STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OXNARD HARBOR DISTRICT, Charging Party, v. SEIU LOCAL 998, Respondent.	Case No. LA-CO-9-M PERB Decision No. 1580-M January 9, 2004

Appearances: William J. Buenger, Executive Director, for Oxnard Harbor District; Geffner & Bush by Steven K. Ury, Attorney, for SEIU Local 998.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Oxnard Harbor District (District) of a Board agent's dismissal of its unfair practice charge. The charge alleged that SEIU Local 998 (SEIU) violated sections 3502 and 3507 of the Meyers-Milias-Brown Act (MMBA)[1], PERB Regulations 32604(a), (b) and (e),[2] the applicable Memorandum of Understanding (MOU) between the parties, and various local rules by staging a sympathy strike on October 1, 2002 through October 8, 2002.

After reviewing the entire record in this matter, including the original and amended unfair practice charge, the Board agent's warning and dismissal letters, the District's appeal,

[1]The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references herein are to the Government Code.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

and SEIU's response, the Board declines to adopt the warning and dismissal letters. Instead, the Board issues the decision below.

BACKGROUND

The District is responsible for administering the Port of Hueneme. On September 28, 1987, the District, through Resolution No. 638, adopted a policy and procedures for the administration of employer-employee relations under the MMBA. On June 28, 1999, Section 12411 of the employer-employee relations policies was amended through adoption of Resolution No. 840. This section was further amended by Resolution No. 842, adopted on August 9, 1999. On December 10, 2001, the District president approved and adopted Administrative Policy No. 12300.4 regarding leave of absence guidelines.

The District is party to an MOU with SEIU effective from July 1, 2002 through June 30, 2005.[3] The MOU covers the Clerical, Wharfinger and Maintenance Units.

MOU Article 1.16 No Strike or Lockout reads:

> The District agrees not to engage in any lockout of employees represented by SEIU Local 998 during the terms of this MOU. Participation by any employee in a strike or work stoppage that constitutes a breach of this MOU may subject the employee to disciplinary action, up to and including discharge. During the term of this MOU no employee, organization, its representatives, or members shall engage in, cause, instigate, encourage, or condone a strike, work stoppage, or work slowdown of any kind. Employees shall not strike as long as the District adheres to the terms and conditions of this MOU. If employees do strike and the District has not violated this MOU, then such strike shall be a breach of this MOU. If SEIU Local 998, its representatives, or members engage in, cause, instigate, encourage, or condone a strike, work stoppage, or slowdown of any kind, in addition to any other lawful remedies or disciplinary actions, the District's Executive Director may prohibit the use of bulletin boards, prohibit the use of District facilities, and prohibit access to former

[3]The MOU was adopted by the District through Resolution No. 894 on September 9, 2002.

> work or duty stations by SEIU Local 998. As used in this Section, 'strike' or 'work stoppage' means a concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the absence in whole or in part from the full, faithful performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in the conditions of compensation, or the rights, privileges or obligations of employment. Any decision of the Executive Director, made under the provisions of this Section, maybe appealed to the Board of Harbor Commissioners in accordance with the employee relations policy enacted by the Board of Harbor Commissioners adopted Resolution No. 638 as amended. No employee need cross a bona fide picket line if his or her physical health or safety will be jeopardized by so doing.

In late June 2002, SEIU sent a document to its members entitled "Potential ILWU Strike at Oxnard Harbor SEIU Members Responsibilities". This document read, in pertinent part:

> In the event of a strike called by the ILWU on July 1st, 2002 and whether or not a picket line is blocking the entrance to your work site, you must honor the strike or face the possibility of being fined by SEIU Local 998. The Board of Directors has ruled in the past that the fine for working as a strikebreaker is a 'days pay for a day worked.'
>
> During the County of Ventura strike of July 2001, over 100 people were charged as strikebreakers and fined. The collection of such fines includes appearance in small claims court and attachment of wages if necessary.
> (Emphasis in original.)

On July 19, 2001, District Human Resources Manager, Ray Pizarro (Pizarro), issued a memorandum to all employees regarding no strike or lockout. In this memorandum, Pizarro reminded employees that Article 1.16 of the MOU prohibited strikes and "participation by any employee in a strike or work stoppage as described above would constitute a deliberate and intentional breach of the existing MOU between the District and Local 998." On July 24,

2001, certain employees engaged in a sympathy strike and received disciplinary notices from the District.

