STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT UNIFIED SCHOOL DISTRICT, Charging Party, v. FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, Respondent.	)	Case No. SF-CO-380 PERB Order No. IR-54 May 15, 1990

Appearances: Breon, O'Donnell, Miller, Brown & Dannis by Bridget A. Flanagan, Attorney, for Fremont Unified School District; California Teachers Association by Ramon E. Romero, Attorney, for Fremont Unified District Teachers Association.

Before Hesse, Chairperson; Craib, Shank, Camilli and Cunningham, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on a Request for Injunctive Relief filed by the Fremont Unified School District (District) after three one-day strikes by the Fremont Unified District Teachers Association (Association).

SUMMARY OF FACTS

The District and the Association are parties to a collective bargaining agreement effective July 1, 1986 through June 30, 1989. The parties engaged in negotiations for a three-year successor agreement during June, July, August and September

1989.[1] After negotiations failed to produce an agreement, impasse was declared and the parties proceeded through mediation and factfinding. A factfinding report issued on February 16, 1990,[2] and found in favor of the District's position on the monetary issues.

Pursuant to PERB case law, negotiations resumed after the issuance of the factfinding report, with eight bargaining sessions occurring from February 20 to March 1. The Association declared impasse on March 1 and, in accord with its February 26 notice to the District, the Association engaged in a one-day strike on March 2.

Following the strike, the District sought assurances from the Association that a 48-hour notice would be provided for all future strikes. The Association, declining to give such assurances, responded that "appropriate legal notice" would be provided in the future. The Association also stated it had no current plan to strike again, but would consider doing so only in response to District unfair practices or if no progress was made in another round of bargaining.

Based upon the Association's dual actions of the March 2 strike and the failure to promise to give a 48-hour notice of future work stoppages, the District filed an unfair practice charge (Case No. SF-CO-380) with PERB on March 7, alleging the

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[1]Approximately 17 bargaining sessions occurred during this period.

[2]Unless otherwise stated, all dates refer to 1990.

Association failed to bargain in good faith and participate in good faith in the impasse procedures. On this same date, the District filed a request for injunctive relief, which was summarily denied by the Board on March 9.

The parties met again on March 19, and continued to meet until March 27. During this period, it appears that neither party was willing to make concessions to reach agreement. Thereafter, the Association gave the District a two-day notice and engaged in a second one-day strike on April 4.

On April 4, the District amended its prior unfair practice charge to include the additional allegations of the Association's failure to bargain in good faith and participate in good faith in the impasse procedures.

On April 19, the Association engaged in a third one-day strike, also after a two-day notice was given to the District. On May 7, the District filed a second amended unfair practice charge and, based on the strike activity, a request for injunctive relief.[3] On April 30, May 3 and 7, the parties again met in negotiations. Prior to April 30, there is no evidence that either party was ready or willing to negotiate or make concessions. On May 3, the Association notified the District that it would engage in a two-day strike on May 8 and 9. However, no strike occurred on these days.

[3]Throughout these negotiations, the Association filed at least eight unfair practice charges against the District.

Between 80 and 90 percent of the teaching staff participated in the series of one-day strikes. The District has been able to replace approximately 50 percent of the striking teachers with substitutes. Student attendance, while down between 50 and 70 percent on strike days, rebounds to near normal attendance on nonstrike days.

DISCUSSION

Under San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 11, PERB has initial exclusive jurisdiction to determine whether parties have engaged in conduct that is an unlawful practice under the Educational Employment Relations Act (EERA or Act).[4] Specifically, PERB has exclusive initial jurisdiction to determine whether a strike is an unfair practice and what, if any, remedies the Board should pursue.

In Public Employment Relations Board v. Modesto City Schools District (1982) 136 Cal.App.3d 881, 896, the appellate court ruled that a superior court must grant the Board's request for injunctive relief when two essential requirements have been met: (1) the Board has "reasonable cause" to believe that the charging party has committed an unfair practice; and (2) injunctive relief is "just and proper."

