STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RIM OF THE WORLD TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. RIM OF THE WORLD UNIFIED SCHOOL DISTRICT, Respondent, and DANIEL M. CORCORAN, Intervenor.	)	Case No. LA-CE-2169 Interlocutory Appeal PERB Order No. Ad-161 December 31, 1986

Appearances; Charles R. Gustafson for Rim of the World Teachers Association, CTA/NEA; Lawson and Hartnell by Raymond N. Haynes for Intervenor Daniel M. Corcoran.

Before Morgenstern, Burt and Craib, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on an interlocutory appeal filed by Rim of the World Teachers Association, CTA/NEA (Association) and certified to the Board by an administrative law judge (ALJ). The Association charged that Rim of the World Unified School District (District) engaged in an unlawful reprisal when the president of its board, Daniel Corcoran,[1] threatened to and then did file a libel action in Superior

[1]Corcoran's motion to intervene in the case was granted by the ALJ, see infra. Corcoran will be referred to in this decision by name, rather than by the term "Intervenor."

Court against the Association's president and chief negotiator, James Gutman, for statements Gutman made in an Association newsletter during contract negotiations. After an evidentiary hearing on the charge, the ALJ granted Corcoran's motion to stay further proceedings by PERB, pending resolution of the libel action. We hold that the Superior Court has concurrent jurisdiction over the dispute and affirm the ALJ's decision to stay.

FACTUAL AND PROCEDURAL HISTORY

The District and the Association met in scheduled negotiations on April 3, 1985.[2] During the session, the Association called a caucus. Gutman testified at the hearing before the ALJ that, when he and the other Association representatives returned from the caucus to the meeting room, he saw Corcoran standing about a foot away from the bargaining table, on the Association's side. According to Gutman, Corcoran's head was down and he appeared to be looking at materials on the table that belonged to an Association team member, Hal Chapman. Gutman said that he then saw Corcoran look up and walk quickly back to the District's side of the table. Gutman admitted that Chapman told him that he (Chapman) did not see Corcoran on the Association's side of the table as Chapman entered the room immediately behind Gutman.

Two days after the bargaining session, the Association's newsletter North Wind was distributed to its members. A

[2]All dates are 1985, unless otherwise indicated.

front-page story on the bargaining session contained the sentence: "School Board President caught reading our notes during a caucus." Gutman testified that he wrote the story including the above-quoted statement, and believed it to be true based on his own observations.

Corcoran's testimony contradicted Gutman's and was corroborated by that of two other witnesses, members of the District team who were present at the session. Corcoran testified that when Gutman entered the room, he (Corcoran) was seated with his feet up on the table, some six to eight feet away from the place at the table where the nearest Association materials were located. He said that when Gutman entered, he got up and walked around the table in order to return to the seat where he had been before the caucus. However, referring to a diagram of the table, he testified that he did not walk past any of the Association team's seats in order to return to his own. Corcoran testified that he did not read any Association materials that were not given to him.

Gutman admitted in testimony that the only Association materials which remained at Chapman's place at the table during the caucus were the District's two-page bargaining protocols that had been distributed to the Association earlier that day, and a set of salary comparison figures for area schools that the Association had taken from a newspaper article and distributed to the District negotiators shortly after the caucus. Asked about his newsletter reference to Association "notes," Gutman said he believed but was "not sure" that there

were "some" handwritten notes on the protocols. In any event, since the materials he thought he saw Corcoran reading were Chapman's, any notes on them would not have been his own.

Corcoran is a realtor, many of whose clients are teachers; he has also run for political office. He testified that he believed Gutman's newsletter statement libeled him because it accused him of committing a dishonest act in a public forum. On April 16, Corcoran's privately-retained attorney sent Gutman a letter demanding a retraction of the statement, advising Gutman that failure to do so would lead to "appropriate further action" and urging Gutman to seek an attorney's advice. In response, Gutman issued a retraction in the April 18 issue of North Wind, which read, in part:

> Our April 13, 1985 article said Mr. Corcoran was reading our notes. For this I apologize. I do not know that he was reading, or that he can read. The only fact I can report is that he was on our side of the table, head down, eyes directed at our material. I apologize for saying that he was reading.

