OVERRULED IN PART by Sweetwater Education Association (2014) PERB Order No. IR-58

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SOUTH BAY UNION SCHOOL DISTRICT, Charging Party,	)	Case No. LA-CO-468
v.	)	PERB Decision No. 815
SOUTHWEST TEACHERS ASSOCIATION, Respondent.	)	June 13, 1990

Appearance: Brown and Conradi by Clifford D. Weiler, Attorney, for South Bay Union School District.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the South Bay Union School District (District) of the Board agent's dismissal of its amended unfair practice charge that alleges the Southwest Teachers Association (Association) violated section 3543.6(c) and (d) of the Educational Employment Relations Act (EERA).[1] Specifically, the amended unfair practice charge

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6 states, in pertinent part:

. . . . . .

(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.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

alleges that the Association refused or failed to meet and negotiate in good faith with the District and refused to participate in good faith in the impasse procedures by: (1) encouraging, preparing for, and implementing preimpasse strike activity, i.e., threatening to strike; (2) intentionally misrepresenting the District's bargaining positions; and (3) refusing to provide to the District a copy of an Association document allegedly containing a portion of the District's strike plan. We have reviewed the dismissal and find that, with the exception of the intentional misrepresentation and refusal to provide information allegations, the amended unfair practice charge states a prima facie case that the Association violated section 3543.6(d) of EERA.[2]

FACTS

In its unfair practice charge, the District alleges the following facts. The Association is the exclusive representative of a bargaining unit of approximately 350 certificated employees. The District and the Association were parties to a collective bargaining agreement which expired on June 30, 1987. Representatives of the District and Association commenced

[2]As the District's allegations involve events occurring during the period the parties were engaged in the statutory impasse procedures, the appropriate inquiry is whether the Association violated section 3543.6(d) by failing to participate in good faith in the impasse procedures. (Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191, 201-2.) Accordingly, the District's allegation that the Association violated section 3543.6(c) by its refusal or failure to meet and negotiate in good faith must be dismissed.

negotiations on a successor agreement on June 23, 1987. On February 26, 1988,[3] the District filed with PERB a "request for impasse determination and appointment of mediator." PERB declared an impasse and appointed a mediator. At the time of the District's request for impasse determination, the parties had approximately 20 issues remaining in dispute. The parties participated in negotiations, both with and without a mediator, on April 4 and 20, September 15 and 21, and October 11 and 18. Coinciding with the time the parties were in mediation, the following events occurred which the District alleges were sponsored by the Association.

On or about September 22, at an Association meeting, those members present voted to take a strike vote on October 6. The strike vote was contingent upon the parties not obtaining a settlement of their contract by September 30. The District maintains that the existence of this strike vote was of "widespread knowledge" throughout the District due to the fact that everything distributed to bargaining unit members by the Association eventually came to the attention of District management via its administrative interns.[4]

On or about September 26, the Association's bargaining team delivered to the District's board of trustees a memorandum containing the following statement:

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[3]Unless otherwise indicated, all dates refer to 1988.

[4]The District employs approximately 12 teachers in the position of "administrative intern." These individuals, although part of the unit, attend management meetings.

> The Association bargaining team is prepared to meet with your team, with or without a mediator, in an attempt to resolve the impasse and avoid a strike.

On approximately September 28 the Association distributed a circular entitled "Table Talk" to bargaining unit members. The District maintains the Association's circular contained misrepresentations regarding the District's bargaining positions relating to hours, binding arbitration in the grievance procedures, and employee discipline for just cause.

In the beginning of October, the District alleges that the Association distributed a circular captioned "A Message to Parents and Neighbors" in English and Spanish, which misrepresented the District's bargaining positions regarding class size, the right to be disciplined only for just cause, the right to be informed as to the identity of an evaluator, and the right to submit unsettled grievances to an impartial advisory arbitrator. On this same date at a parent/teacher association meeting, an Association representative circulated a document represented to be the District's strike plan to the parents in attendance. Although several management representatives requested a copy of this Association document, the District alleges it never received a copy.

On October 4 the Association circulated to bargaining unit members its circular "Table Talk" which stated in part:

> Substitute teachers, who <u>will honor</u> SWTA picket lines in the event of a strike, have been encouraged to apply for the advertised substitute positions.
> (Emphasis in original.)

On October 7, by the Association's circulation of its publication "Advocate" to bargaining unit members, the District alleges that the Association announced that a strike headquarters was opened at 715 9th Street. On October 14 the District alleges the Association distributed a circular to bargaining unit members which included the following statement:

> The only way that this message could be effective is if it was obvious to the school board that teachers are truly prepared to strike. At the same time it was extremely important to be fully prepared if, on October 17th, teachers do vote to strike. Those preparations have also been made.
>
> Your assistance in maintaining the strike threat is important to our ultimate success. Watch for suggested activities on Monday.

