STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RIO HONDO FACULTY ASSOCIATION, CTA/NEA, Charging Party, v. RIO HONDO COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-1158 PERB Decision No. 292 March 8, 1983
RIO HONDO COMMUNITY COLLEGE DISTRICT, Charging Party, v. RIO HONDO FACULTY ASSOCIATION, CTA/NEA, Respondent.	)	Case No. LA-CO-141

Appearances; Charles R. Gustafson, Attorney for the Rio Hondo Faculty Association, CTA/NEA; Patrick D. Sisneros, Attorney (Wagner, Sisneros & Wagner) for Rio Hondo Community College District.

Before Tovar, Jaeger and Morgenstern, Members.*

DECISION

MORGENSTERN, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Rio Hondo Community College District (District) to a hearing officer's proposed decision finding

*Chairperson Gluck and Member Burt did not participate in the determination of this matter.

that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally adopting a resolution authorizing it to take certain actions in the event of a work stoppage; and that the Rio Hondo Faculty Association, CTA/NEA (Association), did not violate subsection 3543.6(c)[2] by engaging in a one-day strike during mediation proceedings.

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[1]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code, unless specified otherwise.

Subsections 3543.5(a), (b) and (c) provide as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]Subsection 3543.6(c) provides as follows:

> It shall be unlawful for an employee organization to:
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> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

PROCEDURAL HISTORY

On May 30, 1980, the Association filed a charge in Case No. LA-CE-1158 alleging that the District violated subsections 3543.5(a), (b) and (c) by unilaterally changing working conditions of members of the bargaining unit during the 1979-80 school year. Hearing was held on this charge on September 25, 1980.

On October 10, 1980, the District filed a charge in Case No. LA-CO-141 alleging that the Association violated subsection 3543.6(c) by conducting a one-day strike against the District. The Association filed an Answer on November 10, 1980, alleging as an affirmative defense that the strike was provoked by the unfair practices of the District.

On December 2, 1980, the Association filed a Motion to Incorporate the Record in Case No. LA-CE-1158, which motion was taken under advisement by the hearing officer until the District had presented its case at hearing. On February 26, 1981, at the conclusion of the first day's hearing on this matter, the hearing officer granted the Association's Motion to Incorporate the Record in Case No. LA-CE-1158.

At the same time, the Association further moved to incorporate the records of Case Nos. LA-CE-1079, LA-CE-1101 and LA-CE-1157. On August 28, 1981, the hearing officer granted this motion and adjourned the hearing for thirty (30) days to permit the parties to evaluate the records in those cases and to reconvene the hearing if necessary.

In Case No. LA-CE-1079, the Association filed charges on November 30, 1979. Hearing was held on February 6, 1980; the hearing officer's proposed decision issued on May 15, 1980; and the District filed exceptions on June 3, 1980. In Rio Hondo Community College District (11/30/82) PERB Decision No. 260, the Board affirmed the hearing officer's conclusions that the district violated subsection 3543.5(a) on October 2, 1979, by placing a letter of reprimand in the personnel file of Leonora Davila because of her exercise of rights guaranteed by EERA and by processing a letter of reprimand to Gary Curtis in a manner inconsistent with its own procedures, and that it violated subsections 3543.5(a) and (b) by denying Davila and Curtis their right to be represented and denying the Association its right to represent its members at meetings called to discuss the reprimands.

In Case No. LA-CE-1101, the Association filed charges on January 8, 1980, and amended its charge on January 22, 1980. Hearings were held on June 4, 5, 12, 19 and July 9 and 10, 1980. The hearing officer's proposed decision dismissing all charges issued on April 1, 1981, and the Association filed exceptions on April 20, 1981. In Rio Hondo Community College District (12/28/82) PERB Decision No. 272, the Board found that the district violated subsections 3543.5(a) and (b) on January 16 and 18, 1980, by denying employees Vincent Furriel, Steve Collins and Dan Guerrero the right to representation by

the Association at the informal stage of the grievance procedure where the employees were grieving proposed changes in their schedules, and concurrently denying the Association its right to represent its members.

In Case No. LA-CE-1157, the Association filed charges on May 27, 1980. Hearing was held on March 30, 31 and April 1, 1981; the hearing officer's proposed decision issued on April 13, 1982, and the district filed exceptions on April 30, 1982. In Rio Hondo Community College District (12/31/82) PERB Decision No. 279, the Board held that the district violated subsections 3543.5(a), (b) and (c) by unilaterally changing various working conditions of certificated employees during the 1979-80 school year.

FACTS

The District and the Association engaged in meeting and negotiating during the 1979-80 school year for a collective bargaining agreement. The Association made its initial proposal on June 27, 1979, and explained the proposal on July 17 and 31, 1979. The District made its initial proposal on October 2, 1979. From October 16 to November 26, 1979, the District explained its proposal.

On December 6th, 10th and 13th, the parties met, but the District refused to discuss single items until the Association responded to its total proposal.

