STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SOUTHWEST TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2750
v.	)	PERB Decision No. 791
SOUTH BAY UNION SCHOOL DISTRICT,	)	February 8, 1990
Respondent.	)	

Appearances: Reich, Adell & Crost by Marianne Reinhold, Attorney, for Southwest Teachers Association, CTA/NEA; Brown and Conradi by Clifford D. Weiler, Attorney, for South Bay Union School District.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the South Bay Union School District (District) and the Southwest Teachers Association (Association) to a proposed decision issued by a PERB administrative law judge (ALJ). The ALJ held that the District violated the Educational Employment Relations Act (EERA or Act),[1] section 3543.5, subdivisions (a) and (b)[2] when it

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

[2]Section 3543.5, subdivisions (a) and (b) provide:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

refused to permit the Association to file grievances on its own behalf. The ALJ declined to rule on whether the District violated section 3543.5, subdivision (c)[3] by its conduct; he found that it was unnecessary, given his ruling on the subdivision (a) and (b) violations.

The District excepts to that portion of the proposed decision which found that it had violated subdivisions (a) and (b) because neither the charge nor the complaint pled those subdivisions as independent violations of the Act. It also excepts to the ALJ's refusal to rule on the subdivision (c) violation, as well as to one factual finding and to the remedy, which included a cease and desist order and a posting requirement.

The Association excepts to the ALJ's failure to find a subdivision (c) violation.

> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[3]Section 3543.5, subdivision (c) provides:

> It shall be unlawful for a public school employer to:
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

FACTUAL BACKGROUND

The Association is the exclusive representative for the certificated employees of the District. The District and the Association have entered into a series of collective bargaining agreements, commencing in 1977. The current agreement is effective from November 10, 1988 through June 30, 1990.

The events leading to this appeal arose during a hiatus between the immediately preceding agreement, which was effective from May 8, 1984 through June 30, 1986 (hereafter Agreement), and the current agreement. The Agreement and its predecessors limited the Association's right to file grievances in its own name (i.e., without a member as grievant). Pursuant to section 13.415 of the Agreement, the Association could only file a grievance

> regarding an alleged violation, misapplication or misinterpretation of a provision of the Agreement in the following Articles: Recognition and Negotiation Procedures, Organizational Security, Management Rights, Association Rights, Class Size, and Effect of Agreement.

During contract negotiations, after the expiration of the Agreement, the Association proposed changes in the grievance article. Inter alia, it sought to change section 13.415 to permit the Association to file and prosecute any contractually-based grievance in its own name. To persuade the District, the Association relied on the ruling of a PERB ALJ in San Diego Unified School District (1987) PERB Decision No. HO-U-314

[11 PERC 18035]. In San Diego, the ALJ held that bargaining to impasse in order to limit an association's right to file grievances in its own name was an unfair practice.

The District refused to change its position and sought to retain the Agreement's section 13.425 language. According to an Association witness, a District negotiator indicated that the District wanted individual employees "on the line" for grievances.[4] During the course of continued negotiations, the Association repeatedly asserted its right to file and prosecute grievances in its own behalf. The District refused to change its position. After approximately three months of negotiations, the District declared impasse. A request for impasse determination was sent to PERB listing 20 items in dispute. The Association agreed that the parties had many disputed issues; however, it objected to the declaration of impasse. PERB declared the parties at impasse.

During the mediation process, the parties maintained their pre-impasse positions. Ultimately, in order to secure an agreement, the Association agreed to accept the District's

[4]The District excepts to the ALJ's finding that District negotiator Gerald Conradi used that phrase. Our reading of the transcript indicates that the phrase was not attributed to any specific individual. The District also excepts to the ALJ's use of this phrase in formulating his conclusion, contending that the testimony was hearsay. Although the use of the phrase "on the line" may, indeed, be hearsay, it is clear that the District maintains that it is entitled to know the name of employees asserting that the District violated a contractual provision. Since we do not adopt the analysis of the ALJ and since the District does maintain its position that the name of the aggrieved is critical, any perceived reliance on Conradi's alleged use of the phrase "on the line" was harmless error.

grievance article. The current 1988-90 agreement continues to contain a grievance article which restricts the Association's ability to grieve portions of the parties' contract.

PROCEDURAL BACKGROUND

In May 1988, the Association filed an unfair practice charge against the District, which alleged that the District violated section 3543.5, subdivisions (a), (b), (c), (d), and (e). PERB issued a complaint in June 1988, alleging violation of subdivisions (a), (b), and (c). The District denied any violations of the Act. The parties were unable to resolve their differences at informal conferences. At the hearing and after, certain charges were withdrawn as a result of settlement agreements. At the time the ALJ wrote his proposed decision, the remaining allegation asserted that the District violated section 3543.5, subdivision (c) and, derivatively, subdivisions (a) and (b)[5] by insisting that the Association agree to a contractual provision which waived its right to initiate and process grievances in its own name.

THE PROPOSED DECISION

The ALJ separately analyzed the District's conduct under section 3543.5, subdivisions (a), (b), and (c). He concluded that the District violated subdivisions (a) and (b), but made no determination as to (c).

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[5]The ALJ did not distinguish between the alleged independent (c) violation and the derivative (a) and (b) violations. Instead, he analyzed the facts as though independent (a), (b), and (c) violations had been alleged. This issue will be dealt with in the discussion, infra.

Subdivision (a)

Utilizing the Board's test for interference set out in Carlsbad Unified School District (1979) PERB Decision No. 89, the ALJ found that the District unlawfully interfered with the right of an employee to have an employee organization file grievances on the employee's behalf in the organization's name. He found that right to be part of the employee's right to form, join, and participate in organizational activities under section 3543.[6] Critical to his analysis was a determination that "[t]he right to anonymity is a keystone in the exercise of employee rights." He relied on a number of National Labor Relations Board (NLRB) cases which held that employees are guaranteed confidentiality under the National Labor Relations Act (NLRA). He further reasoned that since this Board has held that grievance activities constitute "participation" in an employee organization (North Sacramento School District (1982) PERB Decision No. 264) and, therefore, an employee right, any adverse impact on that right is a violation of subdivision (a) under Carlsbad. He concluded that since the District's policy demanded that the employees reveal their identity to the District if they wished to present grievances, or forego raising contract violations, the District

[6]Section 3543 provides:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations....

caused substantial harm to the employees in their exercise of statutory rights.

