

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



FRESNO UNIFIED SCHOOL DISTRICT,	)	
Charging Party,	)	
v.	)	Case No. S-CO-33
FRESNO TEACHERS ASSOCIATION, CTA/NEA,	)	PERB Decision No. 208
Respondent.	)	April 30, 1982
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FRESNO TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	
v.	)	Case No. S-CE-257
FRESNO UNIFIED SCHOOL DISTRICT,	)	
Respondent.	)	

Appearances: Lee T. Paterson, Attorney (Paterson & Taggart) for the Fresno Unified School District; Ernest H. Tuttle III, Attorney (Tuttle and Tuttle), and Ray Hansen and Kirsten Zerger, Attorneys (California Teachers Association) for the Fresno Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Jaeger and Tovar, Members.

DECISION

The Fresno Unified School District (District) excepts to the hearing officer's proposed decision finding: (1) that the Fresno Teachers Association, CTA/NEA's (FTA or Association) strike was not a per se violation of EERA subsections 3543.6(b), (c) and (d); (2) that the FTA's picket line conduct

did not violate subsection 3543.6(b); (3) that the District's cancellation of dues deductions violated subsections 3543.5(b) and (d); and the hearing officer's failure to provide a make-whole remedy of monetary losses incurred by the District during the strike.<sup>1</sup> The hearing officer dismissed FTA's charge alleging that the District had violated subsections 3543.5(c) and (d)<sup>2</sup> by seeking to bargain over the amount of agency fee. This is the only finding to which FTA excepts.

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<sup>1</sup>The Educational Employment Relations Act (EERA) is codified at Government Code sections 3540 et seq. All statutory references are to the Government Code unless otherwise noted.

Subsections 3543.6(c) and (d) state:

It shall be unlawful for an employee organization to:

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

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

<sup>2</sup>Subsections 3543.5(c) and (d) state:

It shall be unlawful for an employee organization to:

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

### FACTS<sup>3</sup>

#### Events Leading to the Strike

In April 1978, the parties began negotiations for a successor agreement to their first collective bargaining contract which was to expire on June 30, 1978. The FTA sought to modify, among other articles, the contract term clause and the no-strike provision of the existing agreement.

Bargaining sessions occurred regularly during the spring and fall, with a moratorium for the summer after Proposition 13 passed. By late September, the Association perceived that negotiations were deadlocked on three major issues: class size, contract term, and the no-strike clause. It declared impasse and on September 28 requested that the Public Employment Relations Board (PERB) appoint a mediator. After an investigation, the PERB regional director twice rejected FTA's request and instructed it to resume bargaining. In November, FTA then abandoned its attempts to engage the impasse procedures. At the unfair practice hearing, the chief negotiator for FTA admitted that one of the reasons he initially sought a PERB declaration of impasse was to avoid a potential damage claim under the collective bargaining agreement in the event of a strike. He also stated that he

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<sup>3</sup>Contained here are only those facts bearing on issues that have been raised by the parties' exceptions.

believed the presence of a mediator might "stimulate some better activity on the part of the District." But, in the face of PERB's action and the District's opposition to impasse, FTA came to believe that the impasse procedures would be used by the District to unnecessarily drag out the negotiating process. As a result, FTA did not further attempt to engage the impasse process and admitted that, if the District had asked the Association to join it in declaring impasse on the eve of the strike, it probably would not have done so.

The strike began on November 20, the first day of Thanksgiving week and lasted until December 1. On November 30, the District, relying on the no-strike clause in the 1976 agreement,<sup>4</sup> suspended dues deductions amounting to approximately \$36,000.

Negotiations continued during the strike and, shortly after its termination, a tentative agreement was reached December 3, 1978.

#### Agency Fee

During negotiations, FTA proposed an agency fee of \$200, the equivalent of dues and initiation fees paid by members. The District countered with an offer of \$50, which it later

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<sup>4</sup>The clause provides, in pertinent part, that a violation, "will warrant the withdrawal of any rights, privileges or services provided for in this agreement."

increased to \$75. It questioned FTA about affiliates' budgets and about how much of the \$200 was actually required for representational services at the local level. FTA replied that nearly all of it was required and pointed out that all of its lobbying activities supported by Association funds were directed to matters relating to teachers' working conditions. The parties stayed with their respective amounts, and FTA ultimately withdrew its proposal for an agency fee claiming that it would rather have none than \$75.