On January 10, 1980, the Association presented a comprehensive counteroffer very similar to its original proposal and, upon the District's request, explained the counteroffer on January 17, 1980. On January 18, 1980, the District presented a report of its financial status. On February 6, 1980, the District itemized the cost of the Association's proposal and promised to make a counterproposal.

The District distributed a "minicontract" on economic issues to the Association on February 8, 1980. On February 14, 1980, the Association responded to the minicontract and proposed changes to it. The District gave the Association until March 3, 1980, to accept the minicontract as presented and insisted on a merit pay provision.

The Association rejected the minicontract, and the parties declared impasse on February 22, 1980. At that time, the parties had reached an understanding only on the first three articles of the collective bargaining agreement - the agreement, term and recognition clauses.

A mediation session was held on March 24, 1980. The mediator directed the parties back to bargaining, and the parties returned to negotiations on April 14, 1980, meeting on seven occasions thereafter. The District continued to insist on a minicontract with a merit pay provision. The Association agreed on May 6, 1980, to allow a District merit plan outside the contract. However, on May 13, 1980, the Association

refused to consider the minicontract and renewed its January 10th counteroffer. On that date, both parties agreed that impasse had been reached and that mediation should continue. A second mediation session was scheduled for May 29, 1980.

Also on May 13, 1980, the Association met and adopted a resolution authorizing the executive committee of the Association to call a one-day "Day of Dignity" strike to protest the stalled state of negotiations. No date was set for the Day of Dignity; the committee was authorized to call it whenever it deemed it would be most appropriate.

At a special meeting on May 21, 1980, the District's board of trustees adopted a resolution authorizing certain actions to be taken by the District " . . . when the Superintendent/ President deems that a strike, walkout, slow-down or other type of work stoppage by the employees of the District exists or is likely to exist . . . ."

Contrary to past practice, the Association was not provided with a copy of the resolution in advance of the board meeting or at the meeting. Copies of the resolution were made available the following day. A number of subjects covered by the resolution were included in the Association's bargaining proposals and were on the table at the time the resolution was adopted. Immediately prior to adoption of the resolution,

Association President Mary Ann Pacheco addressed the board, urging negotiations instead of adoption of the resolution.[3]

On May 27, 1980, the resolution was formally adopted by the board by approval of the minutes of its prior meeting. At approximately 10:00 that evening, President Pacheco, acting on behalf of the Association's executive committee, decided to hold the Day of Dignity strike the following day.

The Day of Dignity occurred, as scheduled, on the 28th of May, with 90 percent of the Association members participating in the strike. In response, the District implemented the following measures prescribed by the resolution passed by the board of trustees: deducting a day's pay and fringe benefits from the next salary warrant of teachers participating in the Day of Dignity; hiring temporary faculty replacement employees; hiring security guards; refusing to pay for certificated overload assignments not performed; suspending an employment policy; and refusing to grant leaves of absence.

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[3]Association President Mary Ann Pacheco testified:

> . . . I stated that the Association's negotiations team was present at that time and ready to negotiate on a contract that night, all night, all the next day, however long it would take for us to settle. And I urged the board not to consider the resolution that was pending before it and that, rather we get back to negotiating to settle our differences.

The District did not implement those clauses of the resolution suspending organizational privileges, suspending grievance procedures, and disciplining employees who participated in the strike.

The parties resumed negotiations in mediation sessions on May 29 and June 5, 1980. On June 5th, the parties finally reached a collective bargaining agreement. The agreement was ratified later that month.

DISCUSSION

The District asserts that the hearing officer erred principally in two respects:[4]

1. In finding that the District failed to show legitimate business necessity as a defense to its adoption and partial implementation of the emergency resolution; and

2. In failing to find that the Association committed an illegal act by engaging in a one-day strike.

For the reasons set forth below, we affirm the hearing officer's conclusions as to the emergency resolution but on the District's second exception, we reverse the hearing officer and find that the Association's strike was an unfair practice.

The Emergency Resolution

This issue presents the question of what actions a school

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[4]The District additionally excepts to a number of the hearing officer's factual findings. We find these exceptions to be either without merit or inconsequential.

district is justified in taking to prepare for a threatened work stoppage.[5] A district unquestionably has a right to prepare for a strike by taking prudent actions which do not violate the law.[6] Nor can a district be faulted for making such preparations at a time when calm and reason prevail, well in advance of an actual emergency. However, if in the name of preparedness a district proceeds to violate legally protected rights of employees and employee organizations, then calm and reason have given way to labor law violations.

Here, legal and prudent measures taken by the District include: hiring substitutes to replace strikers (Mackay Radio (1938) 304 U.S. 333 [58 S.Ct. 904]) and suspending the employment policy which interfered with such hiring; hiring

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[5]The Board has recently addressed this issue in part in Barstow Unified School District (6/11/82) PERB Decision No. 215 and Sacramento City Unified School District (6/28/82) PERB Decision No. 216, and previously considered the similar issue of preparation for a threatened fiscal crisis in San Mateo County Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105; and Sutter Union High School District (10/7/81) PERB Decision No. 175.

