* * * JUDICIAL APPEAL PENDING * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KENNON B. RAINES et al.,	
Charging Parties,	Case No. LA-CO-1394-E
v.	PERB Decision No. 2475
UNITED TEACHERS OF LOS ANGELES,	February 29, 2016
Respondent.	

Appearances: William D. Evans, Attorney, for Kennon B. Raines et al.; Holguin, Garfield, Martinez & Quiñonez by Dana S. Martinez, Attorney, for United Teachers of Los Angeles.

Before Huguenin, Winslow, and Banks, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the United Teachers of Los Angeles (UTLA) and on a cross-exception filed by Kennon B. Raines (Raines) and other substitute teachers (Charging Parties) to the proposed decision of a PERB administrative law judge (ALJ). The complaint alleged that UTLA violated its own policies and its duty of fair representation under the Educational Employment Relations Act (EERA)[1] by secretly negotiating with the Los Angeles Unified School District (LAUSD or District) for a side letter agreement (July Side Letter) to alter the collectively-bargained seniority rights used for assigning substitute teaching work. The ALJ found that the July Side Letter had a substantial negative impact on the employment relations of approximately 4,000 career substitute teachers represented by UTLA and concluded that UTLA

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

had violated its duty of fair representation under EERA section 3544.9[2] by negotiating and entering into the July Side Letter without providing notice or opportunity for Charging Parties to have their views considered before their seniority rights were downgraded. The ALJ relied on *El Centro Elementary Teachers Association (Willis and Willis)* (1982) PERB Decision No. 232 (*El Centro*) and other authorities holding that, while "there is no requirement that formal procedures be established," the duty of fair representation "implies *some* consideration of the views of various groups of employees and *some* access for communication of those views." (Emphasis added.)

The Board has reviewed the entire record in this matter, including the unfair practice charges filed by Raines and other substitute teachers, the complaint and UTLA's answer, the 19-volume reporter's transcript of the hearing and exhibits, and the parties' exceptions, cross-exception, supporting briefs and responses thereto in light of applicable law. Based on this review, we dismiss the unfair practice charges filed by Henry Charles Parke, Stephanie Jean Parke and Jill Rosalie Balogh as untimely. We reverse the ALJ's dismissal of charges filed by Victoria Garcia-Murphy (Garcia-Murphy), Juana Gramblin (Gramblin), Valerie Vines (Vines), Jessie Gayer (Gayer), and Leslie Druss (Druss) for defective service. We also affirm the proposed decision's finding of liability, as modified and supplemented by the discussion below, and we remand for further proceedings in accordance with this Decision.

PROCEDURAL HISTORY

On October 22, 2009, Raines and 149 other substitute teachers commenced this action by filing unfair practice charges. The charges alleged, among other things, that by negotiating and executing the July Side Letter without notice, membership ratification and/or prior

[2] EERA section 3544.9 provides: "The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."

approval from UTLA officers responsible for substitute issues, UTLA had breached its statutory duty of fair representation. The charges also alleged that the July Side Letter violated UTLA's own policies, as set forth in the UTLA Policy Handbook. Each of these 150 original charges included identical factual allegations and each identified Raines as the "person filing [the] charge," which the Office of the General Counsel treated as authorization for Raines to act in a representative capacity on behalf of the other Charging Parties.

In addition to the original 150 Charging Parties, since October 22, 2009, 26 other current and former substitute teachers employed by the District filed identical or nearly identical charges.[3] Each of these additional charges incorporated by reference the factual allegations included in the Raines charge and most, though not all, likewise identified Raines as the "person filing [the] charge."[4]

The Board agent assigned to the case sent PERB's standard notice of unfair practice charge letter to Raines and UTLA President A.J. Duffy (Duffy). The letter advised Raines and Duffy of PERB's process for investigating unfair practice charges and specifically stated: "*Both* parties in this case are requested to provide me and serve the other parties with the name, address, and telephone number of their designated representative, if any." (Emphasis added.) The Board agent's letter included a blank "Notice of Appearance" form and further

[3] One Charging Party, David Lyell, voluntarily withdrew from the case on June 28, 2013.

[4] Theresa Averiette, Jill Rosalie Balogh, Henry Charles Parke, Stephanie Jean Parke, and Ronald Steinhauser each filed charge forms which incorporated the factual allegations of the Raines charge but did not identify Raines as the "person filing [the] charge." As explained below, during the hearing, the ALJ received information indicating that other Charging Parties who had listed Raines as the "person filing [the] charge" on their charge forms were no longer represented by Raines and/or by her counsel. For convenience, we refer hereafter to these individuals collectively as the Non-Raines Charging Parties.

advised "*[b]oth* parties" as follows: "Once you receive a Notice of Appearance from another party, please communicate with that party only through its designated representative."[5]

On November 16, 2010, Raines filed with PERB and served on UTLA an executed Notice of Appearance form which designated Attorney William D. Evans (Evans) as *her* representative. There is no indication in PERB's file that Evans was retained by, or authorized to represent, the other Charging Parties who had joined or who eventually would join this action.[6]

On January 21, 2010, PERB's Office of the General Counsel issued a complaint, alleging that, on or about July 2, 2009, UTLA breached its duty of fair representation, in violation of EERA sections 3543.1, subdivision (a), 3543.6, subdivision (b), and 3544.9, by negotiating a side letter to UTLA's collective bargaining agreement with LAUSD in secret, without consultation or input from Charging Parties, and in violation of UTLA's internal rules, and that the July Side Letter had a substantial negative impact on Charging Parties' employment relationship.[7]

On January 28, 2010, PERB's Office of the General Counsel notified Raines and counsel for UTLA of an informal settlement conference scheduled for February 26, 2010 at PERB's Los Angeles Regional Office.

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[5] Although PERB regulations do not specifically require a Notice of Appearance form, PERB regards a party as self-represented until an executed Notice of Appearance form has been filed or until other circumstances indicate that the party has designated a representative in the matter. (*City & County of San Francisco* (2014) PERB Order No. Ad-407-M, p. 2, fn. 2; *Los Angeles Community College District* (2000) PERB Decision No. 1377, adopting dismissal letter at p. 1, fn. 1, *State of California (Department of Personnel Administration)* (1995) PERB Order No. Ad-267-S, pp. 2-3.)

[6] PERB's file also includes no Notice of Appearance identifying UTLA's representative. However, correspondence in the file indicates that attorneys from the law firm Holguin, Garfield, Martinez & Quiñonez served as counsel to UTLA in this matter.

[7] As discussed below, although captioned K*ennon B. Raines et al. v. United Teachers of Los Angeles*, the complaint did not identify or append a list of the charging parties other than Raines, or indicate that the complaint would be processed as a representative or class action by Raines on behalf of other, similarly-situated employees.

On February 16, 2010, UTLA answered the complaint by admitting certain facts, denying others, and denying any wrongdoing. The answer also asserted various affirmative defenses, including that Charging Parties' claims were barred in whole or in part by the doctrine of waiver, based on Charging Parties' own acts and/or omissions. Concurrent with its answer, UTLA filed a motion to dismiss the complaint in which it asserted that the complaint's allegations, even if true, would not constitute a breach of the duty of fair representation or other unfair practice under EERA and PERB decisional law.

