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# FLORIDA PUBLIC EMPLOYEES: IS THE SOLUTION TO THE FREE RIDER PROBLEM WORSE THAN THE PROBLEM ITSELF?

CURTIS L. MACK\* AND EZRA D. SINGER\*\*

## I. INTRODUCTION

The passage of the National Labor Relations Act (NLRA) in 1935 greatly facilitated union organization throughout the United States.<sup>1</sup> The union movement was inhibited, however, in 1947 when Congress amended the Act to allow states to enact "right-to-work" statutes.<sup>2</sup> Such proposals were a source of great public debate in the 1950's.<sup>3</sup> Although the issue is no longer of overriding national concern, proposals continue to be made.<sup>4</sup>

The term "right-to-work" is misleading. "Right-to-work" laws do not purport to guarantee a right to work or a right to a job. Rather, these laws prohibit conditioning employment on membership in, or payment of dues to, a labor organization.<sup>5</sup> For this reason, labor unions have traditionally opposed such laws.

Public employees, who are not covered by the NLRA,<sup>6</sup> have traditionally fared poorly in the South. Mississippi, for example, has yet to develop any legislative or policy guidelines for public-sector collective bargaining; North Carolina prohibits public employee collective bargaining.<sup>7</sup> Many other southern states allow only lim-

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1. National Labor Relations Act, Pub. L. No. 198, §§ 1-16, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-166 (1970)).

2. Act of June 23, 1947, Pub. L. No. 101, § 14(b), 61 Stat. 151 (codified at 29 U.S.C. § 164(b) (1970)). The provision reads: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

3. See P. SULTAN, *RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT* 56-57 (1958).

4. For a discussion of the situation in North Dakota, see Eissinger, *The Right-to-Work Imbroglia*, 51 N.D.L. REV. 571 (1975).

5. *Id.* at 573. See also P. SULTAN, *supra* note 3.

6. "The term 'employer' . . . shall not include the United States or . . . any State or political subdivision thereof . . ." National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (1970).

7. See *Summary of State Labor Laws*, 51 GOV'T EMPL. REL. REP. (BNA) 501, 516 (Mar.

ited bargaining rights to select groups of public employees.<sup>8</sup>

Florida is the exception in the South. Florida's Public Employees Relations Act (PERA),<sup>9</sup> enacted in 1974, governs nearly all the state's public employees.<sup>10</sup> PERA established a system of governing labor relations quite similar to that of the NLRA,<sup>11</sup> with the exception of the right to strike.<sup>12</sup>

At present, there are approximately 470,000 public employees in Florida, of whom about 250,000 are covered by a union contract.<sup>13</sup> Under the "right-to-work" provision in the Florida Constitution, no employee may be required to join a union or to pay the equivalent of dues paid by union members, even though these nonunion employees are given full use of the union's services.<sup>14</sup> Thus, the non-

14, 1977); N.C. GEN. STAT. §§ 95-97 to 100 (1975) (prohibiting public employees from joining unions).

Tennessee had a strong prohibition, *Weakley County Mun. Elec. Sys. v. Vick*, 309 S.W.2d 792 (Tenn. Ct. App. 1957), cert. denied, 309 S.W.2d 792 (Tenn. 1958) (held county had no authority to enter into a collective bargaining agreement), but in February, 1978, enacted a collective bargaining law. Tennessee Education Professional Negotiations Act, ch. 570, 1978 Tenn. Pub. Acts. The Act is limited to public school teachers and administrators. For a discussion of this new law, see 753 GOV'T EMPL. REL. REP. (BNA) 12-15 (Apr. 3, 1978).

8. *Summary of State Labor Laws*, supra note 7.

9. Act of May 30, 1974, ch. 74-100, 1974 Fla. Laws 134 (current version at FLA. STAT. §§ 447.201-.609 (1977)). For a survey of the scope and current status of the provisions of PERA, see McHugh, *The Florida Experience in Public Employee Collective Bargaining, 1974-1978: Bellwether for the South*, 6 FLA. ST. U.L. REV. 263 (1978).

10. Certain categories of employees are excluded under § 447.203(3) of PERA. See McHugh, supra note 9, at 277, 288-96.

11. See McHugh, supra note 9, at 270.

12. FLA. STAT. § 447.505 (1977) provides that "[n]o public employee or employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike."

13. See FLA. DEP'T OF COMMERCE, FLORIDA EMPLOYMENT STATISTICS, BULL. No. 357, at 17 (1978). As of April, 1978, approximately 216,000 public employees were eligible for membership at the time of elections in units certified by the Florida Public Employees Relations Commission. Inquiries should be directed to Supervisor of Elections, PERC, 2003 Apalachee Parkway, Tallahassee, Florida. Based on author Mack's experience as former chairman of PERC, 250,000 is probably a more accurate, but conservative, figure because membership figures are not updated at PERC once a unit has been certified and because the 216,000 figure does not reflect public employees covered by private union contracts in units not certified by PERC.

14. FLA. CONST. art. I, § 6 provides: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization."

The original 1885 constitution did not contain a right-to-work provision. Article I, § 12 of the 1885 constitution was amended in 1944 by adding the following provision:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

The 1968 constitutional revision put the provision in a separate section and revised the language. See generally D'Alemberte, *Commentary*, in 25A FLA. STAT. ANN. 102 (West 1970).

union employees may be viewed as "free riders." They have the benefits of unionism without the costs.

To relieve the financial burden on unions required to represent fully both dues-paying members and nonmembers who contribute nothing for the services received, PERA was amended in 1977 to stipulate that "certified employee organizations shall not be required to process grievances for employees who are not members of the organization."<sup>15</sup> This approach is unusual in that, although exclusive union representation is maintained, the statute as amended attempts to grant equitable relief to unions burdened with a high percentage of nonmember employees who are reaping the benefits of the union's services.

This is the first time a state legislature has adopted such an approach to grapple with the problem of "free riders" in the public sector. This amendment must be analyzed carefully to determine its legality. A thorough analysis may also be useful to other state legislatures faced with this problem.<sup>16</sup>

This article will first outline the relevant labor law concepts to provide a framework for the discussion of the "free rider" problem. After an analysis of the Florida statutory scheme, the authors will propose a solution they feel will withstand judicial scrutiny and at the same time meet the conflicting needs of public employers, public employee unions, and individual employees.

## II. BACKGROUND

### A. *The Doctrine of Exclusivity*

A union elected by a majority of the employees in a bargaining unit serves as the *exclusive* bargaining representative for all employees in that unit.<sup>17</sup> In granting unions exclusive control over both contract negotiation and administration, the legislature has concluded that individual interests are necessarily subordinated to the interests of the group.<sup>18</sup> The United States Supreme Court, recogniz-

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15. Act of June 24, 1977, ch. 77-343, § 14, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.401 (1977)).

16. Ga. HB 1536 (to authorize collective bargaining by public employees) and Ga. HB 1537 (to authorize collective bargaining with policemen and firemen) were introduced in the Georgia Legislature in January, 1978.

17. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . [Emphasis added.]

