

# Janus v. AFSCME

Story behind the case and what questions need to be asked.



# *Legal Backdrop to Janus*

- *Abod v. Detroit Board of Education* (1977) - Court permitted “agency shop” agreements in state or local government when authorized by state law. Court ruled (unanimously) that dues cannot be used for political activities, but held ( 6 to 3) a employee can be compelled to pay for contract negotiations, contract administration, grievance related matters, and activities related to the duties of the organization.

**Agency Shop & Fair Share(private sector)** – belief that each person should bear the cost of maintaining union whose benefits they enjoy.

- Over 40 years of legal precedent likely to be overturned by *Janus v. AFCSME*.

# QUESTIONS PRESENTED BY *JANUS*

- 1- How did Janus come about?
- 2- Who is behind the case?
- 3- Why now?
- 4- Why are they doing it?
- 5- What is their ultimate goal in the elimination of agency shop fees?
- 6- What can we do about it?

# So, how did *Janus* come about?

- Illinois Governor Rauner (following lead of Walker (WI) & Snyder (MI)) issued an executive order directing all state agencies to cease enforcement of fair share provisions. ***On same day he filed suit against public unions claiming public sector bargaining should be banned (emphasis added).***
- Court dismissed Rauner suit for obvious lack of standing but allowed motion to intervene filed by Mark Janus.
- Janus's motion to intervene was filed by National "Right to Work" Legal Defense Found & Liberty Justice Center.

# 'Right to Work' Misnomer

- Has nothing to do with someone's right to work. Everyone is free to work within their chosen profession.
- But it sounds better than “right to free load off your colleagues.”
- “We must guard against being fooled by *false slogans*, such as 'right to work.' ....Its purpose is to destroy labor unions and the freedom of collective bargaining by which unions have improved wages and working conditions of everyone. Wherever these laws have been passed, wages are lower, job opportunities are fewer and there are no civil rights....” **MARTIN LUTHER KING, JR.**

# National Right to Work Foundation?

- The origins of the National Right to Work Legal Defense Fund can be found in the National Right to Work Committee – which was founded by Vance Muse (oil industry lobbyist) who campaigned against women's suffrage, child-labor laws, 8 hour workday. 'Right to Work' originated as a means to maintain Jim Crow labor relations.
- Now the National Right to Work Legal Defense Fund is financially backed by among others, **David and Charles Koch**.
- Koch brothers are corporate billionaires with anti-labor/union views and are among the largest conservative political donors in the nation.
- Koch brothers have spent millions on anti-union/labor campaigns that include legislation and countless legal challenges.
- Koch brothers view unions as grassroots organizations of the Democratic party that stand opposed to their personal financial interests.

# Largest company you've never heard of- Koch Industries

- Second largest private company in nation with combined wealth that makes them 3<sup>rd</sup> Wealthiest in America. They own Brawny paper towels, Dixie Cups, Georgia-Pacific, Stainmaster, Lycra, & several other companies.
- Top ten worst environmental polluters in America.
- End goal is to eliminate collective bargaining, government backed pensions, and unions.

# Use of Dark Money “Think Tanks” and “Foundations”

- Koch brothers have provided funding to neutral sounding ‘think tanks’ or ‘foundations’-- **Americans for Prosperity, Institute for Justice, Institute for Humane Studies, National Right to Work, Bill of Rights Institute, Cato Institute, Heritage Foundation, Mercatus Center, Citizens for a Sound Economy, American Legislative Exchange Council.** – to name a few.
- Foundations like the **Mackinac Center** and **State Policy Network** (trade association of think tanks) do not release donor information but Koch brothers, Phillip Morris, Inc. and others have been linked.
- The “think tanks” or “foundations” are funded by corporate interests and issue reports or findings which impact the profits of those corporate interests (e.g. Koch Industries).
- It is unknown exactly how much dark money is funneled into these non-for-profits—believed to be in the hundreds of millions. Koch network has 1,600 paid staffers in 35 states.
- **Foundation of Research on Economics and the Environment** hosted the conservative majority Supreme Court Justices at an exclusive Montana Ranch the week prior to Supreme Court case **Citizens United (which excluded these not-for-profits from political contribution limits).** – Guess who?