In determining whether there is reasonable cause to believe an unfair practice has been committed, PERB " . . . need not establish an unfair labor practice has in fact been committed,"

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

but that PERB's theory is ". . . neither insubstantial nor frivolous." (Id. at pp. 896-897, emphasis in original.) In the present case, PERB statutory impasse procedures have been completed. Under Modesto City Schools (1983) PERB Decision No. 291, the Board held that, after the recommendations of the factfinder, the parties may remain at impasse or return to the bargaining table until they reach agreement or again reach impasse. As stated by the court in Public Employment Relations Board v. Modesto City Schools District, supra. 136 Cal.App.3d 881, 898-99:

> We find nothing in EERA intimating that the duty to bargain automatically ceases at the end of the impasse procedures. Even though section 3548.4 may not mandate post-factfinding mediation, it does provide that mediation efforts may continue. Moreover, as discussed infra, District's contention that, under the instant circumstances, it had no duty to bargain after issuance of a factfinding report is without support in the law and would undermine the collective bargaining process established by the EERA to improve employer-employee relations within the public school system of California. If, after exhausting statutory impasse procedures, an employer's duty to bargain permanently ceases under all circumstances, the impasse procedure will, as the Association contends, become an empty charade. [Fn. omitted.]
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> . . . . . .
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> Indeed, it is well settled in the private sector that a legal impasse can be terminated by nearly any change in bargaining-related circumstances. "An impasse is a fragile state of affairs and may be broken by a change in circumstances which suggests that attempts to adjust differences may no longer be futile. In such a case, the parties are obligated to resume negotiations and the

> employer is no longer free to implement changes in working conditions without bargaining. Just as there is no litmus-paper test to determine when an impasse has been created, there is none which determines when it has been broken. . . . Most obviously, an impasse will be broken when one party announces a retreat from some of its negotiating demands." [Citations.]
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> As the Association contends, and we concur, since collective bargaining is at the heart of the EERA scheme, it is necessary that PERB embrace the concept of the duty to bargain which revives when impasse is broken. "The existence of impasse resolution procedures does not negate this conclusion. Whether one considers impasse to happen at the beginning, the end, or throughout the statutory impasse resolution mechanism, at some point that impasse can be broken, just as in the private sector. When it is, the duty to bargain revives."
> (Emphasis in original.)

When the parties reach this second impasse after the statutory impasse procedures have been completed, PERB has no authority to recertify impasse or reinvoke the impasse procedures. (Modesto City Schools, supra, PERB Decision No. 291, p. 38.) The District's allegations show that the parties completed the statutory impasse procedures, resumed bargaining after the factfinder's recommendations, and reached a second impasse on March 1.[5] (Modesto City Schools, supra, PERB Decision No. 291, pp. 37-38.) After the March 2 one-day strike, the parties resumed meeting. On March 27, the Association again declared

[5]Although the second impasse was declared by the Association, the District does not dispute that the parties had reached this impasse.

impasse. On April 4 and 19, the Association engaged in one-day strikes.

The second amended unfair practice charge, filed on May 7, alleges that the Association engaged in bad faith bargaining conduct during the EERA statutory impasse procedures, post-factfinding negotiations, and post-impasse negotiations. These allegations include misrepresentations of District bargaining proposals, submission of regressive bargaining proposals, failure to provide financial information, slowdowns and work-to-rule activities, and one-day strikes on March 2, April 4 and 19.[6]

Under the traditional totality of the circumstances test[7] and assuming that the unfair practice charge allegations are true, such allegations, dating back to mediation and factfinding, constitute sufficient facts to state a prima facie violation of

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[6]While the second amended unfair practice charge also alleged that, on May 3, the Association notified the District of its intention to stage a two-day strike on May 8 and 9, no strike occurred on these days.

