

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

ANNICE CONE, SHARON MALLORY
and KARL SCHLEPP,
Complainants,

vs.

NEVADA SERVICE EMPLOYEES UNION/
SEIU LOCAL 1107, and UNIVERSITY
MEDICAL CENTER OF SOUTHERN NEVADA,
Respondents.

ITEM NO. 361-A

CASE NO. A1-045582

DECISION

For Complainants:

Glen Taubman, Esq.
NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION
Frank J. Cremen, Esq.

For Respondent Local 1107:

James G. Varga, Esq.
VAN BOURG, WEINBERG, ROGER
& ROSENFELD

Dennis Kist, Esq.

For Respondent UMC:

Mitchell M. Cohen, Esq.
CLARK COUNTY DISTRICT ATTORNEY'S
OFFICE

STATEMENT OF THE CASE

The Complainants are employees of Respondent University Medical Center of Southern Nevada (a local government employer as defined by NRS 288.060) and members of a bargaining unit represented by Respondent Nevada Service Employees Union/SEIU Local 1107 (a local government employee organization as defined by NRS 288.040).

The Complainants were formally members of Respondent Nevada Service Employees Union/SEIU Local 1107 (hereinafter referred to as Local 1107). During October, 1994, the Complainants, along with approximately 100 other employees of Respondent University Medical Center of Southern Nevada (hereinafter referred to as

1 UMC), resigned from Local 1107 and revoked their dues check-off
2 authorizations.

3 Also, in October, 1994, Local 1107 posted on bulletin boards
4 within the UMC facility an "Executive Board Policy" which reads as
5 follows:

6 "Whereas, it is incumbent upon the Union to uphold the
7 integrity of the various collective bargaining agreements, and

8 Whereas, the Union is obligated by law to represent all
9 eligible employees regardless of membership.

10 Therefore, the Union now establishes a fee schedule for non-
11 members who request to be represented by the Union through its
12 various collective bargaining agreements, and

13 Wherein, non members may select outside counsel to represent
14 their issues through the various grievance procedures, let it be
15 known that all costs incurred are the sole liability of the non-
16 member instituting said action.

17 UNIFORM FEE SCHEDULE
18 FOR
19 NON MEMBERS

20 Grievance Consultation	A minimum of sixty dollars for the first hour and each additional hour will be prorated accordingly
21 Informal Grievance Step	Same as above
22 First Step (1st Step)	Same as above
23 Second Step (2nd Step)	Same as above
24 Third Step (3rd Step if applicable)	Same as above
25 Pre-termination Hearings	Same as above
26 Post Termination Hearings	Same as above
27 FMCS/AAA Arbitration's	Same as above
28 Hearing Officer Fee	Fifty percent of the billed fee. Usually \$350.00
Arbitrator's Fee	Fifty percent of the billed fee which includes lodging, travel, and brief preparation. Usually three to four thousand dollars.
Union attorney fees	One hundred percent of billed fee which can run up to two hundred dollars per hour."

29 The collective bargaining agreement between UMC and Loca
30 1107 contains a provision (Article 6, § 2) which reads as follows:

1 "The Union recognizes its responsibility as bargaining
2 agent and agrees fairly to represent all employees in
3 the bargaining unit. UMC recognizes the right of the
4 Union to charge nonmembers of the Union a reasonable
5 service fee for representation in appeals, grievances
6 and hearing."

7 The collective bargaining agreement also contains provisions
8 which contemplate that grievances may be filed and processed by
9 either the employee(s) or Local 1107 (Article 9 -Discipline and
10 Grievance Procedure), as well as provisions which limit
11 arbitration to disputes between Local 1107 and UMC (not disputes
12 between individual employees and UMC) and provide that the
13 expenses of arbitration are to be borne equally by UMC and Local
14 1107 (Article 10 - Arbitration).

15 Additionally, the collective bargaining agreement contains
16 provisions (Article 7 - Union Rights) which provide that the Chief
17 Steward or Stewards and other representatives of Local 1107 are to
18 be paid "release time" to conduct "union business". Union
19 business is defined in said provisions to include "the
20 investigation of grievances" and the "representation of employees
21 at any step of the grievance procedure".

22 On March 7, 1995, the instant Complaint was filed on the
23 premises that Article 6, § 2, supra, of the collective bargaining
24 agreement, which purports to authorize the union to "charge non-
25 members of the Union a reasonable service fee for representation
26 in appeals, grievances and hearings" is "facially illegal and
27 invalid" under NRS 288.140(1)(a), 288.270(1)(a), 288.270(1)(c),
28 288.270(2)(a) and 288.270(2)(c); that said provisions of the
collective bargaining agreement are illegal and invalid
particularly in light of the fact that the collective bargaining

1 agreement simultaneously permits only representatives of Local
2 1107 -- and not non-members -- to have "release time" privileges
3 to process grievances, even though the union representatives
4 allegedly will not use this employer-paid "release time" to
5 process the grievances of non-members who refuse to pay a fee in
6 accordance with Local 1107's "Executive Board Policy", supra;
7 that, in applying these provisions of the collective bargaining
8 agreement, the Respondents have "interfered with, restrained,
9 coerced and discriminated against the Complainants (and all other
10 employees in the bargaining unit) in the exercise of their right,
11 if they choose, to be non-members of the Union, all in violation
12 of NRS 288.140, 288.270(1)(a), 288.270(1)(c), 288.270(2)(a)"; that
13 by establishing, disseminating, maintaining and enforcing its
14 "Executive Board Policy", Local 1107 has restrained, coerced and
15 discriminated against the Complainants and all other employees in
16 the bargaining unit, in violation of NRS 288.140(1), 288.270(2)(a)
17 and 288.270(2)(c); and that by negotiating, maintaining and
18 enforcing a collective bargaining agreement which permits only
19 representatives of Local 1107 - and not non-members - to have
20 employer-paid "release time" to process grievances, "even though
21 these union representatives will not use this employer paid time
22 to process the grievances of non-members who refuse to pay a fee
23 in accordance with Local 1107's 'Policy'", the Respondents have
24 "violated, interfered with, restrained, coerced and discriminated
25 against the Complainants and all other employees in the bargaining
26 unit in violation of NRS 288.140(1), 288.270(1)(a), 288.270(1)(c),
27 288.270(2)(a) and 288.270(2)(c)".

28 / / /

1 In a Pre-Hearing Conference on August 14, 1995, the parties
2 agreed to forego a hearing in the instant Case and let the Board
3 decide the issue(s) based on the pleadings. The parties also
4 requested that the Board establish a briefing schedule for the
5 filing of final briefs and submitted a statement entitled
6 "Stipulations of Fact", which reads, in pertinent part, as
7 follows:

8 The parties hereby stipulate to the following facts
9 in this matter:

10 1) Local 1107 stipulates that the document
11 attached to the Complainants' Complaint as Ex. 2
12 (hereinafter referred to as "Executive Board Policy")
13 was created by Local 1107. Local 1107 further
14 stipulates that beginning in October, 1994, it had the
15 "Executive Board Policy" posted on bulletin boards
16 within UMC and disseminated to bargaining unit employees
17 in the UMC bargaining unit.

18 Local 1107 agrees that this stipulation supersedes
19 the Amended Answer which it filed regarding Paragraph 9
20 of the Complaint in this matter.

21 2) The Complainants stipulate that the terms of
22 this "Executive Board Policy" were not actually enforced
23 against them, or any nonmembers or bargaining unit
24 employees.

25 Complainants agree that this stipulation clarifies
26 and supersedes the allegation made in Paragraph 13 of
27 the Complaint in this matter.

28 3) Local 1107 stipulates that in October, 1994,
in addition to the three Complainants, approximately 100
other bargaining unit employees resigned from membership
in Local 1107 and revoked their dues check off
authorizations.

Local 1107 agrees that this stipulation supersedes
the Amended Answer which it filed regarding Paragraph 8
of the Complaint in this matter.

The parties further stipulate to the authenticity
and admissibility of the following documents, which are
attached hereto and adopted herein by reference:

1) The UMC-Local 1107 collective bargaining agreement
that runs from September 9, 19954 to June 20, 1996
(attached to the Complaint as Exhibit 1);

2) the "Executive Board Policy" (attached to the
Complaint as Exhibit 2);

3) the SEIU Local 1107 Constitution and by-laws;

4) a certified copy of the agenda and minutes of the
September 9, 1994 meeting of the trustees of UMC
relative to approval of the collective bargaining
agreement; and

1 5) those portions of the contracts between UMC and
2 Local 1107 that were attached to UMC's Prehearing
3 Statement, specifically the contracts dated September 6,
4 1988 to June 20, 1989; August 15, 1989 to June 30, 1991;
5 and February 18, 1992 to June, 1993.