# So, who is Mark Janus?

- Mr. Janus is a \$71,000 a year health care worker who is asserting that he is being compelled to accept higher wages, pensions, and benefits that he does not agree with and by being forced to do so, his 1<sup>st</sup> Amendment Rights are being violated. Janus gets his name on a potential landmark Supreme Court case.
- Argument presented is that all items of collective bargaining within the public sector (e.g. class size, etc) are inherently political in nature as they involve the appropriation of taxpayer's money. Therefore, should not be required to pay any union fee.

# After 40 years, why now?

- Great Recession.
- Decline Private Sector Unionization.
- **Success** and continued growth of public sector unions.

# Great Recession (2008)

- Prior to Great Recession- Right-to-work laws were mostly found in southern states.
- Since 2012- Indiana, Michigan, Wisconsin, West Virginia, Missouri and Kentucky have passed right to work laws.
- Now 28 states and 52% of workforce “right to work” - That is up from 22 states and 41% back in 2011.
- Public sector has been far more resilient than private sector in protecting salary and benefits since 2008. Pensions have been stripped, benefits cut, salaries slashed in the private sector.
- This has led to **resentment, animosity and envy** within the private sector towards unionized public sector which has been seized upon by **National Right to Work Committee, National Right to Work Legal Defense Foundation, American Legislative Exchange Council** and corporate interest groups.

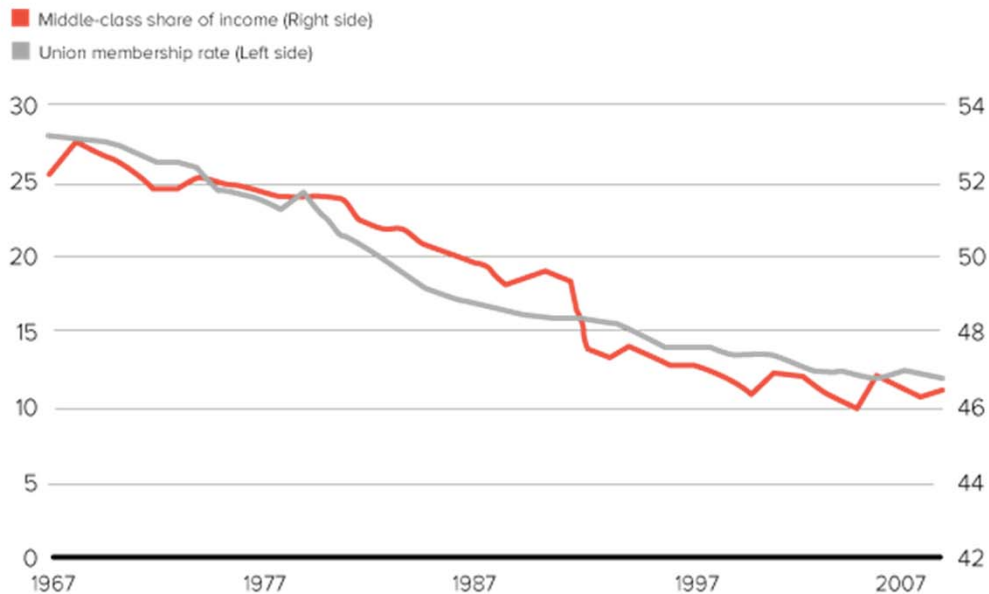
# Private Sector v. Public Sector

- 1950s about one of every three US workers were union members - now only 6.4% of private sector.
- Pay for private-sector workers has been stagnant for over the past three and a half decades.
- Bureau of Labor Statistics 2016 Employee Benefits Survey found that only 8 percent of private sector firms offered a defined benefit pension plan.
- Public sector unions have raised wages compared with non-union public employees (8% wage boost- Economic Policy Institute).
- Public sector salaries 13% higher than equivalent private sector.
- **Heritage Foundation** (Koch) found that private sector employees receive roughly one-third less time off with an average of 13 vacation and eight paid sick days each year. [This information is used to divide, enrage, and turn the private sector against the public sector and their unions.]