On March 23, 2010, the Office of the General Counsel convened an informal settlement conference but the dispute was not resolved. As a result, on March 30, 2010, the ALJ sent notice to Raines and UTLA that the matter would proceed to a formal hearing.

On August 2, 2010, Raines filed a response/opposition to UTLA's motion to dismiss.[8]

On August 2, 2010, the ALJ opened the first of what eventually totaled 19 non-consecutive days of formal hearing. Raines and Charging Party Karen Noel Frolich Morgan (Morgan) identified themselves as the representatives for *all* Charging Parties, except for Helen Bregere (Bregere), who was deceased as of the date of the hearing.[9] Attorney Dana Martinez (Martinez) represented UTLA. At the outset, the ALJ considered various preliminary motions, including a motion by UTLA to dismiss charges filed by Garcia-Murphy, Gramblin,

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[8] The case file gives no indication that the ALJ ruled on UTLA's motion to dismiss. However, as discussed below, at the hearing, the ALJ granted a separate motion by UTLA to dismiss five Charging Parties from the case for defective service.

[9] Bregere was misidentified in the transcript as Helen "Brigaire." Although no representative of Bregere's estate has made an appearance in this matter, in the absence of voluntary withdrawal by an authorized representative or a motion to dismiss, her interest in this matter survives and any back pay awarded shall be paid to the legal administrator of her estate or to any person authorized to receive such payment under applicable law. (*St. George Warehouse* (2008) 353 NLRB 497, 504; see also *Vaca v. Sipes* (1967) 386 U.S. 171, 174.)

Vines , Gayer, and Druss.[10] Although the five individuals had timely filed unfair practice charges, according to UTLA, they had not properly served their charge forms on UTLA and/or filed proof of service with PERB as of the date of hearing.[11]

On August 18, 2010 and September 28, 2010, the ALJ served Raines, in her capacity as representative of *some* Charging Parties, and Martinez, in her capacity as counsel for UTLA, with notice of additional hearing dates. On these and subsequent dates when the ALJ sent notice of additional hearing dates, no notice was served on the Non-Raines Charging Parties.

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[10] We discuss below UTLA's separate motion to sequester "witnesses," including *all* Charging Parties except the two acting as representatives.

[11] On August 6, 2010, and apparently in response to *the ALJ's decision* to dismiss her from the action, Garcia-Murphy wrote to the ALJ *ex parte* to request an opportunity to review PERB's case file in this matter because, according to Garcia-Murphy, "Ms Raines refuse[d] to take my case." PERB Regulation 32185, which governs *ex parte* communications, provides:

> (a) No party to a formal hearing before the Board on an unfair practice complaint shall, outside the hearing of the other parties, orally communicate about the merits of the matter at issue with the Board agent presiding. Nor shall any party to a formal hearing communicate in writing with the Board agent presiding without providing a copy of the writing to the other parties.
>
> (b) A Board agent who receives such an ex parte communication shall state on the record that the communication was made, identify the person who made it and either summarize the contents of the communication, or provide all parties with a copy of such communication. The Board agent shall then afford the other parties to the hearing the opportunity to rebut the communication on the record.

The contents of PERB's case file do not indicate whether the ALJ responded to this request or whether he disclosed the existence of Garcia-Murphy's letter or ex parte communications from other Charging Parties, as described below. However, there is no evidence that these communications were considered by the ALJ or that they caused prejudice to any party.

On November 17, 2010, the sixth day of the hearing, Evans identified himself as the attorney representing *at least some* of the Charging Parties, though he did not identify *which* or *how many* Charging Parties he represented.

On December 10, 2010, Charging Party Edwin McCready (McCready) sent an e-mail message to the ALJ, in which McCready identified himself as a "complaining party" in the case. The e-mail message advised the ALJ that McCready had "not signed on" with Evans and that "there are probably many other substitutes who have not done so either." McCready's e-mail expressed concern that "a large group of individuals who signed on to this action will be overlooked and even prevented from testifying on their own behalf," because Evans would not call as witnesses any substitutes who were not represented by him. There is no indication in the file that the ALJ responded to McCready's message or sought clarification on the record from Raines and/or Evans regarding their authority to represent McCready or other Charging Parties who "had not signed on with this lawyer."

On January 21, 2011, the fifteenth day of the hearing, Charging Parties rested their case-in-chief. UTLA began presenting its case-in-chief on the next day of the hearing, January 24, 2011.

On January 27, 2011, the ALJ again served Raines, Evans and Martinez with notice of additional hearing dates. Again, no notice of the additional hearing dates was served on the Non-Raines Charging Parties.

On April 5, 2011, the nineteenth day of the hearing, UTLA concluded its case-in-chief. Although both UTLA and Raines reserved the right to present rebuttal and surrebuttal evidence, no further testimony was offered or taken and the hearing was closed. Post-hearing briefing schedules were set the following day.

On August 22, 2011, UTLA and Raines submitted post-hearing briefs on the question of UTLA's liability for breach of the duty of fair representation.

On September 8, 2011, Raines filed a motion and supporting attorney declaration to permit the filing of reply briefs and on September 14, 2011, UTLA filed its opposition to this motion. On October 17, 2011, UTLA and Raines filed reply briefs and the matter was fully submitted.

On November 1, 2012, the ALJ issued his proposed decision.

After requesting and receiving two extensions of time in which to file exceptions to the proposed decision, on February 4, 2013, UTLA filed with the Board itself a statement of exceptions and supporting brief.

After requesting and receiving two extensions of time, on April 15, 2013, Raines filed a response to UTLA's statement of exceptions and a cross-exception and supporting brief.

On March 20, 2015, PERB's Appeals Assistant requested that Evans identify which of the Charging Parties in this case were his clients. On March 30, 2015, Evans responded with a list that identified as his clients 38 of the more than 175 Charging Parties in this case.

To address issues raised in Raines' cross-exception and supporting brief, on April 17, 2015, PERB requested supplemental briefing from UTLA and from the Non-Raines Charging Parties on whether PERB Regulation 32164[12] and/or the relation back doctrine permits additional parties to join an unfair practice charge without regard to the six-month statute of limitation set forth in EERA section 3541.5, subdivision (a)(1). On May 12, 2015, UTLA filed a supplemental brief. None of the Non-Raines Charging Parties filed supplemental briefs or filed reply briefs in response to UTLA's supplemental brief.