[6]National Labor Relations Board (NLRB) decisions are in accord. See Betts Cadillac Olds (1951) 96 NLRB 268, 286 [28 LRRM 1509] stating that an employer may take "reasonable measures . . . where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike." And see Quaker State Oil Refining Corp. v. NLRB (1958) 121 NLRB 334, 270 F.2d 40 (3d Cir. 1959), cert. denied (1960) 361 U.S. 917. (It is for the NLRB to determine if it is a reasonable response to a reasonably feared work stoppage.)

security guards; authorizing appropriate legal action (Mid-America Machinery (1978) 238 NLRB 537, 546); and refusing to pay strikers for time not worked, including fringe benefits (Simplex Wire & Cable Co. (1979) 102 LRRM 1452).

In other respects, however, the resolution overstepped the bounds of the law.

Threatened Suspension of Employee Organization Rights and Grievance Procedure

The emergency resolution authorized the suspension of employee organization rights, including dues deduction and access to college mail, bulletin boards, telephones and meeting rooms,[7] and also authorized the suspension of the faculty

[7]Section 10 of the Resolution provides:

> Suspension of Employee Organization Privileges
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> Any employee organization which urges its members to participate in a work stoppage or other illegal activity as outlined above shall have its privileges as an acknowledged employee organization withdrawn including, but not limited to:
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> A. Use of College mail service.
>
> B. Use of College bulletin boards.
>
> C. Use of College telephone facilities for organizational purposes.
>
> D. Use of College premises for meeting purposes.
>
> E. Privilege of employee organization officers and representatives to visit

grievance procedure.[8] These provisions of the resolution were never implemented.

Employee organization rights are protected by section 3543.1[9] and include the right to dues deductions, reasonable

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college property other than regularly assigned by the District.

F. Dues deduction.

[8]Section 2 of the Resolution provides:

> Suspension of Academic Due Process, Faculty Grievance (Certificated Personnel) C P . 5005
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> The provisions of this resolution and the application thereof to bargaining unit members are specifically determined not to be subject to the existing guideline for "Academic Due Process, Faculty Grievance (certificated personnel)" C P . 5005. No bargaining unit member or the Rio Hondo College Faculty Association/CTA-NEA shall be permitted to file or process a grievance regarding any application or effect of this resolution or its effect or operation upon the Association.

[9]Section 3543.1 provides, in pertinent part:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

access, and the right to represent its members in grievances. Mount Diablo Unified School District (12/30/77) EERB[10] Decision No. 44, Rio Hondo Community College District (12/28/82) PERB Decision No. 272.

Clearly, then, the District's resolution threatened to take away the Association's statutorily mandated rights. Apparently relying on the fact that these provisions were not implemented, the District offered no justification for the threatened suspension of these statutory rights.

A threat to punitively suspend statutory rights tends to undermine the status of the exclusive representative and has a chilling effect on employee activity. This is so because an

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> (b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.
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> . . . . . .
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> (d) All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

[10]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

employer's threat is backed by the considerable power that an employer holds over an employee. Even if acting illegally, an employer can withhold employment and earnings for months or even years before a legal remedy can be effected. Faced by such potential hardship and dire consequences, an employee might well be persuaded to forego rights, even those provided by the Legislature and protected by the Board, rather than test the employer's authority and intent.

In Barstow, supra, the Board summarily affirmed the hearing officer's finding that, even without implementation, the threat to suspend statutorily protected employee organization rights in an emergency resolution constitutes a violation of subsection 3543.5(a). The decision states:

> The District offers no support for an argument that a school district has a right to rescind statutory rights nor can one reasonably be made . . . .

Following this holding, the Board finds that the threatened suspension of the statutorily guaranteed employee organization rights of dues deductions, reasonable access, and the right to represent members in grievances, constitute separate violations of subsection 3543.5(a).

Change in Leave Policy

A unilateral change by an employer concerning a matter which is a proper subject of negotiation is, absent a valid affirmative defense, a per se refusal to negotiate. Moreno Valley Unified School District (4/30/82) PERB Decision No. 206;

San Mateo Community College District, supra; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51.

Leave policy is a specifically enumerated subject within the scope of representation.[11] The record indicates that the Association had introduced a proposal on leave policy during the course of negotiations, and that Association President Pacheco addressed the board and requested negotiations on the matters contained in the resolution immediately before the board adopted the resolution.

Section 9 of the resolution concerns leave policy.[12] While much of this section simply reiterated existing policy

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[11]Subsection 3543.2(a) provides, in pertinent part, as follows:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits . . . leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security . . . , procedures for processing grievances . . . , and the layoff of probationary certificated school district employees . . . . (Emphasis added.)

[12]section 9 of the resolution provides as follows:

> Leaves of Absence-Certificated
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> Provisions of Board Policy 5400, "Leaves of Absence - Certificated," are modified as follows:
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> Leaves of Absence - All employee absences

authorizing the District to require verification of illness and to withhold pay for nonperformance of duties, in other respects this section changed existing board policy.