6 The parties further stipulate that this Stipulation
7 of Facts, the Complaint, the Answer of UMC and the
8 Amended Answer of Local 1107 constitute the entire
9 record in this case.

10 The parties request the Board to establish a
11 briefing schedule for the filing of final briefs in this
12 matter.

13 The Complainants' Reply Brief was filed with the Board on
14 October 26, 1995, which completed the briefing schedule
15 established by the Board. Concurrent therewith, the Case stood
16 submitted for decision.

17 DISCUSSION

18 Local 1107's defenses against the instant Complaint are: that
19 the parties allegedly have negotiated "non-exclusive" grievance
20 machinery (where individuals have the right to file grievances and
21 process them on their own - including the decision to arbitrate
22 such grievances); that the policy in question and the service fees
23 provided for therein allegedly apply only to those areas where the
24 union is "non-exclusive" representative; that union representation
25 services on "release time" (such services as filing and
26 investigating grievances, representing the employee at the various
27 grievance steps or during disciplinary interviews, or when
28 necessary to file an appeal) allegedly are available to all
employees in the bargaining unit at no cost; that the non-member
allegedly is not required to use union representation to process
a grievance to arbitration, but may use private counsel if the
non-member so chooses; that allegedly, neither union
representation nor payment of a service fee is a condition of

1 employment; that, while grievances which are handled by a union
2 representative on release time and other representation that might
3 be required (such as representation in an investigative meeting)
4 are handled free of charge to all employees in the bargaining unit
5 regardless of union membership or non-membership, this duty
6 allegedly does not extend to an obligation to take a non-member's
7 grievance to arbitration free of cost, since the union allegedly
8 does not "own" the arbitration process under the terms of the
9 collective bargaining agreement; that, in the instant Case, the
10 union allegedly does not control the arbitration process, inasmuch
11 as the individual employee retains the right to pursue grievances
12 all the way to arbitration; that, if the non-member is willing to
13 pay the costs involved, then the union's duty of fair
14 representation allegedly extends to providing access to
15 arbitration, and the right of access to the arbitration process
16 allegedly is equal to the member and non-member; that, in the
17 instant Case, the non-member can control the cost of filing and
18 processing grievances to arbitration, thus the union allegedly is
19 not precluded from charging non-members for representation; that,
20 in the instant Case, it allegedly is not unlawful discrimination
21 to treat members different than non-members (charging only non-
22 members for costs of representation) since all release time
23 representation allegedly is provided at no cost, and the
24 individual employees maintain the right to use the grievance
25 machinery; that there allegedly is no evidence in the instant Case
26 that anyone has suffered any injury as a result of the union's
27 service fee policy (no employee of the bargaining unit has been
28 charged any of the service fees for representation), therefore,

1 the Complainants allegedly lack standing to bring the Complaint;
2 and that there allegedly is no basis in evidence or law for the
3 remedies requested by the Complainants.

4 UMC's defenses against the Complaint are: that the service
5 fee provision (Article 6, § 2) of the collective bargaining
6 agreement was contained in the first collective bargaining
7 agreement between the parties, adopted September 6, 1988, and has
8 been in every collective bargaining agreement since that time;
9 that the Complainants have not alleged that UMC was in any way
10 involved or had any knowledge of the posting of its policy and fee
11 schedule in October, 1994; that (as stipulated to by the parties)
12 the union's fee schedule was never actually enforced against any
13 UMC employee; that no employee has been denied union
14 representation based upon inability or refusal to pay a servi-
15 fee; that the service fee for grievance representation allegedly
16 is neither coercive nor discriminatory; that, as exclusive
17 bargaining agent for all employees of the bargaining unit (not
18 just members), the union must exercise its discretion to determine
19 which grievances to process fairly and in good faith, and it
20 allegedly is a legitimate exercise of the organization's
21 discretion to condition grievance representation for non-members
22 upon payment of a proportionate share of the cost of such
23 representation; that non-members have the right to select their
24 own representative, at their cost, or be represented by the union,
25 at their cost, and the policy/fee schedule specifically advises
26 non-members that they have this option; that allowing the union to
27 charge non-members for representation allegedly simply places it
28 services on a par with non-union representation; that requiring

1 non-members to select between two payment options (for union or
2 non-union representation) allegedly has a neutral effect on union
3 membership; that it allegedly is not discriminatory or coercive to
4 require non-members, who contribute no dues to the union to pay
5 their fair share for union activities which directly benefit them;
6 that it allegedly is the Complainants who would discourage union
7 membership by requiring union members to subsidize free services
8 to non-union members; that the right of non-members to be free
9 from discrimination and coercion allegedly cannot be read as an
10 entitlement to subsidized representation; that several
11 jurisdictions allegedly have found that their state right to work
12 laws did not prohibit service fees, and, allegedly, Nevada law
13 also contains no provision prohibiting all payments to unions by
14 non-members; that the Board has already found that providing paid
15 release time to employee organization representatives does not
16 constitute prohibited discrimination against non-members (See,
17 County of Lyon v. International Union of Operating Engineers
18 Stationary Local No. 39, EMRB Item No. 229, Case No. A1-045549,
19 October 4, 1989) that the cases cited by the Complainants
20 allegedly are not relevant to the Board's decision in this matter,
21 inasmuch as the service fees established by the union in the
22 instant Case can only be charged for service which the non-member
23 requests (not for service provided which the non-member does not
24 want); that the union's service fee policy and the service fee
25 provision of the collective bargaining agreement allegedly are
26 valid, and are a reasonable approach to the problem of "free
27 riders", which allegedly neither discriminates against or coerces
28 non-members of the union; that service fees allegedly are not

1 prohibited by the Nevada Right to Work Law; that it is not
2 necessary for the Board to look beyond its own statute to decide
3 the instant Case; that, allegedly, there is nothing in the Nevada
4 cases cited by Complainants which can be read to prohibit service
5 fee arrangements; that service fees allegedly are not the
6 equivalent of dues (they allegedly are payment for services
7 rendered only upon request); that the payment of such service fees
8 is not a condition of employment; that the failure of prior
9 legislative attempts to pass "fair share" statutes allegedly has
10 no bearing on whether service fee arrangements are statutorily
11 prohibited; that the legislation alluded to by the Complainants
12 involved "fair share" proposals, requiring a proportionate share
13 of all union services be imposed on non-members, not just fees for
14 specific services to non-members upon request only; that UMC
15 involvement allegedly consisted only of negotiating a service fee
16 provision in the collective bargaining agreement and is
17 insufficient to render it culpable; that the Complainants
18 allegedly lack standing to bring this action (they have suffered
19 no direct injury and have not been "aggrieved"); that the
20 allegation that the posting of the policy/service fee schedule had
21 a chilling effect on the employees allegedly is based on
22 conjecture, inasmuch as there is no evidence that any of the
23 approximately 100 employees who resigned from the union changed
24 their mind after the posting of said policy, or that union "drops"
25 decreased dramatically after said posting; that this matter
26 allegedly is either moot or not ripe for review (inasmuch as the
27 Complaint is based upon an allegedly invalid provision which is
28 absent an imminent and realistic threat of enforcement); that the

1 Complaint, allegedly, is untimely from the standpoint that it is
2 based on service fee and release time provision of the collective
3 bargaining agreement which were adopted for the first time on
4 September 6, 1988, well outside the six months limitation period;
5 that the Complainants allegedly have waived objection to the
6 service fee and release time provisions of the collective
7 bargaining agreement, inasmuch as they failed to contest said
8 provisions for over six years; that a ruling by the Board on the
9 merits allegedly would have a prospective and general effect and
10 therefore the Board should proceed by regulation rather than
11 adjudication; and that the remedies requested by the Complainants
12 allegedly are both inappropriate and outside the Board's
13 authority.

14 The provisions of NRS 288 which are most relevant to the
15 Board's adjudication of this dispute are quoted below:

16 "288.027 'Bargaining agent' defined. 'Bargaining
17 agent' means an employee organization recognized by the
18 local government employer as the exclusive
representative of all local government employees in the
bargaining unit for purposes of collective bargaining.