[12] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

FINDINGS OF FACT

The Parties

UTLA is the exclusive representative of LAUSD's certificated employees, including some 40,000 teachers working at more than 700 schools throughout LAUSD. (Reporter's Transcript (R.T.), Vol. XVII, pp. 11-12.) At all times relevant to this action, Duffy was the president of UTLA.[13]

Raines and other Charging Parties are among approximately 4,000 "career" substitute teachers employed by LAUSD, some of whom have worked in this capacity for many years or even decades. Some substitutes work exclusively for LAUSD, while others have alternative sources of income.[14] Although Article 1, section 1.1 of the 2006-2009 UTLA/LAUSD collective bargaining agreement purports to exclude from the certificated bargaining unit "[a]ll day-to-day substitutes who were paid for fewer than 100 days during the preceding school year" (Charging Party (C.P.) Ex. 7, Art. I, § 1.1), the ALJ found and UTLA has not disputed that Charging Parties were part of the certificated unit as of March-June 2009 and, as such, were exclusively represented by UTLA at the time of the events giving rise to this dispute.

[13] The duties of UTLA President and other UTLA officers are discussed below.

[14] For example, in addition to her work as a substitute teacher for LAUSD since 1986, Charging Party Lynn Bertucci is a nurse and LVN. (R.T., Vol. VI, pp. 70-71.) Charging Party Charles Zigman began substitute teaching for LAUSD in 1997 to supplement his income as a writer, while Michelle Markel (Markel) works as a freelance writer in addition to her substitute teaching assignments. (R.T., Vols. VI, pp. 6-7 [Zigman], VII, p. 91 [Markel]; see also Vol. VII, p. 69 [Sherry Lincoln (Lincoln)].)

UTLA Structure, Governance, and Policies[15]

Representation within UTLA is primarily geographic. The geographic areas vary, however, depending upon whether one is a "regular" teacher assigned to a more or less permanent work location, or, like most substitutes, is not assigned to a specific site on a permanent basis.

For regular teachers, UTLA members at each site elect a chapter chair for their site. If the site has more than 80 members or is a year-round school, the members at that site may also elect a co-chair. Some sites may also have a vice chair position. Chapter chairs' responsibilities include attending area meetings and communicating information between members at the chapter and other levels of union governance. Chapter chairs are also responsible for ensuring that the so-called "matrix," which is LAUSD's process for assigning teachers to classes, follows the priority calling order negotiated by UTLA. (R.T., Vol. XII, pp. 6-7 [Robert Scott Johnson (Johnson)]; see also Vol. XII, pp. 46-47 [Janis Luckstein].)

Each site falls within one of eight geographic divisions within the District, referred to as areas. Members in each area vote in bi-annual elections to select one or more representatives to HOR. Representation in HOR is proportional at the rate of one HOR member for every 150 teachers within the area. (R.T., Vol. XII, pp. 11, 12.)

For substitutes and other teachers who are not permanently assigned to a specific school site, UTLA representation is based on a three-part geographic division (north, central and south) which corresponds to geographic areas used by the District for making substitute teaching assignments (see below). As with the eight geographic areas applicable to regular

[15] Unless otherwise indicated, the information in this section is based on the testimony of Betty Forrester (Forrester), who, in addition to her current position as UTLA Secretary, has served in various capacities, including chapter chair, area representative, and member of both UTLA's House of Representatives (HOR) and its Board of Directors (BOD). (R.T., Vol. XVII, pp. 5-6.)

teachers, each of the three geographic areas used for substitutes also has an elected area chair. In addition to the geographically-based representation, UTLA also has 12 special category chapters, one of which is for substitutes.[16] Each special category chapter elects a chapter chair and representatives to HOR.

HOR and BOD are UTLA's highest decision-making bodies. As president, Duffy chairs meetings of both HOR and BOD. (R.T., Vol. XIX, p. 9.) HOR is the organization's policy-making body. Any decision requiring a change in the UTLA constitution or that would develop broad policy for the organization begins in HOR. (R.T., Vol. XII, p. 13.) HOR is composed of more than 300 representatives, based on a combination of geographic and special category representation, as described above, and meets every five weeks during the school year. (R.T., Vols. XII, p. 13, XIX, p. 6 [Duffy].)[17] All UTLA officers and directors are members of HOR. In addition, HOR has 33 standing committees whose chairs are automatically members of HOR. (R.T., Vol. XII, p. 13.)

The Substitute Committee is one such standing committee within HOR. (R.T., Vols. XII, p. 13, XV, p. 23 [Pechthalt].) It elects eight full members and two alternates as members of HOR. (R.T., Vol. XII, p. 14.) At all times relevant to this action, Dave Peters (Peters) was the elected chair of the Substitute Committee. (*Ibid.*; R.T., Vols. XVII, pp. 11-13, 15-16, XIV, p. 125 [Peters].)

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[16] The 12 standing committees for special categories appear to correspond with the 12 areas identified in Article XXX of the 2006-2009 collective bargaining agreement, which are: (1) Adult Education, (2) Bilingual, (3) Children's Centers, (4) Counselors, (5) Traveling Music Teachers, (6) Librarians, (7) Mentor Teachers, (8) Psychologists, (9) Special Education, (10) Substitutes, (11) Multitrack Schools, and (12) Others as needed by mutual agreement and special needs arise.

[17] Although HOR and BOD are the two highest leadership bodies within the organization, there was uncontroverted testimony that they "almost never convene" in the month of July, because "nobody is in town" during the summer break. (R.T., Vol. XV, p. 40 [Pechthalt].)

According to Johnson, a member of the House Rules Committee, any UTLA member can make a motion to establish or change UTLA policy at an area meeting, a BOD meeting or a HOR meeting. (R.T., Vol. XII, p. 7.) Standing committees may also make such motions. Motions raised at area or committee meetings proceed through the House Rules Committee which will direct the matter to the appropriate body. (R.T., Vols. XII, p. 16, XII, pp. 8-9 [Johnson].).

BOD is the operational arm of UTLA. BOD's responsibilities include fiduciary matters, personnel, communications, and making policy recommendations to the House. (R.T., Vol. XVII, pp. 15-16.) BOD includes seven executive officers. (R.T., Vol. XVII, p. 16 [Forrester].) Other officers are members of BOD by virtue of being elected to positions on HOR. (R.T., Vol. XI, p. 91.) Each of the eight geographic areas described above for "regular" teachers elects four directors. (R.T., Vol. XVII, p. 15 [Forrester].)

BOD also has five special categories, including one for substitutes. Each of the five special categories elects a director to represent the interests of that special category within BOD. Since 2002, Leonard Segal (Segal) has been the director responsible for substitute issues. (R.T., Vol. XII, p. 73.) By virtue of his position as a director, Segal is also a member of HOR. (R.T., XII, pp. 55-56.) Segal also holds various other offices within UTLA, including substitute teacher chapter chair for the north calling area. (R.T., Vol. XII, p. 55.)

Since 2008, Greg Solkovits (Solkovits) has been a secondary vice president and the organization's point person for substitute issues. (R.T., Vols. XI, p. 46 [Solkovits], XVII, p. 16 [Forrester].) Solkovits, who began his teaching career as a substitute, volunteered for the position, because he wanted to "try to help to make sure that sub issues got attention" and to ensure "that there would be someone subs could go to if they had a problem within UTLA."