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must be substantiated by written proof of the need for the leave.

a. Sick Leave - Employees requesting pay for sick leave must complete a signed affidavit of illness and provide a doctor's certificate of illness within five working days of the last day of absence.

b. Personal Necessity - Personal Necessity leave will only be allowed for emergency reasons as determined by the Superintendent/President.

Unauthorized Leave

a. Unauthorized leave is defined as non-performance of those duties and responsibilities assigned by the district and its representatives, including all duties and responsibilities as defined by the Education Code, rules and regulations of the Governing Board of California Community Colleges, and policies and regulations of the Board of Trustees of the Rio Hondo Community College District. Such unauthorized leave may include but is not limited to collective refusals to provide service, unauthorized use of sick leave, unauthorized use of other leave benefits, non-attendance at required meetings, and failure to perform supervisory functions at college-sponsored activities.

b. An employee is deemed to be on unauthorized leave at such time and on such occasions as the employee may

Specifically, existing board policy 5400 provided that, while prior approval was generally required for personal necessity leave, no prior approval was required for leave occasioned by the death or serious illness of a member of an employee's immediate family, or for an accident involving an employee's person or property or that of a member of an employee's immediate family. The school board resolution eliminated these exemptions from the prior approval requirement. In addition, the resolution adopted a higher standard for granting personal necessity leave, changing the language from "circumstances serious in nature" to "emergency reasons."

The District contends that its need to protect itself against a threatened strike constitutes a valid business necessity defense to its unilateral change in leave policy.

In Sacramento City Unified School District, supra, this Board considered an asserted defense of "necessity" where the

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absent himself/herself from required duties without approval.

c. Unauthorized leave shall constitute a breach of contract and therefore may result in the initiation of dismissal procedures, loss of salary or such disciplinary action as may be deemed appropriate by the Board of Trustees.

d. Beginning on the first day of unauthorized leave, no warrant shall be drawn in favor of any employee for the days for which he/she has not faithfully performed all duties prescribed (Education Code Section 87828) .

district adopted an emergency resolution retroactively changing leave policy the day following a one-day strike. The Board rejected the district's proffered defense, finding that the change in leave policy was not necessary to avert a serious threat of interruption of educational services.

The same reasoning applies to the change in leave policy here. The District could have achieved the same result by simply enforcing or announcing its clear intent to continue to enforce the existing policy, as that policy did not provide for, or allow, the use of personal leave to participate in a work stoppage. Therefore, this change in leave policy cannot be found to be reasonably "necessary to avert a serious threat of interruption of educational services" and is not justified by business necessity.

For this reason, the Board finds that the unilateral change in leave policy constitutes a refusal to bargain in violation of subsection 3543.5(c) and subsections (a) and (b) derivatively. San Francisco Community College District, supra; Barstow Unified School District, supra.

The One-Day Strike

The District argues that public employee strikes are illegal, citing a number of Court of Appeal cases as authority.[13] According to the District, if a strike is

[13]Stationary Engineers Local 39 v. San Juan Suburban Water District (1979) 90 Cal.App.3d 796 [153 Cal.Rptr. 666];

illegal, this Board may not find it to be justified on any grounds.

However, as discussed more fully in Modesto City Schools (3/8/83) PERB Decision No. 291, the appellate cases relied on by the district are not controlling on our decision here. All of these cases were decided before the effective date of EERA under substantially different statutes[14] which, unlike EERA, do not provide a comprehensive bargaining scheme or enforcement by an expert administrative agency. Indeed, in the most recent of the cases cited by the District, the court expressly

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Pasadena Unified School District v. Pasadena Federation of Teachers (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41]; Los Angeles Unified School District v. United Teachers (1972) 24 Cal.App.3d 142 [100 Cal.Rptr. 806]; Trustees of California State Colleges v. Local 1352, San Francisco State Teachers (1970) 13 Cal.App.3d 863 [92 Cal.Rptr. 134]; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.App.2d 684 [8 Cal.Rptr. 1].

[14]The Winton Act, formerly section 13080 et seq. of the Education Code, governed employer-employee relations in California's public schools prior to the enactment of EERA.

The Meyers-Milias-Brown Act, section 3500 et seq. of the Government Code, governs local government employer-employee relations.

The George Brown Act, section 3525 et seq. of the Government Code, now governs employer-employee relations for managerial and confidential state employees. Prior to the passage of the State Employer-Employee Relations Act (SEERA), Government Code section 3512 et seq., and the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., all State and higher education labor relations were governed by the George Brown Act.

acknowledged the limited scope of its holding in light of the enactment of EERA. It stated:

> We leave for future adjudication the question of whether illegal strikes by educational employees after the effective date of these enactments [EERA] are "unfair practices" within the exclusive jurisdiction of the board. Pasadena Unified School District, supra, 72 Cal.App.3d 100, 114.

Moreover, in San Diego Teachers Association v. Superior Court (1979) 24 Cal.App.3d 1 [154 Cal.Rptr. 893], the Supreme Court reviewed the state of the law regarding public school employee strikes in California, considering the Court of Appeal cases cited by the District, and declined to grant imprimatur to the reasoning and holdings of those cases. However, the Court did clearly decide, based on "the comprehensiveness of the EERA scheme" and the "marked similarities between EERA and the [National Labor Relations Act]," that the preemption doctrine, which has long been applied to the NLRB, applies similarly to PERB. Thus, the Court held that, "PERB has exclusive initial jurisdiction to determine whether a public school employee strike is an unfair practice and what, if any, remedies PERB should pursue." Id., at p. 14.

