STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALHAMBRA TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-1801
v.	)	PERB Decision No. 560
ALHAMBRA CITY AND HIGH SCHOOL DISTRICTS,	)	January 8, 1986
Respondent.	)	

Appearances: Michael R. White, Attorney for Alhambra Teachers Association, CTA/NEA; O'Melveny & Myers by Paul M. Lusky for Alhambra City and High School Districts.

Before Hesse, Chairperson; Burt and Porter, Members.

DECISION

HESSE, Chairperson: This case is before the the Public Employment Relations Board (PERB or Board) on exceptions filed by the Alhambra City and High School Districts (District) to a proposed decision of an administrative law judge (ALJ) which found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by offering to give employees, represented by the Alhambra

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to:

Teachers Association, CTA/NEA (Association), an early retirement benefit conditioned upon the Association's agreement not to request negotiations on the subject and by sending a letter to all certificated employees represented by the Association explaining why they were not eligible for this early retirement benefit.

The ALJ found that when the District conditioned the retirement benefit upon the Association's waiver of its bargaining rights, the District failed to bargain in good faith. The ALJ held that this action constituted a per se refusal to bargain and was similar to a unilateral change of a matter within the scope of bargaining. The ALJ also found that this conduct was both derivatively and independently violative of EERA because a refusal to bargain has the effect of interfering with the employees' EERA right to representation and the employee organization's EERA right to represent and bargain for bargaining unit members. The ALJ found the May 9, 1983 communication from the District to the bargaining unit members to be a violation of the EERA.

> (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.

For the reasons which follow, we reverse the underlying proposed decision and dismiss the charge.

FACTUAL SUMMARY

At all times relevant to the issues in this case, the certificated bargaining unit was represented by the Association, and the classified bargaining unit was represented by the California School Employees Association (CSEA). The classified unit employees were covered by a collective bargaining agreement effective September 1, 1982 to October 31, 1983. The certificated employees were covered by a collective bargaining agreement that expired on August 31, 1982. Negotiations for a successor agreement to the certificated unit agreement began in March 1982. A tentative agreement was reached on January 27, 1983, after almost eleven months of negotiations. This tentative agreement was then submitted to the Association for ratification and to the school district governing board for approval.

In January 1983, the District perceived a possible financial crisis in the coming year. A determination was made by the District that if classified employees were encouraged to retire one or two years earlier than their anticipated retirement date, a substantial savings could be attained without layoffs.

To accomplish this objective, Superintendent Bruce Peppin and Deputy Superintendent William Pickford developed an early

retirement incentive plan (RIP).[2] As envisioned by Peppin and Pickford, the RIP was to be offered only to the classified employees. Pickford and Peppin presented the RIP to the school district governing board on February 1. Following a review of the proposal, the board instructed Peppin and Pickford to revise the proposal so as to include all District employees.

On February 2, 1983, Pickford met with CSEA and requested that CSEA accept the RIP as school board policy and agree not to negotiate the RIP. CSEA, on behalf of the classified employees, agreed.

During the first week in February, Peppin met with the Association president, Jane Christeson, and made an offer identical to the offer accepted by CSEA. Christeson indicated that she would have to take it to the Association representative council for study. Peppin testified that his understanding was that Christeson would get back to him after showing the plan to the council.

On February 15, at a meeting of the Alhambra Board of Education, the board unanimously adopted the first reading of the RIP as a board policy covering all employees.[3]

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[2]Under this RIP, an employee who gave notice of retirement prior to June 1, 1983, and whose retirement became effective before September 1, 1983, would receive 15 percent above the initial verified monthly retirement compensation for a period of 36 months thereafter. In addition, an employee who retired from other locally administered retirement systems in California, the State Teachers' Retirement System, or the Public Employees' Retirement System, would also receive 15 percent above their total retirement allowance from all systems.

[3]Standard practice by the board in adopting policies was

On or about February 28, Christeson told Peppin that the Association would not agree to the RIP without negotiations. In response to a question from Peppin, Christeson said that the Association did not want its members to be included in the second board reading of the RIP policy. She indicated that the Association wanted to negotiate the proposal and that if the District was concerned about the Association's internal contract ratification timelines, which required a three-week process, those matters could be worked out. Peppin indicated that the District was unwilling to negotiate over the RIP.