On April 24, Corcoran's lawyer filed a complaint for damages for libel against Gutman and Does 1 through 50 in Superior Court, County of San Bernardino.

In response to Corcoran's lawsuit against Gutman, the Association filed an unfair practice charge against the District on May 3; a complaint issued on July 22. On September 25, the first day of the hearing, Corcoran moved to intervene as a party and the motion was granted. Corcoran then

moved to stay the PERB proceeding, but that motion was denied.

Corcoran then moved for a brief continuance of the PERB hearing in order to seek a writ of prohibition from the Superior Court to prevent the ALJ from going forward with the taking of evidence. All parties agreed to, and the ALJ granted, a 30-day continuance for that purpose. At a status conference on October 8, the Superior Court ordered a stay in the libel proceeding to permit PERB to act on the charge. The court said that if PERB did not resolve the matter by December 1, the stay would be automatically lifted and the matter would proceed.

The PERB hearing reconvened on October 24 and 25, 1985. The Association, the District and Corcoran were each allowed to present evidence and call witnesses and cross-examine them. The principal witnesses were Gutman for the Association and Corcoran for the District. After all of the evidence was presented, Corcoran again moved to stay the PERB proceeding until the libel suit was resolved, relying on the U.S. Supreme Court's decision in Bill Johnson's Restaurants v. National Labor Relations Board (1983) 461 U.S 731 [113 LRRM 2647].

The ALJ granted the motion, finding that a genuine issue of material fact regarding the events of the April 3 bargaining session was presented by the evidence and, therefore, that Bill Johnson's required that he not proceed further (i.e., issue a proposed decision) until the libel suit was resolved. On November 19 the Association requested that the ALJ certify

to the Board an interlocutory appeal of the stay order. The ALJ granted the request on November 20, and that appeal is now before the Board.

On November 26, the Association filed a request for injunctive relief, seeking to have the Board either (1) order the District and Corcoran to withdraw the libel suit filed by Corcoran, or (2) seek injunctive relief from a court to the same effect. On December 18 the Board denied that request. There is no information in the record about the current status of the libel action.

DISCUSSION[3]

Jurisdiction

On appeal, the Association argues that PERB has exclusive jurisdiction over unfair practices and, for that reason, should

[3]The Board reaches the merits of this interlocutory appeal over Corcoran's unsupported, almost offhand assertions that the Association's request for a Board ruling on the ALJ's decision to grant a stay was not filed at PERB headquarters and was not timely filed as required by PERB Regulation 32360. Corcoran's reliance on that section is misplaced. PERB Regulation 32200 (codified at California Administrative Code, Title 8, section 31001 et seq.) governs interlocutory appeals of Board agent decisions to the Board itself. Regulation 32200 provides that an interlocutory appeal may be taken only when joined by the Board agent and that the party seeking such an appeal must make a written request to the Board agent that he so join. The section prescribes no time limits for the making of such a request. The record reflects that on November 19, 1985, shortly after the conclusion of the evidentiary hearing, the Association filed with the ALJ a request for Board ruling on the ALJ's decision to grant a stay. On November 20, the ALJ certified an interlocutory appeal of his decision to the Board.

not stay its processes pending the civil litigation. The Association cites California cases holding that PERB has exclusive initial jurisdiction over disputes in which the conduct involved is arguably protected or prohibited by the laws that PERB administers. For the reasons that follow, the Board concludes that it has concurrent jurisdiction with the Superior Court over the conduct involved in the present case.