On October 17 a packet was distributed by the Association to its bargaining unit members. The packet included a delineation of "last day of school" procedures. These procedures advised, in part, for teachers to lock their desks, and to take lesson plans, grade books, and keys unless specifically directed to turn them into the office. In addition, the last-day procedures suggested that students discuss the strike with their parents, and advise their parents that they may choose to keep them at home. The last-day procedures further included a suggested lesson plan, the contents of which dealt exclusively with the history of the labor movement and the South Bay labor dispute. Finally, the packet instructed teachers to advise prospective substitutes that they were participating in strike-breaking activities.

The original strike vote scheduled for October 6 was postponed to October 17. On this date a strike vote was held and the teachers, by one vote, voted not to strike. The District alleges that on October 18, before the Association announced the result of the strike vote, a tentative agreement was reached between the parties.

The District alleges that the above-mentioned activities of the Association were aimed at placing pressure upon the District to make concessions within the collective bargaining process in order to settle the contract and reach an agreement. The District also alleges that the Association's activities resulted in various disruptive effects on the educational community and the educational process.

DISCUSSION

In determining whether an unfair practice charge alleges sufficient facts to state a prima facie case, the charging party's allegations are assumed to be true. (San Juan Unified School District (1977) EERB Decision No. 12.[5]) In this case, the District alleges numerous instances where the Association distributed memoranda, circulars and packets which contained statements that: (1) directly or indirectly threatened a strike; and (2) explained the Association's strike-preparation activities, i.e., strike headquarters, last-day-of-school procedures, and notice to substitutes. The District also alleges

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

that the Association intentionally misrepresented the District's bargaining positions in its September 28 issue of "Table Talk" and October circular entitled "A Message to Parents and Neighbors," and refused to provide necessary and relevant information to the District.

In analyzing bad faith bargaining cases, there are two applicable tests: (1) the per se test; and (2) the totality of the circumstances test. As the above-alleged conduct does not fall into one of the per se categories,[6] the facts should be analyzed in the context of the totality of the circumstances test. Under the totality of the circumstances test, the Board looks to the entire course of negotiations to determine the respondent's subjective intent. (Oakland Unified School District (1982) PERB Decision No. 275; Pajaro Valley Unified School District, supra, PERB Decision No. 51.) Surface bargaining occurs when a party goes through the motions of negotiations, but, in fact, engages in other conduct to delay, prevent agreement, frustrate or avoid the negotiation process. (Ibid.)

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[6]The per se categories include the following: (1) an outright refusal to bargain (Pajaro Valley Unified School District (1978) PERB Decision No. 51); (2) refusal to provide information that is necessary and relevant to the employee organization's duty to represent bargaining unit employees (Stockton Unified School District (1980) PERB Decision No. 143); (3) insistence to impasse on a nonmandatory subject of bargaining (Lake Elsinore School District (1986) PERB Decision No. 603; Modesto City Schools (1983) PERB Decision No. 291); (4) bypassing the employee organization's negotiators (Muroc Unified School District (1978) PERB Decision No. 80); and (5) implementation of a unilateral change in working conditions without notice and opportunity to bargain (Pajaro Valley Unified School District, supra. PERB Decision No. 51).

Here the District alleges that the Association's strike threat and strike preparation activities frustrated the negotiation process by coercing the District to make concessions.

Strike Preparation Activities

In the amended unfair practice charge, the District alleges that the Association's conduct was "aimed at placing pressure upon the employer to make concessions within the bargaining process," and that the Association was "threatening and preparing for illegal strike activity during the impasse process, with the intent to coercively gain concessions within the bargaining process." During this period, the parties continued to negotiate and, in fact, reached a tentative agreement shortly after the strike vote, but before the Association's announcement of the strike vote result. The District alleges that this tentative agreement was reached due to concessions made by the District as a result of the Association's threatened strike and strike preparation activities.

Under the totality of the circumstances test, the facts alleged in the amended unfair practice charge, including the strike threat and strike preparation activities, constitute sufficient facts to state a prima facie violation of section 3543.6(d). While the District's facts regarding the coercive effect upon the bargaining process are minimal, the allegations are sufficient to warrant an evidentiary hearing. For example, the fact that the parties reached a tentative agreement on October 18, after the strike vote on October 17, might suggest,

upon a proper evidentiary showing, that the Association's conduct was intended to and did place pressure on the District to reach an agreement and, therefore, had a coercive impact on the negotiations. Additionally, a hearing might shed some light on the context surrounding distribution of the Association's circular containing the words, "Your assistance in maintaining the strike threat is important to our ultimate success."[7] Assuming the amended unfair practice charge allegations to be true, we find that the alleged statements state a prima facie case that the Association refused to participate in good faith in the impasse procedures in violation of section 3543.6(d) of EERA.[8]

Misrepresentations

The District alleges that the Association intentionally misrepresented the District's bargaining positions. The District alleges that these misrepresentations were "fraught with malice" and intended to further the Association's goal of obtaining a bargaining advantage. The Board agent concluded the statements "are most likely protected under EERA," based on her finding that

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[7]We do not mean to suggest that factual findings on these particular issues would be determinative of the result, but only point out that these issues must be explored, together with other issues raised by the factual allegations in the unfair practice charge, in a hearing to determine whether the totality of the circumstances test is satisfied.