19 288.033 'Collective bargaining' defined. 'Collective
20 bargaining' means a method of determining conditions of
21 employment by negotiating between representatives of the
22 local government employer and employee organizations,
entailing a mutual obligation of the local government
employer and the representative of the local government
employees to meet at reasonable times and bargain in
good faith with respect to:

- 23 1. Wages, hours and other terms and conditions of
employment;
- 24 2. The negotiating of an agreement;
- 25 3. The resolution of any question arising under a
negotiated agreement; or
- 26 4. The execution of a written contract incorporating
27 any agreement reached if requested by either party, but
28 this obligation does not compel either party to agree to
a proposal or require the making of a concession.

1 **288.110 Rules governing various proceedings and**
2 **procedures; hearing and order; injunction; time for**
3 **filing complaint or appeal; costs.**

4 1. The Board may make rules governing:

5 (a) Proceedings before it;

6 (b) Procedures for factfinding;

7 (c) The recognition of employee organizations; and

8 (d) The determination of bargaining units.

9 2. The Board may hear and determine any complaint
10 arising out of the interpretation of, or performance
11 under, the provisions of this chapter by any local
12 government employer, local government employee or
13 employee organization. The board shall conduct a
14 hearing within 90 days after it decides to hear a
15 complaint. The board, after a hearing, if it finds that
16 the complaint is well taken, may order any person to
17 refrain from the action complained of or to restore to
18 the party aggrieved any benefit of which he has been
19 deprived by that action. The board shall issue its
20 decision within 120 days after the hearing on the
21 complaint is completed.

22 3. Any party aggrieved by the failure of any person
23 to obey an order of the board issued pursuant to
24 subsection 2, or the board at the request of such a
25 party, may apply to a court of competent jurisdiction
26 for a prohibitory or mandatory injunction to enforce the
27 order.

28 4. The board may not consider any complaint or appeal
filed more than 6 months after the occurrence which is
the subject of the complaint or appeal.

 5. The board may decide without hearing a contested
matter:

 (a) In which all of the legal issues have been
previously decided by the board, it if adopts its
previous decision or decisions as precedent; or

 (b) Upon agreement of all the parties.

 6. The board may award reasonable costs, which may
include attorneys' fees, to the prevailing party.

288.140 Right of employee to join or refrain from
joining employee organization; discrimination by
employer prohibited; limitations on nonmember acting for
himself; membership of law enforcement officer.

 1. It is the right of every local government
employee, subject to the limitation provided in
subsection 3, to join any employee organization of his
choice or to refrain from joining any employee
organization. A local government employer shall not
discriminate in any way among its employees on account
of membership or nonmembership in an employee
organization.

 2. The recognition of an employee organization for
negotiation, pursuant to this chapter, does not preclude
any local government employee who is not a member of

1 that employee organization from acting for himself with
2 respect to any condition of his employment, but any
3 action taken on a request or in adjustment of a
4 grievance shall be consistent with the terms of an
5 applicable negotiated agreement, if any.

6 3. A police officer, sheriff, deputy sheriff or other
7 law enforcement officer may be a member of an employee
8 organization only if such employee organization is
9 composed exclusively of law enforcement officers.

10 **288.150 Negotiations by employer with recognized
11 employee organization: Subjects of mandatory bargaining;
12 matters reserved to employer without negotiation.**

13 2. The scope of mandatory bargaining is limited to:

14 (o) Grievance and arbitration procedures for
15 resolution of disputes relating to interpretation or
16 application of collective bargaining agreements.

17 6. This section does not preclude, but this chapter
18 does not require the local government employer to
19 negotiate subject matters enumerated in subsection 3
20 which are outside the scope of mandatory bargaining.
21 The local government employer shall discuss subject
22 matters outside the scope of mandatory bargaining but it
23 is not required to negotiate those matters.

24 **288.270 Employer or representative; employee or
25 employee organization.**

26 1. It is a prohibited practice for a local government
27 employer or its designated representative willfully to:

28 (a) Interfere, restrain or coerce any employee in the
exercise of any right guaranteed under this chapter.

(c) Discriminate in regard to hiring, tenure or any
term or condition of employment to encourage or
discourage membership in any employee organization.

(f) Discriminate because of race, color, religion,
sex, age, physical or visual handicap, national origin
or because of political or personal reasons or
affiliations.

2. It is a prohibited practice for a local government
employee or for an employee organization or its
designated agent willfully to:

(a) Interfere with, restrain or coerce any employee in
the exercise of any right guaranteed under this chapter.

(c) Discriminate because of race, color, religion,
sex, age, physical or visual handicap, national origin
or because of political or personal reasons or
affiliations.

288.280 Controversies concerning prohibited practices to be submitted to board. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in NRS 288.210, except that an alleged failure to provide information as provided by NRS 288.280 shall be heard and determined by the board as soon as possible after the complaint is filed with the board."

After a thorough review of all the relevant provisions of NRS 288, as well as the arguments and evidence presented by the parties, the Board has concluded as follows:

I.

**LOCAL 1107's "EXECUTIVE BOARD POLICY",
PROVIDING A "UNIFORM FEE SCHEDULE FOR NON
MEMBERS" IS NOT PROHIBITED BY NEVADA'S RIGHT
TO WORK LAW AND IS NEITHER COERCIVE NOR
DISCRIMINATORY**

At least twenty states, including Nevada, have adopted constitutional or statutory provisions prohibiting the negotiation of union security clauses. While these enactments were intended primarily for the private sector, they have been interpreted to prohibit the negotiation of union shop, agency shop, or fair share arrangements in the public sector. The basis for said prohibition is that such arrangements are compulsory; i.e., they condition employment upon membership and/or payment of dues or fees. The "Executive Board Policy" and "Uniform Fee Schedule for Non Members" involved in the instant Case, however, does not condition employment upon the payment of the fees set forth therein. Likewise, it does not require all non-members to pay a fee for representation services provided by the union. It only requires that non-members "who request to be represented by the Union" in the filing and/or processing of a grievance, pay the union's cost of providing the requested representation services, as set forth

1 in the "Uniform Fee Schedule for Non Members". It also advises
2 non-members that they "may select outside counsel to represent
3 their issues through the various grievance procedures".
4 Accordingly, the fee arrangement established by Local 1107's
5 "Executive Board Policy" and/or "Uniform Fee Schedule for Non
6 Members" contains none of the compulsory-membership elements
7 and/or conditions of employment prohibited by Nevada's Right to
8 Work Law (NRS 613.230-300).

9 The Complainants have alluded to several bills introduced
10 during recent years in the Nevada legislature, which would, if
11 passed, have made arrangements such as "fair share" lawful in
12 Nevada. Said bills have been allowed to die in committee, which
13 the Complainants contend is indicative that Nevada's legislature
14 disapproves of union policies establishing fees for representation
15 services requested by non-members. The Complainants' contentions
16 in this regard are a "red herring". As indicated by that stated
17 above, the policy and service fee schedule involved in the instant
18 Case is not comparable to a "fair share" arrangement or any other
19 compulsory fee arrangement applicable to non-members.

20 NRS 288.140, supra, gives employees the right to join or
21 refrain from joining an employee organization. It also provides
22 (§ 2) that any employee who is not a member of that employee
23 organization has the right to act for himself with respect to any
24 condition of his employment, provided that any action taken on a
25 request or in adjustment of a grievance shall be consistent with
26 the terms of the negotiated agreement. This means that every non-
27 member (of the employee organization which is recognized to
28 represent the bargaining unit) has an option if and/or when he

1 feels it is necessary and/or appropriate that a grievance be filed
2 with respect to any condition of his employment; i.e., he has the
3 option of acting for himself or requesting that the employee
4 organization (union) file and/or process the grievance. When the
5 non-member requests the union to file and/or process his
6 grievance, the union is obligated to do so (pursuant to its
7 statutory duty under NRS 288.027 as exclusive bargaining agent for
8 all employees of the bargaining agent). However, there is nothing
9 contained in NRS 288.140 (or any other provision of NRS 288) which
10 prohibits or precludes the non-member from being required to pay
11 the union's cost for the representation services requested. (The
12 fees set forth in the "Uniform Fee Schedule for Non Members"
13 appear to be reasonably related to the actual market value of the
14 services requested.) Additionally, the only time a union may
15 refuse to file or process a grievance in behalf of a non-member is
16 when it (the union) determines fairly, impartially and in good
17 faith that said grievance is not timely or not supported by the
18 terms of the collective bargaining agreement. Allen Asch vs.
19 Clark County School District. The Board of Trustees of the Clark
20 County School District, and the Clark County Classroom Teachers
21 Association, Case No. A1-045541, Item #314 (5-19-93).