(R.T., Vol. XI, pp. 16, 46.) Although described by some as a "liaison" between BOD and the Substitute Committee (R.T., Vol. XVII, p. 16 [Forrester]), Solkovits characterized his position as the organization's highest-ranking officer for substitute issues. (R.T., Vol. XVIII, p. 16 [Solkovits].)

UTLA Communications

UTLA communications are within BOD's operational responsibilities. Although UTLA has a communications department, Duffy is in charge of communications and the self-described "voice of UTLA." (R.T., Vol. XIX, p. 6 [Duffy].) All UTLA communications and publications are reviewed by at least one officer, with Duffy acting as the final point of approval. (R.T., Vol. XVII, pp. 8-9 [Forrester].)

UTLA's publications include the monthly *United Teacher*, whose editor-in-chief is Duffy. (R.T., Vol. XIX, p. 6 [Duffy].) The *United Teacher* is mailed to members and made available to agency fee payers via UTLA's website. (R.T., Vol. XVII, pp. 39, 42 [Forrester].)

Negotiation of Collective Bargaining Agreements, Reopener Negotiations and Side Letters

UTLA has various policies governing the accountability and oversight of its negotiators. It is undisputed that collective bargaining agreements negotiated by UTLA require HOR authorization and are subject to various formalities. (R.T., Vol. XVI, p. 21.) For example, collective bargaining agreements are subject to ratification by a membership vote, pursuant to UTLA's constitution. (R.T., Vol. XVI, p. 21.) Reopener negotiations are generally subject to the same process and formalities as "full" contract negotiations. (*Ibid.*; see also C.P. Ex. 7, Art. XXXII, §§ 1.0, 2.0.)

Additionally, UTLA's negotiating team must include the chair of any standing committee whose area of expertise would be affected by the negotiations. According to the

UTLA Policy Handbook, "when a subject pertaining to a UTLA Standing Committee is negotiated, … the chair of that committee or a person designated by that committee [shall] be present at all the negotiations sessions dealing with that subject." (C.P. Ex. 37.) The quoted language comes from a motion identified as "Special Order [No.] 2," which was adopted by HOR in 1987. In 1995, HOR passed a similar motion, identified as "Special Order [No.] 1," whose purpose was "to reiterate House policy that when a committee has a motion on the negotiations table[,] that the chair of that committee be present." Neither motion includes a definition of "negotiations."

In 1998, HOR passed another motion, identified as "NBI [New Business Item No.] 1," which required that "[w]ritten reports on negotiations will be promptly made by the people responsible for negotiations to the Board of Directors and the House of Representatives." NBI No. 1 defined the term "negotiations" as follows: "on-going negotiations, proposals for negotiations made by UTLA and the LAUSD, and the outcomes of all negotiations between UTLA and the LAUSD." NBI No. 1 specifically exempted Article 30 discussions from the term "negotiations"[18] but otherwise, the language of NBI No. 1 made no limitations or exclusions from the phrase "*all* negotiations between UTLA and the LAUSD." (Emphasis

[18] Article XXX of the 2006-2009 collective bargaining agreement states, in relevant part:

> Three member subcommittees as designated by UTLA shall meet periodically with the District administration responsible for the following areas to discuss matters of concern. In addition, these groups are to function as subcommittees of the negotiating teams during contract renewal negotiations, with the understanding that they may draft preliminary recommendations for consideration by the parties' full negotiations teams.

The areas identified are the same as those identified above as "special category committees," which include a committee for substitute issues.

added.) NBI No. 1 also reiterated the commitment previously adopted by HOR in 1987 and reaffirmed in 1997: "In the future UTLA will follow current UTLA policy in that when an issue is brought to the negotiations table the committee chair of the relevant UTLA [standing] committee will be at the table."

Considerable testimony at hearing focused on the purpose of "side letters" (also referred to as "memoranda of understanding") and whether they are subject to the same requirements as contract and reopener negotiations. Former UTLA President Day Higuchi (Higuchi) was among the current and former UTLA officers who described a side letter as an agreement designed to address often time-sensitive issues or problems that arise during the life of a collective bargaining agreement without reopening the collective bargaining agreement or going through the "time consuming" and "cumbersome" process of convening UTLA's governing bodies for approval. (R.T., Vol. XVI, pp. 19-21; see also Vols. XI, pp. 68-72 [Solkovits], and XIX, pp. 7-8, 41 [Duffy].) Higuchi and other UTLA witnesses testified that Sam Kresner (Kresner), who was the assistant to the president for many years, frequently negotiated side letters with the District with varying levels of involvement or oversight from officers or UTLA's governing bodies. According to Higuchi, while prior authorization from BOD or HOR was not required for side letters, "obviously it had to be discussed with someone, so the officers usually discussed them amongst themselves." (R.T., Vol. XVI, pp. 19-20 [Higuchi].)

Higuchi also testified that "there was very little discussion" of the UTLA policy requiring that standing committee chairs attend negotiations before the measure was passed in 1987. (R.T., Vol. XVI, p. 26.) According to Higuchi, because it was prepared by an ad hoc committee known as the Living Contract Committee in the context of reopener negotiations,

Higuchi understood it as an effort to develop language for contract or reopener negotiations. (R.T., Vol. XVI, pp. 16-19, 26-27.) More generally, Higuchi did not think the various motions requiring that committee chairs be included in negotiations were intended to apply to side letter negotiations, because, at least during Higuchi's tenure as president (from 1996-2002), these motions had not been applied to negotiations over side letters. (R.T., Vol. XVI, pp. 28-30.)

However, Higuchi admitted on cross-examination that he knew of no "written definition" to distinguish "full" or reopener negotiations from negotiations for a side letter agreement. (R.T., Vol. XVI, p. 33.) Higuchi did not know whether side letter negotiations could be distinguished from "full" negotiations based on the number of employees affected by the resulting agreement but he acknowledged that, during his tenure, no side letter had been negotiated that had reduced the wages or benefits of several thousand employees. He recalled one instance in which teachers at year-round schools had been given priority for substitute jobs, though he could not recall the details, including whether the deal had been consummated in a side letter or some other instrument. (R.T., Vol. XVI, pp. 34-36.)

Solkovits testified that he was on the standing committee concerned with salary and finance issues in 1987, when UTLA adopted the policy requiring that the chair of each committee affected by negotiations be present at the negotiations. According to Solkovits, Stan Malin (Malin), the chair of UTLA's Salary and Finance Committee, was upset that he had been excluded from salary negotiations and brought the measure to ensure that he was involved when UTLA negotiated issues within the purview of Malin's committee. (R.T., Vol. XI, pp. 71-72.) Solkovits testified that, to his knowledge, the measure does not pertain to side letters because it has never been enforced with respect to side letters. (R.T., Vol. XI, p. 63.) However, he could not recall whether side letters had been discussed when this motion was debated and adopted. (R.T., Vol. XI, pp. 62-63.)

