SUPREME COURT OF THE UNITED STATES

No. 97–428

AIR LINE PILOTS ASSOCIATION, PETITIONER *v.* ROBERT A. MILLER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May 26, 1998]

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

In *Teachers* v. *Hudson*, 475 U. S. 292 (1986), this Court held that

> "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, *a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker*, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id*., at 310 (emphasis added).

The Court added that, if the "impartial decisionmaker" is an arbitrator, that arbitrator's decision would not bind a court in a subsequent court action. *Id*., at 308, n. 21 ("arbitrator's decision would not receive preclusive effect in any subsequent §1983 action"). Cf. *ante*, at 7, and n. 3 (treating procedural requirements set forth in *Hudson*, a §1983 case, as "transfer[ing] fully" to Railway Labor Act cases such as this one).

I read *Hudson* as implying approval, not disapproval, of a union rule that would require initial participation in "prompt," but *non*-binding, arbitration. Indeed, Justice White, joined by Chief Justice Burger, concurring in the

Court's judgment and opinion in *Hudson*, specifically stated that

> "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." 475 U. S., at 311 (concurring opinion).

I agree with Justice White that the law permits the Union to insist upon compliance with that internal procedure– as long as the required arbitration is nonbinding and conducted expeditiously by an "impartial" arbitrator, as *Hudson* requires. *Id.*, at 310.

The Court majority quotes with approval the Court of Appeals' statement that Justice White's concern, while "'practical,'" lacked a "'legal basis.'" *Ante*, at 8 (quoting 108 F. 3d 1415, 1421 (CADC 1997)) (emphasis omitted). But *Hudson* itself, and the case law upon which *Hudson* rests, provide more than adequate legal support for Justice White's basic position. Those cases make clear that *Hudson*'s requirements do not rest solely upon the interests of dissenting employees, but, rather, grow out of a judicial effort to balance two distinct interests.

One interest is the union's concern that nonmember employees share the cost of the collective bargaining from which they benefit. See *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 222 (1977) (imposition of agency fees "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress"); *Railway Clerks* v. *Allen*, 373 U. S. 113, 122 (1963) ("no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement"); *Machinists* v. *Street*, 367 U. S. 740, 761–764 (1961); see also *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 520–521 (1991). The other interest is that of the nonmember in

not paying for "non-germane" union activity, which activity may promote ideological or political views that the nonmember does not share. *Lehnert*, *supra*, at 515–519; *Abood*, *supra*, at 233–236; *Allen*, *supra*, at 118–121; *Street*, *supra*, at 765–769.

This Court has interpreted the relevant labor statutes, in light of the Constitution's requirements, as requiring procedures that "protect *both*" these "interests to the maximum extent possible without undue impingement of one on the other." *Street*, *supra*, at 773 (emphasis added). Indeed, *Hudson* itself makes clear that procedural requirements "'must'" seek as their "'objective'" to "'preven[t] compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*'" *Hudson*, 475 U. S., at 302 (quoting *Abood*, *supra*, at 237) (emphasis added). The mandatory, but nonbinding, arbitration requirement at issue here satisfies these objectives, for it amounts to a reasonable elaboration of *Hudson*'s own mandate: that the Union provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." *Hudson*, *supra*, at 310.

First, consider the matter from the Union's perspective. The "arbitration first" requirement seems reasonable because it lowers the costs of resolving agency fee disputes and makes their resolution manageable. As this case illustrates, different groups of nonmember dissenters with different motivations for objecting may proceed in different forums. Without the "arbitration first" rule, they might do so simultaneously. Judge and arbitrator, perhaps subject to different discovery requests, obtaining somewhat different information, hearing different arguments, operating under different rules of procedure and evidence, and exercising different judgments (each without knowledge of the other), could well determine differ-

ently costs and complex expenditure relationships, thereby reaching different, even conflicting, conclusions. *Amicus* National Education Association says that this "would be the most expensive and burdensome system imaginable." Brief for National Education Association as *Amicus Curiae* 14. *Amicus* AFL–CIO adds that the "costs of defending such litigation" (which may involve no more than $50 or so for any individual dissenter, see Tr. of Oral Arg. 10) "can easily consume the union's agency fee receipts." Brief for AFL–CIO as *Amicus Curiae* 14, n. 5. The Court itself recognizes as "[g]enuine" the Union's "concern" about defending "its fee calculation simultaneously in judicial and arbitral fora." *Ante*, at 12.