Subdivision (b)

The ALJ also concluded that the District denied the Association rights guaranteed it under section 3543.1[7] of the Act and, thus, violated section 3543.5, subdivision (b). His analysis relied upon this Board's decision in Modesto City Schools (1983) PERB Decision No. 291 and the NLRB's decision in Latrobe Steel Company (1979) 244 NLRB 528 [102 LRRM 1175]. In Modesto, the Board held that the district committed an unfair practice by demanding to impasse that the association give up the right to represent employees at informal grievance proceedings. In Latrobe, the NLRB held that the employer violated the NLRA by insisting to impasse that the union agree to a proposal that prohibited the union from submitting grievances in its own name. The NLRB held that the employer could not insist that a union give up rights guaranteed to it by the NLRA, doing so constituted

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[7]Section 3543.1 provides, in pertinent part:

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

demanding to impasse on a matter outside the scope of representation.[8]

Subdivision (c)

Although the ALJ recognized that insistence to impasse on a nonmandatory subject of bargaining constitutes a per se violation of subdivision (c), Lake Elsinore School District (1986) PERB Decision No. 603, he declined to make a finding on a subdivision (c) violation. He relied on the United States Court of Appeals decision in Latrobe Steele Company v. NLRB (3d Cir. 1980) 630 F.2d 171 [105 LRRM 2393], in which the court refused to enforce the NLRB's order in Latrobe Steele Company, supra, 244 NLRB 528. The court concluded that the employer did not unlawfully insist on the proposal in question because "[t]he record demonstrates that even had the Company dropped its nonmandatory proposals, the parties would have been at impasse." (Latrobe Steele Company, supra, 630 F.2d 171 [105 LRRM at p. 2399.)

The ALJ found that the evidence demonstrated that the impasse between the parties would have occurred absent the dispute over the grievance procedure. However, instead of, then, applying the Latrobe analysis, he concluded:

> [i]nasmuch as it is questionable whether the District independently violated section 3543.5(c), and since section 3543.5(a) and (b) violations have been found which will result in substantially the same remedy, no section 3543.5(c) finding will be made.

(Proposed Decision at p. 26, fn. omitted.)

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[8]Modesto City Schools, supra, PERB Decision No. 291 and Latrobe Steele Company, supra, 244 NLRB 528, will be discussed in further detail, infra, in the Discussion section.

THE EXCEPTIONS

The District's Exceptions

The District primarily contends that the ALJ exceeded the scope of the pleading by finding subdivision (a) and (b) violations where they had been pled solely as derivative violations. Specifically, it excepts to six portions of the proposed decision: 1) the expansion of the scope of the charge and complaint by analyzing and considering whether or not respondent violated section 3543.5(a) and (b); 2) the analysis and determination that a violation of section 3543.5(a) occurred; 3) the factual finding, "Conradi further stated that the governing board members wanted individual employees to be 'on the line' for grievances, and apparently felt that if the Association could file any grievances in its own name, more grievances would result," and this factual finding's application to the analysis; 4) the analysis and determination that a violation of section 3543.5(b) occurred; 5) the failure to render a decision concerning violation of section 3543.5(c); and 6) the remedy, order or posting.

The District relies on the Board's decision in Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, to support its argument that the ALJ improperly expanded the scope of the pleadings. As for the independent (a) violation, it contends that since the issue was not fully litigated it is impossible to ascertain whether evidence exists to support the findings of interference. The District also disagrees with the ALJ's analysis of the (b) violation because there was no finding that

the District ever rejected a grievance filed by the Association in its own name.

The Association's Exception

The Association excepts only to the ALJ's failure to find a section 3543.5, subdivision (c) violation. It relies primarily on the ALJ's underlying analysis that the Association had a statutory right to file grievances in its own name to support its contention that such a subject was nonmandatory. It concludes that the District violated its duty to bargain by impermissibly insisting to impasse on a nonmandatory subject, citing Lake Elsinore School District, supra, PERB Decision No. 603.

The Association also disputes the District's contention that the ALJ impermissibly expanded the scope of the pleadings. It asserts that the District was on notice of the alleged subdivision (a) and (b) violations and fully litigated those issues.

DISCUSSION

This case should be analyzed solely as a section 3543.5, subdivision (c) violation, both because of the scope of the pleadings and because of the factual basis underlying the charge. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, at pp. 5-10.) Furthermore, as more fully explained below, the ALJ erred by not applying the Board's per se analysis as set forth in Lake Elsinore and also misapplied Latrobe Steele Company, supra, 102 LRRM 2393, thus, needlessly, expanding the scope of the pleadings to find independent subdivision (a) and (b) violations.

EERA requires a public school employer to "meet and negotiate" with its employees' exclusive representative over matters within the scope of representation. Failure to meet and negotiate in good faith on a matter within scope is a violation of section 3543.5, subdivision (c). Conversely, insistence to impasse on a nonmandatory subject is a per se violation. (Lake Elsinore School District, supra, PERB Decision No. 603; accord NLRB v. Wooster Div. of Borg-Warner Corp. (1958) 356 U.S. 342 [42 LRRM 2034]; Industrial Union of Marine & Shipbuilding Workers v. NLRB (3d Cir. 1963) 320 F.2d 615 [53 LRRM 2878].

The threshold issue which we must decide is whether the Association's right to file and process grievances in its own name is within the scope of representation under EERA and, thus, a mandatory subject of bargaining; or if it is outside the scope of representation and, thus, a nonmandatory subject of bargaining. Although the propriety of negotiating a limitation on an association's right to file grievances in its own name has been litigated previously, San Diego Unified School District, supra, PERB Decision No. HO-U-314, Lancaster School District (1989) PERB Decision No. HO-U-406, Chula Vista City School District, Case No. LA-CE-2038 (currently on appeal to the Board), the Board has not yet ruled on this issue.[9]

[9]In a recent case, Temple City Unified School District, (1989) PERB Order No. Ad-190, the right of an association to file grievances in its own name was raised peripherally. There, the district sought to defer to arbitration the issue of its unilateral change in benefit plan contributions. The Board, relying on the parties' collective bargaining agreement, held that the matter was not deferrable because the association, itself, did not have a right to grieve the benefit plan reduction. Neither party raised the question of whether EERA

The scope of representation provision of EERA is found in section 3543.2.[10] Matters not specifically enumerated in section 3543.2 are analyzed under a three-part test set out in Anaheim Union High School District (1981) PERB Decision No. 177 (approved of in San Mateo City School District v. PERB (1983) 33 Cal.3d 850, 858-60). The Association's right to grieve in its own name does not fall within the subjects enumerated in section 3543.2.[11] A subject, which is not expressly enumerated, will be found to be a mandatory subject of bargaining if: 1) it is

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provided the association the right to grieve any portion of the collective bargaining agreement. Thus, our holding in that case, in no way, reflects a determination that a limitation on association rights is within the scope of representation.

[10]Section 3543.2 provides, in pertinent part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code.

