Carol Horgan	-	Pro se

DECISION

Statement of the Case

Between January 19, 1984 and April 24, 1984, Irene Roman, Stanley Wolaszek, red P. DiPoli, Edward J. Mulhern, Gerald J. Hegarty, Maria L. Vallone, Edward H. agian, Jessie A. McChesney-Timberlake, and E. Carol Horgan (Charging Parties) ed charges with the Labor Relations Commission (Commission) alleging that the ton Teachers Association/MTA/NEA (Union) had violated Section 10(b)(1) of the Law imposing a service fee on them for 1983-84 which exceeded the amount permitted Section 12 of the Law. After an investigation, the Commission issued Complaints Notices of Hearing on June 24, 1985, alleging that the Union was imposing a vice fee in excess of the amount permitted by the Law. After several prehearing ferences, a Formal Hearing took place before Judith Neumann, a Commission hearing icer, on March 24, 1986.[1] At the hearing, all parties had full opportunity to

[1] Charging Parties Timberlake and Hegarty did not appear at the hearing, npting the Union to file a Motion to Dismiss their Complaints for lack of (continued)

evidence and to examine and cross-examine witnesses. At the conclusion of ɔn's case-in-chief, the Charging Parties moved for a directed verdict. Charg- :ies Roman and Vallone chose to present oral argument in support of their all other charging parties, as well as the Union, timely filed written

In March 4, 1986, the United States Supreme Court issued its decision in Teachers Union, Local No. 1, A.F.T., AFL-CIO v. Hudson, 106 S.Ct. 1006 enunciating certain constitutional requirements for the Union's collection :y fees. On March 27, 1986, the Commission issued a "Notice to Parties," g the Charging Parties and the Union in the present case, soliciting memoranda ddressing the applicability of the Hudson decision to their cases. Between and April 28, 1986, the Commission received responses to its Notice from Parties Horgan, Timberlake, Sahagian and Roman, each of whom contends that pplies to his or her cases and also that because the Union did not provide an itemization of the expenses for which they were being charged, Hudson that no fee should be payable to the Union. On April 25, 1986, the Union s response to the Commission's Notice, arguing that Hudson did not apply to e, and that in any event, the Commission's procedures satisfied the Court's in Hudson.

Facts[2]

he Union and the Newton School Committee were parties to a collective bargain- ement in effect from September 1, 1982 through August 31, 1984, covering all of a bargaining unit comprising a variety of professional employees. Article ncy Fee, of that collective bargaining agreement provided, inter alia,

> Commencing on September 1, 1983, every employee covered by this Agreement if and when not a member in good standing of the Association, shall pay, or, by payroll deduction, shall have paid to the Association an agency service fee of 100% of the affiliated dues; provided, however, that in no case shall such condition arise before the thirtieth (30th) day next following the date of the beginning of the employee's employment or the effective date of this Agreement, whichever date shall be later. An employee paying the agency service fee to the Association as provided herein may obtain from the Association a rebate of a pro rata share of certain expenditures of the Association, said expenditures as defined in G.L. c.150E, Section 12.

ince none of the Charging Parties was a member of the Union during the period ɔy the collective bargaining agreement, the Union on or about December 8, anded that they pay a service fee, in the amount of $245.00, for the period r 1, 1983 through August 31, 1984. Of that amount, $40.00 was the fee for ɔn Teachers Association (NTA), $148.00 was for the NTA's affiliate, the

(continued)

ion. The Commission asked Timberlake and Hegarty to show cause why their ɔuld not be dismissed, to which they responded that they were unable to be ɔn the hearing date but wished to remain parties to the case. By letter dated May 15, 1986, the Commission denied the Union's Motion to Dismiss.

(2, see page 1591)

sachusetts Teachers Association (MTA), and $57.00 was for the NTA's affiliate, the ional Education Association (NEA). The Charging Parites challenged the amount of service fee and placed the full amount into separate, joint escrow accounts. the 1983-84 service fee period, the NTA offered a rebate[3] of $3.45, while the 's rebate was $6.04 and the NEA's was $6.64.