# The Shrinking Middle Class!

## AS UNIONS DECLINE, SO DOES THE MIDDLE CLASS

Union membership rate and middle-class share of aggregate income, 1969-2009



Source: David Madland, Karla Walter, and Nick Bunker, "Unions in the Middle Class: Without Unions, the Middle Class Withers," Center for American Progress, April 2011, 2.



- **WHY TARGET PUBLIC SECTOR AGENCY SHOP FEES?**

# Five highest paid teacher states

- **Alaska** - \$82,020
  - New York- \$81,410
  - Connecticut- \$76,260
  - New Jersey- \$75,250
  - California- \$74,940
- \*(Massachusetts, Wash DC, Maryland, RI, Penn)
- Every state listed above is closed shop – (i.e. agency fees permitted).

# Five lowest paid teacher states

- **\*Oklahoma** - \$42,460
  - **Mississippi** - \$43,950
  - **South Dakota** - \$44,210
  - **North Carolina** - \$45,220
  - **\*West Virginia** - \$45,240
- 
- All right to work (open shop) states.
  - \* Recent teacher strikes have hit both states.



# Strength of public sector unions

- New York has the highest total union rate in the nation. (23.8%) – 37% public sector.
- The largest number of union members lived in **California** (2.5 million) and **New York** (2.0 million). Bureau of Labor Statistics (2017).
- The union membership rate of public-sector workers (34.4 percent) continued to be more than five times higher than that of private- sector workers (**6.4 percent**).
- The same forces behind Janus have successfully lobbied for anti-worker and anti-labor legislation within the private sector. They have been unable to accomplish that in the unionized public sector.

# Role of Unions in Wage Growth

- Among full-time wage and salary workers, union members had median usual weekly earnings of \$1,041 in 2017, while those who were not union members had median weekly earnings of \$829. Bureau of Labor Statistics (2017). **Thus, non-union workers earn 26% less than unionized workers!**
- In December 2011, union-represented civilian workers in management, professional, and related occupations earned an average of \$37.37 per hour while their non-union counterparts earned only \$34.60 per hour, **an 8% difference [8% of \$100,000=\$8,000]**.
- **Corporations** see higher future profits with weaker labor unions—evidence shows it reduces labor's share of income.
- Non-union wages are higher in unionized industries and regions.

# Impact Agency Shop has on Wages

## Public Sector Pay v. Private Sector Pay Comp

*Full collective bargaining states(NY)* 0.6%

*Partial or mixed collective bargaining states* -3.9%

*States prohibiting collective bargaining* -7.8%

*Non right-to-work states(NY)* 2.7%

*Right-to-work states* -6.4%

# What is the Impact of RTW?

- Only 17% of state and local government employees are unionized when collective bargaining is prohibited (Wisconsin, NC). **Wisconsin has seen their salaries and benefits plummet by 2.6% and 18.6%, respectively. [Kenosha teachers went from 86 pg CBA to a 1 page Board Contract].**
- States with RTW legislation have 1/3 the rate of public union membership as non-RTW states. (Keefe, EPI 2015)
- Public Sector in RTW states suffer a 10 percent pay penalty compared to private sector. [Economic Policy Institute]

# Strength of Unions on Long Island!

- Median pay on Long Island for union members is 50% above that of their nonunion neighbors.
- Long Island accounts for nearly 24.5% of all union employees in the State.
- 71% of the 237,000 public sector workers on LI are in unions.
- Long Island – median union pay is \$1,200 weekly compared to \$961 nonunion. Earn 24.9% higher than non-union workers.
- Union membership highest within ages 44-64. -- Millennials?

***[ Center for Study of Labor and Democracy, Hofstra (8/21/17) ]***

# Three Core Strengths of Unions

## 1- Advocacy

State and national political level

Local level behalf of membership

## 2- Collective Bargaining

Drive up wages

Increase, improve, maintain benefits

## 3- Legal Representation and Protection

Rights under Education Law

Rights under Contract and Taylor Law

# Political Advocacy

- CAS has had a lobbying presence in Albany since 1966 with a Professional NYS Licensed lobbyist *to review and monitor proposed legislation* that may impact members. CAS/PAC funds allow for a legislative presence.
- Relationships with Assembly and Senate members are fostered and developed.
- Constitutional Convention is one example of why these forces look to weaken union's political influence through the *Janus* decision.
- For a more complete analysis of CAS's legislative advocacy:  
<https://interactivepdf.uniflip.com/2/611850/1090999/pub/html5.html#page/1>