According to Solkovits, Special Order No. 1 was also moved by Malin, and for essentially the same reasons that prompted passage of the similar measure in 1987. In 1995, Malin was still the chair of the Salary and Finance Committee and was once again outraged that he had not been involved in negotiations with the District over salaries. (R.T., Vol. XI, p. 63.) Like Higuchi, Solkovits testified that these measures were concerned with contract and reopener negotiations but not with side letter negotiations. (R.T., Vol. XI, pp. 63-64.)

Solkovits testified that he was also "general[ly]" familiar with NBI No. 1 from 1998 requiring written reports to BOD and HOR for "all negotiations," but not the specifics of the policy. He testified that, "for quite a while reports have been made to the board and to the house about the status of negotiations. I can't recall if it was before 1998 or after, but now that I see this, I can certainly see that there was a specific directive on the 20th of May, 1998." (R.T., Vol. XI, p. 65.) Solkovits understood the measure as applying only to "negotiations," which he admitted "is a little bit unclear" from the document itself, but which he interpreted as "dealing with things that are included in the contract," but not side letters. (R.T., Vol. XI, p. 65.)

In contrast to contract and reopener negotiations, Solkovits testified that side letters have been entered into without approval from BOD or HOR so that, "frequently the side letters are in existence, and many of [the officers] don't know that they're in existence." (R.T., Vol. XI, p. 66.) Solkovits mentioned one instance, in approximately 2006 or 2007, involving a pay differential for special education teachers for grades kindergarten through 12, but which excluded pre-kindergarten teachers. The subject was noteworthy to Solkovits because his wife teaches pre-kindergarten level classes. Solkovits testified that, to the best of his knowledge, Kresner had negotiated and signed the side letter "on his own." However, because these events occurred before Solkovits was an officer, he had no personal knowledge of whether Kresner had sought officer approval before executing the side letter. (R.T., Vol. XI, pp. 66-67.)

Generally, Solkovits testified that that neither prior approval from HOR or BOD nor membership ratification is required before an officer of the organization enters into a side letter that is binding on the organization. (R.T., Vol. XI, pp. 67-68.) According to Solkovits, the fact that the July Side Letter was negotiated without involving Peters, the chair of UTLA's standing committee concerned with substitute issues, or Segal, the director responsible for substitute issues, did not violate UTLA's policies because, in Solkovits' opinion, those policies do not apply to side letters. (R.T., Vol. XI, p. 72.)

Other UTLA officers similarly testified that they were "not aware" of any UTLA policy concerning the authorization, negotiation, or approval process for side letters. Aside from Solkovits, however, none specifically discussed or attempted to distinguish the above provisions of the UTLA Policy Handbook from negotiations for side letters. According to Duffy, UTLA has not historically regarded side letters as subject to the same processes as contract negotiations and, *to the best of his knowledge*, "[t]here was no official mechanism" requiring officers to report to BOD or HOR regarding their negotiations over side letters as of July 2009.

Joshua Pechthalt (Pechthalt), who is a vice president of UTLA and a member of HOR and BOD, similarly testified that, while proposals raised in negotiations would "generally" be brought before officers for approval, his understanding was that no such policy prohibited an officer of the union from negotiating and entering into a side letter agreement with LAUSD without first seeking advice or approval from the organizations' governing bodies or officers. (R.T., Vol. XV, pp. 36-37.)[19] Pechthalt's testimony was somewhat qualified, however, by his acknowledgement that he, personally, was not the organization's point person in negotiating

[19] Pechthalt, Segal and other witnesses testified that, as a result of the present dispute, UTLA has *since* formed a committee to develop a policy requiring various levels of prior approval, depending upon the subject of the agreement. (R.T., Vol. XV, p. 37.)

side letters, and that he had, in fact, "sat in on meetings where *proposals* [for side letters] have been brought back" to UTLA's governing bodies for approval. (R.T., Vol. XV, pp. 12, 13-14, emphasis added.)

Although also lacking in specifics about the policies contained in the UTLA Policy Handbook, also worth noting is the contrary view offered by Johnson. Johnson has held several offices within UTLA for many years, the most pertinent of which for this discussion are his membership in HOR and on the House Rules Committee. (R.T., Vol. XII, pp. 8-9.) Johnson testified that when he learned of the July Side Letter in September 2009, his first reaction was incredulity. "I really couldn't believe that it had occurred. The first questions that came to my mind were, how is that possible, that's illegal." (R.T., Vol. XII, p. 9.) In addition to concerns about violations of EERA, Johnson testified that he was "shocked" that "there was a signed agreement, and yet there had never been any talk of it within any body within our Union." (R.T., Vol. XII, p. 9.)

Johnson wrote the motion to rescind the July Side Letter and negotiate an alternative "because I saw this action as a potentially grave threat to the entire membership." Johnson testified that he

> didn't see it as something that pertained just to substitute teachers, but as a violation of the very process by which we establish our agreements between our Union and the District itself. And if we would let what I saw at the time, this dangerous precedence [sic] stand, that the president alone in secret could make an agreement which nullified parts of the contract which have been voted upon by the entire membership, if we let that stand, then it would be used again against somebody else in the bargaining unit.

(R.T., Vol. XII, p. 38.)

Michael Dreebin (Dreebin), who served in various capacities for UTLA over approximately 25 years, including chapter chair, area chair, director, member of HOR, and

elementary vice president from 2002 until 2005, offered a view similar to Johnson's. Dreebin could not recall if he was present when each of the above policy motions was enacted by HOR, but he testified that, in his experience as an officer and HOR member, that these policies were consistently applied to require that committee chairs be present for ***all*** negotiations affecting the subjects of their respective committees. (R.T., Vol. X, pp. 15-18.) Dreebin explained that the relevant distinction was not whether an agreement was characterized as a side letter or a reopener agreement, but whether *the effect* of the negotiations was to ***apply*** the existing language to a particular situation that arose, or to ***change*** contractual rights or responsibilities. (R.T., Vol. X, p. 54.) According to Dreebin, in the latter case, the presence of affected committee chairs was ***required***, regardless of how the negotiations were characterized. (R.T., Vol. X, pp. 53-54, 58.) He recalled that, at bargaining "sessions where UTLA met with the District and discussed issues of importance to substitutes, … there was always a representative of the substitute committee there, usually the chairperson of the committee, as there was when any committee had discussions with the District." According to Dreebin, "That's our policy." (R.T., Vol. X, p. 18.) By contrast, side letters usually required no such formalities because, at least in Dreebin's experience, they typically affected only one person but never hundreds of employees. (R.T., Vol. X, p. 58.)

Selection of Personnel for Substitute Teaching Assignments

The Certificated Substitute Unit, also referred to as the Sub Unit, is the administrative department responsible for coordinating the District's substitute teaching needs with qualified and available personnel. (C.P. Ex. 7, Art. XIX, § 5.1.) Marjorie Josaphat (Josaphat) is the director of the Substitute Unit and Regina Echols (Echols) its assistant director.