In 1983-84, the NTA represented approximately 940 individuals and the MTA roximately 53,000 to 54,000 individuals; the record does not disclose the number individuals who were represented by or were members of the NEA during that period. NTA's audited schedule of Cash Receipts and Disbursements for the period July 1, 3 to June 30, 1984, reflects the following expenditures:

MTA-NEA dues	$ 172,951.25
Accounts payable - previous year	273.43
Scholarship	400.00
Refunds	200.00
MARC	603.61
Operating expense	52,424.74
	$ 226,853.03
Less - Accounts Payble [sic] June 30, 1984	$ 1,722.49
	$ 225,130.54

audited "Actual Expense" schedule was attached, which detailed the "operating ense" of $52,424.74 as follows:

Secretaries Salaries	$ 13,921.75
Payroll Taxes	1,686.41
Officer's expense	2,500.00
President's expense	46.92
Clerical	1,236.75
Insurance	200.00
Substitutes	10,340.86
Telephone	938.89
Rent	6,500.00
Repairs equipment	247.48
Supplies and postage	1,687.03
Accounting and auditing	585.00
Conventions and workshops	8,746.15
Donations	100.00
Travel	250.00
Miscellaneous	227.50

2 (from page 1590
None of the parties contests the Commission's jurisdiction in this matter.

[3]The "rebate" is that portion of the agency service fee which the unions volun- r to refund to the fee payer. Generally, such rebares represent an amount which unions concede is not chargeable to the fee payer, such as political contributions or members-only benefits.

Committees:	
Professional rights & responsibilities	$ 1,394.00
Publications	233.34
Social	461.11
Personnel policies	276.99
Other	844.56
	$52,424.74

istitutes" expenditure refers to payments the Union made for substitutes while pursued certain professional development activities sponsored by the NTA. olarships" expenditure was made with monies derived from a scholarship fund, dues and agency fees did not contribute. The NTA's voluntary rebate was these two expenditures, as well as a contribution the NTA made to the Newton Center. It is not clear from the record whether the $100.00 "donations" et forth in the expense schedule refers to the contribution to the Newton Center. None of the other NTA expenditures was clarified through testimony entary evidence.

he Union's evidence in support of the permissible portion of the MTA service isted of a five-page document, entitled "The MTA 1983-1984 Final Rebate: ion." This exhibit shows a rebate calculation based upon the MTA's view of istitutes impermissible expenditures under Section 12 of the Law. It lists egate amounts expended in each of seven "service divisions" within the MTA ental Services, Legal Services, Higher Education, Professional Development, ations, Research, and Regional Offices) and in each of four "maintenance s" (Governance, Administrative Services, Building Services, and Finance and ing). For the service divisions, the document itemizes the amount spent on ies the MTA deems rebatable, but then states conclusorily that the rest of nditures were permissible. Thus, for "legal services," the document states),551 of the $1,495,788 expenditures were for the retirement consultant pro- member-only service that the MTA thinks is impermissible; but "[t]he rest ivision's activity is for maintaining job security and other collective bar- issues." The MTA then calculated the "rebatable" expenditures to be of the total expenditures in the service divisions; that percentage was to each of the aggregate amounts spent in the four maintenance divisions, dded to other rebateable activity, became the rebateable amount for the main- divisions. The MTA finally added the rebatable amounts for all eleven divi- determined that the ratio of rebatable expenditures to total expenditures was , and calculated that the agency fee rebate should be 4.0818% of the 1983-84 $6.04.