# Collective Bargaining History

- In 1967, average high school principal salary on Long Island was around \$15,000. The average now is over \$180,000.
- The statistics without question show collective bargaining has provided unions with better fringe benefits which include, but are not limited to, health insurance, life and disability insurance, tuition reimbursement, longevity, paid holidays, vacation, snow days, flexible scheduling, and sick time --- to name a few.
- Salaries of unionized public sector are considerably higher than non-unionized private sector counterparts because of unions and collective bargaining.
- Full list of CAS collective bargaining services:  
<https://interactivepdf.uniflip.com/2/611850/1090999/pub/html5.html#page/1>



# Legal Representation

- Unions members receive assistance and guidance on handling an array of issues involving parents, central office, and staff, including but not limited to: draft emails, letters, and responses on behalf of a member, as well as discussing strategies and taking legal action when appropriate on behalf of the member.
- Representation in grievances and formal representation at arbitration hearings. Handling of all aspects of performance evaluations (APPR) appeals.
- Representation at disciplinary interviews conducted by the school district, State Education Department, Department of Education, Attorney General's Office, and/or other state and federal agencies.
- Full and complete representation during a 3020-a hearing, section 75 hearing, or other disciplinary hearing for active members in good standing at no cost to the individual member or unit.

# Legal Representation (cont.)

- Full and complete representation at Part 83 Hearing (Moral Conduct Hearing) before the State Education Department for active unit members in good standing.
- Litigation before the Commissioner and Courts regarding non-discrimination work related disputes such as tenure, seniority, under/over payment, improper termination, improper transfer, etc.
- Full representation before PERB regarding a change in practice, work year, subcontracting out positions, etc.
- Assist in the drafting of rebuttals to evaluations, letters from parents and central office memorandums, etc.
- Unlimited consultations and legal advice on all matters dealing with professional employment.
- For complete list of legal services provided to members.

: <https://interactivepdf.uniflip.com/2/611850/1090999/pub/html5.html#page/1>

# Goal of eliminating agency shop fee is to weaken public sector unions

- RTW legislation has been shown to reduce the ability of unions to organize, lobby, negotiate contracts and represent members. Attack the unions' three strengths.
- Reduce legislative clout leaves public unions vulnerable to attack (ie, Triborough, Charter Schools, Tenure, Collective Bargaining ). Illinois Gov. Rauner **sued to eliminate collective bargaining!!! Remember Wisconsin!! That is their ultimate goal– the elimination of collective bargaining – not RTW.**
- Weakened public unions will be less effective and will lead to reduced **wages, benefits and pensions (reduce taxes)**
- RTW legislation has been shown to make unions more vulnerable to **decertification** as free-riding drives membership below necessary membership status. ( Hunt and White 1983).

# What is Decertification?

- Loss of collective bargaining agreement. No salary schedules, longevity, work year, etc.!!

[Drop in unit membership may result in decertification of unit and loss of collective bargaining agreement for **EVERYONE**. So not everyone can drop that is why they are referred to as “free-riders” or “free-loaders”.]

- District can unilaterally set all terms and conditions of employment. Your Union Protects Your Contract!
- If no contract they can increase work year, health insurance contribution and reduce salaries. They can change all terms and conditions of employment.
- School District can file for decertification.

# If local unit membership drops what can they expect?

- Longer and less effective negotiations leading to stagnant or reduced wages.
- An increase in divide and conquer proposals by Superintendents & Boards.
- Superintendent and Board making unilateral changes to contract and terms and conditions of employment because they know unit has no access to union representation to safeguard contract. (e.g. work Saturday, Recess, different interpretations of contract, etc.)
- District's will begin to use threats of disciplinary actions against employees using cost as a financial blackmail to get resignations or transfers.
- Decertification filings by school districts. Remember, Wisconsin (Kenosha) went from 86 page CBA to a 1 page "Board contract".