18. J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944). The Court held that "the majority

ing the centrality of the doctrine of exclusivity in the law of labor relations, stated that:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.*<sup>19</sup>

Although criticized as incompatible with any "coherent conception of civil liberty,"<sup>20</sup> the system of exclusive union representation is essential to promote the congressional goal of "industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining."<sup>21</sup>

Both the employers and the unions benefit by exclusive union status. This is readily apparent in contract negotiations. Multiple unions representing different employees in the same bargaining unit will of necessity result in numerous agreements to be enforced. Each agreement conceivably might contain significantly different provisions applicable to different members of the same group. The Supreme Court has recognized that interunion rivalries may create "dissension within the work force and eliminat[e] the advantages to the employee of collectivization."<sup>22</sup> By channeling employee grievances through an agreed-to dispute resolution machinery, the employer and the union will be spared the "[c]haos [which] would result if every disenchant[ed] employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration . . . ."<sup>23</sup>

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rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result."

19. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (emphasis added); see Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 *YALE L.J.* 1327, 1333 (1958). See also Frank, *The Rights of the Exclusive Bargaining Representative Versus the Rights of the Individual: A Union Perspective*, 6 *J.L. & Educ.* 367, 370 (1977).

20. *Petro, Civil Liberty, Syndicalism, and the NLRA*, 5 *U. Tol. L. Rev.* 447, 447-48 (1974).

21. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); see *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

22. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221 (1977).

23. *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179, 186 (2d Cir. 1962).

Exclusive control over the grievance procedure is necessary to achieve industrial peace.<sup>24</sup> From management's perspective, "vesting exclusive control over grievances in the [majority] union simplifies contract administration."<sup>25</sup> Grievances are processed in an orderly manner, following a procedure negotiated by the employer and the union. The employer works with recognized or certified bargaining agents with a vested interest in protecting the integrity of the collective bargaining agreement. By working with the exclusive bargaining representative, the employer in many instances is spared the time, effort, and money of processing spurious grievances because the union has eliminated or dismissed all grievances which do not raise a colorable violation of the contract.<sup>26</sup> Most important for the employer, exclusive control over the grievance procedure by a majority union precludes a situation in which members of rival (minority) unions "press aggressively all manner of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement even of the most trivial grievances as a vehicle to build up their own prestige."<sup>27</sup>

Aggressive and irresponsible action by a minority union will, in all probability, bring a response from the majority union. To combat the minority unions, the majority union might well become more militant in its administration and enforcement of the collective bargaining agreement and more reluctant to refuse to process unmeritorious grievances for fear of losing members to a militant and perhaps irresponsible rival union which would be inclined to arbitrate many spurious grievances for purposes of campaign strategy. Without exclusive union control over the grievance procedure, the employer would be faced with two or more unions making often unreasonable demands based on their interpretations of the collective bargaining

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24. *Contra*, Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004, 1016-23 (1970).

25. Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362, 392 (1962).

26. In *Vaca v. Sipes*, 386 U.S. 171, 191 (1967), the Court did "not agree that the individual employee has an absolute right to have his grievance taken to arbitration . . ." See *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179, 186 (2d Cir. 1962) (finding that "[c]haos would result" if every grievance had to go to arbitration).

27. *Douglas Aircraft Co.*, 25 War Lab. Rep. 57, 61-62 (1945), as cited in *Cox, Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 626 (1956).

Imaginary grievances could be conjured up and others which, under ordinary circumstances, would be dropped at the first step could be magnified out of all proportion to their importance. The settlement of grievances could become the source of friction and competition and a means for creating and perpetuating employee dissatisfaction instead of a method of eliminating it.

agreement in an effort to impress the employees and gain new members for their organizations.

From the union's perspective, exclusive control of the grievance procedure enhances the organization's prestige and authority,<sup>28</sup> builds loyalty among the members, and institutionalizes the union in the eyes of the employees. Merely to maintain itself in power is probably sufficient reason to explain the union's desire for exclusive status. In addition, however, the grievance procedure often completes the contract or modifies the bargaining agreement to fit changing circumstances or to address problems which are not readily apparent during negotiations. Resolutions of individual grievances often have ramifications that extend throughout the entire bargaining unit. Therefore, since control over the grievance procedure may well mean control over negotiating changing terms in the contract and continuing the negotiating process, unions have a vested interest in seeing that, just as they are the exclusive negotiators of the contract, so too are they exclusive administrators of the agreement.

### B. *The Duty of Fair Representation*

There is a great potential for abuse in exclusive representation. As the only party with the authority to compel the employer to discuss grievances,<sup>29</sup> an unscrupulous union might exercise control over the grievance procedure so as to emasculate the rights of dissident employees or employees who refused to support the union enthusiastically at critical times. Further, a union might refuse, for invidious or irrelevant reasons, to process the grievances of members of particular ethnic or religious groups.

Recognizing the grave implications of allowing a union to dispense its statutorily granted powers in a discriminatory manner, the Supreme Court held in *Steele v. Louisville & Nashville Railroad*:

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. [The statute] . . . require[s] the union, in collective bargaining and in making contracts with the [employer], to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.<sup>30</sup>

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28. Summers, *supra* note 25, at 391.

29. Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962).

30. 323 U.S. 192, 204 (1944).

Though *Steele* was decided under the Railway Labor Act,<sup>31</sup> the duty of fair representation was soon applied to employees covered by the National Labor Relations Act.<sup>32</sup> The duty to represent fairly *all* the employees in a bargaining unit stems directly from the union's right to be the *exclusive* bargaining representative of all the employees in the unit.<sup>33</sup> Under the doctrine of the duty of fair representation, the union's "exclusive . . . statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."<sup>34</sup>

In finding the duty of fair representation implicit in the particular statutes,<sup>35</sup> the Court avoided ruling on the difficult constitutional questions which would arise had the Act conferred power without any commensurate statutory duty.<sup>36</sup>

31. 45 U.S.C. §§ 151-188 (1970).

32. See, e.g., *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (truckdrivers); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) (UAW); *Vaca v. Sipes*, 386 U.S. 171 (1967) (meatpackers); *Humphrey v. Moore*, 375 U.S. 335 (1964) (auto transporters); *Syres v. Oil Workers Int'l Union*, 350 U.S. 892 (1955) (oilworkers); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (autoworkers).

33. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-81 (1967).

34. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

The exact extent of this duty has never been defined beyond saying that the union breaches the duty when its conduct is "arbitrary, discriminatory, or in bad faith." *Id.* at 190. Legal scholars debate what standard a union should be held to when it fails to take a member's grievance to arbitration. See, e.g., Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 *TEX. L. REV.* 1119, 1161-78 (1973); Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 *CIN. L. REV.* 55 (1972); Comment, *The National Labor Relations Board and the Duty of Fair Representation: The Case of the Reluctant Guardian*, 29 *U. FLA. L. REV.* 437 (1977). The central theme in *Vaca v. Sipes* is that the purpose of the duty is to "prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." 386 U.S. at 182.