On June 27, 2002 the District executive director issued a memorandum to all employees regarding no strike or lockout policy. The memorandum indicated that there were rumors circulating that the International Longshore Warehouse Union (ILWU) may go on strike this year as their contract expires on July 1, 2002. Employees were reminded that it would be a violation of the MOU to go on strike and that if there were a picket line employees were to report to the training room located in the administration building and await further instructions.

On July 30, 2002, the executive director issued a memorandum to each employee which stated:

> Media articles and rumors continue to suggest that an ILWU strike is imminent. This is to remind you that the Oxnard Harbor District (District) has no contractual relationship with the International Longshore and Warehouse Union (ILWU) nor with the Pacific Maritime Association (PMA). The District is not a party to the Pacific Coast Longshore Contract Document (PCLCD) nor the Pacific Coast Clerks' Contract Document (PCCCD) nor any other related ILWU contract, port supplement or port working rules. Accordingly, the District cannot improve or otherwise affect ILWU wages, benefits, or working conditions. Therefore, any job action the ILWU may deem necessary to further its cause should be focused on PMA or their direct employers. Any demonstrations or picketing against the District or District property including the Central Gate is illegal, and the District will deal with it in that manner.

For the period October 1, 2002 through October 8, 2002, members of the bargaining units exclusively represented by SEIU engaged in a sympathy strike. On October 7, 2002, Pizarro issued a memorandum to each employee entitled "Forfeiture of District Compensation". This memo read, in pertinent part:

> This is to inform you that employees who have failed or fail to report to work will forfeit all District compensation on an hour-

> for-hour basis. Employees who report to work and then abandon their work are subject to the same provisions. You will be provided with specific details as to how this applies to you.
>
> . . . . . .
>
> Participation in a strike or a work stoppage, is defined by the MOU 'as a concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the absence in whole or in part from the full, faithful performance of the duties of employment.' This means that all employees who are involved in a strike or work stoppage not related to the District's MOU are subject to disciplinary action.

DISCUSSION

The District alleges that SEIU violated sections 3502 and 3507 of the MMBA, PERB Regulation 32604(a), (b), (c) and (e), local rules and regulations related to the MOU between the District and SEIU, District Resolution 840 and District Resolution 638, District Administrative Policy No. 12300.4, and MOU Article 1.16, by staging a sympathy strike on October 1, 2002 through October 8, 2002.

Under MMBA section 3509, PERB's jurisdiction extends to the processing of unfair practice charges that allege a violation of the MMBA or "any rules and regulations adopted by a public agency pursuant to section 3507."

Unilateral Change

The central violation asserted in this charge is that SEIU violated Article 1.16 of the parties MOU by engaging in a sympathy strike on October 1, 2002 through October 8, 2002. This allegation will be reviewed as an alleged unilateral abrogation of the MOU. Such a unilateral change violates MMBA section 3505 and is an unfair practice under PERB Regulation 32604(c).

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)[4] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) The employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Although this test is written as if the employer committed a unilateral change, the standard is applicable to unilateral repudiations by an employee organization. (Regents of the University of California (1992) PERB Decision No. 922.) As such, the District must demonstrate Article 1.16 of the MOU prohibits sympathy strikes and that SEIU violated this provision by engaging in a sympathy strike.

The California Supreme Court has recognized that there is no common law prohibition on strikes by California public sector employees and their unions. (County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn. (1985) 38 Cal.3d 564 [214 Cal.Rpt. 424].)

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[4]When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 617 [116 Cal.Rpt. 507].)

Thus, SEIU's sympathy strike would only constitute an unlawful unilateral change if the District can demonstrate that the MOU prohibits such strikes. The District asserts that the MOU does contain such prohibitory language. Specifically, the Article 1.16 contains a general no-strike clause which states, in part:

> During the term of this MOU no employee, organization, its representatives, or members shall engage in, cause, instigate, encourage, or condone a strike, work stoppage, or work slowdown of any kind.

The District argues that SEIU violated this clause by its actions.

In examining the breath of the District's no-strike clause, it is critical to note that the courts have held that a general no-strike clause that does not specify whether sympathy strikes are included or excluded, does not, simply by virtue of its incorporation in a collective bargaining agreement, prohibit such strikes. (Indianapolis Power & Light Co. v. NLRB (7th Cir. 1990) 898 F.2d 524, 528 [133 LRRM 2921] (Indianapolis Power).) This standard was recently examined and followed by the 9th Circuit Court of Appeals in Children's Hospital Medical Center v. Nurses Assn. (9th Cir. 2002) 283 F.3d 1188, 1192 [169 LRRM 2779] (Children's Hospital).)