Additionally, the Board's adoption of the standard set forth in section 8(c) of the National Labor Relations Act (NLRA) further supports the Board's holding that the alleged strike threat may constitute evidence of an unfair practice. (See discussion, infra.)

the Association's publications were related to matters of legitimate concern to employees and were protected as not being "opprobrious, flagrant, insulting, defamatory, insubordinate or fraught with malice." While the Board finds that the Board agent properly dismissed the misrepresentation allegations, the Board does not adopt her analysis. Both the District and the Board agent improperly relied on reprisal or discrimination cases in which the issue was whether the employee engaged in protected activity. (See Rancho Santiago Community College District (1986) PERB Decision No. 602; Mt. San Antonio Community College District (1982) PERB Decision No. 224.) Here, the issue is whether the alleged misrepresentations violate section 3543.6(d) of EERA.

In Rio Hondo Community College District (1980) PERB Decision No. 128, pages 18-20, this Board looked to the NLRA for guidance in formulating a test for determining when employer communications will be considered violative of the provisions of EERA. Specifically, the Board examined section 8(c) of the NLRA which provides:

> 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.

While the Board noted that EERA contains no provision parallel to section 8(c),[9] the Board specifically recognized that "a public school employer is entitled to express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" and adopted a standard derived from the NLRA:

> The Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. [Fn. omitted.]
> (Id, at p. 20.)

The National Labor Relations Board (NLRB) and the courts apply section 8(c) of the NLRA to employee organizations, as well as employers. (International Brotherhood of Electrical Workers v. National Labor Relations Board (1951) 341 U.S. 694, 704 [28 LRRM 2115]; Boaz Spinning Company v. NLRB (6th Cir. 1971) 439 F.2d 876, 878 [76 LRRM 2956], citing The Bendix Corp. v. NLRB (6th Cir. 1968) 400 F.2d 141, 146 [69 LRRM 2157]; see also Morris, The

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[9]Section 3571.3 of the Higher Education Employer-Employee Relations Act contains language virtually identical to that of section 8(c) of the NLRA:

> The expression of any views, arguments, or opinions, 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 provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization.

Developing Labor Law (2d Ed. 1983) p. 42.)[10] Accordingly, the Board holds that the standard established in Rio Hondo Community College District, supra, PERB Decision No. 128 is equally applicable to employers and employee organizations.

In the present case, the alleged misrepresentations of District bargaining positions fail to constitute either a threat of reprisal or force or promise of benefit. Accordingly, the misrepresentation allegations must be dismissed for failure to state a prima facie violation of EERA.

Refusal to Provide Information

With regard to the alleged refusal to provide information, we agree with the Board agent's conclusion that the District failed to state why the requested information was necessary and relevant to the bargaining process and, therefore, affirm the Board agent's dismissal of this allegation. In her discussion, the Board agent recognized that the Board has not yet addressed the effect of an employee organization's refusal to provide information to an employer. In reaching her conclusion that the information requested was not relevant to the District's negotiations, the Board agent relied upon Detroit Newspaper Printing and Graphic Communications Union, Local 13 (1977) 233 NLRB 994 [97 LRRM 1047], affirmed (D.C. Cir. 1979) 598 F.2d 257 [101 LRRM 2036]. In Detroit Newspaper, supra. the NLRB held that

[10]While PERB is not bound by decisions of the NLRB, the Board will take cognizance of them where appropriate. (Carlsbad Unified School District (1979) PERB Decision No. 89; Los Angeles Unified School District (1976) EERB Decision No. 5.)

the employee representative violated the NLRA by refusing to provide requested information that was necessary and relevant to the employer's structuring of economic proposals at the bargaining table.

In cases where the employer has refused to provide information to an employee organization, the Board has held the exclusive representative is entitled to all information that is "necessary and relevant" to the representative's statutory duty to represent employees. Specifically, the Board has held that information pertaining to mandatory subjects of bargaining is so intrinsic to the core of employer-employee relations that it is considered presumptively relevant, and that such information must be disclosed unless the employer can establish that the information is plainly irrelevant or can provide adequate reasons why it cannot furnish the information. (Stockton Unified School District, supra. EERB Decision No. 143.)