No California court or PERB decision[4] directly addresses whether PERB has exclusive jurisdiction, thus preempting the Superior Court's jurisdiction over a libel action arising out of the same facts as the complaint before PERB. For that reason, the Board turns first to federal case law construing the National Labor Relations Act (NLRA).[5] 5

When the activity of an employer or employee that a state purports to regulate is arguably protected by or prohibited by the NLRA, the state must defer to the exclusive (or

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[4]The Association incorrectly cites State of California (Department of Transportation) (1983) PERB Decision No. 304-S and Pittsburg Unified School District (1978) PERB Decision No. 47 for the proposition that PERB has previously assumed exclusive jurisdiction in the circumstances presented here. Although both cases involved employer response to an employee leaflet, and both decisions discussed the standard for protected speech in the labor relations context, in neither case had a civil libel action been filed nor was there any other proceeding then pending.

[5]King City High School District Assn., CTA/NEA, et al., (1982) PERB Decision No. 197; see San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 12-13 [154 Cal.Rptr. 893].

"preemptive") jurisdiction of the National Labor Relations Board (NLRB) "if the danger of state interference with national policy is to be averted." San Diego Building Trades Council v. Garmon (1953) 359 U.S. 236, 245 [43 LRRM 2838]. However, the preemption doctrine does not apply to activity that is otherwise within the scope of the NLRA if the activity is of "peripheral concern" to the NRLA or "touche[s] interests so deeply rooted in local feeling and responsibility" that, absent "compelling congressional direction," it could not be inferred that Congress intended to deprive the states of power to act. Id., at 243-244.

Thus, in Linn v. Plant Guard Workers (1966) 383 U.S. 53 [61 LRRM 2345], the Supreme Court held that a federal court had jurisdiction over and could apply state libel law to allegedly false and defamatory statements about managers, made in a leaflet distributed by a union during an organizing campaign. Noting that the activity was arguably protected under the NLRA, the court held that such a lawsuit would not interfere with the federal interest in permitting the free, and even heated, exchange of ideas during labor disputes so long as the standard of proof for defamation under state law required that statements be knowingly false or made with reckless disregard of their truth or falsity. The court found that allowing state libel law to be applied to the statements was "merely [a] peripheral concern" of federal labor law, and that an "'overriding state interest' in protecting its residents

from malicious libels should be recognized in these circumstances." Linn, 383 U.S. at 61. In such a case, the NLRB does not have exclusive jurisdiction over the conduct.

More recently, the Supreme Court held that the NLRA does not preempt a local union member's state (California) court action against the union for intentional infliction of emotional distress. Farmer v. Carpenters (1977) 430 U.S. 290 [94 LRRM 2759]. The action alleged that the union refused to make hiring hall referrals in retaliation for the member's dissident activities. The court noted that the NLRA does not protect "outrageous" conduct and that such conduct must be proven in order to satisfy the elements of an emotional distress cause of action under California law. Discussing the development of the Garmon doctrine of exclusive jurisdiction, the Farmer court said:

> Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme. Id., 430 U.S. at 302.

Prior to 1978, no California decision directly addressed the issue of competing jurisdiction between courts and labor agencies. However, several earlier decisions recognized a right to sue for defamation based on publications issued during labor disputes. These cases held that such a right was not foreclosed by either state or federal labor law, so long as the

only unprotected statements were those that were made maliciously. Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596 [131 Cal.Rptr. 641], citing Emde v. San Joaquin Etc. Labor Council (1943) 23 Cal.2d 146 [143 P.2d 20]; Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal.App.2d 560 [30 Cal.Rptr. 350].

In 1978, a state Court of Appeal, following the U.S. Supreme Court's decision in Linn, held that the Superior Court was not preempted by the NLRA from hearing a union's libel action against a private sector employer. Hotel and Restaurant Employees v. Anaheim Operating, Inc. (1978) 82 Cal.App.3d 737 [147 Cal.Rptr. 510], cert. den., 440 U.S. 914 (1979). An employer leaflet had alleged the union's "connection to the underworld and organized crime." The union first filed an unfair practice charge with the NLRB, which refused to issue a complaint on the ground that the leaflet was protected expression under the NLRA. When the union filed its lawsuit, the Superior Court dismissed it on the ground that only the NLRB had jurisdiction over such disputes. The Court of Appeal examined the factors permitting an exception to the Garmon doctrine of exclusive jurisdiction and found, as the Linn court had, that California had a strong interest in protecting against defamatory speech and that no interference with the federal regulation of labor disputes would result from the Superior Court hearing the libel action.