In Children's Hospital, California Nurses Association (CNA) and the hospital were parties to a collective bargaining agreement, which included a general no-strike clause. When CNA gave notice of its intent to engage in a sympathy strike, the hospital sought injunctive relief arguing the no-strike clause constituted a waiver of CNA's right to engage in sympathy strikes. In rejecting the hospital's rationale, the Court held:

> "Since the Union's waiver of the employees' statutory rights must be clear and unmistakable, the extrinsic evidence must manifest a clear mutual intent to include sympathy strikes within the scope of the no-strike clause or else the clause will not be read to waive sympathy strikes. . . . A broad no-strike provision

> by itself is not sufficient to waive the right to engage in sympathy strikes if extrinsic evidence of the parties' intent does not demonstrate that the parties' [sic] mutually agreed to include such rights within the breadth of the no-strike clause." [Children's Hospital, at p. 1195, quoting Indianapolis Power, at p. 528; emphasis in original.]

In its amended charge, the District apparently concedes that Children's Hospital holds that a general no-strike provision does not extend to sympathy strikes. However, the District argues that Children's Hospital is inapplicable to this case because SEIU was not engaged in a sympathy strike. The District's argument relies on language from Children's Hospital, where the court stated that:

> The term 'sympathy strike' ordinarily refers to a strike conducted by workers belonging to one bargaining unit in support of a primary strike that is conducted by workers belonging to another bargaining unit at the same plant or shop. [Fn. omitted.]

Based on this language, the District argues that SEIU was not engaged in a sympathy strike since its was not supporting other employees of the District.

The District is correct that a sympathy strike ordinarily refers to one group of employees supporting the strike of another group of employees of the same employer. However, the National Labor Relations Board (NLRB) and the Federal Courts have recognized the right of employees to refuse to cross "stranger" picket lines. Such a picket line was the subject of a 9th Circuit Court of Appeals decision in NLRB v. Southern Calif. Edison Company (1981) 646 F.2d 1352 [107 LRRM 2667] (Southern Calif. Edison). In that case, a Southern California Edison employee represented by the International Brotherhood of Electrical Workers refused to cross a picket line set up by the International Association of Machinists and Aerospace Workers at the Freightliner Corporation, an Edison customer. Edison disciplined

the employee. The NLRB and court found the employee's actions protected, rejected Edison's contract defense of waiver based on the no strike clause, and ordered the discipline rescinded.

In the instant case District employees represented by SEIU respected ILWU informational picket lines at the District's place of business. The ILWU was protesting the lockout by their employer, the Pacific Maritime Association (PMA). The connecting factor is that the District provides the work location for employees of the PMA.[5] This conduct falls somewhere in between the conduct described in Children's Hospital and that in Southern California Edison and thus should be considered a sympathy strike.

Further supporting the Board's holding in this matter is the extrinsic evidence in the record. In reviewing extrinsic evidence, the court looks to "the bargaining history, the context in which the contract was negotiated, the interpretation of the contract by the parties, and the conduct of the parties bearing upon its meaning. (Children's Hospital, supra, at 1195.) In this case the parties' intentions regarding the no strike clause is clear. The section states:

> As used in this Section, 'strike' or 'work stoppage' means a concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the absence in whole or in part from the full, faithful performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in the conditions of compensation, or the rights, privileges or obligations of employment. [Emphasis added.]

Thus, a key element of any prohibited strike is that it be for the purpose of changing the conditions of compensation, rights, privileges or obligations of employment. This element is not present in SEIU's sympathy strike. Rather, based on SEIU's June letter to its members, it

[5]There is no information indicating that the ILWU picket line was an attempt to conduct a secondary strike or boycott prohibited by the National Labor Relations Act (NLRA). Such actions require "...union pressures calculated to induce the employees of a secondary employer to withhold their services in order to force their employer to cease dealing with the primary employer." NLRB v. Servette, Inc. (1964) 377 U.S. 46, 52-53 [84 S.Ct. 1098].

appears that the purpose of the strike was to show support for the ILWU whose previous support for SEIU had "helped to win many of the items" in SEIU's MOU. The District acknowledged this fact in its July 30, 2002 memorandum to each employee, which states in pertinent part: "the District cannot improve or otherwise affect ILWU wages, benefits, or working conditions."