#### Picket Line Conduct

At the beginning of the strike, picket lines were established at the entrances to the parking lots of District schools. FTA instructed pickets not to block the driveways, but to walk slowly across them with five feet distance between each picket. This practice resulted in some delay in getting in and out of parking lots, but no one was prevented from going to or from work. In general, the pickets followed these instructions, although there were some confrontations. Substitutes were called "scabs"; exhorted to "go home"; and asked, "Don't you have any pride?" On one occasion, a fight broke out between a striker and a substitute teacher. The hearing officer determined that the substitute provoked this incident. That finding has not been specifically excepted to.

At one school, where strikers had been bumped on a few occasions by cars attempting to exit the parking lot, the

strikers took down license plate numbers of cars crossing the picket line. At another school, a pretense was made of photographing teachers who had gone to work, but there had been no film in the camera and the pickets were laughing while this was being done.

At one of the middle schools, a regular teacher was delayed briefly as she tried to cross the picket lines. When she stopped, the pickets gathered along the side of her car and tried to persuade her to join them, but even according to the District's own witness to the conversation, nothing said or done could be considered as threatening. At this same school, the principal received anonymous, threatening phone calls. No evidence of the callers' identities was presented at the hearing.

One striker was observed standing in front of a nonstriker's car for a few moments. The people involved were friends, there was no exchange of words that could be interpreted as threatening and the striker did move to let the driver pass. Another striker shouted, "We'll get you," at a substitute who had run for political office, but the hearing officer's finding that, in context, the phrase was meant as a political rather than a physical threat is a reasonable one in light of the evidence.

## The Charges

On April 30, 1979, five months after the strike and related events, the District filed an unfair practice charge against the Association alleging that FTA violated subsections 3543.6(a), (b), (c), and (d) by conducting a strike prior to the exhaustion of impasse procedures and by intimidating and coercing employees who crossed the picket lines. FTA cross-filed against the District on May 24, 1979, contending, inter alia, that the District violated the Act by imposing reprisals on employees because of their exercise of rights under EERA, illegally suspending dues deductions during the strike and engaging in surface bargaining by, among other things, attempting to bargain over the amount of agency fees.

The District did not file an answer to this charge until November 7, 1979, well after the 20-day period prescribed by PERB rule subsection 32635(a).<sup>5</sup> In this written answer, it moved to dismiss as barred by the statute of limitations, all

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<sup>5</sup>PERB rules are codified at California Administrative Code, title 8, section 31000 et seq.

Subsection 32635(a) states:

(a) The respondent shall file with the Board an answer to the unfair practice charge within 20 days or at a time set by the Board agent following the date of service of the charge by the Board agent. The answer shall be served on the charging party. Proof of service shall be filed with the Board.

of the allegations of conduct occurring before November 24, 1978.<sup>6</sup> The hearing officer refused to consider this defense, finding that the statute of limitations is a procedural rather than jurisdictional matter and therefore must be timely raised. Nevertheless, he dismissed on the merits all the FTA's charges which were time-barred.

During the hearing on September 20, the District orally objected to certain evidence concerning unilateral changes<sup>7</sup> in employment matters it had made because they had taken place more than six months before the date FTA's charges were filed. The hearing officer allowed the evidence only for the purpose of considering FTA's defense to the strike charge, rejecting its use to support FTA's charge against the District.

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<sup>6</sup>These charges include allegations that the District (1) violated subsection 3543.5(a) by threatening to withdraw health and welfare benefits on November 20 and by intimidating pickets; and (2) interfered with the FTA's right to use impasse procedures in September or October by making misrepresentations to a PERB agent about possible movement the District was willing to make at the table and by refusing to join FTA in declaring an impasse.

The statute of limitations is found in subsection 3541.5(a):

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:  
(1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge . . .

## DISCUSSION

### The Strike and Picket Line Conduct

The District claims that the hearing officer erred in refusing to find that a strike before impasse is a per se unfair practice. It argues that public employee strikes are inherently illegal, that a strike violates the section 3543 rights of nonstrikers not to participate in organizational activities and that a strike is a per se refusal to bargain and to participate in impasse procedures in good faith.

The California Supreme Court in San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, specifically rejected the argument that section 3549 of EERA makes strikes illegal.<sup>8</sup>

As pointed out above, however, section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code's section 923 protection of concerted activities. Id, p. 13)

Further, the Court declined to resolve the question of the legality of public employee strikes under the common law.

Similarly it is unnecessary here to resolve the question of the legality of public

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<sup>7</sup>These alleged unilateral changes concerned lunch duty, instructional hours, and group advising requirements.

<sup>8</sup>Section 3549 states:

The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees . . . .

employee strikes if the injunctive remedies were improper because of the district's failure to exhaust its administrative remedies under the EERA. Id, p. 7.

The Court considered the effect of strikes on the duty to negotiate in good faith and to utilize the statutory impasse procedures.

[B]y engaging in a strike, the [Association] may have committed at least two of the unfair practices . . . 1) failure to negotiate in good faith . . . and 2) refusal to participate in the impasse procedures . . .

The question of negotiation in good faith is resolved by determining whether there was a genuine desire to reach agreement. Under the NLRA, a strike does not, itself, violate the duty to confer in good faith . . . Thus, if the [Association's] strike were held to be legal, it would not constitute a failure to negotiate in good faith as an illegal pressure tactic; however, its happening could support a finding that good faith was lacking. (Emphasis added.)

. . . . .

. . . . the impasse procedures almost certainly were included in the EERA for the purpose of heading off strikes . . . since they assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith and, thus, an unfair practice under section 3543.6(d). Id. p. 9.

In keeping with the holdings of the Court, PERB adopted, after extensive public testimony, its rule 38100 which states, in pertinent part:

In recognition of the fact that in some instances work stoppages by public school

employees and lockouts by public school employers can be inimical to the public interest and inconsistent with those provisions of the EERA requiring the parties to participate in good faith in the impasse procedure, it is the purpose of this regulation to provide a process by which the Board can respond quickly to injunctive relief requests involving work stoppages or lockouts.

The EERA imposes a duty on employers and exclusive representatives to participate in good faith in the impasse procedure and treats that duty so seriously that it specifically makes it unlawful for either an employer or an exclusive representative to refuse to do so. The Board considers these provisions [impasse procedures] as strong evidence of legislative intent to head off work stoppages and lockouts until completion of the impasse procedure . . .

Thus, the effect of the rule, and the San Diego decision is to create something similar to a rebuttable presumption that a strike during negotiations or prior to exhaustion of impasse proceedings constitutes an illegal pressure tactic.

In the absence of any sustainable allegation of provocation by the employer, and in light of FTA's admissions that it was seeking to utilize the impasse procedure in part to avoid damage liability, we find evidence of an "illegal pressure tactic" constituting a refusal to negotiate in good faith in violation of subsection 3543.6(c).

However, that portion of the District's charge alleging that FTA violated subsection 3543.5(d) is dismissed. As the Supreme Court indicated, a strike may constitute an unfair practice in two ways: (1) a failure to negotiate in good faith

and (2) a refusal to participate in the impasse procedures. FTA did not refuse to participate in impasse procedures. To the contrary, its request for an appointment of a mediator was twice rejected by PERB before the strike occurred.

#### Picket Line Conduct

The District charges that FTA's strike violated subsection 3543.6(b) because (1) public employee strikes are illegal and automatically violate the rights of nonstrikers; and (2) the alleged picket line misconduct coerced and threatened employees who exercised their right to refrain from participating in the activities of the Association are also dismissed. We have already stated our reasons for finding no per se violations in FTA's actions. As to picket line activity, the District specifically complains of the pickets' alleged blocking of driveways, verbally threatening nonstrikers, and photographing and recording the license plate numbers of certain nonstrikers.