Following the Supreme Court's San Diego decision, this Board has exercised its exclusive initial jurisdiction and applied its expertise to determine whether public school strikes were unfair practices in Fremont Unified School District (6/19/80) PERB Decision No. 136, Fresno Unified School

District (4/30/82) PERB Decision No. 208, Westminster School District (12/31/82) PERB Decision No. 277, and Modesto City Schools, supra.

In the instant case, the hearing officer, in a rather cursory discussion, found that this strike "falls squarely within the precedent set by the Board itself in Fremont." He characterized that case as establishing a "totality of conduct" test, and concluded that he:

> . . . [had] little discretion but to consider the one day strike of the Association as only one significant factor in the totality of the employee organization's conduct during negotiations.

We find that the hearing officer misstated our holding in Fremont, and consequently misapplied it to the facts of this case. In Fremont, the Board determined that the work stoppage at issue there did not constitute an unlawful refusal to participate in good faith in the impasse procedures.[15] Contrary to the hearing officer's characterization, this decision was based on two distinct findings: (1) the totality of the employee organization's "overall conduct during mediation and factfinding in fact negate an inference of bad faith," and (2) "the work stoppage was provoked by the

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[15]In an unpublished opinion, the Court of Appeal reversed the Board's finding that the District committed an unfair practice. However, it did not disturb the rule of law stated therein nor the Board's finding that the strike was protected, Fremont Unified School District (3/25/82) PERB Decision No. 136a.

District's own unlawful conduct and was undertaken as a last resort."

Conversely, in Westminster School District, supra, where "no employer provocation is shown and a strike is motivated solely by economic considerations to gain concessions at the bargaining table," we found that the strike itself amounts to a refusal to negotiate. If undertaken prior to the onset of impasse, such strike violates the duty to negotiate in good faith. If undertaken during impasse, such a strike also violates the duty to participate in good faith in the impasse procedures.

Therefore, it is necessary to determine whether this strike was "provoked by the District's own unlawful conduct and was undertaken as a last resort" (Fremont) or if it was motivated "by economic considerations to gain concessions at the bargaining table" (Westminster).

Provocation is a question of fact. Under the NLRA, for a strike to be deemed an unfair practice strike, it must be caused by an unfair labor practice. The mere fact that an unfair labor practice is committed prior to a strike does not necessarily render that strike an unfair labor practice strike. Latrobe Steel Co. v. NLRB (1980) 630 F.2d 171 [105 LRRM 2393, 2400], citing NLRB v. Broadmoor Lumber Co. (9th Cir. 1978) 578 F.2d 238, 242; NLRB v. Colonial Haven Nursing Home, Inc. (7th Cir. 1976) 542 F.2d 691, 704-5 [93 LRRM 2241].

Rather, the burden rests with the striking employee organization to prove, in the nature of an affirmative defense, that the District's unfair labor practice in fact caused the strike. To ascertain the actual cause of a strike, it is necessary to consider the record as a whole (NLRB v. Wichita Television Corp. (1960) 277 P.2d 579 [45 LRRM 3096, 3100]), cert, denied 364 U.S. 871), including such indicators as union statements as to the cause of the strike in testimony (Latrobe Steel, supra), at the time a strike vote was taken, or in the content of picket signs and handbills used during the strike (Wichita Television, supra), the closeness in time between the unfair practice and the strike, union expression of opposition to the unfair practice prior to the strike (Jordan Bus Company (1954) 107 NLRB 717), and the nature and seriousness of the unfair practice, as well as any other relevant evidence.

In the instant case, the hearing officer did not address the question of provocation. Our de novo review of the entire record in this case compels us to conclude that the Association has failed to carry its burden of proof. Though the District committed several unfair practices which could arguably have provoked the strike, the evidence presented by the Association fails to establish a causal connection between these unfair practices and this strike. Rather, the prevailing weight of evidence indicates that the Day of Dignity was conceived and conducted to protest the stalled state of negotiations and

thereby bring pressure to bear on the District to grant concessions at the bargaining table. The District's conduct in negotiations arguably evidences surface bargaining and illegal delay, violations which might provoke a strike. However, the Association, which generally showed no hesitancy to file unfair practice charges, never charged the District with an unfair practice by its conduct at the bargaining table and, as the issue was not fully litigated, there can be no finding of an uncharged violation. (Santa Clara Unified School District (9/26/79) PERB Decision No. 104.)

The only direct evidence concerning the cause of the strike consists of the testimony of Association President Pacheco, two strike leaflets introduced by the Association and a newspaper article introduced by the District. As the only witness on the issue of motivation, we rely heavily on the testimony of President Pacheco.