On March 1, 1983, the Association voted to ratify the 1982-84 collective bargaining contract. Also on the same date, the school board unanimously adopted the revised RIP policy which deleted all certificated bargaining unit employees' eligibility from the provisions.

On March 15, the District also signed the 1982-84 collective bargaining contract for the certificated employees. The 1982-84 contract included a retirement incentive plan,[4]

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to have two readings of proposed policies at board meetings before their formal adoption.

[4]Article XX - Early Retirement Incentive Plan

1. Eligibility - Has served the District for 20 years or more; be between the ages of 55 and 58; apply not less than ninety (90) days prior to last day of service; resign from the District after acceptance of option.

2. Program - Work on District-assigned projects for twenty-five (25) days per year at the rate of $200.00 per day not to exceed

unchanged from the 1980-82 contract provision, and a "Conclusiveness of Agreement" (zipper) clause.[5]

On March 18, Association bargaining chairperson Victor Sandoval made a written request to Peppin to open negotiations on the RIP. The District did not respond. Sandoval again wrote to Peppin and reiterated the request to negotiate the RIP. On March 30, in reply to Sandoval's letter, Peppin indicated that the request to open negotiations on the RIP had

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> $5,000.00 per year; may do this for five (5) consecutive years; may terminate at any time, but once terminated cannot be placed back on the program; days to work will be by mutual agreement and agreed to prior to each fiscal year; no travel expenses or other expenses will be covered unless actually required of assignment; District may terminate if participant fails to carry out obligations.

[5]Article XXVII - Conclusiveness of Agreement

> 1. During the term of this Agreement, except for the exceptions noted within Articles of this Agreement, the Association and the District expressly waive and relinquish the right to meet and negotiate and agree that neither party shall be obligated to meet and negotiate with respect to any subject or matter whether referred to or covered in this Agreement or not, even though each subject or matter may not have been within the knowledge or contemplation of either or both the District or the Association at the time they met and negotiated on and executed this Agreement, even though such subjects or matters were proposed and later withdrawn.
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> 2. Salary, fringe benefits, plus one (1) additional individual contract Article may be reopened by either party for the 1983-84 contract year. Other items may be reopened by mutual agreement of both parties.

been discussed with the board of education and the board declined to open negotiations on that item.

On May 1, the Association exercised a 1982-84 collective bargaining agreement option to reopen two contract items. The items proposed by the Association did not include the RIP.

After District administrators received inquiries from the certificated employees asking why they had not been offered the early retirement benefit as the classified employees had been/ the District sent each certificated employee a written explanation.[6]

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[6]The letter read as follows:

ALHAMBRA SCHOOL DISTRICT

May 9, 1983

TO ALL BARGAINING UNIT MEMBERS

What is the Story about the Retirement Incentive Program (RIP)?

I. The district developed the RIP as part of the effort to reduce the budget. In addition to saving money, retirements reduce the need for layoff of existing staff.

II. In early February 1983, the district offered the RIP to ATA and CSEA, asking that it be accepted without negotiation. A written draft of the proposal was presented and an early reply requested. The proposal was scheduled for the February 15 Board agenda.

III. Prior to February 15, CSEA agreed to waive its right to negotiate this item and to accept the offer.

Three issues are presented in this case. The first is whether it is an unlawful refusal to bargain where: following a tentative agreement, an employer makes a proposal conditioned upon the exclusive representative's agreement to waive bargaining on that proposal. The second issue is whether it is unlawful to withdraw such a proposal when the exclusive

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IV. On February 15, 1983, the Board approved first reading of the RIP covering "Any employee of the district. . ., " although no response had been received from ATA. Second reading was scheduled for March 1, 1983.

V. On February 28, 1983, ATA notified the district that it would not accept the offer without negotiation.

VI. On March 1, 1983, the Board approved second reading of the RIP with language amended to include only "classified, Management, confidential employees. . . ."