The standard consistently applied by the NLRB and courts in determining whether misconduct during a strike constitutes coercion and intimidation is an objective one, i.e., whether the misconduct may reasonably tend to coerce or intimidate employees in the exercise of their rights, Operating Engineers, Local 542 v. NLRB (1964) [55 LRRM 2669]; NLRB v. McQuaide (1977) [94 LRRM 2950]. The fact that an individual may have felt threatened by conduct which cannot reasonably be considered as threatening does not result in a violation.

Threats of physical violence and bodily injury are generally always found to be coercive.<sup>9</sup> Mere namecalling, and even abusive or vulgar language or epithets are not enough to constitute a violation. See NLRB v. McQuaide, supra, where yelling "scab" and "we'll get you" did not amount to a violation. In this case, none of the words uttered to the employees who crossed the picket lines rose to a level which can reasonably be considered as threatening.

The blocking of egress and ingress has been found to coerce and intimidate nonstriking employees who have been prevented from going to or from work when the blocking occurs in conjunction with an atmosphere of intimidation and violence, Maywood Plant of Grede Plastics (1978) 235 NLRB 313 [97 LRRM 1510]; District 11, United Mineworkers (1978) 235 NLRB 757 [98 LRRM 1297]; Teamsters Local 115, supra. A brief delay at the gate, however, has been held to be an insufficient ground for finding a violation. General Iron Corp. (1976) 224 NLRB 1180 [93 LRRM 1260].

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<sup>9</sup>For example, "I'm going to rape your wife and break your legs," coupled with the statement, "We're going to get you and your truck" made while riding on the running board of the truck, were found to be threats violative of section 8(b)(1)(a) of the NLRA in Shipmen's Local #455, Iron Workers (1979) 243 NLRB 340 [102 LRRM 1109]. Similarly, "You'd better watch your house," and "Do you want your car knocked over?" were condemned in Teamsters Local 298 (1978) 236 NLRB 428 [98 LRRM 1486] and Teamsters Local 115 (1966) 157 NLRB 1637 [61 LRRM 1568], respectively.

Here, no one was prevented from going to work or leaving the parking lots in Fresno. Although there was some delay in getting in and out of the gates because of the picket lines, there was no credible evidence that these delays were prolonged or accompanied by menacing gestures or threats or acts of violence.

As for the photographing and the taking of license numbers, all of the cases cited by the District which condemn such activity similarly involve accompanying acts of violence or threats of violence.<sup>10</sup> The incidents here were isolated, did not involve violence, and did not occur in a menacing or coercive atmosphere. See General Iron Corp., supra.

#### Suspension of Dues Deductions

In excepting to the hearing officer's ruling that it violated subsections 3543.5(b) and (d) when it suspended the deduction of dues from employees' paychecks, the District contends that the FTA was not entitled to dues deductions because it was engaged in an illegal strike and that the parties' agreement<sup>11</sup> permitted the suspension. The District's arguments fail for two reasons.

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<sup>10</sup>See Dover Corp. (1974) 211 NLRB 955 [86 LRRM 1607] where there were threats of bodily injury, nails were thrown in the employer's driveway, and the photographing and license plate incidents were directed at an employee who had been threatened the previous day.

<sup>11</sup>See footnote 4, supra. The District relies on the following contract language in claiming that the agreement was in effect at the time of the strike.

EERA provides an absolute guarantee of dues deductions,<sup>12</sup> unlike the NLRA, which leaves the issue to the collective bargaining arena. The District's argument that subsection 3543.1(d) is defeasible by an organization's strike is without merit because the statute bestows the right to the dues deductions, regardless of an exclusive representative's actions.

The question, then, is whether FTA waived its rights or attempted to waive its members' rights to such deductions,

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1. This agreement shall remain in full force and effect from September 1, 1976 until June 30, 1978.
2. In the event a successor agreement is not adopted prior to the termination date, this agreement shall remain in full force and effect until such time a successor agreement is adopted or the impasse procedures . . . are exhausted.

<sup>12</sup>Subsection 3543.1(d) states:

All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

guaranteed by the Education Code,<sup>13</sup> by the contract language. A waiver will not be lightly inferred and thus must be "clear and unmistakable ." Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74. This is especially true where a waiver of a statutory right is alleged. Timken Roller Bearing v. NLRB (6 Cir. 1963) 325 F.2d 746 [54 LRRM 2785].