[7]PERB uses both a "per se" and a "totality of conduct" test in determining whether a party's negotiating conduct constitutes an unfair practice, depending on the specific conduct involved and its effect on the negotiating process. (Regents of the University of California (SUPA) (1985) PERB Decision No. 520; Pajaro Valley Unified School District (1978) PERB Decision No. 51; Stockton Unified School District (1989) PERB Decision No. 143.) The duty to bargain in good faith requires the parties to negotiate with genuine intent to reach agreement and a "totality of conduct" test is generally applied to determine if the parties have bargained in good faith. This test looks to the entire course of negotiations to see whether the parties have negotiated with the required subjective intention of reaching an agreement. Certain acts have such potential to frustrate negotiations and undermine the exclusivity of the bargaining agent that they are held to be unlawful without any finding of subjective bad faith. These are considered "per se" violations, (Pajaro Valley Unified School District, supra.)

section 3543.6(c) and (d) of EERA.[8] However, the fact that the District's unfair practice charge states a prima facie violation of the statute does not necessarily satisfy the higher "reasonable cause" standard upon which a decision to seek injunctive relief must be based. (Public Employment Relations Board v. Modesto City Schools District, supra, 136 Cal.App.3d 881.) In order to meet the reasonable cause standard, the Board must determine that it is probable that a violation of the Act has been committed. The requirement of reasonable cause is more than the mere finding of a prima facie case, which is satisfied by the charging party stating allegations which, if proven, would constitute an unfair practice. After examining the unfair practice charge allegations, and the intermittent nature of the strike, the Board finds that the reasonable cause standard is satisfied.[9]

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[8]Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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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.
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> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

[9]In Compton Unified School District (1987) PERB Order No. IR-50, a majority of the Board found that the strike which caused a "total breakdown in education, and the lack of even

REASONABLE CAUSE

In contrast to a strike of short duration, the present case involves an intermittent strike, where the employees are allegedly retaining the benefits of working and striking at the same time. In the private sector, partial and intermittent work stoppages have been consistently held to be unprotected. (First National Bank of Omaha (1968) 171 NLRB 1145 [69 LRRM 1103], enforced (8th Cir. 1969) 413 F.2d 921 [71 LRRM 3019].) In First National Bank of Omaha, the court explained its rationale for disfavoring partial and intermittent strikes.

> Employees may protest and seek to change any term or condition of their employment, and their ultimate sanction is the strike. If they choose to strike over hours of work, their strike is no different in quality or essence than is a strike over any other term of employment. What may make such a work stoppage unprotected is exactly what makes any work stoppage unprotected, that is, the refusal or failure of the employees to assume the status of strikers, with its consequent loss of pay and risk of being replaced. Employees who choose to withhold their services because of a dispute over scheduled hours may properly be required to do so by striking unequivocally. They may not simultaneously walk off their jobs but retain the benefits of working.
> (Id. at p. 1151.)

In essence, the intermittent strike allows the employees to pick and choose when they work, and be able to afford to strike because of the economic benefit earned when not striking. In Palos Verdes Peninsula Unified School District (1982) PERB

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basic instruction" met the reasonable cause standard. However, Compton does not preclude the Board from finding reasonable cause exists under either a different theory or different facts.

Decision No. 195, the Board held that a partial work stoppage or slowdown was unprotected, and that an employer did not violate EERA by disciplining employees for participation in unprotected conduct. The Board reasoned employees may not pick and choose the work they wish to do, and that accepting full pay for services implies a willingness to provide full service.[10]

Thus, under PERB's case law, these strikes by the Association are unprotected. The question that has yet to be answered, however, is whether intermittent strikes are also unlawful under EERA. Based on the inherent differences between the public and private sectors, the Board finds that such post-impasse intermittent strikes are both unprotected and unlawful under the Act.[11]

In the private sector, when an economic strike occurs, the employer is free to hire permanent replacements for the strikers,

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[10]In San Ramon Valley Unified School District (1984) PERB Order No. IR-46, the Board also discussed the issue of whether partial and intermittent strikes are unlawful. However, due to the unsettled state of the law, as well as the lack of evidence in the record, the Board found that reasonable cause did not exist to warrant injunctive relief. Consequently, the Board did not reach the issue of the status of partial and intermittent strikes.