The duty has been held to prevent unions from discriminating in contract negotiations or in processing grievances on the basis of race, *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); Local 12, *United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966); sex, *NLRB v. Local 106, Glass Bottle Blowers Ass'n*, 520 F.2d 693 (6th Cir. 1975); or national origin, *NLRB v. International Longshoremen's Ass'n*, 489 F.2d 635 (5th Cir.), *cert. denied*, 419 U.S. 1040 (1974).

This duty extends to representing all members of the unit in the grievance procedure. During contract negotiations, the cost differential between bargaining solely for union members and bargaining for the entire unit is negligible. However, in contract administration, each grievance and each arbitration have identifiable costs. The difference between processing the grievances of members rather than the entire unit is great. Only in the processing of grievances, up to and including arbitration, does the union have an economic reason to discriminate against the nonmember.

35. In *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 199 (1944), the Court stated: "Congress . . . did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority."

36. *Id.* at 198.



In dicta, however, the Court stated in *Steele*:

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.<sup>37</sup>

The Supreme Court has thus given constitutional dimension to the duty of fair representation. Therefore, even if the courts are unwilling to read into the statutes a duty to represent all the members of the bargaining unit fairly, the duty will be found to arise from constitutional considerations.<sup>38</sup>

### C. Union Security Agreements

As the exclusive bargaining representative for all employees in the unit, the certified or recognized union is required to process the grievances of all unit members, both union and nonunion, with the same degree of enthusiasm. Organized labor, faced with nonmembers receiving the same benefits as dues-paying members, sought to remedy this inequity by bargaining with the employer to insert various provisions in the collective bargaining agreement to bolster the union's treasury, strength, and membership. The most common of these union security agreements were the closed shop, the union shop, and the agency shop.

In a closed shop, the employer may hire or employ only workers who are already members of the union. In a union shop, all employees are required to join the union within a specific period of time as a condition of employment and to remain union members for the duration of their employment with the particular employer who is a party to the labor agreement. In an agency shop, the reluctant

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37. *Id.* at 202. See also *Syres v. Oil Workers Local 23*, 350 U.S. 892, *rev'g* 223 F.2d 739 (5th Cir. 1955); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944).

38. For decisions finding a duty of fair representation in the public sector, see *Malone v. United States Postal Serv.*, 88 L.R.R.M. 3010 (1974); *McGrail v. Detroit Fed'n of Teachers*, 82 L.R.R.M. 2623 (1973); *New Jersey Turnpike Employees' Union v. New Jersey Turnpike Auth.*, 303 A.2d 599 (N.J. Super. Ct. App. Div. 1973); *Sedita v. Board of Educ.*, 371 N.Y.S.2d 812 (Sup. Ct. 1975); *Antinore v. State*, 371 N.Y.S.2d 213 (Sup. Ct. 1975); *Kaufman v. Goldberg*, 315 N.Y.S.2d 35 (Sup. Ct. 1970); *Belanger v. Matteson*, 346 A.2d 124 (R.I. 1975), *cert. denied*, 424 U.S. 968 (1976).

For decisions finding a duty of fair representation in the private sector in right-to-work states, see *Sanderson v. Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973); *Byrd v. Local 24, Int'l Bhd. of Elec. Workers*, 375 F. Supp. 545 (D. Md. 1974); *Davis v. Mason & Dixon Tank Lines, Inc.*, 539 S.W.2d 40 (Tenn. Ct. App. 1975).

employee may refrain from joining the union, but, as a condition of employment, he or she must pay the union a service fee which is the equivalent of the initiation fees and dues paid by union members.

In 1947, the Taft-Hartley Act<sup>39</sup> “abolishe[d] the closed shop but permit[ted] voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership . . . .”<sup>40</sup> Outlawing the closed shop was a congressional response to abuse by union leaders who dealt with dissidents and potential rivals by suspending them from union membership, thus forcing them to lose their jobs.<sup>41</sup>

Recognizing, however, that “in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost,”<sup>42</sup> Congress permitted both the union shop and the agency shop.<sup>43</sup> These forms of union security reflected congressional concern that “at least as a matter of federal law, the parties to a collective-bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.”<sup>44</sup>

#### D. “Right-to-Work” Provisions

At the same time that Congress permitted union and agency shops, Congress also enacted section 14(b) of the National Labor

39. Pub. L. No. 101, § 8(a)(3), 61 Stat. 140 (1947) (current version at 29 U.S.C. § 158(a)(3) (1970)).

40. S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947).

41. R. GORMAN, BASIC TEXT ON LABOR LAW 640 (1976).

42. S. REP. No. 105, 80th Cong., 1st Sess. 6 (1947).

43. The Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, § 101, 61 Stat. 136, 140 (1947) (current version at 29 U.S.C. § 158(a)(3) (1970)), provides:

It shall be an unfair labor practice for an employer—

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . : *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

44. Oil Workers Int’l Union v. Mobil Oil Corp., 426 U.S. 407, 416 (1976).

Relations Act to prevent a total extinction of the state's power over certain union security agreements.<sup>45</sup> Under section 14(b), states may outlaw all forms of union security agreements within their jurisdictions.<sup>46</sup> Pressured by a national "right-to-work" movement,<sup>47</sup> twenty states have enacted right-to-work laws banning such agreements.<sup>48</sup>

However, states which proscribe union security agreements do not have the authority to alter the principles of union exclusivity. Consequently, the duty-of-fair-representation doctrine as enunciated in *Steele* remains applicable in right-to-work states. Since the union must act as the exclusive representative for all bargaining unit employees, it is not surprising that labor so vehemently opposes right-to-work laws. In states where such statutes have been enacted, there is nothing to prevent employees from going for a "free ride,"<sup>49</sup> getting the benefits of union representation, and forcing those who have joined the union to pay higher dues and fees to compensate for the "free riders'" failure to contribute.

Clearly, then, in states in which union security provisions are permitted, the duty of fair representation will shield nonmembers from union discrimination in the processing of grievances.<sup>50</sup> In "right-to-work" states, the duty of fair representation applies as well. While it may appear unfair to require those employees who have joined the union to pay the entire cost of contract administration, the benefits to all from exclusive representation and the need

45. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, § 101, 61 Stat. 136, 151 (1947) (amending National Labor Relations Act) (codified at 29 U.S.C. § 164(b) (1970)).

46. See *Oil Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407 (1976).

47. In 1968, The National Right to Work Legal Defense Fund was created for the purpose of "providing free legal aid to workers [so that] legal precedents could be established protecting American workers against the injustices that arise from compulsory union membership." The National Right to Work Legal Defense Foundation, Inc., untitled folder (no date) (available from the organization at 8316 Arlington Blvd., Suite 600, Fairfax Va. 20038).