With respect to the NEA portion of the fee, the Union attempted to introduce art exhibit (Ex. 4) purporting to justify the NEA fee. The first part is a age document entitled "1983-84 membership year: NEA State Specific Agency Fee ; the second part was the "Findings of Fact and Determination" of a represen- fee umpire, dated January 15, 1985. In that document, the umpire purported examined the NEA's expenditures for the 1983-84 membership year in each of rogram" areas and in each of four "administration" areas. The umpire listed ction of each area and then set forth his findings with respect to how much

ey was rebatable, and how he determined that amount. He found that 20.21% of program area expenditures were impermissible. He then allocated the program a percentage to the administrative areas and held that 20.21% of the expenditures e rebatable, except that he deducted specific expenditures where they clearly t for impermissible purposes. He finally summed up the rebatable and nonrebatable enditures and concluded that 21.74% of the total dues figure was rebatable, or .24. He expressly excluded from his calculations NEA's expenditures for the ted Legal Services Program (ULSP) and UniServ grants, because the manner and pur- e for which these were spent would vary from state to state. The first portion the Union's proffered exhibit 4 is a worksheet that purports to apply the ire's findings, as modified by the percentage of NEA money (ULSP & UniServ) that spent rebatably in Massachusetts, to the NEA's dues for Massachusetts service payers. The final rebate figure stemming from this worksheet was $10.32.

The Union attempted to introduce this exhibit through Henry Sennott, the 's accounting manager. In response to the Charging Parties' voir dire questioning Sennott, however, he testified that he received the proffered exhibit in one ce, with the worksheet and the umpire's report stapled together. He was unsure the source within NEA who prepared the exhibit, did not know the date the work- et was prepared, and could not explain how the figures on the worksheet were de- ed or how the percentages set forth on it were calculated. The Charging Parties ected to the admission of the exhibit and the hearing officer rejected the ibit.

The Union argues in its post-hearing brief that exhibit 4 should have been itted as a business record, since the MTA receives it on an annual basis and it presents a good faith effort by the NEA to determine the amount of money the NEA ends on impermissible items." (U. Br. at 2) We hereby affirm the hearing offi- 's ruling and decline to accept Exhibit 4 into evidence. The Union was unable lay the appropriate foundation for introducing the umpire's report or the ached worksheet. As we indicate in our companion decision in Milford Teachers ociation, MUPL-2491, any document purporting to summarize union expenditures

> "must be introduced through a witness or witnesses who can knowledge- ably testify about the nature and accuracy of the underlying expense data and who can sufficiently detail the summarized expenses, through documents or testimony, to persuade the Commission that the summary is reliable." Sl. Op. at 19.

testimony of Mr. Sennott clearly indicates that he could not identify or attest the accuracy or reliability of the expense data summarized and analyzed in the ire's report. Accordingly, the exhibit was properly excluded, leaving the record oid of evidence concerning the permissibility of the NEA's expenditures.

Opinion

We are presented in this case with the Charging Parties' Motion for Directed dict, based on their argument that the Union failed to produce sufficient evi- ce to establish a prima facie case that any of its agency fee assessment is for

ɔle expenditures within the meaning of Section 12 of the Law and of the Com- s regulations 456 (formerly 402) CMR 17.04(2). We shall treat the Charging motion as a Motion for Judgment, which we grant for the reasons that fol-

ıe Law allows the union to collect a service fee from nonmembers to cover ɔ rata shares of the costs of collective bargaining. Lyons v. Labor Rela- mmission, 397 Mass. 498, 501 (1986). It is a violation of Section 10(b)(1) aw for the union to demand a fee in excess of that amount. School Committee field v. Greenfield Education Association, 385 Mass. 70, 76 (1982). An em- no objects to the amount of the fee must voice that objection by filing a ed practice charge. However, once the fee is challenged, the union bears en of producing sufficient evidence to persuade the Commission that the fee the fee payer's proportionate share of the union's permissible expenditures. ld, supra, 385 Mass. at 85; 456 (formerly 402) CMR 17.15(2). Since the Union uced no admissible evidence to justify the NEA portion of the 1983-84 fee, ı may not lawfully assess the Charging Parties any of the $57.00 allocable EA.