She testified that "[The] primary purpose was to get out information about the stalled state of our negotiations" (Case No. LA-CE-1158, RT 19) and that, "the Association felt that we were not getting anywhere in negotiations and that it was very important that we get the message out to the community." (Case No. LA-CE-1158, RT 27.) Only after a series of leading questions by the Association's attorney did Pacheco acknowledge that, in addition to the stalled state of negotiations, there were other reasons for the strike; "the major one was the

passage of the resolution on emergency procedures." (Case No. LA-CE-1158, RT 28.)[16] Then, in restating her testimony, she said:

> The reasons for the day of dignity were to get our message to the community and the other purpose, primary one, not purpose, let

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[16]The transcript reveals the following exchange at pp. 27-28.

> Q. Did the fact that the Board of Trustees had passed the resolution on a —
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> SISNEROS: Objection, Mr. Hearing Officer.
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> Q. (By Mr. Gustafson) — emergency policy rules and regulations on —
>
> HEARING OFFICER: Just a moment.
>
> Q. (By Mr. Gustafson) — May 21 have anything to do with the decision to hold a day of dignity?
>
> HEARING OFFICER: All right. There's —
>
> WITNESS: Yes, very much.
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> HEARING OFFICER: Hold on. There's been an objection to that last question.
>
> SISNEROS: I think he may be leading the witness.
>
> HEARING OFFICER: Yeah, I think you were leading.
>
> GUSTAFSON: I didn't suggest an answer. She can answer yes or no.
>
> SISNEROS: (Inaudible.)
>
> HEARING OFFICER: It sounded leading to me. I'd like you to reask that question. Can

> me rephrase that. The other reason for it was that we felt that we were getting absolutely nowhere with the District and the passage of the emergency resolution was a prime example of how the District was responding to our good faith efforts to try to negotiate with them. (Case NO. LA-CE-1158, RT 29.)

At no time did Pacheco mention any unfair practices prior to passage of the emergency resolution.

Thus, it is clear that to Pacheco herself, the emergency resolution provided at most only a secondary reason for the strike in that it was viewed as a "prime example" of the District's intransigence in negotiations. The documentary evidence introduced by both parties supports this conclusion. The District's Exhibit A in Case No. LA-CE-1158 is a reprint of

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> you ask it in a —
>
> GUSTAFSON: Nonleading manner.
>
> HEARING OFFICER: — nonleading manner.
>
> GUSTAFSON: If you give me a minute, I'll think of something.
>
> Q. (By Mr. Gustafson) You've already indicated, Ms. Pacheco, one reason why the Association made the decision on May 27 to stage a day of dignity, are you aware of any other reasons?
>
> A. Yes, there were other reasons?
>
> Q. Could you tell us what those other reasons are?
>
> A. The major one was the passage of the resolution on emergency procedures.

an article from the Los Angeles Times dated May 22, 1980. There Pacheco recited the Association's bargaining demands and is quoted as saying that teachers are prepared to consider calling an all-out strike unless negotiations are resumed and a satisfactory agreement is reached. Similarly Association Exhibits 7 and 8 in Case No. LA-CO-141, two flyers used during the strike, concentrate on bargaining issues. "Why Are RHC Teachers Striking?" recites certain "Facts" and concludes, "Won't you join us in demanding that the board provide a just and fair contract for teachers?" Similarly, "For The Record" presents the history of negotiations in greater detail and concludes on the bottom line, "We want a contract NOW!"

Though both of these leaflets allude to various unfair practice charges that were filed against the District, the reference is incidental to the main thrust of the leaflets, the protracted negotiations.

In addition, Pacheco's testimony indicates that the strike was planned prior to the passage of the emergency resolution and cannot be said to be caused by it. The Faculty Association passed a resolution on May 13,

> that the Faculty Association executive committee be authorized to call a one-day day of dignity, a work stoppage to emphasize to a community, in particular the problems that we have been having throughout the year of negotiations. (Case No. LA-CO-141, RT 138.)

A strike planning committee was created. While no specific date was set at that time, Pacheco stated, "The Faculty

Association had the authority to call a one-day walkout whenever it deemed it would be most appropriate." (Case No. LA-CE-1158, RT 76.) (Emphasis added.) Even before May 21, "there were a series of dates that were being considered and the final decision had not yet been made." (Case No. LA-CE-1158, RT 75.)

> There was at the time a kind of lottery and poll that was going around the campus and people were saying dates all over the place, if somebody happened to hit right on the 28th, they may have done that, but the authority to call that date was in the executive committee and the executive committee had given that authority to me. (Case No. LA-CE-1158, RT 81.) (Emphasis added.)

We find, based on Pacheco's unwavering testimony, that the Association had decided on May 13 to hold a one-day strike. The executive committee and Pacheco were authorized only to set the exact date. In passing an emergency resolution that unilaterally and illegally changed conditions of employment and illegally threatened to deprive employees of statutory rights, the District committed a serious unfair practice that cannot be excused by its failure to carry out all of its threat. But, while the District's passage of the emergency resolution may have triggered Pacheco's decision to set the date for the following day, this event influenced only the timing of the strike, not its occurrence.