[11]Although the Board has held that grievance procedures in general are a mandatory subject of bargaining (Anaheim City School District (1983) PERB Decision No. 364, at p. 15; see also section 3543.2 (quoted at fn. 10.), the issue of whether the Association has a right to file and process grievances in its own name is not necessarily encompassed by section 3543.2. The right of the Association to file and process grievances in its own name is, however, reasonably related to the procedures for processing grievances and, thus, it is appropriate for the Board to utilize the Anaheim test to determine whether the issue is within the scope of representation.

logically and reasonably related to hours, wages or an enumerated term and condition of employment; 2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and 3) the employer's obligation to negotiate would not specifically abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. (Anaheim Union High School District, supra, PERB Decision No. 177, at pp. 4-5)

In the case currently before the Board, the issue of the Association's ability to file and process grievances in its own name satisfies the first two prongs of the Anaheim test: the subject is reasonably related to procedures for grievance processing and, as is obvious from this litigation, the subject is of such concern to both management and employees that conflict is likely to occur and collective negotiations would be an appropriate method of resolving the conflict. However, the third prong of the Anaheim test cannot be met. The third prong was designed to address a situation where the employer refused to bargain over an issue presented by the exclusive representative. In the present case, the third prong of the test must be modified to provide protection for the Association's inherent concerns with its role as exclusive representative. When addressing the concerns of an exclusive representative we must ask whether compelling the exclusive representative to negotiate its right to present and process grievances in its own name would

"significantly abridge the organization's freedom to exercise those representational prerogatives essential to the achievement of the organization's mission as exclusive representative of the negotiating unit."[12]

The District's attempt to limit the Association's right to file and process grievances in its own name would seriously inhibit the Association's ability to effectively operate as an exclusive representative for the unit. Section 3543.1, subdivision (a) grants employee organizations "the right to represent their members in their employment relations with public school employers . . . ." The employee organization's right to file grievances arises out of this right to represent. Protecting the integrity of a collective bargaining agreement is of concern to all members of the bargaining unit, not just the employee or employees immediately affected by a particular breach of the contract. Consequently, limits on the ability to grieve contract violations fundamentally alter the concept of collective action. (Industrial Union of Marine & Shipbuilding Workers v. NLRB, supra, 53 LRRM 2878; see also Education Association v. Red Bank Board of Education (1978) ____ A.2d ____ [99 LRRM 2447, 2452-53].)

In Marine & Shipbuilding Workers, the Third Circuit rejected the employer's attempt to require all grievances to be signed by

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[12] This language is found in the ALJ's decision in San Diego Unified School District, supra. PERB Decision No. HO-U-314 [11 PERC 18035, at p. 181], Similar language is proposed by a different ALJ in Chula Vista City School District, supra, LA-CE-2038, Proposed Decision at pages 126-33. This language is not being quoted because it is binding on the Board (PERB Regulation 32215), but rather because the Board finds it persuasive.

the employee affected. The court rejected the employer's argument that such a requirement was a mandatory subject of bargaining.

> Although at first glance it might appear to be a "condition of employment," actually the effect of the proposal is to limit the union's representation of the employees . . .

(53 LRRM at p. 2881.) The court relied on both section 8, subdivision (d)[13] and section 9, subdivision (a)[14] in reaching its conclusion. The court concluded that such a provision would

> "substantially modif[y] the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It [would] enable[] the employer, in effect, to deal with its employees rather than with their statutory representatives. [Citation.]"

(Ibid.) The court reasoned that such a requirement would

> preclude the union from prosecuting flagrant violations of the contract merely because the employee involved, due to fear of employer

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[13]Section 8, subdivision (d) of the NRLA provides, in pertinent part:

> For the purposes of this section [unfair labor practices], to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

[14]Section 9, subdivision (a) of the NLRA provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of employees . . . shall be the exclusive representatives . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

> reprisals, or for similar reasons, chose not to sign a grievance.

.(Ibid.)

The NLRB relied on Marine & Shipbuilding Workers when it decided Latrobe Steele Company, supra, 244 NLRB at p. 533.[15] As discussed supra. in Latrobe, the NLRB held that the employer violated the NLRA by insisting to impasse that the union agree to a proposal that prohibited the union from submitting grievances in its own name. (Id. at p. 533.) The employer in Latrobe proposed that the union give up its existing contractual right to file and process grievances in its own name. The parties went to impasse on this and other issues. The NLRB rejected the employer's right to insist to impasse on this issue. Relying on Marine & Shipbuilding Workers, the NLRB stated:

> The right of the Union, however, to represent the employees in the unit, both individually and collectively, at all stages of the grievance procedure, including the right to file grievances and process them, and to administer the collective-bargaining agreement, is a statutory right which Respondent may not insist to the point of impasse that the Union waive.

(Ibid.)

The Supreme Court of New Jersey has also had an opportunity

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[15]The District argues that we should not rely on the NLRB analysis because the definition of employee organization in the NLRA differs, in its view, significantly from the definition found in EERA. Although the definitions do differ, the NLRB cases remain persuasive because neither the NLRB nor the reviewing courts rely on the definition of employee organization to reach the conclusion that unions have a right to grieve in their own name. While we are not bound by NLRB analysis, we will take cognizance of NLRB precedent when appropriate. (Carlsbad Unified School District (1979) PERB Decision No. 89; Los Angeles Unified School District (1976) EERB Decision No. 5.)

to consider whether the New Jersey Public Employment Relations Act permits an exclusive representative to file and process grievances in its own name. (Education Association v. Red Bank Board of Education, supra, 99 LRRM 2447.) In that case, the association attempted to file a grievance in its own name and the employer rejected it as outside the scope of the collective bargaining agreement. Although the New Jersey court relied primarily on its interpretation of a section of the New Jersey Public Employment Relations Act, a portion of its analysis is instructive.

> Permitting a public employer to require individual action at the critical moment when vindication of employee rights is at stake would surely "short circuit" the system of collectivity the Legislature sought to promote in the Act and weaken its benefits. . . . Requiring an individual to put himself on the line as the sole means of initiating a grievance is inherently contrary to the very concept of collectivity and would, if sanctioned, bring about a "prejudicial dilution" of the basic right to organize secured by the [New Jersey] Constitution.

(Id. at p. 2453.) The New Jersey court has allowed an employee organization to file a grievance over the objection of the affected member.

As indicated earlier, PERB has not yet had an opportunity to address the issue of an association's right to file a grievance in its own name. However, in Modesto City Schools, supra, PERB Decision No. 291, the Board addressed a slightly different, but related issue: whether an association had the right to appear with an employee at the first and most informal grievance proceeding. The Board held that EERA afforded the association

that right.

> The grievance procedure is perhaps the most important point at which employee organizations represent their members in their day-to-day employment relations. EERA also provides that a grievance may be settled between the employer and an individual employee, but is carefully drawn so as not to diminish an employee organization's right to fulfill its representational duties under the Act. . . . [T]he grievance process is an "employment relation" within the meaning of subsection 3543.1(a) and, therefore, employee organizations have a statutory right to represent employees in the presentation of their grievances. Indeed, the statutory right of unions to represent employees in grievances is of such significance that it includes not only negotiated grievance procedures but non-negotiated ones as well.

(Id. at pp. 28-29, fn. omitted.) The Board concluded that the district violated its duty to bargain in good faith by insisting to impasse on this issue. The Board stated:

> [W]hile the District may negotiate over every aspect of the grievance procedure, it may not demand to impasse that the Association abandon rights guaranteed under section 3543.

(Id. at pp. 29-30.)