48. ALA. CODE tit. 25, § 27-7-30 to 36 (1975) (enacted 1957); ARIZ. CONST. art. XXV (adopted 1946); ARK. CONST. amend. XXXIV (adopted 1944); FLA. CONST. art. I, § 6 (adopted 1968); GA. CODE ANN. §§ 54-901 to 907, -9922 (1974) (enacted 1947); IOWA CODE §§ 736A.1-.8 (1977) (enacted 1947, amended 1959); KAN. CONST. art. XV, § 12 (adopted 1958); LA. REV. STAT. ANN. §§ 23:981-987 (West Supp. 1978) (enacted 1976); MISS. CONST. § 198-A (adopted 1960); NEB. CONST. art. XV, §§ 13-15 (adopted 1946); NEV. REV. STAT. §§ 613.230-.300 (1973) (enacted 1953); N.C. GEN. STAT. §§ 95-78 to 84 (1975) (enacted 1947); N.D. CENT. CODE § 34-01-14 (1972) (enacted 1947); S.C. CODE §§ 41-7-10 to 90 (1976) (enacted 1954); S.D. CONST. art. VI, § 2 (adopted 1946); S.D. COMPILED LAWS ANN. §§ 60-8-3 to 8 (1967) (adopted 1947); TENN. CODE ANN. §§ 50-208 to 210 (1977) (enacted 1947); TEX. REV. CIV. STAT. ANN. art. 5154a, §§ 8a, 11 (Vernon 1971) (enacted 1943); UTAH CODE ANN. §§ 34-34-1 to 17 (1974) (enacted 1953); VA. CODE §§ 40.1-58 to 69 (1976) (enacted 1947); WYO. STAT. §§ 27-245.1 to .8 (1967) (enacted 1963).

49. S. REP. No. 105, 80th Cong., 1st Sess. 7 (1947).

50. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *Miller v. Missouri Pac. R.R.*, 372 F. Supp. 170 (W.D. La. 1974); *Anderson v. Ambac Indus., Inc.*, 356 N.E.2d 478 (N.Y. 1976).

to protect individual rights<sup>51</sup> justify the union's duty to process the grievances of members and nonmembers with the same diligence and care.

### *E. Public Employees*

Congressional intervention in the field of labor-management relations represents a national commitment to collective bargaining as the primary method of preventing industrial strife and promoting the free flow of commerce.<sup>52</sup> The National Labor Relations Act, however, did not cover public employees. Section 2(2), in defining employers subject to the Act, specifically excluded "the United States, or any wholly-owned Government Corporation, or any Federal Reserve Bank, or any state or political division thereof . . ."<sup>53</sup>

When the Act was passed in 1935, no respectable scholar or government official debated the state's authority to prohibit collective bargaining by public employees.<sup>54</sup> The prevailing philosophy of government sovereignty was that since the government is supreme, it is immune from the pressures of collective bargaining.<sup>55</sup> All decisions pertaining to employer-employee relations were to be made solely by government officials. Consequently, to permit unions to participate in establishing the procedures and laws governing the terms and conditions of employment for public workers would constitute an illegal delegation of power.<sup>56</sup>

Since 1935, public service employment has become the most rapidly growing sector of employment in the United States, with nearly one out of every five workers today on a government payroll.<sup>57</sup> Accompanying this increase in the public payroll has been a decline in use of the sovereignty theory as a reason for denying public employees collective bargaining rights<sup>58</sup> and an increasing recognition

51. Absent a duty of fair representation, an individual would have no legal remedy against the union and no mechanism to meet with the employer and vindicate his claim if the union were permitted to refuse to process grievances.

52. See 29 U.S.C. § 141 (1970).

53. Pub. L. No. 198, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 152(2) (1970)).

54. *Proposition 13 and Public Employment*, 98 LAB. REL. REP. (BNA) 314 (Aug. 14, 1978) (report of proceedings at the 27th Annual Conference of the Association of Labor Mediation Agencies); McCann & Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining*, 13 HARV. J. LEGIS. 479, 485 (1976).

55. C. Rehmus, *Labor Relations in the Public Sector* (paper prepared for the 3rd World Congress, International Industrial Relations Association, London, England (Sept. 3-7, 1973)), reprinted in *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 5, 7 (R. Smith, H. Edwards, & R. Clark eds. 1974) [hereinafter cited as C. Rehmus].

56. *Id.* at 7-8.

57. *Id.* at 5.

58. *Id.* at 8; see Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. INDUS. & COM. L. REV. 993, 997 (1976).

that the values and goals which mandated granting such rights to private employees are equally valid for public employees.<sup>59</sup> The result has been a recognition by the federal<sup>60</sup> and state<sup>61</sup> governments of the rights of their employees to bargain collectively through a representative chosen by a majority of the employees. Given this right, public workers have unionized in much higher percentages than their private-sector counterparts.<sup>62</sup>

Though neglected by Congress forty years ago, public-sector collective bargaining has emerged as "one of the half dozen most important issues the country faces."<sup>63</sup> Cases involving issues dealing with public-sector labor law have come to "represent a growing and increasingly important part of the [Supreme] Court's work."<sup>64</sup> In the 1977 term, in *Abood v. Detroit Board of Education*,<sup>65</sup> the Supreme Court gave "specific support to the concept of 'exclusive [union] representation'"<sup>66</sup> and to the validity of the agency shop in the public sector. *Abood*, for all practical purposes, places governmental union security provisions on an equal footing with their private-sector counterparts. Aside from the proscription of the right to strike,<sup>67</sup> most public-sector labor enactments have been patterned

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59. C. Rehmus, *supra* note 55, at 8.

60. In 1962, President John F. Kennedy signed into law Executive Order 10,986, granting federal employees the right to bargain collectively. Employee-Management Cooperation in the Federal Service, 3 C.F.R. 521 (1962).

61. At least 28 states have statutes recognizing public-sector collective bargaining and other fundamental rights for state and local employees. The recognition varies as to the categories of public employees covered and the rights guaranteed.

Eighteen states have comprehensive laws requiring collective bargaining for state and local employees. Alaska's law covers state employees, allowing local employees to opt out. Four states cover local employees. Two permit limited collective bargaining for state workers. Three have "meet-and-confer" statutes covering both state and local workers. Zwerdling, *supra* note 58, at 993-94 n.5.

62. About 58% of federal employees were represented by unions in 1976. 699 GOV'T EMPL. REL. REP. (BNA) 4 (Mar. 14, 1977). About half of all state and local employees belonged to employee organizations in 1975. 698 GOV'T EMPL. REL. REP. (BNA) 25 (Mar. 7, 1977). Union membership for the total (public and private) workforce was 20% in 1976. 726 GOV'T EMPL. REL. REP. (BNA) 24 (Sept. 19, 1977). The arrival of unionism in the public sector has "provided enough new recruits to the labor movement to reverse the decline in the trade union movement which took place during the late 1950's and early 1960's." C. Rehmus, *supra* note 55, at 83.

63. Address by John Dunlop, public-sector labor relations conference at Massachusetts Bay Community College, Wellesley, Massachusetts (Mar. 14, 1977), reprinted in 700 GOV'T EMPL. REL. REP. (BNA) 9 (Mar. 21, 1977).

64. Address by Benjamin Aaron, annual meeting of the Section of Labor Relations Law, American Bar Association, Atlanta, Georgia (Aug. 9, 1976), reprinted in 671 GOV'T EMPL. REL. REP. (BNA) E-1 (Aug. 23, 1976).