22 Also, pursuant to the union's "Executive Board Policy" the
23 non-member who feels it is necessary and/or appropriate that a
24 grievance be filed with respect to any condition of his
25 employment, can select (hire) outside counsel to represent him.
26 In that event, the grievant/non-member would have to pay outside
27 counsel for the services provided.

28 / / /

1 From the foregoing, it is clear that the purpose of Local
2 1107's "Executive Board Policy" and "Uniform Fee Schedule for Non
3 Members" is not to restrain or coerce bargaining unit employee
4 from exercising their statutory right to refrain from joining the
5 union (withdraw from the union), but rather simply to assure that
6 representation services are available to the member and non-member
7 alike, without exhausting the union's treasury in the process.
8 (Arguably, the union has the right to require a non-member to pay
9 the cost of requested representation services, even in the absence
10 of a posted policy in that regard.) There has been no evidence
11 introduced which would indicate that the posting of said policy
12 and/or fee schedule during the drop period had a chilling effect
13 on the employees' right to withdraw from the union; i.e. there is
14 no indication that anyone changed his mind or that the "drops"
15 decreased dramatically after the posting. Indeed, the only
16 substantiated "effect" of the posting was the filing of the
17 instant Complaint, which in and/or of itself is not evidence of
18 coercion or restraint.

19 The union has statutory duties and obligations to all members
20 of the bargaining unit, not just those who do not pay union dues.
21 Its resources are limited and it would be derelict in its duty to
22 dues-paying members of the bargaining unit, if it exhausted its
23 treasury by providing, upon request, cost-free representation to
24 employees of the bargaining unit who do not pay dues.

25 The premise for the Complaint is that non-members of the
26 union (free riders) are statutorily entitled to invoke union
27 efforts on their particular behalf, such as the prosecution of
28 grievances and arbitrations, without assuming any of the costs

1 associated with such efforts. To accept this premise as valid is
2 tantamount to suggesting that employees of the bargaining unit w.
3 do not choose to be dues-paying members of the union have a
4 legitimate claim on the union's treasury. (If they are
5 statutorily entitled to require the union to deplete its treasury
6 in their particular behalf, this is almost equivalent to
7 contending that a non-member holds a lien of an unspecified amount
8 against the union's treasury. It is not unlike "payment upon
9 demand" and the non-member alone determines if and/or when he will
10 call in the loan.) It is a non-sequitur, therefore, to contend
11 that the union's efforts to recoup some of the costs associated
12 with the efforts it expends in behalf of free riders, with respect
13 only to the representation services they request, is unfair to the
14 free rider (non-member).

15 In the instant Case, it is clear that Local 1107's
16 implementation of the "Executive Board Policy" and "Uniform Fee
17 Schedule for Non Members" did not strip the Complainants of
18 redress. National Treasury Employees Union vs. Federal Lab. Rel.
19 Auth., 800 F 2d 1165 (DC Cir., 1986). They were not required to
20 join the union and/or pay union dues in order to be assured of
21 representation in the filing and/or processing of grievances.
22 When they withdrew from the union and canceled their dues
23 deduction authorizations, they still had (have) several avenues of
24 redress available to them; i.e., they can choose to act for
25 themselves, pursuant to NRS 288.140(2), and assume the costs, if
26 any, associated with that choice, or (pursuant to Local 1107's
27 policy and fee schedule) they can either request union
28 representation (assuming the costs associated therewith) or select

1 (hire) outside counsel (assuming the costs associated therewith)t
2 The existence of these avenues of redress for bargaining unit
3 employees, who choose to refrain from joining the union, do not
4 evidence unlawful discrimination but rather the intentions of
5 Nevada's legislature [as evidenced by the provisions of NRS
6 288.140(2)] and Local 1107, to assure that all members of the
7 bargaining unit are fairly represented in the processing of their
8 grievances, without regard to union membership status.

9 Additionally, some bargaining unit employees may regard the
10 availability of representation services as a higher priority than
11 others. They may determine that the payment of union dues is the
12 most cost-effective way of assuring that such services are
13 available, if and/or when they are needed, and join the union for
14 this reason only.

15 The above must not be construed to indicate that a union has
16 no obligation or duty to represent non-members in matters other
17 than the filing and/or processing of grievances at the request of
18 a particular non-member. As the exclusive bargaining agent for
19 all employees in the bargaining unit, the union has a statutory
20 duty [pursuant to NRS 288.027, NRS 288.028, NRS 288.033 and that
21 part of NRS 288.140(2) reading "...any action taken on a request
22 or adjustment of a grievance shall be consistent with the terms of
23 an applicable negotiated agreement..o"] to participate in the
24 processing of all grievances/arbitrations which might impact the
25 bargaining unit, including those filed and/or processed in behalf
26 of non-members of the union who are either "acting for
27 (them) selves" or being represented by outside counsel. However,
28 as the Board stated in Allen Asch, supra:

1 **FIRST:** NRS 288.140(2) specifically grants an "employee
2 who is not a member" of the recognized employee
3 organization the right to act for himself with respect
4 to any condition of his employment. The logical
5 inference to be drawn from the language of NRS
6 288.140(2) is that the legislature did not intend to
7 require employee organizations to process the grievances
8 of non-members. If the legislature had intended to
9 require employee organization(s) to process the
10 grievances of non-members it appears that it would have
11 specifically so provided. However, because the
12 legislature did not specifically so provide, but rather
13 provided that employees who are not members of a
14 recognized employee organization have the right to act
15 for themselves with respect to any condition of
16 employment (consistent with the terms of an applicable
17 negotiated agreement, if any); the legislature clearly
18 intended that employee organizations retain discretion
19 in the processing of grievances in behalf of non-
20 members.

21 **SECOND:** In exercising the discretion bestowed upon it
22 by the legislature pursuant to NRS 288.140, the employee
23 organizations only representation obligation to non-
24 members is to exercise said discretion fairly and in
25 good faith. Accordingly, a breach of an employee
26 organization's statutory duty of fair representation to
27 members of the bargaining unit only occurs when the
28 union's conduct toward said members is arbitrary,
discriminatory, or in bad faith. Vaca vs. Sipes, 386
U.S. at 191.

17 In the instant Case, the union's conduct (which conditions
18 the providing of representation services to non-members requesting
19 such services on said non-member's payment of a service fee,
20 representing the union's cost of providing said services to the
21 non-member), clearly was (is) not arbitrary, discriminatory or in
22 bad faith.

23 There is, no doubt, some NLRB precedent, as well as cases
24 emanating from other jurisdictions, which can be construed to
25 support the Complainant's position(s) in the instant Case. The
26 Board has frequently looked to NLRB precedent and other
27 jurisdictions for guidance in reaching its determinations.
28 However, the provisions of NRS 288 are often distinguishable from

1 the provisions of the National Labor Relations Act, as well as the
2 statutes of other states, and the Board is not bound to apply such
3 precedent to its cases when it determines that the facts,
4 circumstances and/or statutes involved are not sufficiently
5 analogous. This is just such a case, as concerns the
6 Complainants' citations in support of a conclusion contrary to the
7 Board's findings herein.

8 II.

9 THE PROVISIONS OF THE COLLECTIVE BARGAINING
10 AGREEMENT PROVIDING "RELEASE TIME" AND
11 PAYMENT THEREFOR TO UNION REPRESENTATIVES,
12 WHEN CONDUCTING UNION BUSINESS; AND
13 RECOGNIZING "THE RIGHT OF THE UNION TO CHARGE
14 NON-MEMBERS OF THE UNION A REASONABLE SERVICE
FEE FOR REPRESENTATION IN APPEALS, GRIEVANCES
AND HEARINGS" ARE NOT DISCRIMINATORY OR
COERCIVE, AND THE COMPLAINANTS HAVE WAIVED
ANY RIGHT THEY MAY HAVE HAD TO OBJECT TO SAID
PROVISIONS

15 Collective bargaining agreement provisions which provide
16 "release time" and payment therefor to union representatives when
17 conducting union business (such matters as filing and
18 investigating grievances, appearing as an employee's
19 representative at grievance steps, representing employees faced
20 with disciplinary interviews, etc.), such as Article 7, §§ 5, 9,
21 10 and 11, are common in both the public and private sectors.
22 They are obviously lawful, and this Board has previously
23 determined that such provisions are not discriminatory and do not
24 encourage or discourage union membership. County of Lyon vs.
25 International Union of Operating Engineers Stationary Local No.
26 39, Case No. A1-045449, Item #229 (10-4-89).