Since EERA has created a system of labor relations which rests upon the notion of collective action and since the grievance procedure is merely a tool to enforce the collective action accomplished in negotiations, we find that the Association has a right to file grievances in its own name. We agree with the ALJ in San Diego Unified School District:

> For contract violations to be grievable and arbitrable only at the instigation of an individual employee, runs counter to the very idea of collective action. Any employer violation of a contract, even if it directly affects only one employee, has the potential of initiating a practice detrimental to the

> entire bargaining unit. In a system of collective bargaining, the ability to challenge contractual violations must lie with the party that negotiated the contract, i.e., the union. Any other system makes the viability of the contract dependent upon the willingness of each unit member to stand individually.

(PERB Decision No. HO-U-314 [11 PERC 18035, at p. 181].)[15]

There remains one issue unaddressed. The ALJ declined to address the subdivision (c) violation because of what he perceived as a conflict between the NLRB and PERB over insisting to impasse on a nonmandatory subject, when there remain disputes over other mandatory subjects. To support his analysis of the NLRB position, he relied on Latrobe Steele Company v. NLRB, supra, 105 LRRM 2393. The NLRB decision in Latrobe Steele Company, supra, 244 NLRB 528, was reviewed by the Third Circuit Court of Appeals. The court reversed the portion of the decision which held that, by insisting to impasse on the grievance procedure, the employer violated its duty to bargain in good faith. It held that, because the parties were not in agreement on a number of significant issues, insisting on the grievance proposal was not the cause of the parties' impasse. The court discussed the seminal United States Supreme Court case, NLRB v. Wooster Div. of Borg-Warner Corp., supra, 42 LRRM 2034, which held that a party is not permitted to insist to impasse on a nonmandatory subject of bargaining and discussed subsequent cases which held that the insistence on the nonmandatory subject need

[16]Again, we note that we are not quoting the PERB ALJ's proposed decision because we are bound to do so, rather we find his comments persuasive. (See fn. 12.)

not be the sole cause of the parties' failure to reach agreement. Nevertheless, the Third Circuit Court of Appeals held,

> [u]nder the facts of this case, it cannot be said that the insistence on the non-mandatory proposal prevented agreement on any mandatory subjects.

(Latrobe Steele Company v. NLRB, supra, 105 LRRM at p. 2400.) In a footnote, the court indicated that it was not bound by language it considered dicta in Industrial Union of Marine & Shipbuilding Workers v. NLRB, supra, 53 LRRM 2878. The Marine & Shipbuilding Workers court stated:

> It was not necessary for the Board to find that the company's insistence on this proposal was the sole cause of the failure to reach agreement. If the proposal is not a mandatory bargaining subject, insistence upon it was a per se violation of the duty to bargain. [Citations.] Any other rule would permit insistence upon a non-mandatory item so long as there were any disputes as to mandatory topics.

(Id. at p. 2880, emphasis added.) The Latrobe court took exception to the emphasized portion, claiming it to be dicta.[17] (Latrobe Steele Company v. NLRB, supra, 105 LRRM at p. 2400, fn. 9.)

We disagree with the court's rejection of the Marine & Shipbuilding Workers language, emphasized above. Even if that

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[17]The court, however, clarified its position by stating:

> Any dispute on a mandatory subject is not sufficient to protect a party's insistence to the point of impasse on a non-mandatory subject. The dispute over the non-mandatory subject must itself rise to the level of impasse.

(Latrobe Steele Company v. NLRB, supra, 105 LRRM at 2400, fn. 9, emphasis added.)

language itself were dicta, the rule stated immediately prior to that "dicta" was, and remains, the law, as established by the United States Supreme Court in NLRB v. Wooster Div. of Borg-Warner Corp., supra, 42 LRRM 2034. Thus, even if the parties had gone to impasse over other issues, the employer's insistence on an inclusion of a nonmandatory subject violates its duty to negotiate in good faith.

Furthermore, this Board has held that insistence to impasse on a nonmandatory subject is a per se violation of the Act. (Lake Elsinore School District, supra, PERB Decision No. 603.) There appears to be no reason to adopt a different rule in this instance.

CONCLUSION

We, therefore, find that the District violated section 3543.5, subdivision (c) by insisting to impasse on the Association's right to file grievances in its own name. We decline to follow the Third Circuit's Latrobe analysis. We also reject the ALJ's subdivisions (a) and (b) analysis as unnecessary in these circumstances.

REMEDY

The Association seeks an order requiring the District to cease and desist its unlawful conduct and delete from the current collective bargaining agreement the offending provisions. A cease and desist order directing the District to stop its unlawful conduct is appropriate in this case. We, therefore, order the District to accept grievances filed by the Association

on behalf of individuals as well as grievances filed to protect Association rights. Because we have specifically ordered the District to process the Association's grievances, it is unnecessary to strike the offending clauses of the parties' collective bargaining agreement. The purpose of this order is to assure that those clauses will not be enforced for the duration of the agreement.

It is also appropriate that the District be required to post a notice which incorporates the terms of this order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms of the order. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from that activity.

ORDER

Based upon the foregoing findings of fact and conclusion of law and the entire record in this case, it is found that the South Bay Union School District has violated section 3543.5, subdivision (c) of the Educational Employment Relations Act. Pursuant to section 3541.5, subdivision (c) of the Government Code, it is hereby ORDERED that the South Bay Union School District, its officers and representatives shall:

A. CEASE AND DESIST FROM:

1. Insisting to impasse on contractual language outside the scope of representation which has the effect

restricting the union's right to file grievances on its own behalf.

2. Enforcing and. giving effect to those portions of the 1988-90 collective bargaining agreement which restrict the Association's right to file and process grievances in its own name.

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

1. Accept and process all contractual grievances filed by the Association in its own name, irrespective of any contractual terms or other policies in effect which deny the Association that right, for the term of the current contract which expires June 30, 1990.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with this order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

Member Camilli's concurrence begins on page 24.
Chairperson Hesse's dissent begins on page 26.

Camilli, Member, concurring: While I concur in the lead opinion's conclusion that the right of an association to file a grievance in its own name is not a mandatory subject of bargaining, I write separately to present my analysis on this issue.

Mandatory subjects of bargaining are specifically enumerated under the Educational Employment Relations Act (EERA) section 3543.2. I agree that this issue is not among those mandatory subjects. Ordinarily, the Public Employment Relations Board has found that subjects not listed in section 3543.2 are mandatory subjects of bargaining only if all three prongs of the test set forth in Anaheim Union High School District (1981) PERB Decision No. 177 are met. The lead opinion modified the third prong of the Anaheim test to fit the instant facts and concluded that the right of an association to file a grievance in its own name was a nonmandatory subject of bargaining. I would reach the conclusion that this item is not a mandatory subject of bargaining without applying the Anaheim test.

EERA section 3543.l(a) gives the Southwest Teachers Association (Association) a statutory right to represent its members. This section provides in pertinent part:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, ...

Therefore, I would analyze this issue as a statutory right which is not among the enumerated mandatory subjects of bargaining. I would further address the issue of whether the Association can

bargain away its statutory right to file a grievance in its own name. It is difficult to conclude that this particular "right" is a part of the statutory grievance right, under section 3543.1(3), and then find that it can be "bargained away."