VII. On March 18, 1983, ATA asked to negotiate the RIP.

VIII. On March 30, 1983, the request to negotiate the RIP with ATA was declined by the Board of Education:

A. The district had stated initially that it did not wish to negotiate this item.

B. The RIP was offered to all employees under the same conditions.

C. CSEA had exercised the collective bargaining procedure of choosing not to negotiate the matter.

Bruce H. Peppin
Superintendent

representative refuses to waive bargaining over the proposal. The third issue is whether the May 9th letter constituted a violation of the EERA. For the reasons discussed below, we reverse the ALJ on all three issues.

DISCUSSION

Per Se Refusal to Bargain

The ALJ determined that the District's offer, conditioned on the Association's waiver of bargaining over the proposal, constituted a per se violation of the EERA. In finding a per se violation, the ALJ relied on NLRB v. General Electric Co. (2nd Cir. 1969) 418 F.2d 736 [72 LRRM 2530] and NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. We find that the ALJ was incorrect in reaching this conclusion.

In Katz, supra, the employer made unilateral changes in wages and conditions of employment without negotiating with the exclusive representative. It was this unilateral change that was a per se violation of the National Labor Relations Act (NLRA). The adoption of the RIP for all employees except certificated employees was not a change in the terms and conditions of employment for the certificated employees. Past and current collective bargaining agreements already contained a RIP provision for certificated employees. Thus, the ALJ's reliance on Katz is incorrect.

In General Electric, supra, there had been a long history of employer animus directed toward the union. The employer told the union of plans to unilaterally institute an insurance

plan for the employees. But, if the union objected, the employer would not offer the insurance to the union members, although it would make the plan available to all other employees. The employer conduct, however, was not limited to this "take-it-or-leave-it" offer. Instead, the employer bypassed the exclusive representative by polling the employees as to their wishes and formulated a plan which it then attempted to force onto the exclusive representative. The employer began an extensive publicity campaign designed to show employees that the union could not win more benefits for them than the employer was willing to offer. Despite the extent of the employer's actions, neither the National Labor Relations Board (NLRB) nor the circuit court found per se violations. Instead, the employer's conduct was viewed under the "totality of the circumstances" standard. By that standard, the NLRB and circuit court found an overall failure to bargain in good faith.

Since the instant case does not involve a unilateral change, but only an allegation of a failure to bargain in good faith, we find that the District's conduct must be viewed under the "totality" test, and not as a possible per se violation. Looking at the events surrounding the District's offer in this case, we conclude there was no bad faith by the District in making its proposal.

First, the parties had just completed nearly 11 months of negotiations, culminating in a tentative agreement. The Association has not alleged that the employer's offer was part

of any continuing bad faith.

Second, the tentative agreement contained an early retirement provision. Thus the employer previously recognized its obligation to negotiate this subject.[7]

Third, there are no facts in the record that indicate the employer "held back" this offer until a tentative agreement was reached. Rather, the administrators made a determination that the District could meet its financial need by offering the plan to the classified employees. It was only after the plan was presented to the board that the board decided the plan should be offered to all employees.

Fourth, the District went directly to the exclusive representative with its proposal. When the Association's agent expressed some interest, the District included certificated employees in the first reading of the policy. Later, when the Association conveyed its rejection of the employer's conditional offer, the District removed the certificated employees from the second reading and adoption of the policy. Thus, the District recognized the exclusive representative's role in representing the certificated employees.

Fifth, the District justified the reason for not wanting to negotiate the proposal: to be effective in meeting the

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[7]It is undisputed that retirement is a mandatory subject of bargaining, including early retirement incentives. Indeed, the parties had negotiated an early retirement incentive provision in their previous collective bargaining agreements, including the tentative agreement reached on January 27, 1983.

District's financial needs, the policy had to be in place early in the year in order to entice employees who otherwise might not retire to retire at the end of that school year. In view of the amount of time it had taken the parties to reach tentative agreement on the contract, the required three-week process under Association bylaws for ratification, and the board's practice of requiring two readings of policies prior to adoption, it is apparent this concern about the length of time to negotiate the proposal was not unreasonable.

Given the totality of the circumstances in this case, we conclude the District's offer did not evidence bad faith.

Withdrawal of Proposal

The second issue we address is whether the District, having made its offer, can withdraw it and refuse to negotiate its proposal. This case involves a question of first impression for the Board. However, NLRB cases are instructive.[8] According to NLRB decisions, the timing of an employer's proposal is critical in determining whether a duty to bargain exists. As discussed below, we also find timing to be a critical factor in deciding if an unfair labor practice has been committed.