Article VII of the collective bargaining agreement, "Professional Dues and Payroll Deductions," provides for the right of employees who are members of the FTA to authorize the

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<sup>13</sup>The relevant Education Code section 45060 provides, in pertinent part:

The governing board of each school district when drawing an order for the salary payment due to a certificated employee of the district, shall with or without charge reduce the order by the amount which it has been requested in a revocable written authorization by the employee to deduct for the purpose of paying the dues of the employee for membership in any local professional organization or in any statewide professional organization, or in any other professional organization affiliated or otherwise connected with a statewide professional organization which authorizes such statewide organization to receive membership dues on its behalf and for the purpose of paying his pro rata share of the costs incurred by the district in making the deduction. (Emphasis added.)

District to make payroll deductions for Association dues.<sup>14</sup> While the Article further provides that the District will remit promptly such monies to the Association, the thrust of Article VII is to implement the rights of employees to have their dues deducted from their pay warrants and have those remitted to the Association.

This section gives employees a right which is not defeasible by the employer, though may be waived by the employees. Without reaching the question of whether the exclusive representative may waive its members' rights (See NLRB v. Magnavox (1974) 415 U.S. 322 [85 LRRM 1475]), we find nothing in Article XLV which permits the employer to discipline

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14 ARTICLE VII - PROFESSIONAL DUES AND PAYROLL DEDUCTIONS

1. Any teacher who is a member of the Association, or who has applied for membership, may sign and deliver to the Board an assignment authorizing deduction of unified membership dues in the Association. Such authorization shall continue in effect from year to year unless revoked in writing before October 1 of any year. Pursuant to such authorization, the Board of Education shall deduct one-tenth of such dues from the regular salary check of the teacher each month for ten months. Deductions for teachers who sign such authorization after November 10 shall be appropriately prorated to complete payments by the end of the school year.

. . . . .

FTA by revoking the employees' dues authorizations, especially where employees are not subject to any charge by the employer.

Since the statute creates both the employees' and FTA's rights, the contract cannot be said to "provide" them. The penalty clause of the no-strike provision more reasonably relates to matters obtained only through negotiations. For this reason we cannot find the clear and unmistakable waiver the District claims.

The Negotiability of the Amount of Agency Fees<sup>15</sup>

Section 3543.2, which defines the scope of representation, provides that "organizational security pursuant to section 3546" shall be negotiable. Section 3546 states in part: ". . . organizational security, as defined, shall be within the scope of representation." Subsection 3540.1(i) defines "organizational security" to mean either:

- (1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him, as a condition of continued employment, if he does join, to maintain his

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<sup>15</sup>The District apparently claims that this charge is barred by the six-month statute of limitations. We find otherwise.

Although negotiations on this matter began beyond the six-month period, they did not terminate until December 3 when the FTA tentatively agreed to a contract with no union security clause. This was a reaction to the District's illegal insistence on the \$75 fee. December 3 fell within the six-month period.

membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his obligation to the employee organization within a period of 30 days following the expiration of a written agreement; or

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

It is section 3546 that sets the parameters of negotiability.<sup>16</sup> Nowhere in this section or in section

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<sup>16</sup>Section 3546 states:

Subject to the limitations set forth in this section, organizational security, as defined, shall be within the scope of representation.

(a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not

3543.2 is the amount of fees listed as negotiable. The prohibition in subsection 3541.1(i) against fees exceeding membership dues is not meant to make the amount actually charged negotiable. Its purpose is to preclude discriminatory financial treatment of employees who choose to exercise their right not to join the labor organization.

Further, we find no relationship of agency fees to an enumerated subject of negotiation contained in section 3543.2 sufficient to meet the test of negotiability expressed in Anaheim Unified High School District (10/28/81) PERB Decision No. 177.<sup>17</sup> There, we said that such a relationship depends,

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be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

(b) An organizational security arrangement which is in effect may be rescinded by majority vote of the employees in the negotiating unit covered by such arrangement in accordance with rules and regulations promulgated by the board.

