STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO CITY SCHOOLS, Charging Party, v. MODESTO TEACHERS ASSOCIATION, CTA/NEA, et al Respondents.	)	Case No. S-CO-48 PERB Order No. IR-12 March 12, 1980
MODESTO TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. MODESTO CITY SCHOOLS, et al Respondents.	)	Case No. S-CE-318, 319, 320

Appearances: Keith V. Breon, Attorney (Breon, Galgani & Godino) for Modesto City Schools; Kirsten Zerger, Attorney (California Teachers Association) for Modesto Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION AND ORDER

In Modesto City Schools (3/10/80) PERB Order No. IR-11, the Public Employment Relations Board (hereafter PERB or Board) asserted jurisdiction over injunctive relief requests by the parties to this proceeding, based on unfair practices each alleged the other was committing, and directed the general counsel to investigate the matter further and report back to the Board itself within 24 hours. (Gov. Code section

3541.3(j).[1] (Also see Board rule 38100 (8 Cal. Admin. Code, sec. 38100).)

In our order IR-11 we indicated that PERB had "insufficient grounds . . . to seek injunctive relief against either party at this time." The District's pleadings appeared to indicate that the Modesto Teachers Association (hereafter Association or MTA), was engaged in an arguably protected economic strike following completion of mediation and factfinding procedures. As we said in IR-11, EERA "contains no provision which makes strikes after the completion of the statutory impasse procedures unlawful per se." Nevertheless we retained jurisdiction in order to determine whether, as suggested by the Association's pleadings, the work stoppage was in fact an unfair practice strike, and, if so, whether extraordinary relief is appropriate to effectuate the purposes of the Act.

Based on the results of the general counsel's further investigation of this matter the Board concludes that it is probable that the Modesto City Schools (hereafter District) violated section 3543.5(c)[2] by refusing to meet and negotiate

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[1]The Educational Employment Relations Act (hereafter EERA) is codified at Government Code section 3540, et seq. All statutory references in this decision are to the Government Code, unless noted otherwise.

[2]Section 3543.5(c) provides:

It shall be unlawful for a public school

with the exclusive representative over concessions and new proposals that the Association offered following exhaustion of statutory procedures prescribed to break impasse.[3] (See section 3548 et seq.) It is also probable that the District violated section 3543.5(c) by unilaterally changing some terms and conditions of employment beyond the prerogative extended to the District to act after impasse procedures have been exhausted.[4]

To protest the employer's apparent refusal to negotiate in good faith the Association thereafter engaged in a work stoppage. This work stoppage is not per se prohibited by EERA. (San Diego Teachers Association v. Superior Court (1979) 24 Cal. 3d 1, 13.) Rather, the work stoppage appears to be a

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employer to:

. . . . . .

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[3]See, e.g., NLRB v. Webb Furniture Corp. (4th Cir. 1966) 366 F.2d 314 [63 LRRM 2163]; NLRB v. Sharon Hats, Inc. (5th Cir. 1961) 289 F.2d 628 [48 LRRM 2098]; R. James Span (1971) 189 NLRB 219 [76 LRRM 1671]. Comparable provisions and cases applying the National Labor Relations Act, as amended, 29 U.S.C. 151, et seq., may be used to guide interpretation of EERA. Sweetwater Union High School District (11/23/76) EERB Decision No. 4. (Prior to July 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.) Also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

[4]Atlas Tack Corp. (1976) 226 NLRB 222 [93 LRRM 1236]; Newspaper Printing Corp. (1975) 221 NLRB 811 [91 LRRM 1077]; Idaho Fresh Pak-Inc. (1974) 215 NLRB 676 [88 LRRM 1207]. Also see Morris, the Developing Labor Law (1971) pp. 330-332.

protected response to an employer's unfair practices.[5]

The Association has requested PERB to seek injunctive relief against the employer's continued refusal to meet and negotiate over concessions and new proposals offered following mediation and factfinding. The Association has also requested recision of the probable unlawful unilateral actions. As ordered below, such injunctive relief is appropriate to "maintain the continuity and quality of educational services." San Diego Teachers Association v. Superior Court supra, 24 Cal. 3d 1, 11.

The District maintains that after exhaustion of the statutory impasse procedures it is free to make unilateral changes consistent with its last, best offer, the factfinder's recommendations, or the status quo. This argument raises novel considerations for PERB. While the NLRA does not contain comparable impasse procedures, including mediation and factfinding, the rule in the private sector is that after impasse an employer may make changes consistent with its last, best offer. (Ante, n.4.) The Board has had a telescoped time period in which to evaluate the injunctive relief requests and frame the order here. An injunctive relief proceeding is not necessarily the best context in which to develop major new principles of law. Accordingly, at this juncture, for the purpose of

[5]Mastro Plastics Corp. v. NLRB (1956) 350 U.S. 270 [37 LRRM 2587].

effectuating the relief here, we have determined to follow the rule of the private sector and prohibit the employer from making unilateral changes inconsistent with its last, best offer during negotiations.