65. 431 U.S. 209 (1977).

66. Edwards, *Labor Relations Law in the Public Sector*, 724 GOV'T EMPL. REL. REP. (BNA) 25, 26 (Sept. 5, 1977).

67. Though granted rights are substantially equivalent to those of private employees, the right to strike is withheld because of the essential nature of the services performed.

after the National Labor Relations Act.<sup>68</sup> The Supreme Court has held that, as in the private sector, unions representing public employees have the right to act as exclusive agents for the members and also have the duty of fair representation:<sup>69</sup>

The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act [and in the National Labor Relations Act] was designed to avoid.<sup>70</sup>

In states permitting agency shops, *Abood* represents an "important victory"<sup>71</sup> for all public employee unions. Public employees can now be charged for the services of their bargaining agent (regardless of whether they requested such an agent), and the problem of free riders would seem to be eliminated.<sup>72</sup>

However, in states with right-to-work laws, agency shops are illegal in the public sector.<sup>73</sup> Federal employee unions, under section 12(c) of Executive Order 10,988 forbidding union security agreements, are faced with "an overwhelmingly high rate of union organization with a correspondingly low rate of membership."<sup>74</sup> In the twenty states with right-to-work laws, state and municipal employee unions may well face the same dilemma of high organization-low membership. It is not inconceivable that the gains made in organizing public employees will soon be dissipated by the burden of supporting "free riders." If labor unions are seen as a means both of ensuring industrial peace and of promoting industrial democracy, it is in the interests of the public employer, the union, the individual

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FLA. STAT. § 447.505 (1977) is typical: "No public employee or employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike."

68. Craver & LaPeer, *The Legal Obligations of Governmental Employers and Labor Organizations Under the Recognition-Certification Provisions of the Florida Public Employees Relations Act*, 27 U. FLA. L. REV. 705, 711 (1975); see Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 932 (1973); McCann & Smiley, *supra* note 54, at 504.

69. *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 221, 223.

70. *Id.* at 224.

71. Albert Shanker, president of the American Federation of Teachers, *quoted in* 710 GOV'T EMPL. REL. REP. (BNA) 12 (May 30, 1977).

72. *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 224.

73. See, e.g., FLA. CONST. art. I, § 6, *quoted in* note 14 *supra*.

74. Sebris, *Federal Free Riders and Employer Free Speech: Some Changes Needed*, 6 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 45, 46 (1977).

workers, and the citizens dependent upon government service to find a solution to this problem.

### III. FLORIDA'S STATUTORY SCHEME: PROBLEMS WITH SECTION 447.401

Pursuant to the 1968 constitution, public employees in the State of Florida were granted the right to bargain collectively through a representative chosen by a majority of employees in a unit appropriate for collective bargaining. Article I, section 6 of the Florida Constitution provides:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

The Supreme Court of Florida interpreted this provision in 1969 as granting "public employees . . . the same rights of collective bargaining as are granted [to] private employees"<sup>75</sup> without, of course, the right to strike. The legislature failed to act, however, until 1974.<sup>76</sup> Then, pushed by threats of judicial implementation, the legislature enacted the Public Employees Relations Act (PERA),<sup>77</sup> implementing article I, section 6 with respect to public employees.

In many respects, PERA's provisions are analogous to those of the NLRA.<sup>78</sup> The Florida Supreme Court has held that "[i]f a Florida statute is patterned after a statute of a sister state, it is amendable [sic] to the same construction that its prototype has been given . . . ."<sup>79</sup> National Labor Relations Board and Federal Court decisions interpreting analogous legislation thus should be highly persuasive when applied to Florida's public sector.<sup>80</sup> PERA grants public employees rights similar to those granted to private employees in

75. *Dade County Classroom Teachers' Ass'n v. Ryan*, 225 So. 2d 903, 905 (Fla. 1969).

76. See McGuire, *Public Employee Collective Bargaining in Florida—Past, Present and Future*, 1 FLA. ST. U.L. REV. 26, 28-59 (1973), for the events leading to passage of PERA, and McHugh, *supra* note 9, for a consideration of the Act since passage. See also *Dade County Classroom Teachers' Ass'n v. Legislature*, 269 So. 2d 684 (Fla. 1972).

77. Act of May 30, 1974, ch. 74-100, 1974 Fla. Laws 134 (current version at FLA. STAT. §§ 447.201-.609 (1977)).

78. Craver & LePeer, *supra* note 68, at 708.

79. *State v. Aiuppa*, 298 So. 2d 391, 394 (Fla. 1974); see *Columbia County Bd. of Pub. Instruction v. PERC*, 353 So. 2d 127 (Fla. 1st Dist. Ct. App. 1977); *Pasco County School Bd. v. PERC*, 353 So. 2d 108 (Fla. 1st Dist. Ct. App. 1977), both applying federal constructions of the NLRA.

80. Craver & LaPeer, *supra* note 68, at 708.

section 7 of the NLRA.<sup>81</sup> Provisions are made for union representation elections,<sup>82</sup> for exclusive union representation,<sup>83</sup> and for a grievance procedure which has as its final step binding arbitration.<sup>84</sup>

Under PERA, individual employees are entitled either to bring their grievances to the employer individually, subject to the union's presence at the meeting,<sup>85</sup> or the employees can have their grievances processed for them by the union.<sup>86</sup> Public employees may also elect to use either the civil service appeal procedure or the established contractual grievance procedure to adjust their grievances.<sup>87</sup>

In 1977, section 447.401 of PERA was amended to provide that "[a]ll public employees shall have the right to a fair and equitable grievance procedure, administered without regard to membership . . . in any organization, except that certified employee organizations, shall not be required to process grievances for employees who are not members of the organization."<sup>88</sup>

This amendment is an innovative—and questionable—approach to resolving the problems created when unions act as exclusive bargaining representatives in states with right-to-work laws. Under

81. Compare FLA. STAT. § 447.301 (1977):

(1) Public employees shall have the right to form, join, and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.

(2) Public employees shall have the right to be represented by any employee organization of their own choosing and to negotiate collectively, through a certified bargaining agent, with their public employer in the determination of the terms and conditions of their employment . . . . Public employees shall have the right to be represented in the determination of grievances on all terms and conditions of their employment. Public employees shall have the right to refrain from exercising the right to be represented.

(3) Public employees shall have the right to engage in concerted activities not prohibited by law, for the purpose of collective bargaining or other mutual aid or protection. Public employees shall also have the right to refrain from engaging in such activities.

with 29 U.S.C. § 157 (1970):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) . . . .

82. FLA. STAT. § 447.307(2)-(3)(a) (1977).

83. *Id.* § 447.307(3)(b).

84. *Id.* § 447.401.

85. *Id.* § 447.301(4).

86. *Id.* § 447.301(2), .401.

87. *Id.* § 447.401.