27 Collective bargaining agreement provisions which recognize
28 "the right of the union to charge non-members of the union a

1 reasonable service fee for representation in appeals, grievances
2 and hearings" (such as the provisions involved in the inst. .
3 Case)t, likewise, are not in and/or of themselves discriminatory or
4 coercive. The propriety of an employer granting a bargaining
5 agent exclusive contract rights is well established. NLRB vs.
6 Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937)q American
7 Federation of Teachers PEN, Local 1800 vs. Clark County School
8 District and Clark County Classroom Teachers Association, Item #2
9 (11-17-70); and County of Lyon, supra. In this connection, public
10 employers often grant bargaining agents, pursuant to negotiated
11 agreement provisions, exclusive contract rights such as bulletin
12 board space for the exclusive use of the union, release time for
13 representatives of the exclusive bargaining agent to conduct union
14 business, etc. The benefits resulting from the grant of exclusi
15 privileges to the elected representative serve the principal
16 policy of insuring labor peace. Labor peace means a continuity of
17 ordered collective bargaining between the employer and
18 representatives of the union. It means a lowered incidence of
19 labor conflict and strife, thus insuring less interference with
20 the employer's primary function. The language of Article 6, § 2
21 which the Complainants object to, appears to fall within the
22 category of such provisions; i.e.q a provision of the collective
23 bargaining agreement which grants the exclusive bargaining agent
24 (Local 1107) the right to charge non-members of the union a
25 reasonable service fee for representation in appeals, grievances
26 and hearings.

27 As the Board concluded in I. above, it is not contrary to N
28 288, and not discriminatory or coercive for a union to charge non-

1 members for representation services which they request.

2 Without prejudice to that stated above, the Board also finds
3 that the Complainants have, by inaction, waived any right they may
4 have had to object to the aforementioned provisions of the
5 collective bargaining agreement. Las Vegas Police Protective
6 Association, Case No. A1-045474, Item #264 (5-30-91). Said
7 provisions have been a part of the collective bargaining agreement
8 for over six years.

9 III.

10 A NON-MEMBER WHO CHOOSES TO ACT FOR HIMSELF,
11 PURSUANT TO NRS 288.140(2)9 MAY NOT BE DENIED
12 ACCESS TO THE GRIEVANCE/ARBITRATION MACHINERY
OF THE NEGOTIATED AGREEMENT

13 The Complainants contend that the collective bargaining
14 agreement only permits a non-member to initially file his own
15 grievance, but it does not contemplate that an individual employee
16 may process his grievance all the way to arbitration. The
17 Complainants cite the provisions of Article 9, § 1(e); Article 9,
18 § 2, STEP 3; Article 10, § 1; Article 10, § 4 and Article 10, § 6
19 in support of this contention. Conversely, Local 1107 contends
20 that under the negotiated grievance machinery individuals have the
21 right to file grievances and process them on their own, including
22 the decision to arbitrate such grievances; that the non-member is
23 not required to use union representation to process a grievance to
24 arbitration, but may use private counsel if the non-member
25 chooses; that its (the union's) duty to provide representation
26 services to all members of the bargaining unit, without regard to
27 membership status, does not extend to an obligation to take a non-
28 member's grievance to arbitration free of costs, since the union

1 does not "own" the arbitration process under the terms of the
2 collective bargaining agreement; and, that the union does
3 control the arbitration process, inasmuch as the individual
4 employee retracts the right to pursue grievances all the way to
5 arbitration.

6 The Board has reviewed the language of Articles 9 and 10 of
7 the collective bargaining agreement and fails to find any support
8 therein for Local 1107's contentions to the effect that the union
9 does not "own" the arbitration process and/or that the arbitration
10 process is available to the non-member without union participation
11 or concurrence. The language of Articles 9 and 10 tends to
12 support the Complainants' contentions to the contrary. However,
13 since it has not been alleged that any employee (member or non-
14 member of the union) has been denied the right to process his
15 grievance all the way to arbitration, pursuant to the terms of the
16 collective bargaining agreement, the fact that said terms would
17 appear to preclude an individual from doing so is not dispositive
18 of the issue.

19 NRS 288.140(2) clearly provides that a non-member who chooses
20 to act for himself with respect to any condition of his employment
21 may do so, with the only limitation being that "any action taken
22 on a request or in adjustment of a grievance shall be consistent
23 with the terms of an applicable negotiated agreement, if any."
24 In the absence of any other statutory limitation on a non-member's
25 right to act for himself with respect to any condition of his
26 employment, it must be concluded that, in adopting the language of
27 NRS 288.140(2), the legislature intended to extend all of the
28 grievance/arbitration machinery of the collective bargaining

1 agreement to the non-member, and not just the right to initially
2 file his grievance.

3 The statutory rights of individual employees may not be
4 bargained away. Accordingly, any provisions of the collective
5 bargaining agreement (e.g., the provisions of Articles 9 and 10
6 alluded to by the Complainants) which are contrary to the
7 legislature's intent and/or which inhibit a non-member from
8 exercising his right to act for himself with respect to any
9 condition of his employment (including processing his grievance
10 all the way through arbitration) may not be lawfully enforced. To
11 the extent that such provisions impose restrictions or limitations
12 on non-members beyond the specific limitation set forth in NRS
13 288.140(2), they are null and void.

14 Notwithstanding that stated above, since Local 1107's
15 "Executive Board Policy" applies only to "non-members who request
16 to be represented by the Union", the availability of the
17 grievance/arbitration machinery to non-members who choose to act
18 for themselves, pursuant to NRS 288.140(2), is neither a
19 determinative factor nor relevant to adjudication of the instant
20 Complaint.

21 IV.

22 THE CASE IS APPROPRIATELY DETERMINED AS AN ADJUDICATION

23 Respondent UMC contends that a ruling by the Board on the
24 merits would have a prospective and general effect and therefore
25 the Board should proceed by "regulations" rather than
26 "adjudication".

27 There has been no evidence presented by the parties to
28 indicate that the alleged discriminatory language of Article 6, §

1 2 is contained in any other collective bargaining agreement
2 currently in effect in Nevada. Likewise, there has been
3 evidence introduced which would indicate that any other employee
4 organization in Nevada has posted and/or implemented a service fee
5 policy for non-members such as that set forth in Local 1107's
6 "Executive Board Policy". The instant Case only involves a
7 question of the legality of two isolated agreement provisions
8 (Article 6, § 2 and Article 7), of one isolated collective
9 bargaining agreement (the agreement between UMC and Local 1107),
10 and one isolated service fee policy (the "Executive Board Policy"
11 posted and/or implemented by Local 1107 in October 1994). There
12 are no intervenors and no other party has indicated that it has a
13 conjunctive interest in the outcome of this Case. Accordingly,
14 there is no basis for concluding that the Board's decision in the
15 instant Case will have an imminent or direct impact on other
16 public employers, employees and employee organizations, generally.
17 The Board therefore finds that the issues involved may properly be
18 determined through adjudication, and it is not necessary for the
19 Board to proceed by regulation to decide this particular Case.
20 Morgan vs. Committee on Benefits, Nev. 297, 894 P.2d 378 (1995).

21 V.

22 ALL OTHER ISSUES ARE EITHER MOOT OR NOT RELEVANT

23 In view of the Board's conclusions in I., II. and III. above,
24 it is neither necessary nor appropriate for the Board to address
25 the other issues which have been introduced by the parties. They
26 are therefore dismissed because they are moot or because they are
27 lacking in relevancy.

28 / / /

1 FINDINGS OF FACT

2 In addition to the facts stipulated to by the parties, the
3 Board finds:

4 (1) That Respondent University Medical Center of Southern
5 Nevada (UMC) is a local government employer as defined in NRS
6 288.060.