[11]The California Supreme Court has noted that section 3549 of EERA does not prohibit strikes, but simply excludes the application of Labor Code section 923's protection of concerted activity. Thus, the Board has the authority and discretion to determine whether a strike constitutes an unfair practice and injunctive relief is warranted. (County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association. Local 660, SEIU, AFL-CIO (1985) 38 Cal.3d 564, 573 citing San Diego Teachers Association v. Superior Court, supra, 24 Cal.3d 1, 13; see also, Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575, 593, fn. 15.)

and may lawfully refuse a striker's request for reinstatement if he or she has been permanently replaced by the time the strike is ended. Unlike the private sector employer, the public sector employer does not have the economic pressure devices available to respond to an intermittent strike (i.e., lockout, discharge). The public interest in education, which is mandated by the California Constitution, and the employees' property rights in their employment precludes the public employer from exerting economic pressure by engaging in a lockout. (See American Ship Building Co. v. NLRB (1965) 379 U.S. 814 [58 LRRM 2672] where the court held that a private employer did not violate the National Labor Relations Act when, after a bargaining impasse had been reached, the employer temporarily shut down the plant and laid off the employees for the sole purpose of bringing economic pressure to support his legitimate bargaining position.) Additionally, due to the nature of the intermittent strike, the District is prevented from effectively maintaining the continuity and quality of education by hiring long-term substitutes. Therefore, the Board finds that intermittent strikes, by their nature, violate the duty to bargain in good faith.

Although NLRB v. Insurance Agents' International Union (1960) 361 U.S. 477 [45 LRRM 2704] is instructive on finding that intermittent strikes are unprotected, the court does not address the difference between public and private sector strikes, and the highly divergent missions of private enterprise and public

education.[12] Unlike the private sector, the public sector, by its nature, involves public interest. Under EERA, the public interest is to maintain the continuity and quality of educational services,[13] and "to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California . . . ." (Gov. Code, sec. 3540.) Due to this public interest, the Legislature enacted a comprehensive statutory scheme in EERA to promote bargaining while safeguarding basic education. (Gov. Code, secs. 3548 et seq.) As recognized by the court in San Diego Teachers

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[12]The court recognized the use of economic weapons in the private sector:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors--necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms--exist side by side.

However, in the public sector, the use of such counterbalancing economic weapons (i.e., strike and strike vis-a-vis lockout) are not available to the employer and employee organization.

[13]San Diego Teachers Association y. Superior Court, supra, 24 Cal.3d 1, 11.

Association v. Superior Court, supra, 24 Cal.3d 1, 8, the impasse procedures were included in EERA for the purpose of heading off strikes. Further, the Board has held that a strike occurring before the parties have completed the statutory impasse procedures creates a rebuttable presumption that the strike is an unlawful pressure tactic constituting a refusal or failure to meet and negotiate in good faith or participate in good faith in the impasse procedures. (Fresno Unified School District (1982) PERB Decision No. 208.)

The Legislature's interest, and the court's acknowledgement of that interest, on reaching agreement in educational labor disputes and the importance of a peaceful resolution of such disputes does not end at the completion of the statutory impasse procedures. To promote constructive employment relations and minimize work stoppages, the Board has both the authority and discretion to determine that the post-impasse intermittent strike is an unlawful pressure tactic constituting a refusal or failure to meet and negotiate in good faith. (San Diego Teachers Association v. Superior Court, supra, 24 Cal.3d 1, 13.) Having found reasonable cause exists that the Association has committed an unfair practice, we next move to the second prong of the test; the requirement that the injunctive relief is just and proper.