Government Code section 3541.5 provides that the determination whether an unfair practice charge is justified is

within the exclusive jurisdiction of the Board.[6] A Garmon-like principle of preemption applies to potential conflicts of jurisdiction between California courts and PERB: the Board has exclusive jurisdiction over conduct that is arguably protected or prohibited by EERA. San Diego Teachers Assn. v. Superior Court, supra. "The aim of [the Garmon] rule is to help bring expertise and uniformity to the delicate task of stabilizing labor relations." Id., 24 Cal.3d at 12. Through the preemption doctrine,

> both federal and state courts seek to avoid conflicting adjudications which may interfere with a labor board's ability to carry out its statutory role, yet [seek] to permit court action when the board cannot provide a full and effective remedy. El Rancho Unified School Dist, v. National Education Assn. (1983) 33 Cal.3d 946, 961 [192 Cal.Rptr. 123].

This principle has been applied in a number of California cases in which one party to a labor dispute in public education has sought judicial relief. In all of them, the conduct complained of was arguably prohibited by EERA, and it was held that PERB had exclusive initial jurisdiction to determine whether the conduct was an unfair practice. See, e.g., Amador Valley Secondary Educators Assn. v. Newlin (1979) 88 Cal.App.3d 254 [151 Cal.Rptr.725] (school district salary freeze because of lack of salary agreement at start of school year); Council

[6]The Educational Employment Relations Act (EERA) is codified at Government Code section 3540 et seq.

of School Nurses v. Los Angeles Unified School Dist. (1980) 113 Cal.App. 3d 666 [169 Cal.Rptr. 893] (provisions of collective bargaining agreement alleged to be contrary to Education Code); San Diego Teachers Assn., supra (strike that district sought to enjoin judicially may have been preceded by teachers' unfair practices); El Rancho Unified School District, supra (suit for damages arising out of strike); and Fresno Unified School Dist, v. National Education Assn. (1981) 125 Cal.App.3d 259 [177 Cal.Rptr. 888] (nominally "tort" causes of action were based on potential unfair practices arising out of strike).

At the same time, a principle of concurrent jurisdiction between California agencies and courts has also been recognized. In Fresno Unified School District, supra, the court of appeal held that PERB and the trial court had concurrent jurisdiction over the conduct that formed the basis of the employer's cause of action for breach of a contract not to strike. Citing a U.S. Supreme Court case,[7] the Fresno court noted that section 301 of the federal Labor Management Relations Act permits judicial enforcement of collective bargaining agreements, and found that federal courts had allowed the judicial vindication of "uniquely personal" rights of employees rising out of those agreements, such as wages, hours, overtime pay and wrongful discharge. The court noted

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7Hines v. Anchor Motor Freight (1976) 424 U.S. 554, 561-562 [91 LRRM 2481].

that a California Labor Code section that long predated EERA gave the parties to a collective bargaining agreement the right, similar to that in section 301, to judicially enforce the contract's provisions.

The Fresno court also quoted extensively from Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, at 199-200 [172 Cal.Rptr. 487]:

> Indeed, in a number of recent cases this court has explicitly eschewed the "meat ax" approach proposed by petitioners and has instead applied harmonizing principles in dealing with overlapping jurisdictional schemes comparable to those present in the instant case. In Vargas v. Municipal Court (1978) 22 Cal.3d 902, 910-913, 916 [150 Cal.Rptr. 918, 587 P.2d 714], for example, this court accommodated the municipal court's jurisdiction over unlawful detainer actions and the Agricultural Labor Relations Board's unfair labor practice jurisdiction, recognizing that neither entity completely ousted the other jurisdiction under all circumstances. Similarly, in Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 67-75 [162 Cal.Rptr. 745, 603 P.2d 1341], we held that the ALRB's jurisdiction over unfair labor practices did not prevent a superior court from granting equitable relief in instances "when the board cannot provide a full and effective remedy."