Since about 2000, the Substitute Unit has used an automated calling system known as SubFinder, which links substitute teaching assignments with individuals in the District's substitute pool, based on their availability, qualifications, geography, seniority and other criteria, as determined by District policy and any applicable collective bargaining agreements. (R.T., Vols. VIII, pp. 7-9 [Lowe], VI, pp. 8-9 [Charles Zigman (Zigman)].) Evelyn Lowe (Lowe) is a principal personnel clerk employed in the Substitute Unit. Her responsibilities include programming SubFinder so that it identifies, selects and contacts the available personnel in the appropriate calling order. In addition to SubFinder, the Substitute Unit maintains a live help desk to answer staffing questions from substitutes. (R.T., Vol. II, p. 182.)

As of early 2009, the criteria for assigning substitute teaching work were contained in Article XIX of the collective bargaining agreement, which provides in relevant part:

> 5.3 <u>Calling Priority Order</u>:
>
> a. Contract pool teachers temporarily assigned to substitute pools, and year-round school teachers newly assigned or whose track is changed and who therefore need to make up time in order to complete one full year of retirement service credit.
>
> b. Incentive Plan Substitutes (see Section 3.0.).
>
> c. Substitutes requested by name and employee number, and available year-round school teachers off-track requested by name and employee number at their home school. The request list is limited to those who are available at least two days per week provided that they are available Friday and Monday and approved by the site administrator in consultation with the faculty.
>
> d. Remaining openings shall be filled from geographic area pools. Substitutes' names shall be arranged by the date of election to certificated service on separate lists for each pool according to service category (elementary K-6, or a given secondary subject field), and called in the following priority order:

Relevant to this dispute are paragraphs c and d of this section, which cover assignments by "personal request," and by so-called "random" calling.[20] Under paragraph c, SubFinder contacts substitute teachers who have been specifically requested either by the teacher who will be absent or by the school administration. Substitute Unit personnel customarily refer to such calls as "personal request[s]."

If no teacher is requested by name for a particular assignment, then selection is governed by the criteria set forth in paragraph d of section 5.3. Although the parties and the District's Substitute Unit staff refer to the process under paragraph d as "random" calling, in fact it is anything but random.[21] As of early 2009, SubFinder was programmed to identify and contact available personnel on the basis of seniority within the appropriate area of competence (e.g., primary or secondary teaching credentials) and within the designated geographic calling area, i.e., north, central or south. (R.T., Vols. VIII, p. 26 [Lowe], VI, p. 39 [Kathleen Negrete].)[22]

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[20] The categories identified in paragraphs a and b of section 5.3 are either not at issue in this case and/or involve only a negligible number of individuals. According to Lowe, the incentive plan substitutes included a total of "maybe four to five" and are only contacted if the assignment is at a Special Education school. (R.T., Vol. VIII, p. 25.) In her opposition to UTLA's pre-trial motion to dismiss, Raines also argued that "Incentive Plan Substitutes" no longer exist, because that program had been terminated before the events of this dispute.

[21] While potentially misleading, we retain usage of the term "random" calls (as opposed to personal requests), because it is the customary term used by the District's Substitute Unit, and because it is terminology familiar to the parties.

[22] Seniority is determined by the date an employee enters the substitute pool and generally carries over from one school year to the next, as reflected in the District's use of "reasonable assurance" letters sent to substitute teachers at the end of each school year. Geography is determined by one of three substitute calling areas: north, central and south, which a substitute must select upon entering the substitute pool. An employee may transfer from one geographic area to another once per school year, but will generally not receive random SubFinder calls for assignments in more than one area.

For random calls occurring before mid-July 2009, SubFinder would contact the 250 most senior qualified persons within the designated geographic area. It would then call each individual a number of times before moving to the next most senior group of 250 qualified individuals within the geographic area. According to Josaphat, only after it had exhausted all qualified persons within a geographic area would SubFinder begin contacting individuals from other geographic areas. (R.T., Vol. XIV, pp. 39-40.)

SubFinder's "random" computer-generated assignments are an important source of work for substitute teachers because, once they have begun working at a particular school, they increase the likelihood that other teachers will ask them to continue working there, or that they will be contacted for future assignments. As Charging Party Nancy Rowland (Rowland) explained, "once you're there, the other teachers see you, and then they ask you to stay because they're going to be gone the next day or two days later." (R.T., Vol. III, p. 37.)

After a substitute has satisfactorily completed an assignment, a school administrator may place the substitute's name on the school's preferred substitute list, which circulates to all teachers in the school. According to Charging Party Lynn Bertucci (Bertucci), "if the teacher doesn't have a particular person in mind to cover his or her class, he [or she] can look at the [preferred] sub list and say, 'oh, well, that person has been to our school before and seems to do a pretty good job, and I will call her.'" (R.T., Vol. VI, pp. 92-93.) Charging Party Kobla Agbanyo testified that he had been placed on referral lists and began receiving routine "personal request" assignments from teachers he had met through "random" assignments. (R.T., Vol. III, pp. 156-157.) Raines explained that it was necessary for substitutes to constantly generate a new list of references because situations and relationships change.

According to Raines, "It's not like a hairdresser, [where] once you get them you keep them forever." (R.T., Vol. V, p. 133.)[23]

The number of hours (or days) worked during each school year is significant to substitute teachers because, in addition to determining seniority, it affects their status within the bargaining unit. Article 1, section 1.1 of the 2006-2009 UTLA/LAUSD collective bargaining agreement purports to exclude from the certificated bargaining unit "[a]ll day-to-day substitutes who were paid for fewer than 100 days during the preceding school year." Pechthalt similarly testified that substitute teachers are only entitled to representation by UTLA, including access to the contractual grievance procedure, if they have worked at least 100 days or 600 hours in the previous school year. (R.T., Vol. XV, p. 33.)

In addition, the number of hours or days worked by substitutes affects their eligibility for medical benefits. Pursuant to the collective bargaining agreement, substitute teachers must work a minimum of 100 days in a year *and at least one day each month* to retain their health insurance benefits for the following year. (R.T., Vol. II, p. 178.) Medical benefits run from October 1 through September 30 and some Charging Parties testified that they expected to lose their health benefits, as of October 1, 2010, because they had not worked at least 100 hours during the 2009-2010 school year. (R.T., Vols. IV, p. 58 [Flores], II, p. 174 [Chris Hendrie (Hendrie)].) Charging Party Mark Latno, who worked 98 days in the 2009-2010 school year, retired on May 28, 2010, two years early, to avoid losing all medical benefits. (R.T., Vol. III, pp. 111-112, 129.)

[23] The importance of maintaining existing contacts and developing new ones is underscored by substitutes' apparent inability to verify that they are included on a preferred substitute list. Charging Party Minerva Flores (Flores) testified that teachers are not given direct access to the preferred lists; they only know whether they are on such a list if informed by an office manager or other administrator with access to the list. (R.T., Vol. IV, p. 75; see also Vol. VII, pp. 65-66 [Danny Cohen (Cohen)].)