JUST AND PROPER

Notwithstanding a finding of reasonable cause to believe that an unfair practice has been committed, the Board finds that the District has failed to demonstrate that injunctive relief is

just and proper, (i.e., that the purposes of the Act would be frustrated absent injunctive relief). As explained by the court:

> Although injunctive relief is an extraordinary remedy, it may be used whenever either an employer or a union has committed unfair labor practices which, under the circumstances, would rendered any final order of PERB meaningless. . . . (Public Employment Relations Board v. Modesto City Schools District, supra, 136 Cal.App.3d 881, 903.)

The parties must bear in mind that an injunction is an extraordinary remedy. (Id. at p. 903.) Courts consistently proceed only with great caution in exercising their powers, and have required a clear showing that the threatened and impending injury is great, and can be averted only by the injunction. (Wilkins v. Oken (1958) 157 Cal.App.2d 603, 606.)

Relying on the Board's decision in Compton Unified School District, supra, PERB Order No. IR-50, the District argues that the disruptive effect of the strikes on the continuity and quality of education constitutes a violation of EERA and must be enjoined. In Compton, the majority of the Board found that the work stoppages violated EERA and that the total breakdown in education and negotiations constituted just and proper cause to seek injunctive relief. Unlike the present case, Compton involved a situation where the harm caused by the strikes could not be adequately remedied by PERB absent injunctive relief. The numerous declarations submitted by the District in its request for injunctive relief fail to include sufficient facts based on personal knowledge to demonstrate a total breakdown in either

education or negotiations. Many of the declarations contain hearsay statements and statements based on information and belief, as well as extraneous facts which are irrelevant to PERB's determination of whether reasonable cause exists or injunctive relief is just and proper.[14] More importantly, the declarations fail to include any facts indicating the effect, if any, on negotiations. For these reasons, the Board concludes the just and proper standard has not been satisfied.

ORDER

Based on the foregoing, the Fremont Unified School District's request for injunctive relief is hereby DENIED. It is hereby ORDERED that the General Counsel shall issue a complaint in Unfair Practice Case No. SF-CO-380, alleging a violation of section 3543.6(c) and (d).

Members Shank and Camilli joined in this Decision.

Member Cunningham's concurrence begins on page 16.

Member Craib's concurrence begins on page 22.

[14]Some of the declarations contained information regarding picket line misconduct. Indeed, pursuant to Code of Civil Procedure section 527.3, the District sought and obtained a superior court order limiting picket-line conduct.

Cunningham, Member, concurring: I agree with the majority that the Fremont Unified School District (District) request for injunctive relief must be denied under the circumstances outlined below. However, I cannot, in good faith, subscribe to the majority's insupportable legal analysis for the reasons that follow.

Initially, I agree that the allegations contained in the District's charge may constitute sufficient facts to state a prima facie violation of section 3543.6(c) and (d) of the Educational Employment Relations Act (EERA or Act).[1] (San Ramon Valley Unified School District (1984) PERB Order No. IR-46, p. 13.)

On the contrary, however, I cannot concur with the majority's conclusion that these facts satisfy the "reasonable cause" prong of the standard enunciated in Public Employment Relations Board v. Modesto City Schools District (1982) 136 Cal.App.3d 881, 896,[2] and further clarified by the Public Employment Relations Board (Board) in Compton Unified School District (1987) PERB Order No. IR-50. Compton involved a prolonged series of work stoppages, lasting from one to five

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[1]See page 7 of majority opinion for text of the Act. The District's second amended charge incorporates all allegations contained in its original and first amended statement of the charge.