The ALJ relied on a NLRB case, Equitable Life Insurance Company and Insurance Agent's International Union (1961) 133

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[8]Cases involving the federal labor laws are persuasive precedent in the interpretation of similarly worded California labor relations statutes. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

NLRB 1675 [49 LRRM 1070], for the proposition that an employer who proposes a change in a contract term during the pendancy of a collective bargaining agreement must negotiate over the proposal upon the demand of the union. Subsequent to his decision, however, the NLRB expressly overturned Equitable Life in Connecticut Light and Power Co. (1984) 271 NLRB No. 124 [116 LRRM 1475].

In Connecticut Light and Power Co., supra, the NLRB held that an employer had no duty to bargain over a proposal it made during the term of the collective bargaining agreement, regardless of whether the proposal was conditioned on the union's accepting it without bargaining. The NLRB rationale is that both parties had the same right to refuse to negotiate over proposals to modify an existing contract. Because the union was not required to negotiate over an employer's proposal to modify an existing contract, the employer likewise did not incur a bargaining obligation by merely making a proposal and, therefore, the employer was free to have a change of mind and withdraw the proposal.

While the instant case does not involve a mid-term contract proposal, we find the policy considerations underlying the NLRB's decision in Connecticut Light and Power to be instructive. In the instant case, the District's proposal to provide an early retirement incentive to the certificated employees[9] came after a tentative agreement on a successor

[9]We note that initially the RIP was to be offered only to

contract had been reached, but prior to contract ratification. The timing in this case is more analogous to a proposed change mid-term rather than a proposal made prior to negotiations or during the contract bargaining process.

Absent good cause, once a tentative agreement is reached, there is an implication that both parties' negotiators will take the agreement to their respective principals in a good faith effort to secure ratification. (NLRB v. Electra-Food Machinery (9th Cir. 1980) 621 F.2d 956 [104 LRRM 2806]; H. J. Heinz Company v. NLRB (1941) 311 U.S. 514 [7 LRRM 291].) While a tentative agreement does not bind either side, it does imply that the negotiators will not "torpedo" the proposed collective bargaining agreement or undermine the process that has occurred. Absent some extenuating circumstance, such as a discovered illegality of a contract term, either side can lawfully refuse to reopen negotiations pending ratification.[10] (See, e.g., Wichita Eagle and Beacon Publishing Company, Inc. (1976) 222 NLRB 742 [91 LRRM 1227].)

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the classified employees. No evidence was presented to indicate an unlawful motive caused this limitation. Rather, the District stated that substantial savings would occur if enough classified employees retired early. Also, the certificated employees already had an early retirement incentive provision in their collective bargaining agreement, albeit that its terms were different than those of the proposed RIP. The school board's desire to include all District employees does not show an intent to violate the Association's rights.

[10]We note, however, that where there has been a good faith rejection of the tentative agreement by the principals, the duty to bargain is also revived.

We find that an employer's proposal made after a tentative agreement has been reached does not by itself reopen negotiations on that agreement. *Here,* the Association could properly refuse to negotiate the District's proposal made during the ratification process. Likewise, once the offer was made, the District could withdraw it prior to the Association's acceptance, or following its rejection, without violating the duty to bargain in good faith. We do acknowledge the Association members' right to reject, in good faith, the tentative agreement and reopen the whole agreement, including early retirement incentives. This, however, did not occur.

In finding that the District did not violate the EERA by making and withdrawing the proposal to the Association, we need not decide whether the Association waived a bargaining right by submitting the tentative agreement to its membership for ratification. We reject the ALJ's finding of a per se refusal to bargain.

District's Communication to the Employees

With respect to the May 9th District communication to the certificated employees, we reject the ALJ's conclusions that the letter was a violation of the EERA.

PERB has adopted the NLRA 8(c)[11] free speech standard. (Rio Hondo Community College District (1980) PERB Decision No.