LAUSD Layoffs and the July Side Letter

On or about March 15, 2009, LAUSD notified some 4,000 teachers that they might be laid off. The affected employees were primarily first and second-year probationary teachers employed at so-called "hardest-to-staff" schools, i.e., schools with a higher percentage of first and second-year probationary teachers due to the higher than average rate of teacher turnover. (R.T., Vol. XIX, pp. 14-15 [Duffy].)[24]

UTLA began negotiations with LAUSD's Chief Human Resources Officer Vivian Ekchian (Ekchian) and Deputy Chief Human Resources Officer Justo Avila (Avila) to try to mitigate the layoffs. (R.T., Vol. XIV, pp. 63, 91-93.) Duffy was the key figure in these negotiations for UTLA, which also included Julie Washington (Washington), UTLA's lead officer on the negotiations team, and UTLA's attorney Jesus Quiñonez (Quiñonez). (R.T., Vol. XIX, p. 19.) Solkovits' status on UTLA's negotiations team during these negotiations is less certain. At some point in 2009, at Duffy's request, Solkovits assumed responsibility as the point person for UTLA's political program and simultaneously relinquished his responsibilities for negotiations. However, the precise timing of this transition is unclear. Solkovits described his role as being "sort of a junior member of the negotiating team," and not fully involved in negotiations by August 2009. (R.T., Vol. XI, p. 53.) He was otherwise unable to specify when he transitioned from negotiating to political responsibilities. What is undisputed is that, during the negotiations concerning layoffs that took place during the summer of 2009, Solkovits was not included as a regular member of the negotiations team and served only in an ad hoc or "as needed" basis. (R.T., Vol. XI, pp. 47-48.) It is also undisputed that he was not privy to any of the discussions that led to the July Side Letter.

[24] Pursuant to California Education Code section 44929.21, subdivision (b), permanent status is achieved after completing two consecutive school years working for a school district in a teaching position or positions requiring certification qualifications. Until attaching permanent status, such teachers are considered probationary.

Simultaneous with these negotiations, ULTA mounted a highly-visible campaign whose stated goal was to preserve teachers' jobs, prevent an increase in class sizes, and stabilize the situation at those schools affected by the proposed layoffs. UTLA used the *United Teacher*, phone blasts, informational flyers, fax blasts and letters to both members and agency fee payers to enlist their support for UTLA's goals.

On June 30, 2009, the District issued layoff notices to some 1,800 probationary teachers, while negotiations continued. Sometime in late June or early July, 2009, the focus of negotiations turned from a comprehensive solution of rescinding the layoffs to the more limited goal of how to get laid-off probationary teachers back to work, even on a temporary basis, until a more comprehensive solution could be reached.

In early July 2009, UTLA and LAUSD verbally agreed to a formula that would bring approximately 700 of the 1,200 laid-off teachers back to their classrooms or to other classrooms in their schools as long-term substitutes. (R.T., Vol. XIX, pp. 15-16 [Duffy].) This agreement was not reduced to writing. Duffy admitted that this omission was an oversight but he did not believe it was necessary to insist after the fact that this agreement be included in a written instrument because of the relationship of trust he had developed with LAUSD's human resources staff, above all, Ekchian and Avila. (R.T., Vol. XIX, p. 16.)

Also in early July 2009, Avila sent Duffy a proposed side letter to the collective bargaining agreement, stating:

> This is to memorialize that the Los Angeles Unified School District (LAUSD) and United Teachers Los Angeles (UTLA) have agreed to the following regarding substitute priority for UTLA members who were laid off on June 30, 2009.
>
> Elementary teachers, secondary English teachers, secondary Social Studies teachers, and counselors who were laid off June 30, 2009 and who have been processed for substitute work,

> shall be given priority for day-to-day substitute assignments not to extend beyond thirty-nine (39) months or their reemployment in contract status, whichever comes first. Such assignment priority shall be within their stated availability (substitute area and days) and their calling priority order shall follow contract pool teachers and substitutes requested by name (Article XIX, Sections 5.3 and 5.4). Compensation for such substitute assignments shall be at the base rate or extended rate (as eligible) as set forth in Article XIX of the collective bargaining agreement.
>
> This one time non precedent setting agreement is made to address unique issues related to the reduction in force of UTLA bargaining unit members and will expire on June 30, 2010 unless renegotiated.
>
> Please sign below if UTLA is in agreement with this side letter.

Duffy signed the July Side Letter on July 14, 2009.

The July Side Letter did not change policy with regard to substitute assignments based on specific requests. Schools could continue to request specific career substitutes or laid-off probationary teachers by name, and those requests would be honored. (See, e.g., R.T., Vol. VII, pp. 38-39 [Cohen].) The July Side Letter did, however, change policy with regard to assignments based on seniority. Laid-off probationary teachers, who by definition had two or fewer years of seniority (see Educ. Code, § 44929.21, subd. (b)), were given priority over career substitutes with more seniority.

Duffy signed the July Side Letter on his own authority. He discussed it with some other UTLA officers, but he did not discuss it with members of the UTLA BOD or the UTLA HOR. ULTA's designated representatives on substitute issues were not consulted or informed of the July Side Letter's existence, in some cases, until several weeks after it had taken effect. (R.T., Vols. XII, p. 57, XVIII, pp. 12-13, 18.) Solkovits, UTLA's highest ranking officer for substitute teacher issues and, at that time, a member of UTLA's negotiating team, testified that he had no knowledge of the July Side Letter, nor that suspending career substitutes' seniority

rights was even under discussion, until "much after it had been signed off on, so it would have been impossible for me to counsel [Duffy] on something I didn't know about." (R.T., Vols. XVIII, pp. 13, 16, XI, pp. 48-49.)

Segal learned of the July Side Letter in late August 2009, when Duffy and Washington announced its existence at a UTLA leadership conference. (R.T., Vol. XII, pp. 57-58.) Although he did not yet know its precise contents, Segal informed Peters that "something dire is in the works," and the two met with other substitutes to discuss how to obtain a copy of the agreement and to "get organized" for "waging some sort of battle against UTLA." (R.T., Vol. XIV, p. 129 [Peters].) Segal and Peters did not see the July Side Letter until September 1, 2009, when it was posted on the UTLA website. (R.T., Vol. XII, pp. 57-58 [Segal].)

The *United Teacher* appeared on July 17, 2009. Its lead article bore the headline "summer of uncertainty," and reported extensively on UTLA's efforts to bring back laid-off probationary teachers and save students from increased class sizes. Mid-way through the article is a paragraph with the subheading "UTLA members would vote on any agreement," which reads as follows: "Any agreement reached with LAUSD would be put to a vote of the membership and would not be implemented unless a majority approves it." The article ends by advising readers that, "[i]f a tentative agreement is reached with LAUSD to save jobs and stop class-size increases, details will be posted online, emailed, and mailed to members as soon as possible." Further: "Any agreement would have to be approved by a vote of UTLA members." (C.P. Ex. 38.) The article includes no by-line though it is undisputed that Duffy was editor-in-chief and "the last approval point for communications and publications" for matters appearing in the *United Teacher*. (R.T., Vols. XIX, p. 6 [Duffy], XVII, pp. 8-9 [Forrester].)