In line with the foregoing, the Board therefore concludes that it does not have exclusive initial jurisdiction to determine whether an unfair practice has been committed where one party to a labor dispute has sued for libel for a statement made during the course of the labor-management relationship. Instead, the Board has concurrent jurisdiction with the

Superior Court over the conduct involved. The Board has reached this conclusion for the following reasons.

First, the leading cases holding that PERB's jurisdiction is preemptive of the courts' arose in strike situations. See San Diego, Fresno and El Rancho, supra. The Board has a special expertise in mediating this type of labor dispute and it can provide a remedy that is "full and effective," if not identical to the remedy available in court. El Rancho, supra. In contrast, no strike is involved in the present case.

Second, the nominally "tort" causes of action in Fresno, which the court held to be within PERB's exclusive jurisdiction, were found to be integrally related to a critical labor relations issue — the right to strike. The court contrasted these tort claims with the one presented in Farmer v. Carpenters, supra. There, the U.S. Supreme Court held that a cause of action for intentional infliction of emotional distress was of sufficiently "peripheral concern" to the labor dispute that an exception to the NLRB's exclusive jurisdiction could be allowed. The recent El Rancho decision reaffirms this distinction, holding that civil damage actions arising out of strikes are preempted by PERB, while acknowledging that certain types of violent conduct in strikes are permitted to be redressed by court action. 33 Cal.3d at 960, fn. 20.

Third, the Board is unable to provide a "full and effective" remedy in the present case. In the civil action, Corcoran seeks an award of money damages in order to vindicate

his reputation. In contrast, even if the ALJ and the Board were to find that the District committed no unfair practice, Corcoran would be limited to a discretionary award of its fees incurred before PERB.[8]

Finally, the court of appeal's decision in Hotel and Restaurant Employees, supra, lends some support to the Board's conclusion that PERB's jurisdiction does not preempt the Superior Court's in these circumstances. While it is true that the union in that case filed suit only after the NLRB had refused to issue an unfair practice charge, it is nonetheless significant that the court found that no interference with the federal scheme of regulation of labor disputes would result from the Superior Court hearing the libel action.

Propriety of Stay

Having concluded that there is no jurisdictional bar to the Superior Court's proceeding with the libel action, the Board must now decide whether it should affirm the ALJ's stay until the libel action is concluded.

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[8]This is only the clearest example of the remedies problem in this case. Even if the ALJ and the Board were to find both that Corcoran acted as the District's agent and that he committed an unfair practice by threatening to sue and filing suit, PERB's range of remedies is limited. PERB may be precluded by the Bill Johnson's case, discussed infra, from ordering the District to cease and desist from pursuing its suit. PERB could, in theory, order the District not to threaten the Association with suits in the future, but the threat in this case has already been made and was followed by the suit which, as noted, PERB may not be able to enjoin.

In Bill Johnson's, supra, the decision on which the PERB's ALJ relied, a restaurant owner sued several of his employees in state court. He alleged that their picketing activity interfered with his business and threatened public safety, and that libelous statements were made about him in leaflets they distributed. The employees filed unfair practice charges with the NLRB, alleging, inter alia, that the suit was filed in retaliation for their protected activity. After a hearing, the NLRB found that prosecution of the suit was in retaliation for the employees' protected activity -- organizing and picketing — and ordered the employer to withdraw its suit. The Ninth Circuit Court of Appeals enforced the NLRB's order, but the U.S. Supreme Court vacated the order.