e next consider whether the Union has demonstrated that any of the MTA or ion of the fee represents the Charging Parties' pro rata share of the costs ctive bargaining. In our companion decision in Woburn Education Association,), we decided that as a threshold matter the union must produce evidence ch we could calculate the proportionality of the fee either by (1) evidence 1983-84 membership dues represented the members' pro rata shares of the expenditures, or (2) evidence of the number of employees represented by the d its affiliates, so that aggregate permissible expenditures can be divided ce a pro rata figure. Slip op. at 15. In the present case, the Union esti- at the NTA represented 940 individuals in 1983-84 and the MTA between 53,000)0 individuals.[4] We will accept the Union's estimates, because the record no reason to doubt their accuracy and because minor inaccuracies in esti- ıe number of employees represented will not materially affect the amount of idual fee. However, in order to encourage accuracy, we will use the largest number within a union's estimates when dividing permissible expenditures, that will produce a smaller pro rata amount.

ıus, this record contains a basis upon which to decide the proportionality TA and NTA fee. However, the Union has not provided sufficient evidence ch to conclude that any of the 1983-84 fee was based on permissible expendi- In support of the MTA portion of the service fee, the Union introduced the 3-84 Final Rebate: Explanation." (Ex. 2) The Commission has already com- pon the deficiencies in this evidence, which excludes as impermissible

No evidence was produced to establish either the number of employees repre- y the NEA or that the NEA dues represent a member's pro rata share of NEA ; thus, even if the NEA had produced any admissible evidence of permissible ures, the Union would not have been able to satisfy the threshold inquiry proportionality of the NEA fee.

·tain identified "members-only" activities and services, reduces that amount to a rcentage, and then applies the percentage to the individual dues to determine the ɔate amount. As set forth in Woburn, Sl. Op. at 17, and Milford, Sl. Op. at 17-18, ɜ union's evidence should include audited financial records or equally reliable idence itemizing the union's expenditures and demonstrating how such expenditures late to the categories set forth in 456 CMR 17.04. Unless a particular expenditure ɪerently relates to collective bargaining, it is not sufficient for profferred idence merely to state conclusorily that undifferentiated aggregate expenditures ·e for the purposes of collective bargaining.

Thus, for example, it is not sufficient for Exhibit 3 to state that the ɡher Education division "is concerned exclusively with organizing and servicing ɱbers in bargaining units at institutions of higher education." Rather, the Union ɜt produce admissible evidence to explain what the higher education division does, ·fferentiate the $577,592 aggregate expenditure into its components, and supply ·fficient detail from which the Commission may independently conclude that all of ɜ activity funded by the $577,592 was permissible. Similarly, with respect to ɜ Legal Services division expenditures, the Union should provide sufficient detail ɔut the division's personnel and the amount and nature of their caseloads to ıble the Commission independently to conclude, as claimed by the Union, that :]he rest of the division's activity is for maintaining job security and other col-:tive bargaining issues." With respect to the Communications division, the descrip-ɔn of rebatable amounts set forth on Exhibit 3 does not clearly indicate what pub-:ations or portions of publications are impermissible and why. In order to justify ɔenditures on publications, the Union could have provided to the Commission evi-ıce of the content of at least a representative sample of such publications, re-:ing the content to the categories in 456 CMR 17.04. The rest of the Union's ɨted expenditures on Exhibit 3 suffer from the same defect: they state in conclu-·y form, without supporting evidence, that a particular amount of a division's ɔenditures was permissible.

Furthermore, the Union has not demonstrated that the figures set forth in ɜ MTA rebate calculation are derived from audited or otherwise reliable financial :ords. Cf. Woburn, Sl. Op. at 17. Thus, the Union's evidence falls far short of ɔonstrating how much, if any, of the MTA's expenditures were for permissible pur-ɨes.