The concept of collective action found in EERA (and probably any statute pertinent to collective bargaining) is one of employees acting collectively through a chosen representative. For contract violations to be grievable only at the instigation of an individual employee seems to be contrary to the basic concept of collective action.

I conclude that the right of an exclusive representative to file a grievance in its own name is a statutory right pursuant to section 3543.1(a). Therefore, the exclusive representative cannot bargain away or waive this right and still meet its responsibilities to its members. EERA makes no provision for "bargaining away" or "waiving" statutory rights. Until such time as the Legislature specifically makes such a provision, I find that the Association's right to file a grievance in its own name is a nonmandatory, nonwaivable right.

Hesse, Chairperson, dissenting: I disagree with the majority opinion that the South Bay Union School District (District) violated Educational Employment Relations Act (EERA) section 3543.5(c)[1] by insisting to impasse on a non-mandatory bargaining proposal, that is, the maintenance of a contract clause that specifies that the Southwest Teachers Association (Association) may initiate and process grievances in its own name on the following six contract articles: (1) recognition and negotiation procedures; (2) organizational security; (3) management rights; (4) association rights; (5) class size; and (6) effect of agreement.

Exceptions to the proposed decision were filed by both parties. The District excepted to a Public Employment Relations Board (PERB or Board) administrative law judge's (ALJ) holding that the Association has a statutory right to grieve in its own name, and to the conclusion that the District did not violate EERA section 3543.5(c), but did violate EERA section 3543.5(a) and (b). The Association appealed the ALJ's refusal to find that the District violated EERA section 3543.5(c). The parties' pleadings, arguments, and briefs address the statutory right issue and the claim that the District violated EERA section 3543.5(c).

The crux of this case turns on the determination of whether the District failed to negotiate in good faith by engaging in

[1]Refer to majority's opinion, footnote 1, page 1 for text of EERA section 3543.5(a), (b), and (c).

conditional bargaining. The Board must first determine whether the subject of bargaining was non-mandatory or a statutory right, and then whether impasse was reached. First, I will address a preliminary matter, the majority's reliance on non-binding proposed decisions.

Reliance on Non-Binding Proposed Decisions

In determining the nature, operation, and effect of administrative determinations, one must examine the governing statute and the purposes of the particular agency. (2 Cal.Jur.3d, Administrative Law, sec. 233, p. *All.)*

As authorized by section 3541.3(g) of EERA, the Board adopted PERB Regulation 32215, which specifically states that "[u]nless expressly adopted by the Board itself, a proposed or final Board agent decision, including supporting rationale, shall be without precedent for future cases."

As Board agent decisions not expressly adopted by the Board have no precedential value, the majority's reference and reliance on San Diego Unified School District (1987) PERB Hearing Officer Decision No. HO-U-314, Lancaster School District (1989) PERB Hearing Officer Decision No. HO-U-406, and Chula Vista City School District, Case No. LA-CE-2038 is inapposite and should be disregarded.

ALJ Pleading Error

The regional attorney issued a complaint in this case on an alleged failure to meet and negotiate in good faith, in violation of EERA section 3543.5(c), with conduct alleged to constitute

"derivative violations of Government Code section 3543.5(a) and (b)." The case was litigated as a section (c) case and no amendment was made to the complaint either prior to or during the hearing to assert independent (a) and (b) allegations. Nor did charging party present facts or arguments regarding independent (a) and (b) violations. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.) The charge, complaint, hearing, and briefs that were filed by both parties only address the claim that the District had failed to meet and negotiate in good faith, in violation of EERA section 3543.5(c). However, in the proposed decision, the ALJ did not find a (c) violation, finding instead, independent interference, restraint or coercion of employees because of their exercise of rights guaranteed by EERA, and denial to the exclusive representative rights guaranteed by EERA. The ALJ erred in analyzing the case as though independent violations of EERA section 3543.5(a) and (b) had been alleged.

A finding of independent (a) and (b) violations cannot be made unless the case was litigated that way. This Board previously held in Los Angeles Unified School District (1982) PERB Decision No. 218 that dismissal of an EERA section 3543.5(c) charge also requires the dismissal of the (a) and (b) charges where (a) and (b) are derivatives of the (c) charge. A finding of independent (a) and (b) violations results in prejudice to the District because the case was never charged or litigated in that

manner. On review of the proposed decision alone, I would reverse the ALJ and dismiss the complaint.[2]

The majority's treatment of the ALJ's pleading error and the (c) violation is confusing, if not misleading. The majority opinion is confusing in that it recognizes the ALJ pleading error, but nonetheless finds a (c) violation, citing no facts, and providing no analysis to support such a finding. The National Labor Relations Board (NLRB) and New Jersey public sector cases, relied upon by the majority, are distinguishable in that they more accurately address the denial of the employee organizational rights, or a (b) violation, and not the (c) violation case that is presently before this Board. In their eagerness to reach the merits of this case, despite its procedural infirmities, the majority has cited inappropriate cases. But even if the case law had been on point, the (c) violation found by the majority (but not the ALJ) does not exist.

Furthermore, the Association did not meet its burden of proof of the (c) violation. I find that, on the facts of this case, the Association failed to show that the District refused to bargain in good faith or insisted to impasse on the Association's agreement to a proposal on a non-mandatory subject.[3]

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[2]Based on the case law relied upon by the majority, this case should have been tried as a (b) violation because the subject matter involves a union's ability to represent its members. That it was tried as a (c) violation is unfortunate and has resulted in the convoluted analysis in the majority opinion.

[3]Assuming arguendo that the Association's right to grieve is a non-mandatory subject of bargaining, there is no evidence the District refused to bargain in good faith.

> When the issue under discussion is concededly permissive rather than mandatory, it makes the existence of an unfair labor practice turn upon the very nice distinction between proposing and insisting, a distinction that is foreign to the practicalities of collective bargaining. . . .
> (See Gorman, Developing Labor Law, p. 497-98.)

The facts of this case show that both parties engaged in hard bargaining. The Association held to its initial proposal, while the District made some bargaining movement, but declined to agree to the proposal.

During contract negotiations, the Association initially proposed a provision that provided the Association's right to grieve and to be a party of interest in the grievance procedure. In support of its proposal, the Association asserted that a proposed PERB (ALJ) decision was controlling case law on the subject. The District's initial proposal, presented approximately two weeks later, called for the continuance of the expired grievance provision relating to Association rights or maintenance of the status quo. Testimony of Association Executive Director Frank Buress shows that the grievance procedure proposals were not the only issues in dispute at the time the District filed a request for declaration of impasse.

> Q -- my question relates only to third-party beneficiaries. The discussions relating to third-party beneficiaries I think.
>
> At any time during the round of negotiations that you've been testifying to, did the District ever propose less than was the status quo within the grievance procedure?
>
> REINHOLD: I'm a little unclear as to what the word less means?