88. Act of June 24, 1977, ch. 77-343, § 14, 1977 Fla. Laws 1476 (codified at FLA. STAT. § 447.401 (1977)).



Florida's statutory scheme, though unions bargain for all employees, they are not obligated to process the grievances of nonmember employees in the bargaining unit. Nonmembers must either fend for themselves or try to get assistance from the leaders of rival unions. Though this approach will certainly eliminate the problem of "free riders," its legal status is questionable. Furthermore, the ramifications of this amendment are likely to prove incompatible with the goal of "promot[ing] harmonious and cooperative relationships between government and its employees, . . . and . . . assuring . . . the orderly and uninterrupted operations and functions of government."<sup>89</sup>

The remainder of this article will discuss the ramifications of section 447.401 of the Florida Statutes, point out its failings, and suggest an alternative means to protect unions against the "free rider" without harming the interests of labor, management, or the individual employees.

#### A. *The Duty of Fair Representation*

The first question the Florida courts must address is whether section 447.401, which relieves the union of any obligation to process the grievances of nonmembers, violates the union's duty of fair representation. In cases under the NLRA, failure to process the grievances of both union and nonunion members equally is a breach of the union's duty of fair representation.<sup>90</sup> The same principle has been held applicable to the public sector.<sup>91</sup>

One may argue that by granting public employees the right to present their own grievances to the employer, PERA actually eviscerated the doctrine of exclusivity.<sup>92</sup> Since the duty of fair representation stems from the union's exclusive control over contract negotiation and administration, there is no need to require unions to represent nonunion employees in processing grievances when individual employees may submit their own grievances to the public employer. This argument, though, does not withstand careful scrutiny.

Section 447.301(4) of the Florida Statutes grants public employees the right to present grievances individually or through legal counsel, without the intervention of the bargaining agent. Section 447.501(f) makes it an unfair labor practice for a public employer

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89. FLA. STAT. § 447.201 (1977).

90. See notes 29-38 and accompanying text *supra*.

91. See notes 68-70 *supra*.

92. See FLA. STAT. § 447.301(4) (1977).

to refuse to discuss grievances in good faith with the certified bargaining agent or the employee involved. A brief look at three relevant labor law concepts indicates, however, that PERA does not actually grant individual workers *complete* access to the grievance procedure, and thus the duty of fair representation is necessary to protect nonunion employees in Florida's public sector.

The NLRA contains a provision similar to section 447.301(4). Section 9(a) of the NLRA grants the individual the "right" to present his grievances to his employer. Section 9(a) provides that:

[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such adjustment.<sup>93</sup>

The Second Circuit Court of Appeals has interpreted this language as not conferring on the individual employee "an indefeasible right . . . to compel compliance with the grievance procedure up to and including . . . arbitration . . . ."<sup>94</sup> Rather, the court held that section 9(a) "'permit[s]' the employee to take his grievances to the employer, and 'authoriz[es]' the employer to hear and adjust them without running afoul of the 'exclusive bargaining representative' language of . . . 9(a)."<sup>95</sup>

Under federal labor law, it is not an unfair labor practice for an employer to refuse to entertain grievances from an individual employee.<sup>96</sup> Just the opposite has been found to be true. Courts have held that an employee who contravenes the established grievance procedure negotiated by the union may be fired if the employee's activities are so "opprobrious" that he forfeits the protection of the NLRA.<sup>97</sup> The justification for this interpretation of section 9(a) is that the benefits to all concerned in having exclusive union control over the grievance mechanism far outweigh any rights the individual employees may have to present their grievances.

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93. 29 U.S.C. § 159(a) (1970).

94. *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179, 185 (2d Cir. 1962).

95. *Id.*

96. *Id.* at 186; see *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

97. See, e.g., *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976).

However, even if the Florida courts determine that under sections 447.301(4)<sup>98</sup> and 447.501<sup>99</sup> an employer is required to meet with individual employees to discuss their grievances, it is highly unlikely that the courts will grant the employee the right to bring along a nonunion outsider who is not an attorney to represent him.<sup>100</sup> It is important to note that the statute permits the employee to bring only an attorney. The employee may not bring in members from rival unions. Absent this ability to bring in outside representation,<sup>101</sup> the "right to proceed alone, without union help, is meaningless."<sup>102</sup>

Frequently, employees will not know enough about their own contractual rights or the procedures to be followed to vindicate their claims. Without union help, the employees are rare who will have the intelligence, ability, determination, and stamina to take their own complaints through the established grievance procedure. Rather, the aggrieved employees will advance through the second or third stage of the procedure, and then, unable to obtain any trained assistance, either will not follow the next step properly, or else will be so intimidated by the public employer's labor relations and personnel managers that they will be forced to give up their claims without getting the grievances adjusted satisfactorily.

The effect of section 447.401 thus is to cut off nonunion members from any meaningful access to the grievance procedure. This is a clear violation of the union's constitutional duty of fair representation, for nonunion members are treated unequally even though exclusivity is maintained. While the legislature's intent in enacting the amendment may have been laudable, it must be struck by the courts because the effect violates individual rights.

Another area of concern is that in which the employer and the union enter into a contract providing for members-only representation. At first glance, such an agreement would violate section

98. FLA. STAT. § 447.301(4) (1977) provides:

Nothing in this part shall be construed to prevent any public employee from presenting, at any time, his own grievances, in person or by legal counsel, to his public employer and having such grievances adjusted without the intervention of the bargaining agent, if the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and if the bargaining agent has been given reasonable opportunity to be present at any meeting called for the resolution of such grievances.

99. *Id.* § 447.501(1)(f) provides: "(1) Public employers or their agents or representatives are prohibited from: . . . (f) Refusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement with either the certified bargaining agent for the public employee or the employee involved." (Emphasis added.)

100. *Malone v. United States Postal Serv.*, 526 F.2d 1099 (6th Cir. 1975); *Lexington-Blue Grass Army Depot*, 728 GOV'T EMPL. REL. REP. (BNA) 24 (Oct. 3, 1977).

101. See notes 17-28 and accompanying text *supra*.

102. Tobias, *supra* note 34, at 68.

447.501, which prohibits the employer from discriminating in hiring, firing, and tenure based on union membership.<sup>103</sup> However, the new amendment to section 447.401, which does away to some extent with union exclusivity by allowing the individual employee to bring the grievance himself, appears to bring such a contract out of the ambit of section 447.501.

Note that in the case recognizing the constitutional collective bargaining rights of public employees in Florida, *Dade County Classroom Teachers' Association v. Ryan*,<sup>104</sup> the Florida Supreme Court required unions to represent members only, and the employer was obligated to recognize the union as the bargaining agent only for its members. The implementation of article I, section 6 of the Florida Constitution by the legislature in 1974 greatly broadened the scope of the union's power by providing for union exclusivity and requiring the union to represent all employees in the bargaining unit. The amendment to section 447.401 may inadvertently result in a movement back to *Ryan* members-only bargaining. In a clash between sections 447.501 and 447.401, the NLRA preference for exclusivity<sup>105</sup> and its disfavor of members-only contracts<sup>106</sup> suggests that exclusivity will be maintained and section 447.401 will be struck down.