[2]The superior court is required to grant the Board's request for injunctive relief when two essential requirements have been met: (1) reasonable cause exists to believe that an unfair practice has been committed, and (2) injunctive relief is "just and proper."

days each, for a total of 16 days, over a period of five months. The district was only able to obtain substitutes for approximately five percent of the striking teachers. Student attendance was down approximately 70 percent on strike days, and remained unusually low (40 percent) on nonstrike days, throughout the entire five-month period. Consequently, the Compton plurality found that a considerable number of the district's students received little or no meaningful education for the entire period during which teachers engaged in intermittent work stoppages. Based upon these facts, the Compton plurality determined that the work stoppages resulted in a "total breakdown in education," satisfied the two-part test described above, and constituted probable violations of EERA sections 3543.6(c) and 3540, thus warranting injunctive relief.

In the present case, the Fremont Unified District Teachers Association (Association) engaged in three one-day work stoppages over the course of two months. An adequate number of substitute teachers was obtained by the District on strike days, as evidenced by student/teacher ratios.[3] Immediately following each strike day, student attendance returned to normal levels. The record evidence does indicate that the strike activity caused some disruption to the educational process. Additionally, while there apparently were some incidents of sabotage and vandalism,

[3]The student/teacher ratio on March 2, 1990, was approximately 26:1. The student/teacher ratio on April 4 and April 19, 1990, was approximately 9:1.

which I certainly do not condone, there is no clear evidence that these acts were perpetrated, encouraged or approved by the Association. However, I find that these facts fail to evidence a "total breakdown in education" consistent with the standard established by the Compton Board.

The majority appears to drastically depart from the Compton test by establishing a bright-line rule that three one-day work stoppages within a two-month period not only constitute unprotected employee activity, but further constitute a per se violation of the Act. I find no legal authority for such a proposition.

The majority primarily relies on Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195 in support of finding intermittent strikes to be unlawful. In Palos Verdes, as the majority notes, the Board held that a partial work stoppage or slowdown was unprotected; however, the Board did not determine that such activity was unlawful within the scope of EERA. Moreover, the facts in Palos Verdes involved a refusal by several teachers to give written final examinations in accordance with established District policy. Again, as the majority points out, the Board reasoned employees may not pick and choose the work they desire, and accepting full pay for services implies a willingness to provide full service. In contrast to the Palos Verdes factual scenario, in the instant case, the striking Association members participated in three total work stoppages

and received no wages on the three occasions.[4] Thus, the policy concerns regarding work slowdowns expressed by the Palos Verdes Board have no applicability to these facts. Furthermore, although the facts involved in Palos Verdes were of a more egregious nature pursuant to traditional labor principles,[5] the Board did not hold such conduct unlawful under EERA.

It is also noteworthy that, in San Ramon Valley Unified School District, supra, PERB Order No. IR-46, the Board cited the unsettled state of the law, as well as the lack of record evidence, in finding that the "reasonable cause" prong of the Modesto test was not met. There, employees engaged in five one-day strikes, three of which occurred within a one-month period.

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[4]The majority declares that the nature of the strike activity herein allowed the teachers to be able to afford to go on strike; however, I question the validity of this assumption inasmuch as each striking teacher suffered the same economic loss as he/she would have had he/she gone on strike for three consecutive days.

[5]The majority cites First National Bank of Omaha (1968) 171 NLRB 1145 [69 LRRM 1103], enforced (8th Cir. 1969) 413 F.2d 921 [71 LRRM 3019] for the proposition that partial and intermittent work stoppages are unprotected. The court in First National Bank of Omaha states:

> What may make such a work stoppage unprotected is exactly what makes any work stoppage unprotected, that is, the refusal or failure of the employees to assume the status of strikers, with its consequent loss of pay . . . . [Employees] may not simultaneously walk off their jobs but retain the benefits of work. . . . [Emphasis added.]

It is this refusal by employees to assume the status of strikers that is the central issue in the determination of what constitutes protected activity under federal law.