[11]NLRA is codified at 29 U.S.C, sections 151-168, Section 8(c) states:

128.) In this decision, PERB held an employer has a protected right to communicate with employees on employment-related matters, so long as that communication does not run afoul of the NLRA 8(c) standard or constitute an intent or attempt to bypass the exclusive representative. In Rio Hondo, supra, the Board found no violation where the employer wrote to all faculty members urging them to reconsider their efforts in a lawsuit which sought reclassification and compensation changes to put the part-time faculty members on an equal but pro rata footing with full-time faculty members. In another communication examined by the Board, the employer urged the Association membership to get their leaders turned around and away from the course of an aggressive, antagonistic approach to labor relations.

Where an employer made an accurate communication (a discussion of what had occurred in the collective bargaining) to employees during negotiations, the Board found no violation of EERA. (Muroc Unified School District (1978) PERB Decision No. 80.) In similar cases, the Board has held that to show a violation of section (a) based on employer speech, it must first be shown the conduct contains reprisals, discrimination,

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> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

threats, interference or coercion. (San Francisco Unified School District (1983) PERB Decision No. 317; Clovis Unified School District (1978) PERB Decision No. 61; and Regents of University of California (1983) PERB Decision No. 366-H.)

In the present case, stimulated by questions from certificated employees, the employer responded by setting forth the factual chronology of events which led to the exclusion of certificated employees from the RIP. There were no allegations that the communication contained, on its face, any threat of reprisal or force, or promise of benefit. In fact, there is no allegation the employer misrepresented the facts through the communication. Thus, the only other way this communication would not be protected is if it is found that it was intended to bypass the exclusive representative and undermine the exclusive representative's position with the unit members. There are no facts showing that the employer intended to undermine the union. Rather, the employer had engaged in good faith negotiations for approximately 11 months and reached a tentative agreement which the board subsequently adopted. The board desired to offer a benefit to certificated employees and communicated that offer to the union, not the employees. There was no intent by the employer to bypass the union nor efforts to publicize the employer's intended action.

Contrary to the ALJ's assertion, the communication to the employees was not "gratuitous," since the uncontradicted testimony of the District witnesses was that it was in response

to numerous questions raised by the certificated employees. The employer did not communicate to all employees regarding the RIP as soon as the school board action was final. Rather, a period of more than two months had passed between the board's final adoption of the retirement incentive for the remainder of the employees and the employer's communication to the certificated bargaining unit employees. The Association had sufficient time to inform members of the facts concerning the RIP. The Association's failure to do so does not prevent the District from communicating to the employees in a factual and non-coercive manner. We do not find that the employer intended to bypass the exclusive representative nor to undermine its position by the May 9 communication to the certificated employees.

ORDER

Based on the entire record, the Board ORDERS that the unfair practice charge and accompanying complaint filed by the Alhambra Teachers Association, CTA/NEA against the Alhambra City and High School Districts is DISMISSED.

Member Porter joined in this Decision.

Member Burt's dissenting opinion begins on page 19.

Member Burt, dissenting: Unlike the majority, I find that the District violated EERA section 3543.5(a). (b) and (c) by conditioning its offer of an early retirement benefit for certificated employees upon the exclusive representative's waiving its bargaining rights over the proposal. The District had a duty to bargain in these circumstances and it violated the EERA by refusing to do so.

The majority's reliance on the National Labor Relations Board decision in Connecticut Light and Power Co. (1984) 271 NLRB 124 [116 LRRM 1475] is misplaced. That decision was based on statutory language contained in section 8(d) of the National Labor Relations Act (NLRA).[1] No similar language is present in the EERA. Connecticut Light and Power, supra, overturned the NLRB's long-standing doctrine set forth in Equitable Life Insurance Company and Insurance Agent's International Union (1961) 133 NLRB 1675 [49 LRRM 1070] that an employer who

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[1]Section 8(d) of the NLRA sets forth the duty of the employer and employee representative to meet and confer in good faith, with the proviso that neither party shall terminate or modify a contract without meeting notification and negotiating requirements, with the further proviso (relied on in Connecticut Light and Power) that:

> . . . the duties so imposed shall not be construed as requiring either party to discuss or agree to any modifications of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

proposes a change in a contract term during the pendancy of a collective bargaining agreement has a duty to bargain over that proposal upon the demand of the union. The employer in Equitable, supra, offered to increase the commission rates for a unit of debit agents during the pendancy of a collective bargaining agreement. The union wanted to negotiate over the increase, but the employer refused. The NLRB adopted the trial examiner's decision, saying that:

> . . . The record establishes the fact that the respondent refused to meet to discuss its own proposal and thereby created a "take it or leave" (sic) situation. This we find is a refusal to bargain. . . . Equitable. supra, at 1676.