Second, consider the matter from the perspective of the dissenting employee. The Court's decision, rejecting the Union's rule, may help to protect the ideological interests of a few of those employees, but only a few, and then in a way that does *not* offset the corresponding harm caused the Union. That is because "arbitration first" does not mean serious delay, for the arbitration must begin promptly and proceed expeditiously. See *Hudson*, *supra*, at 307. Moreover, nonbinding arbitration may resolve the dispute to the satisfaction of some dissenting employees, perhaps those whose objections rest less upon ideology and more upon a desire to minimize the fee they must pay. See *Gilpin* v. *AFSCME*, 875 F. 2d 1310, 1313 (CA7 1989) (noting that many objectors are "free riders" seeking representation at the lowest cost possible); *Weaver* v. *Univ. of Cincinnati*, 970 F. 2d 1523, 1530 (CA6 1992) (same); *Kidwell* v. *Transportation Comm. Int'l Union*, 946 F. 2d 283, 304–306 (CA4 1991) (same).

Nor will trying arbitration first prejudice the cause of the remaining unsatisfied objectors. The nonbinding arbitration process may deprive objectors of their money for a brief additional time, but the disputed fees must remain unspent in escrow during the arbitration proceedings.

Hudson, *supra*, at 305, 310. Nonbinding arbitration also leaves the objectors free to press their claims in a later court action– if the arbitration's result leaves them dissatisfied. And, as the Union conceded at oral argument, the judge in that later action, though informed by the arbitrator's decision, would not accord it any special legal weight. Tr. of Oral Arg. 16, 20–21; see also *Hudson*, *supra*, at 308, n. 21 ("arbitrator's decision would not receive preclusive effect in any subsequent §1983 action"). Cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944) (administrative agency, through its interpretations, may have the "power to persuade, if lacking power to control"). In other words, the objecting dissenter, though briefly delayed, could proceed in court and on a clean slate. See Hensler, Court-Ordered Arbitration: An Alternative View, U. Chi. Legal Forum 399, 401 (1990) (describing differences between mandatory *non*-binding arbitration over agency fee calculations, and traditional mandatory *binding* arbitration).

From the courts' perspective too, nonbinding arbitration can prove helpful. Insofar as it settles matters to the parties' satisfaction, it avoids unnecessary, perhaps time-consuming, judicial investigation of highly complex union accounts and expense allocations. Cf. *Allen*, 373 U. S., at 122 (describing difficulties surrounding "judicially administered relief" for agency fee objectors, as compared with "internal union remedy"); *Abood*, 431 U. S., at 240 (same).

The upshot is that the "arbitration first" rule "prevent[s] compulsory subsidization of ideological activity" without unduly "restricting the Union's ability" to collect a legitimate agency fee. Consequently, neither the First Amendment, nor any statute, as interpreted by this Court, prohibits the Union's insistence upon that rule.

I fear that the majority is led to a different conclusion through use of analogies that, in my view, do not govern the circumstances before us. First, the Court analogizes

the arbitration at issue here to binding arbitration often found in contracts, including labor contracts, where arbitration is legally anchored in the consent of the parties. *Ante*, at 9. But "consent" is not relevant to the legal justification for the "arbitration first" rule before us. Rather, that rule finds its legal anchor in the Union's legal authority (indeed, obligation) under *Hudson* to impose internal procedures that permit collection of agency fees, without undue infringement of objectors' constitutional rights. I have explained above why the rule at issue here satisfies *Hudson*'s requirements. If one needs an analogy, I would find it, not in consensual arbitration, but in court rules that require parties to try nonbinding arbitration before they pursue a case in court. See, *e.g.*, 28 U. S. C. §§651–658 (authorizing district courts to refer certain types of civil actions to arbitration); ADR Local Rules 2–3, 4–2 (ND Cal. 1998); see also Federal Judicial Center, Court-Annexed Arbitration in Ten District Courts (1990).

Second, the Court describes the Union's proposed "arbitration first" rule as an "extension of the discretionary exhaustion-of-remedies doctrine." *Ante*, at 8–9. But whether that particular doctrine offers legal justification in this case is beside the point. The "arbitration first" rule amounts to an elaboration of the obligations set forth in *Hudson*. Those obligations rested upon the substantive law that permits collection of agency fees interpreted in light of the competing demands of the First Amendment. *Hudson* decided that this law required the courts to craft a mandatory, nonbinding mechanism for speedy dispute resolution. Exhaustion principles did not prevent the Court from doing so. Why then should those principles prevent the Court from elaborating upon *Hudson*'s requirements, by permitting a union to impose a reasonable "arbitration first" rule of the kind before us?

I note one additional matter. The Court's opinion refers to the "pilots . . . proceed[ing] at once in federal court."

Ante, at 2. The Court does not decide, however, whether a federal court can await the conclusion of an expeditious arbitration before it proceeds, for example, with discovery. *Ante*, at 12–13, n. 6. Should it await arbitration's conclusion, the court would be able to take advantage of any settlement or narrowing of issues that the nonmandatory arbitration proceeding produced. Doing so would alleviate many of the concerns that I have expressed in this opinion. See *supra*, at 3–5.

Even so, the question before us is whether the Union can insist upon prior recourse to that form of arbitration. For the reasons stated, I believe such a requirement is consistent with, and a reasonable extension of, this Court's decision in *Hudson*.

I therefore dissent.