7 (2) That Respondent Nevada Service Employees Union/SEIU
8 Local 1107 (Local 1107) is a local government employee
9 organization as defined in NRS 288.040.

10 (3) That Complainants Annice Cone, Sharon Mallory and Karl
11 Schlepp are local government employees as defined in NRS 288.050.

12 (4) That the Complainants are employees of UMC and members
13 of a bargaining unit, represented by Local 1107, as defined in NRS
14 288.028.

15 (5) That Local 1107 is the exclusive "Bargaining agent" as
16 defined in NRS 288.027 for the bargaining unit of which the
17 Complainants are members for the purposes of collective
18 bargaining.

19 (6) That "Collective bargaining" as defined in NRS 288.033,
20 includes "The resolution of any question arising under a
21 negotiated agreement", such as those matters which usually form
22 the basis of employee grievances.

23 (7) That, insofar as concerns non-members of the union, both
24 NRS 288.140(2) and the collective bargaining agreement (Article 9)
25 contain provisions which contemplate that grievances may be filed
26 and processed by either the employee(s) or Local 1107, and
27 [pursuant to the provisions of NRS 288.140(2)] a non-member who
28 chooses to act for himself with respect to any condition of his

1 employment, may not be denied access to the grievance/arbitration
2 machinery of the negotiated agreement.

3 (8) That the language of Article 6, § 2 of the collective
4 bargaining agreement, which recognize the "...right of the Union
5 to charge nonmembers of the Union a reasonable service fee for
6 representation in appeals, grievances and hearings" and the
7 provisions of Article 7 providing for "release time" and payment
8 therefor to union representatives when conducting union business,
9 are neither contrary to the provisions of NRS 288 nor
10 discriminatory or coercive. Also, the Complainants have waived
11 (by inaction) any right to object to said provisions by virtue of
12 the fact that the agreement has contained said provisions for over
13 six years, during which time they took no action to challenge the
14 propriety thereof.

15 (9) That Local 1107's "Executive Board Policy", implemented
16 in October 1994, and providing that employees of the bargaining
17 unit who are not members of Local 1107 (including the
18 Complainants) are required to pay a "service fee" for
19 representation services requested by said non-members, is not
20 prohibited by Nevada's Right to Work Law (NRS 613.230-300) and is
21 neither coercive nor discriminatory.

22 (10) That Local 1107's "Executive Board Policy" clearly was
23 not established and implemented to coerce, restrain and discourage
24 bargaining unit employees from exercising their protected right to
25 join or refrain from joining the union, but rather to assure that
26 representation services are available to both the member and non-
27 member, without exhausting the union's treasury in the process.
28 Also, there is no evidence to indicate that the posting of said

1 policy during the drop period had a chilling effect on the
2 employees' rights to exercise such right.

3 (11) That Local 1107, as exclusive bargaining agent for all
4 employees of the bargaining unit, has a statutory duty to
5 represent all employees of the bargaining unit fairly, impartially
6 and in good faith without regard to their union membership status,
7 but that does not preclude or prohibit a non-member who requests
8 grievance representation from being required to pay the costs of
9 said representation.

10 (12) That the instant Case is appropriately determined as an
11 adjudication.

12 (13) That, in view of the Board's conclusions as set forth
13 above, it is neither necessary nor appropriate that the Board
14 address the other issues which have been introduced by the
15 parties.

16 CONCLUSIONS OF LAW

17 (1) That the Local Government Employee-Management Relations
18 Board has jurisdiction over the parties and the subject matter
19 addressed by this Decision, pursuant to the provisions of NRS 288.

20 (2) That the language of Article 6, § 2 of the collective
21 bargaining agreement, which recognizes the "...right of the Union
22 to charge nonmembers of the Union a reasonable service fee for
23 representation in appeals, grievances and hearings" and Article 7
24 which provides "release time" and payment therefor to union
25 representatives conducting union business, are not contrary to the
26 provisions of NRS 288 and are neither coercive nor discriminatory.

27 (3) That a non-member who chooses to act for himself with
28 respect to any condition of employment, pursuant to NRS

1 288.140(2), may not be denied access to the grievance/arbitration
2 machinery of the negotiated agreement.

3 (4) That Local 1107's "Executive Board Policy" (which
4 provides a service fee schedule for non-members who request
5 representation services) is not contrary to either the provisions
6 of NRS 288 or Nevada's Right to Work Law (NRS 613.230-300); is not
7 coercive and is neither discriminatory nor in derogation of Local
8 1107's statutory duty as exclusive bargaining agent to represent
9 all employees of the bargaining unit fairly and impartially.

10 (5) That there is no evidence that Local 1107's "Executive
11 Board Policy", which was posted and/or implemented during the so-
12 called "drop period" in October, 1994, had a chilling effect on
13 the employees' protected right to join or refrain from joining the
14 union, pursuant to NRS 288.140.

15 (6) That the instant Case is appropriate as an adjudication,
16 pursuant to the provisions of NRS 288.110 and NRS 288.280.

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1 DECISION AND ORDER

2 IT IS HEREBY ORDERED ADJUDGED AND DECREED: that the language
3 of Article 6, § 2 and Article 7 of the current collective
4 bargaining agreement between Local 1107 and UMC is neither
5 coercive, discriminatory nor prohibited, and that Local 1107's
6 "Executive Board Policy", implemented in October, 1994, is neither
7 coercive, discriminatory or prohibited. The Board, therefore
8 ORDERS AND DECREES that the Complaint be, and hereby is denied,
9 with each party to bear its own costs and attorney's fees.

10 DATED this 10th of January, ¹⁹⁹⁶~~December, 1995~~.

11 LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
12 RELATIONS BOARD

13 By _____
14 Christopher W. Voisin, Chairman
Dissenting

15 By Tamara Barengo
16 Tamara Barengo, Vice Chairman

17 By David Goldwater
18 David Goldwater, Member

DISSENT

The majority has held that the posting of the Executive Board Policy and Uniform Fee Schedule for Non Members is not a prohibited practice, and implementation of the fee schedule for non-member employees is not a prohibited practice in violation of NRS 288.270 (2)(a) I disagree. Accordingly, I respectfully dissent as follows:

I.

IMPLEMENTATION OF THE "EXECUTIVE BOARD POLICY" DURING THE "DROP PERIOD" IN OCTOBER 1994 HAD A COERCIVE AND CHILLING EFFECT ON THE EMPLOYEES IN EXERCISING PROTECTED RIGHTS.

The Board has consistently held that employer conduct which is inherently destructive of an employee's protected rights is prohibited, pursuant to the provision of NRS 288.270 (1)(a), with regard to the motive or intention of which said conduct is based. In such instances, the employer is held to intend the very consequences which foreseeably and inescapably flow from its actions; e.g. Clark County Classroom Teachers' Association vs. Clark County School District, Timothy Sands, Jan Bennington, Carolyn Reedom and Arlene Simonson, Case No. A1-045435, Item #237 (12-13-89) and Teamsters Local No. 533 vs. Humboldt General Hospital, Case No. A1-045459 and Case No. A1-045460, Item #246 (6-11-90). In the instant Case, Local 1107 is governed by NRS 288.270 (2)(a) which contains the same prohibitions as NRS 288.270 (1)(a) Under NRS 288.140 (1), every local government employee, subject to limitations provided in Subsection 3 has

1 the right to join any employee organization. A consistent
2 reading therewith also requires that any such employee has the
3 right to withdraw from an employee organization as there is
4 nothing in either the wording or the history of the statute
5 which would indicate a legislative intent to make the employee
6 a "captive" of the employee organization once the employee
7 elects to become a member of the employee organization. Absent
8 legislative intent to the contrary, the right to join an
9 employee organization includes a right to withdraw from
10 membership once the employee determines that it is in their self
11 interest to terminate their membership. As such, the employee
12 organization (Local 1107) is prohibited under NRS 288.270 (2)(a)
13 from interfering with, restraining, or coercing any employee in
14 the exercise of any right guaranteed under NRS 288.