### B. Employer Disciplinary Interviews

Another situation involving the question of union representation arises when the employer calls an employee into his office for an investigatory interview. The United States Supreme Court, in *NLRB v. J. Weingarten, Inc.*, held that employees have the "right [to have] union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him."<sup>107</sup> From the union's point of view, attending the interview is necessary not only for the sake of assisting the individual employee, but also to see what, if any, bearing such a meeting might have on the other employees in the unit.<sup>108</sup>

Since the Florida Public Employees Relations Commission and the Florida courts have adopted a *Weingarten* analysis,<sup>109</sup> the following questions arise:

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103. See *Radio Officers' Union v. NLRB*, 347 U.S. 17, 37-38 (1954).

104. 225 So. 2d 903 (Fla. 1969).

105. See note 17 *supra* for the text of § 9(a) of the National Labor Relations Act.

106. See *Gotham Air Conditioning Serv., Inc.*, 235 N.L.R.B. No. 182 (1978); *Don Mendenhall, Inc.*, 194 N.L.R.B. 1109 (1972); *Golden Turkey Mining Co.*, 34 N.L.R.B. 760 (1941).

107. 420 U.S. 251, 267 (1975).

108. *Certified Grocers of Calif.*, 227 N.L.R.B. 1211, 1214 (1977).

109. *Seitz v. Duval County School Bd.*, 346 So. 2d 644, 646 (Fla. 1st Dist. Ct. App. 1977).

(1) Is the union required to accompany nonunion members to investigatory interviews when the nonunion employee requests the union's assistance?

(2) Is a nonunion employee entitled to representation by an outside attorney or, more likely, by a rival union leader at the investigatory interview (or the meeting to discuss grievances)?

(3) If (2) is answered affirmatively, is the employer, in addition to meeting with the individual employee and his outside representative, required to invite the union representative to be present at the investigatory interview?

(4) May union members, dissatisfied with their union's representation, call in rival union leaders to represent them at the investigatory interview or during the handling of grievances?

Clearly, if questions (2), (3), and (4) are answered affirmatively, many of the advantages gained by exclusive union representation will soon be lost. If, in addition to calling in the individual employee, the employer must at the same time meet with the employee's representative and the union's representative, the time delays caused by the inevitable scheduling problems would make the employer reluctant to conduct such an interview. Thus, another result of section 447.401 may be to curtail individual employees' rights. The employer may prefer to take his chances and discipline an employee without calling for an investigatory interview rather than grapple with the delays, scheduling difficulties, and other problems inherent in finding a mutually convenient time for all concerned parties to meet and discuss the matter.<sup>110</sup>

The delay and other problems will be exacerbated in an industry or occupation where there is intense rivalry between competing employee organizations. For example, in Florida's public school system, employees are split fairly evenly between representation by the National Educational Association (NEA) and the American Federation of Teachers (AFT). If rival union representatives are allowed to represent nonunion members at grievance adjustments and investigatory interviews, the strain on government employer-employee relations and the tensions between the rival unions both certainly will be greatly increased.

The presence of two employee organizations may interfere with the legitimate interests of the public employer. Justice Brennan, concurring in a Supreme Court opinion upholding the principle of exclusivity in the public sector, has noted that "[t]here must be a

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110. *Coca-Cola Bottling Co.*, 227 N.L.R.B. 1276 (1977) (employer need not delay employee interview because particular union representative unavailable through no fault of employer).

limit to individual argument . . . if government is to go on."<sup>111</sup> So too must there be a limit on the right of individual employees to bring nonunion members to represent them in grievances and investigatory interviews if industrial peace is to be maintained.

Failure to restrict the individual employee's ability to bring in outside representation will have negative results for all parties concerned. The employer will be faced with radical demands by rival union leaders attempting to increase membership through a victory in the grievance procedure.<sup>112</sup> The employer will be required to deal with unmeritorious grievances being processed for their political value rather than for any intrinsic merit. Much of the simplicity gained by having uniform contract administration will soon be lost.<sup>113</sup>

111. *City of Madison v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 178 (1976) (citing *Holmes, J., in Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915)).

112. See *Mack, Public Sector Collective Bargaining: Diffusion of Managerial Structure and Fragmentation of Bargaining Units*, 2 FLA. ST. U.L. REV. 281 (1974).

113. The authors' proposal in favor of exclusivity would avoid many of the problems that would occur inevitably if individual employees were allowed access to the arbitration process. For example, in a situation in which both the union and a nonunion employee are grieving concerning the improper posting of job notices and the nonunion employee proceeds to arbitration first, would the union be bound by *res judicata* by the arbitrator's finding of facts or would the union have a chance to litigate the same facts?

Another issue which the legislature has not addressed is how the nonunion employee and the employer would select an arbitrator in the absence of any previously agreed-upon procedure and what would happen in the event of a disagreement.

Litigation has already raised the issues discussed here. An arbitration held on June 13, 1978, in Tallahassee, Florida, is illustrative. Three tenured teachers employed by the Leon County School Board contended that they had been improperly dismissed by the school board. The board claimed the teachers had resigned. The teachers filed a formal grievance, but the school board refused to process it. The teachers then sought an arbitration proceeding which the Leon Classroom Teachers Association (the union) challenged unsuccessfully in circuit court.

The arbitrator, Russell A. Smith, held that he had no jurisdiction and remanded the case to the parties. In his award, Mr. Smith stated that although the parties had attempted to confer jurisdiction on him, he could not accept jurisdiction "in the face of the provision in the Agreement giving the LCTA the *exclusive right* to carry grievances to the arbitration level . . . ." *Angel v. Leon County School Bd.*, No. 32-30-01-6-78, slip op. at 30 (Aug. 7, 1978) (Smith, Arb.) (emphasis added).

Mr. Smith stated further:

[G]rievants are really contending that, irrespective of what the existing collective bargaining agreement provides concerning the arbitration process, a member of the bargaining unit who is not a member of the duly certified organization, may, by private agreement with the employer, establish an arbitral forum for the resolution of a claim raised by a grievance alleging a violation of the collective bargaining agreement provided, only, that the organization is notified and given a right to be "present" at the arbitration proceeding. Such a device could be used by a minority group of employees within the bargaining unit, or a minority union, as a method of establishing a competitive [*sic*] control of the administration and implementation of the Agreement in themselves or the minority organization. Certainly this is not

The certified or recognized union will now be required to press overzealously for grievances it once would have disregarded as unmeritorious for fear of losing members. The result will be more difficult and often irrational bargaining, instability in bargaining and contract administration, and consequent work stoppages. The ultimate loser will be the public.

Moreover, union members will not really gain from this change in that a reduction in dues and fees probably will be negligible because of the union's increased activity in processing grievances it normally would have settled or dismissed for lack of merit. The increased instability and interunion rivalry will cause unions to spend more on advertising and election campaigns, with the cost being borne by union members.

The only individuals who might benefit by allowing rival unions into the grievance procedure and into investigatory interviews would be nonunion employees, who might conceivably get better representation. Ironically, the amendment was enacted to protect the unions against exploitation by these very employees. Absent the amendment, the nonunion employee is still protected against adverse union action by the duty of fair representation. This protection is supplied to the nonmember free of charge.