<sup>17</sup>PERB Decision No. 177 states, in part:

. . . a subject is negotiable even though not specifically enumerated 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 significantly abridge his freedom to exercise those managerial prerogatives

in part, on the subject being of concern to management and the union alike. Agency fees, like membership dues, are a matter of internal organizational policy and concern. The employer's interest in the subject generally is limited to its willingness to impose on its non-union employees an agency fee requirement and, if so, whether an authorization election is desirable. It is through the exercise of these two "powers" that the employer's concerns can be satisfied.

However, we find a third and implied employer concern which derives from Abood v. Detroit Board of Education (1977) 431 U.S. 209 [95 LRRM 2411] and King City Unified School District (3/3/82) PERB Decision No. 197. We consider the employer to have a legitimate interest in protecting itself from potential liability resulting from its agreement to withhold agency fees in excess of those permitted by law. But this concern limits the employer's interest in negotiations to seeking some provision which provides it with protection against such a potential liability. Here, for example, the District finally did propose a "hold-harmless" clause, a proposal which we find lawful under the Anaheim test. However, the District's adamant

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(including matters of fundamental policy)  
essential to the achievement of the  
District's mission . . . . (pp. 4-5).

insistence on the \$75 cap on agency fees bears no relationship to its legitimate concerns and constituted an unlawful bargaining proposal. By maintaining this position, the District violated its duty under subsections 3543.5(c) and (d).  
The Statute of Limitations Defense

The District argues that the hearing officer improperly rejected its statute of limitations defense because it was untimely raised. While the established rules of pleading require affirmative defenses to be raised in a timely answer, it is also true that a statute of limitations defense can be raised in a demurrer if the defect appears on the face of the pleadings. 3 Wikin Cal. Procedure (2d ed.) Pleading, Sec., 939. Here, the defect did appear on the face of FTA's amended complaint which alleged certain acts occurring in September and October of 1978. The charge was originally filed on May 24, 1979, more than six months later. Although PERB rules do not provide a procedure for filing demurrers, we think the hearing officer's refusal to consider the defense raised in the answer, under the circumstances of this case, was unnecessarily harsh. However, because he dismissed on the merits those charges which were time-barred, his error is nonprejudicial.<sup>18</sup>

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<sup>18</sup>The only charge that the hearing officer did not dismiss was that concerning the suspension of dues deductions, an act which occurred on November 30, 1978, and therefore within the six-month period preceding the May 24, 1979 charge.

### FTA's Alleged By-Pass of the Negotiating Process

The District excepts to the hearing officer's failure to rule on the fact that the FTA negotiators met individually with members of the school board while negotiations were occurring. We affirm the hearing officer's action on this matter because this alleged by-pass was not specifically alleged in the District's charge which reads simply in relevant part:

Respondent's action of encouraging and causing the instant work stoppage and/or strike without first completing the negotiating process, including the exhaustion of impasse procedures, constituted a refusal to meet and negotiate in good faith and a failure to participate in good faith in the impasse procedure in violation of section 3543.6(c) and (d).

Evidence of the so-called by-pass was initially raised by the FTA, and the District never argued in its brief to the hearing officer that the meetings with the board members constituted an EERA violation.

### The Liability of California Teachers Association (CTA)

The hearing officer held CTA liable for a violation of subsections 3543.6(c) and (d) because of its general support and ratification of the FTA strike. Although this is not excepted to, the Board finds this a serious enough mistake of law to warrant its correction of it. PERB records show that CTA is an organization with which FTA is affiliated, and only FTA is the exclusive representative of District certificated employees. Therefore CTA had no obligation to negotiate with the District. It could not request or be required to

participate in the statutory impasse procedures. Therefore, it cannot be held liable for a violation of subsections 3543.5(c) or (d), which obligate only the exclusive representative.

#### Expenses and Legal Costs

The District asserts that the hearing officer erred in failing to award it reimbursement of costs incurred during the strike, arguing that it should be made whole. It offered proof of such expenses as lost ADA, federal Title I monies, cost of hiring security guards, substitutes, and the cost of reproduction of materials, etc.

We decline to award the requested remedy in this case because at no time did the District seek to mitigate its losses or bring about the termination of the strike by requesting that PERB seek an injunction against it.<sup>19</sup> The District failed to file this unfair practice charge until five months after the strike had occurred.