But unconditional injunctive relief against the employer alone would not completely stabilize the negotiating relationship between the parties. The Association has invoked the processes of PERB to compel a resumption of negotiations. It has demonstrated a desire to resolve differences at the negotiating table by making numerous proposals and counterproposals on significant issues following factfinding. While apparently believing it had no duty to enter into further negotiations, the District has nonetheless met with the Association to hear MTA ideas and thus a basis for resumption of negotiations does exist.

The EERA is a collective negotiations statute. An ultimate purpose of the Act is to promote stability in employer-employee relations in the public schools. This is best served when the parties resolve their disputes at the negotiating table. For this reason we have determined in this case that the employer's obligation to resume negotiations and to rescind its unlawful unilateral actions should be conditioned upon the reciprocal obligation of the Association to end its work stoppage. This condition is in accord with the direction of the Supreme Court that PERB may use the various remedies at its disposal "to

foster constructive employment relations . . . including] the longrange minimization of work stoppages." San Diego, supra, at 13.

Therefore, the Public Employment Relations Board ORDERS that

1. The Modesto City Schools cease and desist from refusing to meet and negotiate with the exclusive representative over concessions and new proposals submitted following completion of mediation and factfinding.

2. The Modesto City Schools rescind unilateral actions changing terms and conditions of employment inconsistent with its last, best offer.

3. The Modesto Teachers Association end its work stoppage upon the District's statement that it is prepared to abide by the obligations this ORDER sets forth.

By: Harry Gluck, Chairperson, Barbara D. Moore, Member

Member Raymond J. Gonzales' concurrence and dissent begins on page 7.

Member Raymond J, Gonzales, concurring on seeking the injunctions against the Association's strike action and against the District from taking unilateral actions not consistent with its last, best offer in negotiations, and dissenting on all other conclusions, rationale and orders.

Although. I voted that PERB lacks jurisdiction over the strike, as a member of this Board, I recognize that by majority order PERB has taken jurisdiction. Acceding to this jurisdiction, therefore, I vote to seek an injunction against the strike because it is an illegal economic and political pressure tactic in violation of the EERA. In this context, if the District is also acting improperly under the EERA, it is appropriate to seek an injunction requiring it to conform its conduct to the law,

I believe that the District was free to take unilateral action to implement its last, best offer or to adopt the factfinders' recommendations in full. It appears that the District, acting without guidance from PERB in a totally new situation, may have implemented some of its last offers and some of the factfinders' recommendations. The District appeared to want scrupulously to avoid a violation of the EERA, yet was groping in uncharted waters. On the basis of very skimpy responses, hastily prepared by the parties in less than a day to five searching questions propounded by the majority, it appears that the District may have unknowingly strayed beyond acceptable post-impasse conduct. If so, an injunction against the District is appropriate,

However, on the basis of the very incomplete information obtained in the cursory, brief investigation, I am unwilling to conclude, as the majority has, that the District committed "unlawful

unilateral actions," a conclusion which is unwarranted absent benefit of a hearing and other formalities which comprise due process of law,

I also emphatically believe that the District need not be subjected to having to negotiate indefinitely, and therefore do not join in the majority's decision which seeks to order the District to continue to meet and negotiate.

My position is that an employer may make unilateral changes following completion of mediation and factfinding providing such changes are consistent with its last, best offer at impasse. If a union could resurrect the obligation to negotiate simply by appearing to make a "concession," it could forever block the employer from taking such lawful unilateral actions. In this case, it appears that the Modesto District has willingly continued discussions with the Association, but has carefully attempted to avoid resurrection of the panoply of legal obligations connected with formal negotiations,

I am greatly disturbed by the majority's conclusion that:

> To protest the employer's apparent refusal to negotiate in good faith the Association thereafter engaged in a work stoppage. This work stoppage is not per se prohibited by EERA. [Citation omitted,] Rather, the work stoppage appears to be a protected response to an employer's unfair practices. [Emphasis added.]

They are doing administratively what no California Legislature or court has ever done: ruled that a public employee strike is a "protected activity." The EERA surely does not do this. Among the rights granted public school employees in the EERA, the right to engage in concerted activities is conspicuously absent. Further underlining this omission, section 3549, declares that section 923

of the Labor Code, generally recognized as granting the right to strike in the private sector, shall not be applicable to public school employees. Nor does any other California statute declare public strikes to be "protected activity,"

The majority cites the NLRA as authority for this legalization of the school strike. Does this now mean that the majority will treat public school employee strikes in the same way the NLRB regards private sector strikes, where they are specifically sanctioned, and indeed "protected" by the NLRA?

My approach in these matters has always been that two wrongs do not make a right. The strike is illegal and should be enjoined. If District conduct is also illegal, then it also should be enjoined. One illegal conduct by one party does not legalize conduct by another which is otherwise illegal.

Finally, I am gratified that my fellow Board members have seen the rightness of deciding to join me in voting to bring an end to this strike. No amount of sophistry can obscure the fact that the Association has led the teachers on strike to pressure the District into granting concessions that the Association was unable to achieve in negotiations and impasse procedures. Our action today will end that strike and send a clear message that the strike by public school teachers is not an acceptable economic and political weapon to use in a public school employment dispute, that it does not promote effective employer-employee relations, and that it is deleterious to the public welfare.

Raymond J. Gonzales, Member