ALJ: Well, I think — I think what is more important is whether or not the witness understands the question, so -- go ahead and try to fathom an answer if you can.

THE WITNESS: The District's initial position was status quo, so it would be the same. The only change that -- and I testified -- was that the only change made there was to include the Association consent before -- an individual teacher could file a grievance to arbitration.

I do not believe the District ever proposed to take away anything that was in the collective agreement in the grievance article.

Q (By Mr. Weiler) Did the Association possess -- already possess a right to file grievances as to some articles of the negotiated agreement?

A I would have to review the agreement to see that.

Q Could you please look at Charging Party Exhibit 1, page 81, section 13.415 —

A Let me find the exhibit first, please. Charging Party 1, what page?

Q Page 81, section 13.415, and my question is specifically, did the District ever propose or request that that article -- that that section be deleted?

A No, we did.

Q No, SWTA did?

A Correct.

Q Did the District ever propose or request within this round of negotiations that SWTA or a SWTA representative not be permitted to participate or assist the individual employee in processing a grievance?

A No.

Q Looking at Charging Party's No. 9, a Request for Declaration of Impasse.

A Yes.

Q The second long page, top right-hand portion, section 10, on the right-hand side, it says, issues which remain in dispute. Is that an accurate reflection of what issues remained in dispute at that time?

A Absolutely not.

Q What issues were not in dispute at that time?

A Oh, I don't know that these were not in dispute, but it is not an accurate portrayal of the issues that were in dispute. There were additional issues other than these that had not been resolved during the negotiations that were not listed on this.

Q So everything that's contained is an issue which remained in dispute -- was in dispute. Your contention is that there were additional issues that were in dispute that were not listed?

A These are not issues, but I point out they are the title of the articles only. And it was prepared by Mr. Conradi, he apparently typed in the title of the article rather than the issues.

Q Were all those articles in dispute at the time of — February 26th, 1988?

A To the best of my reluctance -- recollection, yes, but I would have to look at the party's two positions on that date to determine whether recognition or management rights and a few of those other ones were still in dispute.

To the best of my recollection, at least these articles were in dispute.

Q At least these, being which articles?

A The ones you're asking me about.

Q So at least all those were in dispute?

A To the best of my recollection.

Q So it's safe to say that the grievance procedure was not the only issue in dispute?

A Oh, heavens, no. There were other issues in dispute.

Q And the parties have not, as yet resolved those other issues as well; correct?

A I'm not sure I understand your question.

Q There were a lot of issues, separating the parties at the time of impasse?

A Yes.
(RT, Vol. I, 62:1-65:1.)

By the testimony of an Association witness, Tim O'Neill, who was a member of the negotiating team, the record shows that the Association insisted on its proposal and that there was no room for compromise.

Q Did the District at any time during negotiations relating to the previous procedure at issue in this proceeding did the District had ever -- at any time ever request or demand that SWTA not represent a bargaining unit member in the grievance procedure?

REINHOLD: I'm unclear as to what you mean by not represent; you mean not be present during a grievance meeting?

WEILER: Not be present, not assist, not advise, anything of that nature.

THE WITNESS: During the bargaining session?

Q (By Mr. Weiler) Any time. Did anyone say no, we don't want the union participating at all?

A No.

Q We don't want the union helping the employees at all?

A Well, in discussions with board members, it was clarified to us, as I said before, that they did not want the Association to initiate the grievances. They wanted the individuals to do it. They did not clarify that they didn't want the Associations to assist the individuals.

Merely, that they thought the individuals could do it or initiate it rather than the Association.

Q But they -- no one ever indicated that they did not want SWTA representatives to help the individual write up the grievance document?

A Correct.

Q So the key issue in the grievance procedure -- unfair practice complaint aspects is that whether or not the District was obligated to agree to the contract provision allowing SWTA to be able to independently file a grievance; is that correct?

A Could you repeat that.

Q Never mind. It's objectionable anyway, because I'm requesting a legal conclusion.

ALJ: You know he wants a clean record when he starts -- when he starts objecting to and standing objections to his own questions.

REINHOLD: I was confident Tim could answer the question.

Q (By Mr. Weiler) I've got a meeting at three o'clock. I don't want to engage in long objections, so I just make them to my own questions.

SWTA's position during negotiations on the grievance procedure was that it wanted to negotiate and include in the contract the right to be able to independently file a grievance; correct?

A Correct.

Q The District did not want to agree to that right being included in the contract; correct?

A Correct.

Q Did you propose any compromise position between the yes and the no?

A That's hard for me to imagine what a compromise position could have been on that. Whether we had the right to do it or we didn't have the right to do it. It's -- it's one of those things that in my mind is not really lend itself to a compromise position.

ALJ: Let me jump in here for a second. Mr. O'Neill, had the Association in fact compromised that position in the past by agreeing that it could file its own grievances on certain issues and could not file its own grievances on other issues?

THE WITNESS: It appears it to be that way. I was not part of those negotiations so I don't know if it was part of a compromise position or not.

ALJ: Okay. So I suppose that there could have been further compromise in that the Association could have sought to -- to include additional items that it could find and file some grievances on while not filing -- while not reserving the right on -- on every subject?

THE WITNESS: That — that appears to be true, yes.

ALJ: Okay. Mr. Weiler.

Q (By Mr. Weiler) But you did not offer any such compromise?

A That's correct.

Q But the question as to whether or not a union should have a contractual right to file a grievance on articles which benefit the

> employees as opposed to directly benefiting the union, that's really a yes or no question, isn't it?
>
> A Yes, I believe it is.
> (RT, Vol. II, 78:3-81:1.)

Although the Association initiated the presentation and discussion of the non-mandatory proposal and the District responded with a non-mandatory counterproposal, the District was lawfully under no obligation to discuss or agree to the Association's proposal. There was no evidence presented that the District insisted to impasse on the Association's agreement to the counterproposal. Rather, the record shows that the Association, and not the District, insisted to impasse on the inclusion of the initial grievance rights proposal.

The Board's desire to reach an issue, like the potential for employer intimidation of the grievance process, is not enough to bring the issue under its jurisdiction. The facts and law do not support a finding that the District refused to bargain in good faith in violation of EERA section 3543.5(c). Accordingly, I would dismiss the complaint based on the facts of the case.

Requirements for the Finding of a (c) Violation

The protection of public employees from being intimidated by either employers or employee associations is one of the legislative goals that was accorded in EERA sections 3543, 3543.5(a), and 3543.6(b). In the context of this case, a refusal to bargain in good faith, or a (c) violation, can be found under the following circumstances: (1) the subject of bargaining is a statutory right and a non-mandatory subject, outside the scope of

bargaining; (2) impasse was reached by the parties; and (3) the employer's last, best and final offer was implemented.

Could this case have fit those conditions? No. Even had the parties reached impasse only on the Association's right to grieve, the remaining operative facts and law do not support a finding of a (c) violation for the reasons listed below. Under EERA, the Association does not have a statutory right to initiate and prosecute grievances in its own name. Moreover, the subject of the Association's grievance rights is a mandatory subject of bargaining. Lastly, there is no evidence that the employer did not bargain in good faith and implemented it's last, best and final offer.