Turning to the NTA portion of the fee, the Union has produced audited sche-es itemizing the NTA's expenditures for the 1983-84 fiscal year. The Union has ɨo provided testimony explaining that certain of those expenditures either did ɜ form a basis for the agency service fee (i.e., the scholarships expenditure), were rebatable as "members-only" services (i.e., the "social" expenditure, and ɜ "substitutes" expenditure).[5] The Union provided no clarifying or supporting dence about any of the other itemized expenditures.

[5]We note that the Union apparently considers any "members-only" activity or ·vice to be rebatable, judging from its analysis of rebatable activities in Exhibit ınd in the NTA's testimony. Under Rule 17.04(1)(3), however, a benefit or activity impermissible if it is available only to union members and is "not germane to the governance or duties of the bargaining agent."

ertain of the NTA's expenditures require supporting evidence simply to explain
items are. Thus, the record does not disclose what "MARC" stands for, the
types of expenditures subsumed under the rubric "miscellaneous," or to what
es or purposes the "travel" and "donations" items refer. Without such clari-
, the Commission cannot assume that the expenditures relate to permissible
es.

thers of the NTA's expenditures could be characterized as administrative or
expenditures. Guided by the Supreme Court's decision in Ellis v. Brother-
Railway Employees, 466 U.S. 435 (1984), we will presume that overhead expen-
necessary to maintain an organization's existence are permissible, provided
n has produced some evidence that the expense was incurred in connection with
n's function as a collective bargaining agent. For example, rent for the
which the union conducts its collective bargaining-related activities will
med permissible, even if the union also uses the same space for some activi-
services which are impermissible. Similarly, the union will be permitted
e fee payers for expenditures for union conferences or conventions at which
n elects officers and otherwise maintains its organizational existence, as
for property insurance, building repairs and maintenance, and accounting
ting costs incurred in connection with the union's existence as a collective
ng representative. It would be difficult, if not impossible, to determine
or to what extent such expenses are affected by the amount of impermissible
undertaken by the union. Indeed, as the court recognized in Ellis, the
esumably would incur such expenses in essentially the same amount simply to
at all. Thus, there is no reason to allocate such expenses proportionately
mount of the union's permissible activities. With respect to such "organi-
maintenance" expenditures, a charging party could rebut the presumption of
bility only with evidence that the expenditure was actually incurred in fur-
of an exclusively impermissible activity (for example, renting space from
assist a political campaign or the separate cost of insuring office equip-
d for impermissible activities).

ertain other administrative expenditures, however, such as telephone bills,
rative salaries, and postage and supplies, could be directly affected by the
f impermissible activity undertaken by a union. In the absence of contrary
, such expenses will be presumed permissible in the same proportion as the
activities are found to be allocable to permissible categories. Thus, if
n demonstrates that 75% of its legal division caseload (in terms of lawyer
s related to permissible categories, then that percentage of the division's
, telephone, and supplies will also be presumed permissible.[6] By way of
example, if the union demonstrates that 70% of the space in its publications

[6] If the organization does not maintain separate administrative cost accounts
division, we would consider an allocation of such expenses as permissible
rtion to the amount of overall permissible expenditures. In the alterna-
e union may submit evidence that salaries or other particular expenses are
partially permissible.

devoted to permissible items, then 80% of the salaries, supplies, telephones, tage and other overhead items incurred in connection with disseminating those lications would be presumptively permissible. A charging party would be able to ut the permissibility of this sort of administrative cost by evidence that the on's actual expenditures on postage, telephones, etc. were greater than the pro-tional allocation.[7]

Applying these concepts to the union's evidence regarding the NTA expendi-es, we note that the record lacks any evidence about the employees of NTA or their ivities. Thus, on the basis of this record we cannot determine to what extent y engaged in permissible activity[8] and we have no corresponding basis upon which apportion administrative expenses ("secretaries' salaries," "payroll taxes," ficer's expense," "president's expense," "clerical," "telephone," "supplies" and stage"). Nor does the record contain even the modicum of proof that might allow to conclude that "organizational maintenance" expenses are permissible. We are d nothing about the functions of the various Committees on which money was ex-ded, about what facilities were rented, the purpose for which any facility was ted, or about the nature of the conventions and workshops on which substantial on funds were spent. Thus, we cannot conclude that the "rent," "repairs equip-t," "accounting and auditing," or "conventions and workshops" items ought to be rgeable to the fee payers.