Therefore, the sympathy strike is not a "strike" or "work stoppage" as defined by Article 1.16. That article does not prohibit an employee or SEIU from engaging in a sympathy strike and SEIU's actions in support of the strike are not an unlawful unilateral change.

Interference with Employee Rights

District Resolution 638 adopted rules and regulations for the administration of employer-employee relations in the District presumably under the auspices of MMBA section 3507. District Resolution 840 amends section 12411 (Violations, Grievances and Disciplinary Proceedings) of those rules and regulations. Although not specified in the charge, the only violation that appears cognizable under these sections falls under section 12402 of the rules – Employee Rights. This section reads, in pertinent part:

> Employees of the District also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the District. The District and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against employees because of their exercise of these rights.

This rule incorporates portions of Sections 3502 and 3506 of the MMBA. Accordingly, all of the alleged violations described above will be reviewed together as a violation of these sections of the MMBA.

The test for whether a respondent has interfered with the rights of employees under the MMBA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. [Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797, 807 [213 Cal.Rptr. 491].]

The provisions of Section 3506 apply equally to employee organizations. (Anderson v. Los Angeles County Employee Relations Com. (1991) 229 Cal.App.3d 817 [280 Cal.Rptr. 415].) Neither PERB nor the Courts have been faced with ruling on the legality of a union threatening to fine its members for failing to honor a picket line or call to strike. However, case law has been developed under section 8(b)(1) of the NLRA.[6] In Scofield v. National Labor Relations Board (1969) 394 U.S. 423 [89 S.Ct. 1154], the U.S. Supreme Court held at page 430 that:

> Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate business interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave a union and escape the rule.

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[6]Section 8(b)of the NLRA reads, in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents.
>
> (1) to restraint or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not appear the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

Based on the July letter from SEIU, it appears that its Board of Directors had adopted a rule that strikebreakers would be fined a day's pay for a day worked. Whether SEIU's action impairs a rule imbedded in labor law is answered by reviewing the NLRB's decision in Food & Commercial Workers Local 1439 (Rosauer's Supermarkets) (1989) 293 NLRB 26 [130 LRRM 1387]. The NLRB found that a union did not violate 8(b)(1) by threatening to fine members who failed to engage in a sympathy strike if the strike did not violate the union's collective bargaining agreement with the employer. Here, the sympathy strike is not prohibited by the parties MOU. Thus, SEIU's threat to fine members who fail to strike is likewise not a violation of MMBA section 3506 and not an unfair practice under PERB Regulation 32604(b).

Leave of Absence Violations

The District asserts that SEIU violated District Administrative Policy No. 12300.4 Leave of Absence Guidelines (Exhibit 5 to the unfair practice charge.). This policy was adopted by the District on December 10, 2001. It states in Section 2:

> This Administrative Policy supersedes any previous practice or process regarding leaves of absence except as otherwise provided in the Memorandum of Understanding between the Oxnard Harbor District and the Service Employees International Union, Local 998.

The policies are designed to accommodate employees who encounter unusual or unavoidable circumstances necessitating an extended period of time away from work. It provides for an employee to request leave in writing on a District form with the District presumably granting or denying the request.

Violation of this policy may not be an unfair practice under Section 3509 of the MMBA. Only violations of the MMBA or any rules and regulations adopted by a public agency pursuant to Section 3507 can be reviewed as an unfair practice. There are no facts

indicating whether this policy was adopted pursuant to Section 3507. Without this information, there is no unfair practice.

Even if violation of the policy was an unfair practice, it is unclear how SEIU violated this policy. There are no facts indicating that any employee who engaged in the sympathy strike requested a leave of absence or that SEIU encouraged any employees to do so. Without more information, this allegation does not demonstrate a prima facie unfair practice under MMBA section 3509.

PERB Regulation 32604(a) and (e)

There is nothing in this charge which explains how SEIU caused the District to engage in conduct prohibited by the MMBA or any local rule adopted pursuant to MMBA section 3507. Nor is there any further information on how SEIU violated any other provision (other than those discussed above) of the MMBA or local rule. Thus, there is no prima facie unfair practice with regard to these two allegations.

Accordingly, the charge must be dismissed.

ORDER

The unfair practice charge in Case No. LA-CO-9-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.