Statutory Rights

In NLRB v. Wooster Division of Borg-Warner Corp. (1958) 356 U.S. 342, the United States Supreme Court divided subjects of collective bargaining into categories of mandatory, permissive (non-mandatory), and illegal. As articulated by the court, the basis for the division of the three categories was rooted in section 8(d) of the National Labor Relations Act (NLRA) and its description of the conduct that composes good faith bargaining. Specifically, its definition of subjects of bargaining, including wages, hours and other terms and conditions of employment.

However, there is another category of bargaining subjects called statutory rights. The employees' right to the free selection of an exclusive representative and the right to assist labor organizations are two examples of statutory rights.

Statutory rights bargaining subjects have the qualities in the context of bargaining that are similar to non-mandatory subjects of bargaining. As a result of the origin of the statutory rights subjects and the subsequent treatment of those subjects by the NLRB and the courts, a separate and distinct analysis is required where there is a claim that bargaining conduct relating to a proposal concerning a statutory right has breached the statutory right.

In contrast to the three categories of bargaining subjects, statutory rights bargaining subjects arise not from NLRA section 8(d), but from section 7 of the NLRA. Section 7 sets forth the rights of employees protected by the NLRA. These rights include "the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The NLRB and the courts have held that, while there could be a waiver of some statutory rights, there could be no waiver of certain fundamental rights. Consistently, the NLRB and the courts have held that unions cannot waive statutory rights that threaten employees' rights of association and the corresponding right to engage in the free selection of the bargaining representative. (See Metropolitan Edison Co. v. NLRB (1983) 460 U.S. 693; NLRB v. Magnavox Co. (1974) 415 U.S. 322.)

As with a non-mandatory (permissive) subject, the employer cannot insist to impasse on a proposal concerning a statutory right. The distinction is that, while statutory rights are not directly rooted in terms and conditions of employment, as is the case with non-mandatory subjects, statutory subjects are directly based on rights protected by Congress.

To reach impasse on a non-mandatory subject is to engage in bad faith bargaining by injecting extraneous subjects in preference to subjects on wages, hours, and other terms and conditions of employment. With statutory subjects, the employer cannot insist to impasse because to do so is an infringement on a right not given the employer.

While an employer can implement both mandatory and non-mandatory proposals contained in its last, best, and final offer, an employer cannot implement those items that concern statutory rights. To do so would be destructive of those rights. Contract proposals that embody statutory subjects of bargaining must be affirmatively waived by the union in order to be included in a contract.

EERA Statutory Rights

In this case, the ALJ relies on Latrobe Steel Co. (1979) 244 NLRB 528 [102 LRRM 1175] and Marine & Shipbuilding Workers v. NLRB (3d Cir. 1963) 320 F.2d 615 [53 LRRM 2878] for the proposition that an employer violated the NLRA by demanding to impasse that the union agree to its proposal that the union could not file grievances in its own name. More importantly, the ALJ

cited these cases for the proposition that the filing of grievances in the name of the exclusive representative is a statutory right. According to the ALJ, the union's statutory-right arises from the exegesis of EERA section 3543, "Rights of Employees."

On this point, I disagree and would overrule the ALJ. First, I would note that the Latrobe Steele Co., supra, 244 NLRB 528 status quo was different. As the majority accedes, the Latrobe employer proposed that the union give up its existing contractual right to grieve in its own name. Here, however, the District counterproposed that the Association keep its existing contractual right to grieve in its own name on the six contract articles. Secondly, although the NLRB found, in the underlying Latrobe decision, that the employer could not demand that the union waive its statutory right to represent employees, the Third Circuit Court of Appeals reviewed and reversed that portion of the decision where the NLRB held that the employer unlawfully insisted to impasse on a grievance procedure that precluded the union from bringing general grievances on behalf of unidentified employees. (Latrobe Steele Co. v. NLRB (3d Cir. 1980) 630 F.2d 171 [105 LRRM 2393].) Thirdly, it must be recognized that the Latrobe and Marine & Shipbuilding Workers courts derive the union's statutory right to file and prosecute grievances not from the exegesis of section 7 of the NLRA, "Rights of Employees," but section 9(a) of the NLRA, "Representatives and Elections." The courts rely upon both 9(a) and 8(d) for its holding on the right

of the union to grieve in its own name.[4] In pertinent part, the court held:

> Under section 9(a) the union is the exclusive representative of the employees "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 28 U.S.C.A. section 159(a). Bethlehem's proposal which would restrict the union's role in the prosecution of grievances to those complaints signed by individual employees clearly limits this representation.
> . . .
> (Marine & Shipbuilding Workers, supra, 53 LRRM 2878, 2881.)

The EERA section that covers employee organization rights is section 3543.1. EERA section 3543.1 is not parallel to NLRA section 9(a). EERA sections 3543.1 and 3543.2 are not equal to NLRA sections 9(a) and 8(d). In fact, there is an absence of an EERA provision that specifically makes the filing and prosecution of grievances in its own name a union's independent statutory right.

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[4]The NLRB also recognizes that, under NLRA section 8(d), the collective bargaining obligation of employers and bargaining representatives include the duty "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . or any question arising thereunder . . ." The NLRB and the courts have read this obligation to cover the application of the terms of an agreement, which usually arise in connection with grievances. Under EERA section 3543.3, the duty to negotiate does not include an explicit requirement to meet and confer on any question arising under a collective bargaining agreement. Instead, EERA contemplates the union's involvement in various phases of the grievance process, particularly the union's resolution of contract disputes through grievance procedures that end in final and binding arbitration. (See EERA sections 3543.2, 3548.5, 3548.6, 3548.7, and 3548.8.) However, EERA does not accord the union the same statutory rights given to individual employees in regards to grievances.

The only EERA reference to the union's role regarding grievances is contained at section 3543, "Rights of Employees." Section 3543 refers only to the union's role in the settlement of a grievance or arbitration of a grievance (where there is final and binding arbitration).

The ALJ and my colleagues would derive and condition the union's alleged statutory right to grieve from the employees' statutory rights, generally. (See EERA section 3543.) EERA employees' statutory rights include a provision which limits the ability of the employee and employer in settling grievances prior to a response from the union, and contrary to the collective bargaining agreement. This provision qualifies the right of an individual employee in the presentation and settlement of grievances. The NLRA union's statutory rights includes a provision that limits the union's representational rights where an individual employee wishes to file and settle grievances without the intervention of the bargaining representative. Under the NLRA, the union's right to grieve is specifically related to its broad representational duties and is independent of the rights of employees. The Marine & Shipbuilding Workers court underscored the union's rights when it reasoned:

> . . . In short, the fact that individual employees have the right to adjust their own grievances does not mean that an employer can restrict the union's statutory rights by requiring that each grievance be signed by the employee involved. . . .
> (Marine & Shipbuilding Workers, supra, 53 LRRM 2878, 2881; emphasis added.)