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<sup>19</sup>An unfair practice charge is the required jurisdictional basis for PERB's seeking injunctive relief. See San Diego Teachers Association, supra, where the Supreme Court reversed a contempt order and fines imposed on a striking union because the employer had similarly failed to approach PERB. Also see Union de Tronquistas, Local 901 (Lock Joint Pipe & Co) (1973) 202 NLRB 399 [82 LRRM 1525] and Union Nacional de Trabajadores (Catalytic Industrial Maintenance) (1975) 219 NLRB 414 [89 LRRM 1741], where the NLRB justified its refusal to award damages to victims of picket line misconduct in part because of the availability of injunctive relief which the complainants failed to pursue. The NLRB also noted that courts were far more expert in assessing damages than administrative tribunals whose functions it is to regulate labor relations.

Legal costs requested by the District are denied. The Association had not engaged in repeated and flagrant violations of the law, nor was its defense against the charges frivolous and unwarranted, King City, supra. See also Heck's Inc. (1974) 215 NLRB 765 [88 LRRM 1049] and Tidee Products (1972) 194 NLRB 1234 [79 LRRM 1175].

The Subsection 3543.6(a) Violation

Although the 3543.6(a) charge appears on the form, the District neither presented evidence to support such a finding, nor attempted to argue a 3543.6(a) violation at any stage in the proceedings. The charge itself did not contain an explanation of how any alleged acts would have violated subsection 3543.6(a). The hearing officer did not address this charge. Because the District failed to litigate this, we order it dismissed.

REMEDY

Pursuant to the authority vested by subsection 3541.5(c), the Board finds it appropriate in this case to order the Association to cease and desist from refusing to bargain in good faith by engaging in a concurrent strike. It is necessary that all unit employees be fully informed of this decision and thereby understand that the strike which occurred here violated EERA. FTA will be required to post the attached Notices at all places throughout the District where FTA notices are customarily placed and, additionally, to distribute the Notices

to all employees in the unit through the District's internal distribution system if that is the customary method of distributing FTA literature. Otherwise, FTA shall mail a copy of the Notices to the home of each member and each other employee in the unit, provided the employer gives nonmember addresses to FTA.

Because the employer's failure to deduct dues was a consequence of an unlawful strike and its own belief that its action was permitted by the negotiated agreement, it would be inappropriate to require reimbursement out of its own treasury. However, FTA is entitled to recover lost dues which it did not collect directly from its members.<sup>20</sup> We therefore order the employer to make a one-time double deduction from the paychecks of those employees employed by the District at the time of the strike who fail to notify the District within 30 days of the posting of this Order and attached Notices that they do not wish such double deduction. Thereafter, dues deductions shall continue as normal.

In addition, the District will be ordered to bargain over an organizational security provision, since its illegal

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<sup>20</sup>Pacific Grinding Wheel (1975) 220 NLRB 1389 [90 LRRM 1557]; Albert Van Luit & Co. (1977) 229 NLRB 811 [95 LRRM 1192]. See also NLRB v. Crimptex (1975) 517 F.2d 501 [89 LRRM 2465], where the court upheld the NLRB order that the employer execute a collective bargaining agreement it had repudiated even though it had done so in response to an arguably unprotected strike.

proposal on the amount of agency fees caused the Association to acquiesce to an agreement with no security clause.

I. ORDER S-CO-33

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board, pursuant to subsection 3541.5(c) of the Government Code, hereby ORDERS that the Fresno Teachers Association shall:

CEASE AND DESIST from violating subsection 3543.6(c) by refusing to negotiate in good faith by engaging in an unprotected strike during the course of negotiations.

The Board further ORDERS that the Fresno Teachers Association shall take the following AFFIRMATIVE ACTIONS designed to effectuate the policies of the Act:

(1) Within seven (7) workdays of service of this decision, post at all school sites and all other work locations, upon those bulletin boards where the Fresno Teachers Association's notices are customarily placed, copies of the attached Appendix A. Such posting shall be maintained for a period of twenty (20) working days.