Moreover, the nature of the District's unfair practice, an emergency resolution which was itself a response to the

Association's well-publicized strike threat, blurs the chain of causation. Given the paucity of direct evidence of motivation, we decline to invoke the bootstrapping logic and circular reasoning necessary to conclude that this strike was caused by a resolution adopted to prepare for it.

In conclusion, while the Association argued repeatedly, in its answer, brief, exceptions and at hearing, that the strike was "provoked by the District's own unlawful conduct and was undertaken as a last resort," the Association simply failed to prove its argument. During the period in which the parties were engaged in negotiations, the Association filed at least six unfair practice charges against the District. Three of these charges were sustained on appeal to this Board and are summarized in the Procedural History section of this decision. Yet at no time did the Association charge that the District engaged in bad faith or surface bargaining at the table. At the hearing on this matter, Association counsel claimed to have been caught "totally by surprise" by the District's presentation of testimony regarding the history of negotiations between the parties. (Case No. LA-CO-141, RT 56.) In response, the Association moved to incorporate the records in the above-noted unfair practice cases. That motion was granted so that the records in those cases and the Board's decisions therein are properly before us. Nonetheless, no evidence in the record, apart from counsel's argument, supports a finding of a causal connection to the strike. Without more, the mere

fact that unfair practices were committed is insufficient for this purpose. Latrobe Steel Co. v. NLRB, supra.

We conclude that this one-day strike was motivated by economic considerations to gain concessions at the bargaining table and, therefore, amounts to a refusal to bargain in good faith in violation of subsection 3543.6(c). In addition, because the strike occurred while statutory impasse procedures were underway, it also violates subsection 3543.6(d). Westminister School District, supra.

REMEDY

Subsection 3541.5(c) of the EERA sets forth the PERB's remedial authority in unfair practice cases. It provides:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

This section is similar to section 10(c) of the National Labor Relations Act and, therefore, in fashioning the appropriate relief, cognizance is taken of applicable federal precedent. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.App.3d 608 [116 Cal.Rptr. 507; 87 LRRM 2453].)

In the present case, the District has unilaterally disrupted the status quo. A remedy requiring the District to return to the status quo ante is appropriate to effectuate the policies of the EERA because it restores, to the extent

possible, the positions the parties occupied prior to the unilateral change in the status quo. Plycoma Veneer Co. (1972) 196 NLRB 1009 [1008 LRRM 1222]. Consequently, the District shall be ordered to restore the leave policies as they existed on May 21, 1980, unless and until the parties have exhausted the statutory impasse procedures or agree otherwise by their adoption of a negotiated agreement. In furtherance of this goal, the District shall also be ordered to make the affected employees whole by paying them the wages (i.e., leave) they would have received had the unilateral changes outlined in the decision not been made, with interest at the rate of 7 percent per annum. Notwithstanding the above, the District, pursuant to its past practice, may require verification if it reasonably suspects that an individual employee has abused his or her leave. Any employee whose absence did not conform to the leave policies as they existed on May 21, 1980, need not be paid for that day.

This remedy is consistent with NLRA precedent. See NLRB v. Allied Products Corp. (1975) 218 NLRB 1246 [89 LRRM 1441] enforced as modified (6th Cir. 1977) 548 F.2d 644 [94 LRRM 2433] where a similar remedy was granted as a result of the employer unilaterally changing the status quo. Furthermore, the record discloses no evidence that an order restoring the status quo ante here would impose an unfair burden on the District. NLRB v. Allied Products Corp., supra.

The District will also be ordered to rescind sections 2, 9 and 10 of the Emergency Resolution because they interfere with rights guaranteed by the EERA.

It is also appropriate that the District be required to post a notice incorporating the terms of the order. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to restore the status quo.

The Board also finds it appropriate in this case to order the Association to cease and desist from refusing to negotiate in good faith and refusing to participate in good faith in the statutory impasse procedures by engaging in a concurrent strike. It is necessary that all unit employees be fully informed of this Decision and thereby understand that the strike which occurred here violated EERA. The Rio Hondo Faculty Association, CTA/NEA, will be required to post the attached Notice at all places throughout the District where notices are customarily placed and, additionally, to distribute copies of the Notice to all employees in the unit through the District's internal distribution system if that is the customary method of distributing Association literature.

It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and of the parties' readiness to comply with the ordered remedy. See

Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

ORDER

Based upon the foregoing facts, conclusions of law and the entire record in these cases, it is found that the Rio Hondo Community College District has violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act. It is hereby ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation, and specifically with respect to the alteration of leave policies.

2. Denying the Rio Hondo Faculty Association its right to represent unit members by unilaterally altering leave policies without meeting and negotiating with the Association.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing leave policies without meeting and negotiating with the exclusive representative.

4. Interfering with employees because of their exercise of their right to participate in the activities of an employee organization by threatening to suspend the employee organization's rights guaranteed to them by the EERA to dues deductions, reasonable access and to represent its members in grievances.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE EERA:

1. Rescind Sections 2, 9 and 10 of the Resolution of the Board of Trustees Adopting Emergency Policy Rules and Regulations adopted May 21, 1980, and reinstate the leave policy in effect prior to that date unless a new policy has been lawfully adopted through negotiations.