The NLRB based its decision in Equitable on the rationale that the language in section 8(d) of the NLRA was intended to preserve the status quo and thus could be used as a shield but not as a sword; if one party proposed a mid-term change, the other party could decline to bargain over it but the party making the proposal could not.

I find the rationale in Equitable considerably more persuasive than that in Connecticut Light and Power, supra. Even if I were to agree with the rationale in Connecticut Light and Power, however, I do not find it applicable in the instant case because it involved a contract proposal made during the life of an existing collective bargaining agreement. Here, the District made its proposal before the contract was ratified.

The majority writes that, once a tentative agreement on a contract is reached, there is an implication that both parties' negotiators will take the agreement to their principals in a good-faith effort to secure ratification, and that a tentative agreement also implies that the negotiators will not "torpedo" the proposed collective bargaining agreement. However, by holding that an employer can make a proposal prior to ratification of a contract and then decline to bargain over it, the majority actually makes the collective bargaining process more vulnerable to such pre-ratification torpedos.

EERA section 3543.3[2] imposes a duty on public school employers to meet and negotiate with employee organizations over matters within the scope of representation. The duty to bargain should not be extinguished prior to ratification when the party refusing to bargain made the proposal. The majority's holding will enable a party to withhold contract proposals it does not wish to bargain over until tentative agreement is reached on the rest of the contract. It can then

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[2]Section 3543.3 states:

> A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of appropriate units upon request with regard to matters within the scope of representation.

make such proposals with a "take-it or leave-it" posture, secure in the knowledge that if the other party demands bargaining, it may refuse.

It is just such unilateral, take-it or leave-it contract proposals that the decisions in Equitable, supra, and NLRB v. General Electric Company (2nd Cir. 1969) 418 F.2d 736 [72 LRRM 2530] were meant to prevent. The Board majority correctly cites General Electric, supra, as holding that the employer had refused to bargain under a totality of the circumstances test based on the company's use of the "Boulwarism" approach as a bargaining tactic. However, the court also addressed the employer's offer to unilaterally institute an insurance plan for its employees provided that, if the union objected, it would not institute the plan for union members although it would for the other employees. The union demanded negotiations over the plan and the employer refused. The court found that this was a refusal to bargain in violation of section 8(a)(5)[3] of the NLRA, stating:

> In the context of this case, where the Company's tactics seemed so clearly designed

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[3]NLRA section 8(a) reads, in pertinent part:

> Section 8(a) It shall be an unfair labor practice for an employer--
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> . . . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

> to show the employees that the Union could win them nothing more than the Company was prepared to offer, it is even more apparent that a unilateral offer -- over which the Union may not bargain -- diminishes the rewards and the importance of the bargaining at the end of the contract period. Thus, the Union's ability to function as a bargaining representative is seriously impaired. Indeed, such conduct amounts to a declaration on the part of the Company that not only the Union, but the process of collective bargaining itself may be dispensed with. . . . General Electric. supra. (Emphasis added.)

As in General Electric, supra, and Equitable, supra, the effect of the District's take-it or leave-it offer in the instant case hampers the Association's ability to represent and bargain for its members, regardless of whether the offer was made in good faith or not. The Association was placed in a no-win situation: if it agrees to waive its bargaining rights and accept the offer, its position as employee representative is undermined; if, however, it demands to bargain over the offer, then the employer can withdraw the offer and blame the Association for the employees not getting the benefit, despite the Association's statutory right to bargain over terms and conditions of employment.

In the context of the instant case, where the parties had negotiated for 11 months and reached a tentative agreement on a contract, the employer's take-it or leave-it offer made less than a month before the ratification vote on the agreement was especially oppressive for the Association. The District had a

duty to bargain over its proposal under the EERA and it absolutely refused to bargain upon the demand of the Association. I therefore dissent from the majority's opinion that the District did not violate the EERA by refusing to bargain over its early retirement proposal.