In addition, the Association shall distribute the Notices to all unit employees through the District's internal distribution system if that is the customary mode of distribution of Association literature. Otherwise, the Association shall mail a copy of the attached Notice

(Appendix A) to each unit employee's home, provided the District provides the Association with such addresses of unit employees who are not members of the Association.

(2) Notify the Sacramento regional director of the Public Employment Relations Board, in writing, at the end of the posting period, of the steps taken by the Fresno Teachers Association to comply with this Order.

The Board further ORDERS that the subsections 3543.6(b) and (d) charges filed against the Fresno Teachers Association and the California Teachers Association are DISMISSED.

## II. ORDER S-CE-257

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board, pursuant to subsection 3541.5(c), hereby ORDERS that the Fresno Unified School District shall:

### A. CEASE AND DESIST FROM:

(1) Violating subsections 3543.5(b) and (d) by denying to the Fresno Teachers Association rights guaranteed to it by EERA and interfering with the administration of the Fresno Teachers Association by refusing to deduct membership dues from the pay of those Association members who have authorized such deduction;

(2) Refusing and failing to negotiate in good faith with the Fresno Teachers Association by insisting on bargaining over the amount of agency fees.

The Board further ORDERS that the Fresno Unified School District take the following AFFIRMATIVE ACTIONS:

(1) Make a one-time double deduction from the paychecks of those employees who have not otherwise notified the District within thirty (30) days of the initial posting of the Order and attached Notices and remit same sum to the Fresno Teachers Association.

(2) Upon request, negotiate with the Fresno Teachers Association over organizational security.

(3) Within seven (7) workdays of service of this decision, post at all school sites and other work locations upon those bulletin boards on which notices to certificated employees are customarily placed copies of the attached Notice, Appendix B, for a period of twenty (20) working days.

The Board further ORDERS that the subsections 3543.5(a), (b) and (e) charges filed against the District by the Fresno Teachers Association are hereby DISMISSED.

By: Harry Gluck, Chairperson

John W. Jaeger, Member

Irene Tovar, Member

APPENDIX A

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 Nos. S-CE-257 and S-CO-33, Fresno Unified School District v. Fresno Teachers Association, CTA/NEA, in which all parties had a right to participate, it has been found that the Fresno Teachers Association violated the Educational Employment Relations Act, subsection 3543.6(c) by engaging in a strike during negotiations. As a result of this conduct we have been ordered to post this Notice and abide by the following:

We will:

CEASE AND DESIST FROM:

Refusing to bargain in good faith by engaging in a strike during negotiations.

TAKE AFFIRMATIVE ACTION TO:

Post and distribute copies of this notice to all unit employees.

FRESNO TEACHERS ASSOCIATION, CTA/NEA

Dated: \_\_\_\_\_

By \_\_\_\_\_  
Authorized Agent of the  
Fresno Teachers Association, CTA/NEA

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR TWENTY (20) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

APPENDIX B

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California

After a hearing in Case No. S-CE-257, Fresno Teachers Association, CTA/NEA v. Fresno Unified School District, in which all parties had a right to participate, it has been found that the Fresno Unified School District violated subsection 3543.5(c) by attempting to negotiate over the amount of agency fee, and subsections 3543.5(b) and (d) by suspending the dues deductions on November 30, 1978. As a result of this conduct, we have been ordered to post this notice and abide by the following:

We will:

CEASE AND DESIST FROM:

Refusing and failing to bargain in good faith by insisting on negotiating over the amount of agency fee.

Refusing to deduct and remit dues to the Fresno Teachers Association, CTA/NEA on November 30, 1978.

TAKE THE FOLLOWING AFFIRMATIVE ACTION TO:

Take a one-time double deduction from the pay warrants of Fresno Teachers Association, CTA/NEA members employed by the Fresno Unified School District at the time of the strike unless the employee notifies the Fresno Unified School District within thirty (30) days of service of this Order of his/her objection to such deduction. The Fresno Unified School District shall remit that sum to the Fresno Teachers Association, CTA/NEA.

Bargain upon request with the Fresno Teachers Association, CTA/NEA over organizational security.

FRESNO UNIFIED SCHOOL DISTRICT

Dated: \_\_\_\_\_

By \_\_\_\_\_  
Authorized Agent of the  
District

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR TWENTY (20) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.