2. Make the affected employees whole by paying them the leave they would have received had the unilateral changes not been made, plus interest at the rate of 7 percent per annum. Payment need not be made to those employees who fail to provide verification requested pursuant to the District's reasonable belief that such employees had abused their leave benefits. The verification required may not exceed the type requested of employees in past circumstances whose abuse of leave was suspected.

3. Within thirty (30) days from service of this

Decision, post at all school sites and all other work locations where notices to employees customarily are placed, copies of the Notice attached as Appendix 1. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that said Notices are not reduced in size, altered, defaced or covered by any other material.

4. At the end of the posting period, notify the Los Angeles regional director of the Public Employment Relations Board, in writing, of the action taken to comply with this Order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

It is further found that the Rio Hondo Faculty Association, CTA/NEA, has violated subsections 3543.6(c) and (d) of the Educational Employment Relations Act. It is hereby ORDERED that the Association shall:

A. CEASE AND DESIST FROM:

Violating subsections 3543.6(c) and (d) by refusing to negotiate in good faith and refusing to participate in good faith in the statutory impasse procedures by engaging in a strike during the course of mediation.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within thirty (30) days of service of this Decision, post at all school sites and all other work locations upon those bulletin boards where the Rio Hondo Association's notices are customarily placed, copies of the attached Notice to Employees (Appendix 2). Such posting shall be maintained for a period of thirty (30) consecutive workdays.

In addition, the Association shall distribute copies of the Notice to all unit employees through the District's internal distribution system if that is the customary method of distributing Association literature.

2. At the end of the posting period, notify the Los Angeles regional director of the Public Employment Relations Board, in writing, of the steps taken by the Rio Hondo Faculty Association, CTA/NEA, to comply with this Order. Continue to report in writing to the regional director periodically thereafter as directed. All reports shall be served concurrently on all parties.

Members Tovar and Jaeger joined in this Decision.

APPENDIX 1

NOTICE TO CERTIFICATED EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-1158 in which all parties had the right to participate, it has been found that the Rio Hondo Community College District has violated subsection 3543.5(c) of the Educational Employment Relations Act (EERA) by refusing or failing to meet and negotiate with the Rio Hondo Faculty Association by adopting an emergency resolution in May 1980 which unilaterally changed leave policies.

It has also been found that this same conduct violated subsection 3543.5(b) of the EERA since it interfered with the right of the Rio Hondo Faculty Association to represent its members.

It has also been found that this same conduct interfered with negotiating unit members' right to be represented by their exclusive representative, thus constituting a violation of subsection 3543.5 (a) of the EERA.

It has also been found that the District interfered with employees because of their exercise of their right to participate in the activities of an employee organization, in violation of subsection 3543.5(a) of the EERA by adopting an emergency resolution in May 1980 which threatened to suspend an employee organization's rights guaranteed to them by the EERA to dues deductions, reasonable access and to represent its members in grievances if the organization advocated that its members participate in a work stoppage.

As a result of this conduct, we have been ordered to post this Notice, and we will abide by the following:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation, and specifically with respect to the alteration of leave policies.

2. Denying the Rio Hondo Faculty Association the right to represent unit members by unilaterally altering leave policies without meeting and negotiating with it.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

4. Interfering with employees because of their exercise of their right to participate in the activities of an employee organization by threatening to suspend an employee organization's rights guaranteed to them by the EERA to dues deductions, reasonable access and to represent its members in grievances, if the organization advocated that its members participate in a work stoppage.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Rescind Sections 2, 9 and 10 of the Resolution of the Board of Trustees Adopting Emergency Policy Rules and Regulations adopted May 21, 1980, and reinstate the leave policy in effect prior to that date unless and until the parties adopt a new policy, either by reaching a negotiated agreement or exhausting the statutory impasse procedure.

2. Make the affected employees whole by paying them the leave they would have received, plus interest at the rate of 7 percent per annum, had the unilateral changes not been made, except that payment need not be made to those employees who fail to provide verification requested by the District pursuant to its reasonable belief that such employees had abused their leave benefits, provided that such verification may not exceed that required in past circumstances where abuse of leave was suspected.

DATE: RIO HONDO COMMUNITY COLLEGE DISTRICT

By _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

APPENDIX 2

NOTICE TO CERTIFICATED EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case Nos. LA-CE-1158 and LA-CO-141 in which all parties had the right to participate, it has been found that the Rio Hondo Faculty Association, CTA/NEA, violated subsection 3543.6(c) and (d) by engaging in a strike during mediation. As a result of this conduct, we have been ordered to post this Notice and abide by the following. WE WILL:

A. CEASE AND DESIST FROM:

Refusing to negotiate in good faith and refusing to participate in good faith in the statutory impasse procedures by engaging in a strike during the course of mediation.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

Post and distribute copies of this Notice to all unit employees.

RIO HONDO FACULTY ASSOCIATION,
CTA/NEA

Dated: _____ By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.