Before the Supreme Court, the NLRB argued that an employer who sues an employee for a retaliatory motive is guilty of violating the NLRA, regardless of whether the suit has merit. The Court, rejecting this contention, noted two important considerations: that the individual plaintiff has a first amendment right of access to the courts; and that the states have an interest in providing a judicial remedy for tortious conduct in order to maintain domestic peace. The Court recalled that it had consistently allowed an exception to the NLRB's exclusive jurisdiction for torts occurring during labor disputes, citing Linn v. Plant Guards, and Farmer v. Carpenter, supra. Therefore, the Court said, to permit the board to find

an unfair practice based solely on the filing of a lawsuit without regard to its merit would undermine both the individual's and the state's interests. For that reason, the Court held, the NLRB can enjoin a state lawsuit as being an unfair practice only when it finds both that the lawsuit would not have been filed but for the plaintiff's retaliatory motive and that the lawsuit lacks a "reasonable basis."

According to the Court, the reasonable basis inquiry by the NLRB should be a determination of whether the plaintiff in the state action has presented evidence demonstrating that his lawsuit raises genuine issues of material fact, or mixed questions of law and fact. The Court declined to specify a required method for the NLRB's inquiry, stating that the inquiry need not be limited to the pleadings and that its determination could rest solely on documentary evidence or could be based on a full evidentiary hearing. If the NLRB finds that the lawsuit raises genuine issues of material fact, the Court concluded, then it "should proceed no further with the unfair practice proceedings but should stay those proceedings until the state court suit has been concluded." (Emphasis added.) 113 LRRM at 2654.

While this Board is not bound to follow Bill Johnson's, which construes a provision of the NLRA, we find the facts of the present case sufficiently analogous to make Bill Johnson's instructive. Moreover, several of the interests identified by

that decision as supporting an NLRB stay, are likewise present here. First, our affirmance of the ALJ's stay would permit Corcoran access to the court in order to vindicate his personal reputation. This is of particular concern where PERB may be unable to provide as full and effective a remedy for the alleged wrong to Corcoran as can the court. Second, our stay would accommodate the state's interest in providing a remedy for tortious conduct in order to maintain the public peace. Finally, the particular conduct in this case seems, at best, peripherally involved with the labor dispute between the District and the Association.

Upon review of the transcript of the hearing in this case, we are in agreement with the ALJ's finding that genuine issues of material fact were presented. Two questions are crucial to the determination of the libel suit: (1) whether or not Corcoran was reading the Association's notes; and (2) if not, whether or not Gutman made the statements about Corcoran knowing them to be false or in reckless disregard of their truth or falsity. Neither is resolved by the PERB record. The first is a question of fact and, as noted above, factual versions of what transpired at the April 3rd bargaining session remain at odds. The second, which is a mixed question of law and fact, is likewise at issue. Gutman's motive in publishing

the statement and the personal knowledge on which he did so remain open to debate.[9]

Therefore, we hold that any further proceedings in the unfair practice case before PERB are properly stayed until the libel action is resolved.

ORDER

The ALJ's stay of further proceedings in Rim of the World Teachers Association, CTA/NEA v. Rim of the World Unified School District, Case No. LA-CE-2169, until the resolution of the libel action entitled Corcoran v. Gutman, San Bernardino County Superior Court No. 22079, is hereby AFFIRMED.

Members Morgenstern and Craib joined in this Decision.

[9]In this regard, the Association argues that the evidence adduced at PERB's hearing fails to demonstrate that the libel suit has a reasonable basis, because there was no showing that Gutman's statement was either false or made with malice. The Association incorrectly characterizes the degree of knowledge required by the malice standard. The issue is not, as the Association asserts, whether Gutman's statement was made with hatred or ill will, but rather whether it was made with knowledge that it was false or with reckless disregard for its truth or falsity. As the District correctly points out, this definition of malice for cases involving public figures, established in New York Times v. Sullivan (1964) 376 U.S. 254 [11 L.Ed.2d 686], has been adopted in California. See Good Government Group of Seal Beach v. Superior Court (1978) 22 Cal.3d 672 [150 Cal.Rptr. 258].