In sum, although the NTA's expenditures are sufficiently itemized, are audited, could be pro rated because we have an adequate estimate of the number of unit loyees, the record lacks the necessary supporting and clarifying information that ld relate the itemized expenditures to the permissible categories set forth in a. 17.04(2). Since the record also lacks sufficient evidence to justify the MTA's the NEA's fee, we allow the Charging Parties' Motions for Judgment. We hold t the Union has violated Section 10(b)(1) of the Law by demanding an agency ser-e fee from the Charging Parties for 1983-84 in excess of that permitted by Sec-n 12 of the Law.[9]

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[7] As we stated in Milford, Sl. Op. at 19, the charging parties would have to accorded access at their request to the underlying data. Thus, the charging ties would be able to obtain and introduce the evidence necessary to override presumptions discussed above, should they desire to do so.

[8] Although we are prepared to take administrative notice of the fact that the performs a panoply of worthwhile services for the employees whom it represents, have no evidence on this record from which to find that any particular expenses ld be categorized as "permissible."

[9] In view of our disposition of the case we need not reach other arguments parties have raised concerning the applicability of Hudson to this case.

Order

1EREFORE, based upon the foregoing, it is hereby ORDERED that the Newton Association, MTA/NEA (Union) shall:

. Cease and desist from demanding an agency service fee from Irene Roman, Stanley Wolaszek, Alfred P. DiPoli, Edward J. Mulhern, Gerald J. Hegarty, Maria R. Vallone, Edward H. Sahagian, Jessie A. McChesney-Timberlake, and E. Carol Horgan (Charging Parties) an agency service fee for the 1983-84 fee period.

. Not enforce the agency fee provision contained in any collective bargaining agreement between the Newton School Committee and the Union as such agency fee provision applies to the 1983-84 school year, with respect to the Charging Parties.

. Not seek the discharge of, or any other sanction against, the Charging Parties for failure to pay the agency fee for the 1983-84 school year.

. Release to the Charging Parties all monies held in joint escrow by the Union and the Charging Parties, plus all interest accrued to the date of the dissolution of the escrow account.

. Post in all places where notices are normally posted for bargaining unit members, and leave posted for a period of not less than thirty (30) days, copies of the attached Notice to Employees.

. Notify the Commission within thirty (30) days of receipt of this Decision and Order of the steps taken to comply herewith.

O ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

Newton Teachers Association/MTA/NEA and Irene Roman, et al., 13 MLC 1589

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

After a hearing, the Labor Relations Commission has determined that the Newton achers Association, MTA/NEA (Union) has violated Section 10(b)(1) of the Law by manding an agency service fee from certain individuals for the 1983-84 school year.

WE WILL NOT seek to collect from Irene Roman, Stanley Wolaszek, Alfred P. Poli, Edward J. Mulhern, Gerald J. Hegarty, Maria R. Vallone, Edward H. Sahagian, ssie A. McChesney-Timberlake, and E. Carol Horgan (Charging Parties) an agency rvice fee for the 1983-84 school year and WILL NOT enforce the agency fee provi- on contained in any collective bargaining agreement between the Newton School Com- ttee and the Union, as such agency fee provision applies to the 1983-84 school ar, with respect to the Charging Parties.

WE WILL NOT seek the discharge of, or any sanction against, the Charging rties for failure to pay the agency fee for the 1983-84 school year.

WE WILL release to the Charging Parties all monies held in joint escrow by e Union and the charging parties, plus all interest accrued to the date of the dis- lution of the escrow account.

PRESIDENT, NEWTON TEACHERS
ASSOCIATION, MTA/NEA