The Board was not willing, however, to find that such a level of strike activity provided "reasonable cause" to believe that an unfair practice had been committed. Thus, the majority's determination, in this instance, that the "inherent nature" of the strike activity involved herein constitutes a violation of EERA is clearly without precedent or support.[6]

I agree with the majority that the Act expresses a public interest in the continuity and quality of educational services, as well as the improvement of employer-employee relations in California schools. The majority's reasonable cause finding is premised upon a hypothetical set of factual assumptions, that: (1) the educational process is totally disrupted by an intermittent strike; and (2) an intermittent strike significantly affects the bargaining process. As the majority clearly states, however, these assumptions are simply not supported by the facts of this case. At pages 13-14 of the majority opinion, it is stated:

> The numerous declarations submitted by the District in its request for injunctive relief fail to include sufficient facts based on personal knowledge to demonstrate a total breakdown in either education or negotiations."

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[6]Despite the majority's characterization of the strike activity involved in this case, it should be noted that, in the concurring opinion in Compton, the author emphasized that the approach was "premised on the harm caused by the strike, regardless of whether it is intermittent in nature or not." This analysis appears inconsistent with the majority's legal conclusion in the instant case.

In fact, as the majority admits, also at page 14, " . . . the declarations fail to include any facts indicating the effect, if any, on negotiations." (Emphasis added.) How can the majority find reasonable cause to believe, in all probability, that an unfair practice has been committed,[7] when the record admittedly fails to support the factual assumptions underlying the majority's conclusion?

Finally, inasmuch as I find that the District has failed to establish that "reasonable cause" exists to believe that an unfair practice has been committed in this instance, there is no need to address the "just and proper" prong of the Modesto test.

[7]In order to meet the reasonable cause standard, the Board must determine that it is probable that a violation of the Act has been committed. (Majority Opinion at p. 7.)

Craib, Member, concurring: I concur that the Fremont Unified School District's (District) request for injunctive relief must be denied. However, unlike the majority, I would hold that the intermittent strike activity provides no basis for finding reasonable cause to believe that an unfair practice has been committed. Specifically, I disagree that intermittent strikes are unlawful under the Educational Employment Relations Act (EERA).

My position on the legal status of intermittent strikes which take place after the exhaustion of statutory impasse procedures is fully set forth in my dissent in Compton Unified School District (1987) PERB Order No. IR-50, and will not be recounted here. In that opinion, I explained that, while I view all intermittent strikes to be unprotected, there is no basis in either the language of EERA or in accepted labor law principles for finding such work stoppages to be unlawful.

In the present case, the majority correctly cites both Public Employment Relations Board (Board) and private sector precedent for the proposition that intermittent strikes, as well as partial strikes and slowdowns, are unprotected. However, the majority then takes a huge analytical leap and declares that intermittent strikes under EERA are both unprotected and unlawful. Purportedly, this leap is justified by the "inherent differences between the public and private sectors." What those differences are and, more importantly, how they affect the

collective bargaining process created by the Legislature is left unclear.

As stated in section 3540,[1] the Legislature created EERA in order to improve labor relations in the public school system. As the Supreme Court of California has noted, in determining whether to seek injunctive relief, the Board may appropriately consider the effect of the conduct at issue upon the continuity and quality of educational services. (San Diego Teachers Association v. Superior Court of San Diego County (1979) 24 Ca.3d 1, 11.) The majority relies strongly on this statement by the court, but misconstrues it in several ways.

First, the majority fails to recognize that the effect on educational services is an appropriate consideration in determining if injunctive relief is just and proper, but this inquiry is relevant only after first determining that the alleged conduct violates a provision of EERA. Instead, the majority confuses the two prongs of the standard for seeking injunctive

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[1]EERA section 3540 states, in pertinent part:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

relief by relying on hypothetical interference with the continuity and quality of education to conclude that there is reasonable cause to believe that an unfair practice has been committed.