The Board is not bound to follow NLRB precedent where the statutes are dissimilar and are not parallel.

The ALJ decision and majority opinion also rely on Modesto City Schools (1983) PERB Decision No. 291. Modesto is distinguishable. The Modesto decision involved the right of an exclusive representative to represent employees during the employees' grievances. The Board did not rule that the exclusive representative had the right to initiate and process grievances in the union's own name or on behalf of the union.

The majority finds the New Jersey Supreme Court decision in Education Association v. Red Bank Board of Education (1978) 99 LRRM 2447 to be instructive. I disagree. The New Jersey law and facts are dissimilar to EERA and this case.

Unlike EERA, the New Jersey Public Employment Relations Act provides, in pertinent part:

> Public employers shall negotiate written policies setting forth grievance . . . procedures by means of which their employees or representatives of employees may appeal . . . policies, agreements and administrative decisions . . . affecting them, that such grievance . . . procedures shall be included in any agreement entered into between the public employer and the representative organization. . . .
> (New Jersey Employer-Employee Relations Act 34:13A-5.3; emphasis added.)

The explicit statutory authority for New Jersey union rights is reinforced by the New Jersey Constitution in which Article I, paragraph 19 accords public employees the right to present their grievances and proposals through representatives of their own choosing. The New Jersey Employer-Employee Relations Act also

explicitly makes it an unfair practice for employees to refuse to process grievances presented by the exclusive representative. (See New Jersey Employer-Employee Relations Act 34:13A-5.4(a)(5).) Unlike New Jersey, the California Constitution and EERA contain no relevant parallel statutory authority.

Further, the majority misstates the issue before the New Jersey court. The issue before the court was not whether the exclusive representative had the right to file and prosecute grievances in its own name. The issue was whether any existing statutory right of a majority representative to file organization grievances could be the subject of a contractual waiver. The case before the Board does not present the issue of contractual waiver of a statutory right.

Lastly, the Red Bank facts differ from the facts in the case before the Board. The Red Bank union sought a judicial declaration that it had a statutory right to grieve in its own name only after the employer sought (by injunctive relief) to restrain the union from pressing a grievance that it had filed in its own name. Here, the case concerns conditional bargaining where there were no claims made by the Association that it filed a grievance in its own name and that the District did not process such a grievance.

Based on statutory language of EERA and the foregoing argument, I conclude there is no statutory right under EERA of a union to file and prosecute grievances in its own name.

Assuming arguendo, that, under EERA, the Association has a statutory right to grieve in its own name, then the complaint must be dismissed, because the Association failed to show that the District did not bargain in good faith. EERA does not require the parties to reach agreement, generally, and EERA certainly does not require the parties to agree to include a statutory right in a collective bargaining agreement. Much like a non-mandatory subject of bargaining, the party who seeks a change cannot insist to impasse upon its statutory rights proposal.

In the case at bar, the Association initially proposed a change to the successor contract which would allow the Association to grieve in its own name. The Association did not seek to exclude or delete the expired contract provision that permitted the Association to grieve on the six contract articles. The District counterproposed maintenance of the status quo, the expired contract provision. Clearly, the Association was the moving party who sought a change. Moreover, the record shows that, at the point of impasse, the Association saw no room for compromise on its proposal. The Association was the party who sought a change. More importantly, there is no evidence that the District conditioned agreement upon its grievance counterproposal.

The nature of statutory rights is such that the right does not have to be embodied in a collective bargaining agreement; the right is provided by the Legislature and enforced by PERB.

Mandatory Subject of Bargaining

Grievance procedures are expressly included within the scope of representation (see EERA section 3543.2(a)), and this Board has previously held that, generally, grievance procedures are a mandatory subject of bargaining. (Anaheim City School District (1983) PERB Decision No. 364.) While I concur with the majority that matters not specifically enumerated in EERA section 3543.2 are subject to the three-prong test in Anaheim Union High School District (1981) PERB Decision No. 177, I strongly reject the majority's modification of the test and remain unpersuaded that the test needs modification to reach the desired result.

Under Anaheim, a subject will be found to be a mandatory subject of bargaining if: (1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not specifically abridge the employer's freedom to exercise the managerial prerogatives essential to the achievement of the employer's mission.

As the union's right to grieve is related to terms and conditions of employment, the first prong of the test is satisfied. A union grievance is a way in which employees can collectively challenge the propriety of an employer action which has an impact on employment terms and conditions.

A union's right to grieve is such a concern to management and employees that conflict is likely to occur as it has in this case, and the negotiating process is a means by which the conflict can be resolved. Therefore, the second prong of the test is met because the potential for employer conflict and absolute control over the subject matter has the impact of effectively deterring the employees' collective ability to enforce the administration of the contract terms.

With respect to the third prong, the employer's obligation to negotiate this subject does not abridge the employer's freedom to exercise managerial prerogatives. Nor does the union's obligation to negotiate this subject abridge the union's freedom to enforce the contract. A number of collective bargaining agreements prohibit management's right to grieve. At the same time, a contract clause that limits the union's right to grieve in its own name does not intrude on a union's right to manage the contract. In a contract that does not permit management to grieve, management has no recourse. However, where a contact does not permit the union to grieve in its own name, as here in certain circumstances, the union can still redress contractual wrongs through its members' grievances. Accordingly, I conclude that the union's right to grieve meets all prongs of the Anaheim test and is, therefore, a mandatory subject of bargaining. Under EERA, the parties may lawfully maintain their positions on mandatory subjects of bargaining to impasse.

Implementation of Last, Best and Final Offer

An employer fails to bargain in good faith over mandatory subjects of bargaining if the employer implements his last, best and final offer prior to the completion of the EERA statutory impasse proceedings. In this case, the record shows that the employer reached impasse, but did not implement its final offer. Rather, the District counterproposal was included in a lawful collective bargaining agreement with the Association. Therefore, I conclude that the District did not violate EERA by failing to bargain in good faith over a mandatory subject of bargaining.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
Public Employment Relations Board
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-2750, Southwest Teachers Association, CTA/NEA v. South Bay Union School District, in which all parties had the right to participate, it has been found that the South Bay Union School District (District) violated section 3543.5, subdivision (c) of the Educational Employment Relations Act (Act) by insisting to impasse on contractual language outside the scope of representation which has the effect restricting the union's right to file grievances on its own behalf.

As a result of this conduct, we have been ordered to post this Notice we will:

A. CEASE AND DESIST FROM:

1. Insisting to impasse on contractual language outside the scope of representation which has the effect restricting the union's right to file grievances on its own behalf.

2. Enforcing and giving effect to those portions of the 1988-90 collective bargaining agreement which restrict the Association's right to file and process grievances in its own name.

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

1. Accept and process all contractual grievances filed by the Association in its own name, irrespective of any contractual terms or other policies in effect which deny the Association that right, for the term of the current contract which expires June 30, 1990.

DATED: SOUTH BAY UNION SCHOOL DISTRICT

By_____
Authorized Representative

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