15 The posting and/or implementation of the "Executive Board
16 Policy" requiring nonmembers to pay certain fees for services
17 ordinarily provided to union members and the fee schedule
18 therewith, during the "drop period", must certainly have had a
19 coercive and chilling effect on the employees' right to refrain
20 from joining (or withdraw from) the employee organization (Local
21 1107), and is inherently destructive of the subject employees
22 protected rights. As supporting authority and as noted by
23 counsel for complainants, the NLRB has held in a long line of
24 cases that "where state law prohibits a labor organization from
25 compelling membership, a union may not require a fee for vital
26 collective bargaining services, including grievance processing,
27 which is due nonmembers as a matter of right," because "such
28 a fee coerces employees in the exercise of their Section 7 right

1 to refrain from joining a labor organization." Furniture
2 Workers Local 282 (Davis Co.), 291 NLRB at 183 (emphasis added)
3 The facts also show that prior to the "drop period", Local 1107
4 had neither instituted such a Board policy or posted such a "fee
5 schedule". It was only after a significant number of members
6 indicated their intent to withdraw from union membership that
7 Local 1107 instituted the Board policy and fee schedule. The
8 coercive nature of this action and its chilling effect is a
9 consequence which foreseeably and inescapably flows therefrom.
10 Accordingly, in applying the same statutory standard to local
11 government employee organizations [NRS 288.270 (2)(a)] as the
12 Board has applied to local government employers [NRS 288.270
13 (1)(a)], the Board must find that Local 1107's posting and/or
14 implementation of its "Executive Board Policy" and fee schedule
15 was a violation of NRS 288.270 (2)(a).

16 II.

17 THE "EXECUTIVE BOARD POLICY" IS
18 DISCRIMINATORY ON ITS FACE

19 The Complainants are members of a bargaining unit of UMC
20 employees. UMC has recognized Local 1107 as exclusive
21 "bargaining agent" for said bargaining unit. NRS 288.0027
22 defines "bargaining agent" as an employee organization
23 recognized by the local government employer as "the exclusive
24 representative of all local government employees in the
25 bargaining unit for the purposes of collective bargaining."
26 (Emphasis supplied.) The definition of "collective bargaining"
27 in NRS 288.033 includes "(t)he resolution of any question
28 arising under a negotiated agreement"t While NRS 288.140(2)

1 does not preclude any local government employee who is not a
2 member of the employee organization (union) from acting for
3 himself with respect to any condition of his employment, it
4 provides that "any action taken on a request or in adjustment of
5 a grievance shall be consistent with the terms of (the)
6 applicable negotiated agreement..."

7 As exclusive bargaining agent for all employees of the
8 bargaining unit (including non-members) for collective
9 bargaining purposes, Local 1107 has not only the right but also
10 the duty to represent all bargaining unit employees on a non-
11 discriminatory basis. Smith vs. Sheet Metal Workers Local 25,
12 500 F2d 741, 87 LRRM 2211 (CA 5, 1974). This statutory
13 right/duty to represent all bargaining unit employees
14 impartially, without regard to membership status, applies to the
15 adjustment of grievances (grievance processing up to and
16 including arbitration), subject only to the union's discretion
17 to determine whether a grievance has merit and/or is timely
18 under the terms of the applicable negotiated agreement. Allen
19 Asch vs. Clark County School District, The Board of Trustees of
20 the Clark County School District, and the Clark County Classroom
21 Teachers Association, Case No. A1-045541, Item #314 (5-19-93).

22 While a union is not required to process the grievances of
23 non-members (or members) when it has determined that said
24 grievance is untimely or lacks merit under the collective
25 bargaining agreement, its statutory duty or obligation to
26 represent all members of the bargaining unit fairly and
27 impartially does not end with such a determination. It merely
28 changes the union role from primary advocate for the grievant to

1 protecting the interests of the bargaining unit as a whole;
2 i.e., by participating in the grievance process solely for the
3 purpose of assuring that any settlement is in accordance with
4 the terms of the collective bargaining agreement. In other
5 words, when a non-member chooses to act for himself in the
6 processing of a grievance which the union has determined to be
7 invalid or not supported by the terms of the collective
8 bargaining agreement, the statutory requirement of fair and
9 impartial representation does not contemplate blind advocacy on
10 behalf of the grievant/non-member. It does, however,
11 contemplate diligence by the union to assure that any settlement
12 which may be reached does not undermine the integrity of the
13 agreement which was negotiated in behalf of all bargaining unit
14 employees, which can only be accomplished by the union's
15 participation in the processing of the grievance. The very
16 essence of representation by an exclusive bargaining agent under
17 NRS 288 is advocacy which purports to maintain or advance the
18 best interests of all members of the bargaining unit, not just
19 the interests of a particular grievant and not just the
20 interests of dues paying members. As stated by the Supreme
21 Court almost forty years ago,

22 The bargaining representative's duty not to draw
23 irrelevant and invidious distinctions among those it
24 represents does not come to an abrupt end, as the
25 respondents seem to contend, with the making of an
26 agreement between union and employer. Among other
27 things, it involves day-to-day adjustments in the
28 contract and other working rules, resolution of new
problems not covered by existing agreements, and the
protection of employee rights already secured by
contract. The bargaining representative can no more
unfairly discriminate in carrying out these functions
than it can in negotiating a collective agreement.

1 Conley v. Gibson, 355 U.S. 41, 46 (1957). This holding was
2 reaffirmed and expanded by the Supreme Court in ALPA v. O'Neill,
3 499 U.S. 65, ____ (1991), 111 S.Ct. 1127, 1135 (1991)q in which
4 the court held:

5 ..oWe have also held that the duty [of fair
6 representation] applies in other instances in which a
7 union is acting in its representative role, such as
8 when the union operates a hiring hall. See Breininger
9 v. Sheet Metal Workers, 493 U.S.o____,o____, 110 S.Ct.
10 424, ____, 107 L.Ed2d 388 (1989).

11 We doubt, moreover, that a bright line could be
12 drawn between contract administration and contract
13 negotiation. Industrial grievances may precipitate
14 settlement negotiations leading to contract
15 amendments, and some strikes and strike settlement
16 agreements may focus entirely on questions of contract
17 interpretation. See Conley v. Gibson, 355 U.S. 41,
18 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)q
19 Steelworkers v. Warrior & Gulf Navigation Co., 363
20 U.S. 574, 581, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409
21 (1960). Finally, some union activities subject to the
22 duty of fair representation fall into neither
23 category.

24 The bases for Local 1107's statements to the effect that
25 union representation services on union "release time" are
26 available to all employees in the bargaining unit at no cost
27 cannot be established or verified by an objective review of its
28 "Executive Board Policy". There is simply nothing contained
therein to indicate that cost free union representation is
available to non-members under any circumstances at any time.
The implementation and/or posting of the fee schedule is in
direct contravention of Local 1107's position. Said statements
therefore, must be rejected as self-supporting, unsubstantiated
allegations which appear to be pretextual in nature.

29 In attempting to defend against the instant Complaint,
30 Local 1107 contends that it has negotiated "non-exclusive"

1 grievance machinery. Implicit in said contention is the premise
2 that "non-exclusive" representation is contemplated by the
3 provisions of NRS 288.140(2), which gives non-members the right
4 to act for themselves with respect to any condition of their
5 employment. However, under NRS 288 there is no provision for
6 "non-exclusive" representation. The premise for said contention
7 is totally erroneous and without basis under law. Accordingly,
8 as indicated by that set forth above, Local 1107, as the
9 recognized exclusive bargaining agent is statutorily required to
10 represent all employees of the bargaining unit fairly and
11 impartially, without regard to membership status. Vaca vs.
12 Sipes, 386 U.S. 171, LRRM 2369 (1962)t

13 Also, pursuant to the language of NRS 288.140(2) which
14 reads, in pertinent part, "...but any action taken on a request
15 or in adjustment of a grievance shall be consistent with the
16 terms of an applicable negotiated agreement...", Local 1107 is
17 statutorily required to participate in the processing of
18 grievances filed by non-members who chose to act for themselves
19 [pursuant to NRS 288.140(2)] to assure that any adjustment
20 (settlement) is in accordance with the agreement negotiated in
21 behalf of all employees in the bargaining unit. In this
22 connection, the "proviso" to § 9(a) of the National Labor
23 Relations Act, 29 USC § 159(a)q in language similar to the
24 language of NRS § 288.140(2), states:

25t Provided, That any individual employee or a group of
26 employees shall have the right at any time to present
27 grievances to their employer and to have such
28 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...