As I explained in my dissenting opinion in Compton Unified School District, supra, PERB Order No. IR-50, there is no statutory basis for finding intermittent strikes to be unlawful. Thus, the majority has nothing to rely on but its own public policy predilections unartfully disguised as legal analysis. As I also explained in Compton, since EERA provides no basis for outlawing strikes occurring after the exhaustion of impasse procedures, if such a result is warranted, it is properly the role of the Legislature to amend the statute. Notwithstanding the majority's incantations, the EERA, as presently written, does not give the Board such authority. Moreover, as I also explained in Compton, the fact that the Board has no jurisdiction over particular strike activity does not leave the public school employer without recourse. The employer is free to go to court to seek relief under the common law based on the remaining prohibitions (or an expansion thereof) set out in County Sanitation District No. 2 of Los Angeles v. Los Angeles County Employees Association, Local 660, SEIU, AFL-CIO (1985) 38 Cal.3d 564.

A second major flaw in the majority opinion is its failure to point to any evidence that intermittent strikes have an inordinately adverse effect upon either the bargaining process or

upon the provision of educational services that would warrant singling out such conduct for prohibition. The majority relies solely on the bald assertions that the public school employer is unable to respond with its own economic pressure devices and that intermittent strikes prevent the maintenance of the continuity and quality of education.

It is true that lockouts are impractical in the public schools; however, the majority's assumption that disciplinary action is also precluded is not correct. The employer may have more procedural hoops to jump through, but discipline, particularly short of dismissal, is a viable option. More importantly, the majority ignores certain differences in the public sector that undermine its position. The majority asserts that intermittent strikes should be unlawful because the employer has no countervailing economic pressure devices. This ignores the fact that, in the public sector, a strike does not normally cause any economic hardship for the employer. Revenues are generally fixed and, with the exception of monies based on attendance (which are usually offset by salary savings due to the strike), do not change due to the absence of striking teachers. Thus, the need for countervailing economic weapons is lessened.

The majority also ignores two substantial limiting factors upon the frequency and duration of public employee strikes that further undermine its implicit assumption that intermittent strikes provide an unfair advantage to the employees. First, since the employer normally suffers no net economic loss, but the

striking employees do, this naturally limits the employees' willingness to strike for any significant number of days. The majority's statement (at p. 9) that an intermittent strike allows employees to "afford to strike because of the economic benefit earned when not striking" ignores the economic reality that faces most public school employees. For those who must live from paycheck to paycheck, any strike, whether full or intermittent, represents a substantial financial sacrifice. Few can afford to engage in an intermittent strike for any substantial length of time.

Another natural limiting factor on public employee strikes is public pressure. Unlike the private sector, where the public may only have peripheral concerns about a labor dispute, in the public sector the public stake is much higher. Consequently, both sides feel tremendous pressure to settle their labor disputes. A strike of significant length, whether for a continuous period or intermittent, will rarely enjoy the level of public support that is critical for its success as a pressure tactic. Therefore, the intermittent strike is not the all-powerful weapon that the majority apparently assumes that it is.

The majority's assertion that intermittent strikes prevent the effective maintenance of educational services is belied by the record in this case, which, ironically, the majority so ably describes in finding that injunctive relief is not just and proper in this case. As the majority notes, the declarations provided by the District do not reflect a substantial breakdown

in the educational process nor any adverse effect upon negotiations. The declarations and exhibits also reveal that a more than adequate number of substitute teachers were secured for each strike day. Thus, the majority claims that intermittent strikes are unlawful because they inherently have an adverse effect that, nevertheless, the majority finds was not shown here. Such a holding is, of course, internally inconsistent.

In sum, the majority has failed to provide a convincing legal analysis for its radical departure from existing law. Instead, the majority relies on unfounded proclamations as to the inherent nature of intermittent strikes that are not supported by either cogent theory or by the record in the present case. I continue to believe that EERA provides no basis for finding intermittent strikes to be unlawful, and the analysis put forth by the majority serves only to confirm that belief. I must, therefore, disagree with the majority's holding that the intermittent strike activity provides reasonable cause to believe that an unfair practice has been committed.