The costs to the union of handling the lower levels of grievance procedure are not great enough to justify the union's failure to process the grievances of nonmembers. Since the outcome of a grievance will often have ramifications that extend throughout the entire unit, it is in the public employer's, the union's, and the employee's best interests to preserve exclusivity and require the union to process the grievances of nonmembers.

#### IV. PROPOSAL

##### A. *The Balance of Interests*

An assessment of the competing interests involved in public labor in a right-to-work state will help clarify the issues in finding a solution to the free rider problem.

The public employer has an interest in stable industrial relations, in simplified contract administration which will exclude unmeritorious grievances, and in dealing with a responsible union.

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contemplated in the normal collective bargaining relationship or by the typical collective bargaining agreement, and I think it was not contemplated by the parties to the Agreement here in question.

*Id.* at 31-32.

The attorney for the grievants has filed a charge with PERC in a continuation of this same matter.

The union, elected by a majority of the employees in the bargaining unit, has an interest in maintaining proper relations with both the public employer and with union members. The union must be able to cull grievances which have no merit and must have the resources to process meritorious grievances to arbitration if necessary. At the same time, the union wishes to keep membership dues as low as possible.

The union member has an interest in uniform contract administration and in stable relations between the employer and the union. He wants to know that his grievance will be handled with the utmost care by the union. And, like the union, he wants his dues to be as low as possible.

The nonunion employee has an interest in seeing that his grievance will be processed. Even though such an employee is not contributing to the grievance mechanism, states with right-to-work laws have mandated that the union must represent both union and nonunion employees equally.<sup>114</sup> Thus, the nonunion employee wants to see that his grievance proceeds "without hostility [and in] good faith . . ."<sup>115</sup> He has no interest or right in determining who shall represent him, nor does he have a right to bring in an outsider or rival union leader to represent him.

Exclusivity must be preserved as the bedrock of stable labor relations and industrial peace. The problem of "free riders" in right-to-work states remains if the solution requires majority unions to be given exclusive control over the grievance procedure and at the same time have the duty to represent fairly all employees in the unit.

### B. Proposal

The major cost to unions in contract administration is in bringing grievances to arbitration, the final stage of the procedure. Arbitration is an expensive process, and "[m]any unions simply do not have the financial resources to arbitrate every meritorious discharge grievance."<sup>116</sup> A proper solution to the "free rider" problem is to require all nonunion employees to pay the costs of bringing their grievances to arbitration. The grievance would proceed in the name of the union, and the union representative, along with the individual employee, would have the opportunity to argue the case before the arbitrator. In this way, the employee would not be allowed to bring

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114. See, e.g., *Causey v. Ford Motor Co.*, 382 F. Supp. 1221 (M.D. Fla. 1974), *aff'd & rev'd*, 516 F.2d 416 (5th Cir. 1975) (holding that labor organizations representing employees in Florida have a duty to represent fairly all employees within the contract unit).

115. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

116. Tobias, *supra* note 34, at 59.



in outside representation. The union would remain subject to its duty of fair representation while the nonunion employee would be guaranteed access to arbitration for his meritorious grievance so long as he was willing to pay the costs.

Union exclusivity would be maintained since the only party for the employer to deal with would be the union (or the individual employee operating in the name of the union). The incumbent union would continue to determine the merits of all grievances. The employee's rights would be limited to invoking the arbitration process and either representing himself or having the union represent him. The union would remain part of every arbitration proceeding, either arguing the case on behalf of the employee or remaining present and observing in order to protect the bargaining unit's interests. The union thus would be relieved of the financial burden of representing nonmembers for free. The key difference would be that unions would be able to charge nonmembers for the union's services in arbitration.

Union members should receive a reduction in their dues as the number of arbitrations they are supporting is reduced. Much of the resentment against fellow workers who were not contributing should also be eliminated.

Nonunion members would be required to contribute to the costs of their own arbitration hearings.<sup>117</sup> While the costs of arbitration may be so great that the employee may drop the suit should he decide to proceed individually, his options nevertheless would remain open. He could join the union and of course quit if he were not satisfied with the union's service. Or he could decide not to proceed as far as arbitration. This arrangement does no injustice to the state's right-to-work laws. Nonunion members would not be required to pay a service fee<sup>118</sup> or a fee under a fair share agreement,<sup>119</sup> which subjects them to immediate discharge on failure to pay.

No employee would have his right of employment "denied or abridged on account of membership or non-membership in any . . .

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117. One possible difficulty with this proposal arises when a nonunion employee takes his grievance to arbitration individually and the grievance is one that will have an enormous impact on the entire unit. In such situations, it would be blatantly unfair to charge the individual employee the full cost of arbitration: the best procedure would be for the union to pay the costs, or, more likely, have the arbitrator award costs to the individual employee, to be paid by the union.

118. *Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n*, 141 So. 2d 269 (Fla. 1962) (holding that a requirement that nonmembers pay a service fee abridges the state's right-to-work policy).

119. *Florida Educ. Ass'n/United v. PERC*, 346 So. 2d 551 (Fla. 1st Dist. Ct. App. 1977) (holding a proposed fair share agreement unconstitutional). The court found "no real difference between agency shop [service fee] and fair share." *Id.* at 553.

labor organization.”<sup>120</sup> Nonunion employees would not be coerced into joining the union, nor would they be required to pay to have their grievances processed.<sup>121</sup> The free ride would end only at the final stage—arbitration. If the employee felt strongly enough about his case, he would have to be willing to pay the price of obtaining justice.<sup>122</sup>

## V. CONCLUSION

In the 1977 amendments to the Public Employees Relations Act, the Florida Legislature attempted to solve the problem of “free riders” in the public sector by adding to the individual’s right to process his own grievances the right of the unions not to process the grievances of nonmembers. The results of such a system depend on whether the Florida courts interpret this amendment to allow the nonunion employee to bring in outside assistance (usually rival union leaders) to represent him. If the courts decide that outside representation is permissible, the benefits of exclusive union representation will be eliminated. If outside assistance is denied, as it should be, the nonmember will be effectively cut off from the grievance procedure. The union will then be in violation of its duty of fair representation.

The proper solution to this dilemma is to allow the union to maintain exclusive control over the grievance procedure but to require the nonunion employee to bear the costs of bringing his complaint through the expensive process of arbitration. In this way, industrial peace will be preserved, the rights of all employees will be maintained, and the problem of “free riders” will be resolved without running afoul of either the state’s right-to-work laws or the union’s duty of fair representation.

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120. FLA. CONST. art. I, § 6.

121. See Rose, *The Duty of Fair Representation In Public Sector Collective Bargaining*, 5 J.L. & EDUC. 77 (1976).

122. See Blair, *Union Security Agreements in Public Employment*, 60 CORNELL L. REV. 183 (1975); Cox, *supra* note 27, at 652; Eissinger, *supra* note 4; Rose, *supra* note 121; Summers, *supra* note 25, at 403; Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union’s Duty of Fair Representation*, 5 U. TOL. L. REV. 514 (1974).