1 29 USC § 159(a)

2 This NLRA "proviso" language has been authoritatively
3 construed by the Supreme Court in Emporium Capwell Co. v.
4 Western Addition Community Organization, 420 U.S. 50 (1975). In
5 that case, the Court explained that the proviso was very
6 limited; it was designed merely to permit, but not require,
7 employees to present informal grievances to their employer
8 without opening the employer to liability for dealing directly
9 with employees in derogation of the duty to bargain only with
10 the exclusive bargaining representative. The Supreme Court
11 recognized that the union, through its collective bargaining
12 agreement, continues to control all grievances, notwithstanding
13 any individual employee's attempt to raise and redress his own
14 grievances without the union.

15 [Individual grievances] cannot be pursued at the
16 expense of the orderly collective bargaining process
17 contemplated by the NLRA...[W]hile a union cannot
18 lawfully bargain for the establishment or continuation
19 of discriminatory practices, it has a legitimate
20 interest in presenting a united front on this as on
other issues and in not seeing its strength dissipated
and its stature denigrated by subgroups within the
unit separately pursuing what they see as separate
interests.

21 Id., 420 U.S. at 69-70. Additionally, Local 1107's contention
22 regarding alleged "non-exclusive" representation is belied by
23 the provisions of its own collective bargaining agreement; i.e.,
24 Article 10. Notwithstanding Local 1107's contentions to the
25 contrary, the provisions of said Article clearly contemplate
26 that arbitration is limited to disputes between Local 1107 and
27 UMC. Accordingly, if Local 1107 could legally avoid its duty to
28 represent non-members under the guise of "non-exclusivity"?

1 arbitration would not be available to non-members on a cost-free
2 basis.

3 Notwithstanding the contentions of Local 1107 to the
4 contrary, it is clear that the union has sole power under the
5 contract to invoke arbitration, in view of which the non-member
6 who refuses to pay the union service fee(s) is prevented from
7 exhausting his contractual remedies. Maschoff vs. Automobile
8 Workers, 89 LRRM 2098 (ED Mich., 1975)t

9 Exclusive representation cannot be bargained away or
10 unilaterally promulgated away by adopting an "Executive Board
11 Policy". It is a statutory right and duty. By its very term,
12 an "exclusive bargaining" unit or organization precludes
13 nonmembers from being represented by any other entity or
14 organization for bargaining or grievance purposes. Under NRS
15 288.140 (1), an employee can either join an employee
16 organization or refrain (withdraw) therefrom. In a situation
17 where an employee organization is the "exclusive" bargaining
18 agent or representative for employees within a given bargaining
19 unit, such covered employees must either refrain from joining
20 the employee organization or elect to become members thereof.
21 Consequently, when an employee organization, such as Local 1107,
22 is given the "exclusive right" to represent the employee unit it
23 not only has the benefit of being the exclusive bargaining
24 representative for all employees within the covered bargaining
25 unit, but must carry with it the burden of representing all
26 members of the covered bargaining unit equally and without
27 discrimination. Accordingly, Local 1107's attempt to avoid or
28 circumvent its statutory duty to represent all members of the

1 bargaining unit fairly and impartially, by establishing a fee
2 schedule for representation services requested by non-members
3 only, is not only contrary to that contemplated by the
4 aforementioned provisions of NRS 288, but it is also
5 discriminatory on its face. Such a policy discriminates against
6 non-members based on their affiliation (or lack thereof) with
7 said bargaining agent (Local 1107)q and is therefore prohibited
8 by the provisions of NRS 288.270(2)(c)a

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10 **III.**

11 **AN AGREEMENT PROVISION WHICH "RECOGNIZES**
12 **THE RIGHT OF THE UNION TO CHARGE NON-**
13 **MEMBERS OF THE UNION A REASONABLE SERVICE**
14 **FEE FOR REPRESENTATION IN APPEALS,**
15 **GRIEVANCES AND HEARING" IS CONTRARY TO THE**
16 **PROVISIONS OF NRS 288, DISCRIMINATORY AND**
17 **PROHIBITED**

18 Grievance and arbitration procedures for resolution of
19 disputes relating to interpretation or application of collective
20 bargaining agreements is a mandatory bargaining subject pursuant
21 to NRS 288.150(2)(o)a As the exclusive bargaining agent for all
22 employees in the bargaining unit, Local 1107 has the statutory
23 duty and obligation to negotiate grievance and arbitration
24 procedures which are not discriminatory as to union-membership
25 status.

26 To contend that an agreement provision which recognizes the
27 right of the union to charge non-members only a service fee for
28 representation in appeals, grievances and hearings is not
discriminatory, as have the Respondents (both Local 1107 and
UMC) in the instant Case, is beyond comprehension. (The service
fee schedule in question does not apply to representation
services provided union members of the bargaining unit.) It is

1 axiomatic that a union practice (or a union policy which is
2 implemented pursuant to a provision of the collective bargaining
3 agreement) that principally looks to union membership to
4 determine the type of representation that will be provided
5 bargaining unit employees, is discriminatory. National Treasury
6 Employees Union v. FLRA, 721 F.2d at 1406.

7 The agreement provision involved in the instant Case
8 (Article 6, § 2) clearly contemplates that the union may
9 distinguish between the type of representation provided (at no
10 cost or subject to the payment of fees), based on the union
11 membership status of the employee. An agreement provision such
12 as this is clearly discriminatory and prohibited by NRS
13 288.270(1)(c) and (f) and 288.270(2)(c).

14 Where a union breaches its duty of fair representation
15 pursuant to such a discriminatory contract provision, the union
16 and employer are jointly and severally culpable. 9 NPER M1-
17 18084, Hunter, Nanette vs. Wayne-Westland Community School
18 District and Wayne-Westland Education Ass'n (5-7-89) and Pacific
19 Coast Utilities Service, Inc., 238 NLRB 599, 99 LRRM 1619
20 (1978). In the instant Case, the union (Local 1107) clearly
21 breached its duty of fair representation by implementing the
22 "Executive Board Policy" pursuant to Article 6, § 2. UMC's
23 participation in the negotiation of this discriminatory
24 agreement provision, therefore, renders it jointly culpable with
25 Local 1107 for commission of a prohibited practice.

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1 IV.

2 THE COMPLAINANTS HAVE STANDING TO
3 BRING THE INSTANT COMPLAINT

4 Pursuant to NRS 288.110 and NRS 288.280, the Board may hear
5 and determine any complaint arising out of the interpretation
6 of, or performance under the provisions of NRS 288 and/or any
7 controversy concerning prohibited practices.

8 This Board has consistently held that acts or conduct which
9 tend to restrain or chill employees from exercising their
10 protected rights are prohibited. Ormsby County Teachers
11 Association vs. Carson City, Case No. A1-045405, Item #197
12 (1987) and Clark County Classroom Teachers Association vs. Clark
13 County School District, Case No. A1-045435, Item #237 (1989)o
14 Since the posting and/or implementation of the union's
15 "Executive Board Policy" pursuant to Article 6, § 2 of the
16 collective bargaining agreement, was clearly coercive and had
17 the effect of restraining and/or discouraging the employees from
18 exercising their protected right to join or refrain from joining
19 the union, the Complainants and all other employees of the
20 bargaining unit have standing to bring the instant Complaint.
21 No direct injury of any individual employee need be proven to
22 establish standing. Furniture Workers Local 282 (Davis Co.),
23 291 NLRB 182, 183 (1988) and American Postal Workers (Postal
24 Service), 277 NLRB 541 (1985)o

25 V.

26 THE VIOLATIONS WERE NOT WAIVED

27 By virtue of the fact that the discriminatory language of
28 Article 6, § 2 has been a part of the collective bargaining

1 agreement for over six years, Respondent UMC contends that the
2 Complainants' failure to contest the provision until the filing
3 of the instant Complaint constitutes "waiver by inaction".

4 The Board has previously held that a waiver must be "clear
5 and unmistakable". Las Vegas Police Protective Association vs.
6 City of Las Vegas, Case No. A1-045474, Item #264 (1991). In the
7 instant Case, "waiver by inaction" is implied but not "clear and
8 unmistakable". The Complainants, therefore, did not waive their
9 right to object to the discriminatory language of Article 6, §
10 2.

11 For the above reasons, I respectfully dissent to the
12 decision of the majority.

13
14 By Christopher W. Voisin
15 Christopher W. Voisin, Chairman
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