# What is the Duty of Fair (DFR) Representation?

- Union cannot engage in arbitrary, discriminatory, or bad-faith conduct against a member or non-member.
- As part of the recent budget bill, NY has clarified that non-members will not be entitled to union representation during disciplinary interviews (i.e. Weingarten Rights) or afforded any legal or other services (e.g. professional development, life insurance, and other benefits). It significantly restricts the benefits that a non-member would receive.

# What do non-members lose?

- **They won't be able or allowed to negotiate any aspect of their salaries or benefits.** They will be governed by the terms of the contract negotiated and approved by active members.
- They have **NO** voting rights within their local Association and cannot object to or vote on the contract.
- They will not be eligible to receive any legal representation or counsel of any kind relating to a disciplinary proceeding/investigation or interview and will need to obtain private counsel at their own expense. **NOTE:** The average cost of a full 3020-a or Section 75 disciplinary hearing ranges from \$75,000 to over \$150,000.
- They will not be provided with any legal representation in regard to issues before the Commissioner (e.g. excessing, seniority, tenure, discipline), PERB, NYSTRS, NYSED or State and/or Federal Court actions. **NOTE:** The average cost associated with such proceedings can range from \$25,000 to \$75,000.
- They will not be provided access to legal advice or guidance as to situations that may arise during the school year which are not related to a specific clause in the collective bargaining agreement (e.g. evaluation rebuttal, parent complaints, social media posts, certification issues, *parental lawsuits*, etc.).
- They will not receive representation of any kind during retirement.
- They will reduce the bargaining strength of their unit and in so doing hurt their own financial interest.

# What to expect after Janus decision?

- **National Right to Work, State Policy Network** affiliates, will blitz the airwaves criticizing unions and encouraging opt-out. They'll offer alternatives claiming to save you money. *The people behind the alternatives or the same people funding and supporting Janus.*
- Papers (e.g. Newsday) will likely publish **National RTW** withdrawal template letter.
- Email and mail campaign launched by foundations funded by Koch Network, Devos foundation and others.



# What can be done?

- There is good news! What you and your fellow members have cannot be taken, **it must be voluntarily given up by you.**
- We need to educate and support each other. Ask questions.
- Why is some “foundation” sending you a withdrawal letter? Why is the right to work foundation so concerned about saving public sector workers union dues, while simultaneously claiming that you’re all overpaid?
- Need to be proud of being a union member and of the salaries and benefits that have been afforded by union membership. This doesn’t mean salaries and benefits can’t continue to be improved that is of course the #1 priority of unions is to continue to improve benefits.

# What can be done?

- Talk to those that may be thinking of opting-out and inform them of what they would be giving up and/or placing at risk.
- Take steps to get members to become active in the local and regional associations by highlighting the local's accomplishments and what might be lost.
- Take steps to develop a strong unit identity. **Create a unit letter and logo. Develop membership folders for all members and new members. Create union email address and private emails (i.e. Gmail, Yahoo, etc.) for executive board members and membership. It is easy and makes communication more reliable. Disseminate periodic unit email updates or forward to unit members pertinent emails or information.**
- Get members to commit to the local association and collective bargaining agreement and have them sign up prior to June 30<sup>th</sup>.
- Recent changes in the law contained in the 2017 Budget Bill will likely result in Districts requiring dues authorization cards (regardless of Janus decision). CAS has developed secure e-cards and have paper cards available. **Units should make efforts to get all cards signed by June 1<sup>st</sup>.**
- Local executive boards can explore possible contractual clauses to address union membership. Each local unit should discuss by-law amendments. CAS has updated local bylaw guidance and suggestions. Whatever DFR obligation does exist it rest with the local association.
- CAS will be seeking to amend its bylaws at the May delegate meeting.

# CAS will work with each unit

- *Janus* will place an emphasis on regional and local representation.
- Help create and foster local identity.
- Assist unit president with unit and/or members explaining the value of unions.
- Work closely with each unit in the collective bargaining process to make improvements and strengthen the individual unit.
- Work with leadership of each unit to provide insight and information that unit leadership can use with their locals.
- Provide unit leaders with relevant information to share among their members.
- Continue to push for membership participation in both regional and local activities.