In the amended unfair practice charge, the District alleges:

> The document at issue was necessary and relevant to the negotiation process in view of respondent's conduct referenced throughout this charge and especially since union representative(s) were indicating to parents that the document was a portion of the District's strike plan.

The District's allegation fails to state why the information is necessary and relevant to either the District's statutory duties under Stockton Unified School District, supra, or the District's structuring of economic proposals at the bargaining table under Detroit Newspaper, supra, 233 NLRB 994. Therefore, as the

District has failed to allege the relevance of the requested information, the Board affirms the Board agent's dismissal of this allegation.

ORDER

For the reasons stated above, the Board AFFIRMS the Board agent's dismissal of the allegations that the Southwest Teachers Association unlawfully misrepresented the South Bay Union School District's bargaining positions, refused to provide the South Bay Union School District with the necessary and relevant information, and refused or failed to meet and negotiate in good faith pursuant to section 3543.6(c) of the Educational Employment Relations Act. The Board hereby REVERSES the Board agent's dismissal of the allegation that the Southwest Teachers Association refused to participate in good faith in the impasse procedures by encouraging, preparing for, and implementing preimpasse strike activity, and REMANDS the Board agent's dismissal of this allegation to the General Counsel. The Board hereby ORDERS the General Counsel to issue a complaint alleging a violation of section 3543.6(d) of the Educational Employment Relations Act.

Member Shank joined in this Decision.

Member Craib's concurrence and dissent begins on page 15.

Member Craib, concurring and dissenting: While I concur that the South Bay Union School District (District) failed to state a prima facie violation for bad faith bargaining based upon the Southwest Teachers Association's (Association) misrepresentations and refusal to provide the District with a copy of an alleged District strike plan, I must dissent from my colleagues' decision to issue a complaint against the Association based solely on its alleged threat to strike.

In describing the appropriate test to apply, the majority correctly cites Oakland Unified School District (1982) PERB Decision No. 275 and Pajaro Valley Unified School District (1978) PERB Decision No. 51 for the Public Employment Relations Board's (Board) approach in applying the totality of the circumstances test. (Majority opn. at p. 7.) The majority then, without citing any authority, appears to hold that surface bargaining can be evidenced by engaging in conduct which is aimed at coercing the other party to make concessions. (Majority opn. at pp. 8-9) While the Board has indeed found that surface bargaining occurs when a party engages in conduct to delay or prevent agreement, this is the first time the Board has held that conduct which has the effect of coercing a party to make concessions to reach agreement is indicative of surface bargaining. Conduct which is aimed at seeking agreement, regardless of its coercive nature, is quite different from surface bargaining. Surface bargaining, as the phrase implies, is conduct aimed at not reaching agreement.

I find the majority's sub silentio change in the standard for surface bargaining disturbing.

The illogic of the majority's application of surface bargaining analysis aside, it is true that, in some circumstances, a threat to strike prior to the exhaustion of statutory impasse procedures could be evidence of bad faith. However, this would be true only where the threat was used as a method of delaying or avoiding agreement, or otherwise interfering with the negotiations process. As the "totality of the circumstances" test implies, the entire course of negotiations must be examined to determine if a party has negotiated with the requisite subjective intent of reaching an agreement. (Pajaro Valley Unified School District, supra, at p. 5.)

In the case before the Board, the Association's alleged conduct does not rise to the level of a cognizable threat. The alleged facts indicate only that the Association engaged in strike preparation activities. Notably, there are no allegations that the Association ever directly told the District that unless the District met the Association's demands, it would strike. More importantly, there are no allegations that the Association's strike preparations interfered with bargaining. There are no allegations, for example, that the Association refused to come to the table or refused to respond to proposals. Indeed, the parties continued to bargain throughout the period of strike preparations. The majority believes that

> the fact that the parties reached a tentative agreement . . . might suggest . . . that the Association's conduct was intended to and did place pressure on the District to reach an agreement and, therefore, had a coercive impact on the negotiations.

(Majority opn. at pp. 8-9.) Under the circumstances presented by the District's allegations, the opposite assumption is more appropriate, i.e., the Association's strike preparation activities had little or no impact on the parties' bargaining process; hence, the parties were able to reach agreement.

In sum, the District has failed to allege facts which reflect that the alleged strike threat had any adverse impact upon negotiations. Without such allegations, no prima facie violation is stated under a totality of the circumstances test. The majority, instead, appears to believe that it is appropriate to issue a complaint and give the District the opportunity to prove the critical facts which it failed to allege in the first place. On the contrary, the District had the opportunity to amend its charge to state a prima facie violation, but did not do so successfully. Therefore, I would affirm the Board agent and dismiss this charge.