Notwithstanding the article in the *United Teacher*, there was no ratification process for the July Side Letter. In fact, it took effect as soon as Duffy signed it. The same day, Josaphat and Echols convened a meeting of Substitute Unit staff to discuss how to re-program SubFinder to correspond to the change in priority calling order memorialized in the July Side Letter. Lowe and others immediately began reprogramming SubFinder's random calling function to select laid-off probationary teachers before other persons in the substitute pool, regardless of seniority. (R.T., Vols. VIII, pp. 37-28 [Echols], XIV, pp. 17-18.)

When asked why the July Side Letter was not made public, Duffy responded:

> I have no answer for that. It was an incredibly difficult period of time, trying to weigh the needs of tens of thousands of students in the 204 schools that were gravely affected [by layoffs].

Duffy later testified:

> There were many things happening at that point. We were still in full negotiations about the remaining [laid-off] teachers. And we were trying to figure out a way to bring back all the teachers, so we waited on this item until we were done with the complete negotiations. When it became clear at the end of the summer that the negotiations had collapsed and we would not be able to bring back the remaining eight or nine hundred teachers that we would lose, then we made it clear about this agreement.

However, Duffy did nothing to publicize the July Side Letter in July or August of 2009.

On September 1, 2009, Duffy finally wrote a letter to all substitute teachers, in response to the "many" phone calls and e-mails he had received regarding reports of a secret side letter "giving [laid-off] teachers priority to work as subs." Duffy's letter confirmed the existence of the July Side Letter but emphasized that it was "nonprecedent-setting" and only one year in duration at which time it would expire by its own terms. He explained that he entered into the agreement in an effort to stabilize the teaching staff at schools that had been "decimated" by

layoffs, while UTLA continued to negotiate with the District to rehire all of the laid-off teachers to their former positions. According to Duffy's letter, these negotiations went on for over six weeks but fell apart at the last minute when the state's failure to provide anticipated relief resulted in an additional $280-million-plus deficit in the District's budget. (C.P. Ex. 3.)

Duffy's letter acknowledged that UTLA had not informed its members of the negotiations leading to the July Side Letter. Duffy explained his reasons for maintaining secrecy and for delaying disclosure of the agreement, as follows:

> It is important for you to understand that we believed that the [laid-off] teachers would be, for the most part, rehired at their own schools and put in their original classrooms as time went on and that the effect upon the regular substitute pool would be minimal. In addition, because we were certain that the negotiations referenced above would result in an agreement with the district to bring all these people back, we signed the side letter (agreement) with the district to make sure that the [laid-off] teachers would not sever their relationship with LAUSD and therefore be permanently lost to their schools. Many of those teachers had been working within smaller learning communities to develop curriculum and build relationships with students that are vital to the effective education of those schools' students.
>
> UTLA did not inform its members of the nature of the talks to bring back the [laid-off] teachers because the district and union had agreed to a "cone of silence" during the negotiations, so as to allow talks to proceed without the usual posturing and game playing that frequently accompany bargaining talks. Despite our best efforts, due to the state budget crisis, negotiations did ultimately break down, but not until late August. For that reason, I was unable to let Substitute Director Leonard Segal, Substitute Committee Chair Dave Peters, or UTLA Secondary VP Gregg Solkovits, point officer for substitute issues, know about the talks or about the side letter until after I signed it.
>
> It is our belief, however, that as the traditional school year starts, more and more of the [laid-off] teachers will be rehired by their original schools or will find jobs in other school districts. **This means that ultimately, most LAUSD subs will get their usual calls and be able to work.** In the meantime, UTLA is talking with the district about how the district and the union can work

> together to make sure that subs who are eligible for health benefits can work at least one day a month to keep their benefits.
>
> In addition, I want to emphasize that teachers retain the right to request the sub of their choice, and we are asking you to contact your UTLA area representative **as soon as you find out *and have verification* that a teacher's request to have you work for them was denied.** We cannot enforce our contract with the district if we do not know it is being violated.
>
> I apologize for not working more closely with your Substitute Board of Director member Leonard Segal, Substitute Committee Chair Dave Peters, and point officer for substitute issues Gregg Solkovits. I should also have done a better job of communicating this to you sooner, but as you most likely know, our union is at a critical junction in its existence. The Board of Education just voted to potentially give away 50 new schools and more than 200 lower-performing schools to charters and private operators. If in fact this district becomes charterized and/or privatized, up to a quarter of our members--including subs--could lose their jobs. This would be nothing short of disaster for all of us. Please rest assured that not a day goes by in which UTLA is not acutely aware of the difficult situation all of our substitute members are in at this time.

(C.P. Ex. 3, all original emphasis.) Although there had been rumors for some time, Duffy's letter was the first notice to substitute teachers of the July Side Letter.

After reprogramming SubFinder to correspond with the priority calling order mandated by the July Side Letter, LAUSD began tracking the total number of substitutes requested for each work day, and how many of these requests had been filled by laid-off probationary teachers and "regular" or career substitutes, respectively. (R.T., Vol. XIV, pp. 42-43 [Josaphat].) The District records produced at hearing indicate that a significant number of substitute teaching assignments were given to laid-off probationary teachers during the months of July-November 2009. For example, on September 9, 2009, there were 1,446 requests for substitutes, of which 667 were filled by laid-off teachers rather than by career substitutes. (C.P. Ex. 36.) The records in evidence do not show, however, how many laid-off teachers

were assigned based on specific requests and how many were assigned based on the priority they received under the July Side Letter.

The District also began tracking substitutes' hours with respect to their health benefits eligibility. (R.T., Vol. XIV, p. 44 [Josaphat].) Although there is anecdotal evidence of an office manager assigning work to prevent a substitute teacher from losing health benefits (R.T., Vol. VII, pp. 38-39 [Cohen]), it is unclear what, if anything, the District as a whole did with this information.[25]

Because HOR meets on a five-week cycle, the first opportunity for substitute teachers to challenge the July Side Letter was at a UTLA HOR meeting on October 7, 2009. At that meeting, a motion was made and passed to negotiate with LAUSD to rescind the July Side Letter. (See also Katherine Koh (Koh) testimony at R.T., Vol. IV, p. 133.)

UTLA then negotiated with the District, which subsequently sent Duffy a letter stating:

> This is to memorialize that the Los Angeles Unified School District (District) and United Teachers Los Angeles (UTLA) agree to the following changes regarding laid off non-permanent teachers and substitute teachers, such changes to be effective through June 30, 2010. Both the Union and District agree that these changes seek to continue and preserve teaching stability at schools impacted by the 2008-09 reduction in force. These changes also allow schools to request the substitute teachers that best meet the needs of students and the Instructional program.
>
> The July 2, 2009 one-year agreement between the District and UTLA, which gives priority for substitute assignments to non-

[25] It does not appear that this information was used to prevent substitutes from losing health benefits eligibility, as some Charging Parties testified, without contradiction, that they did in fact lose their benefits or that they expected to do so, for failure to work at least one day each month and/or at least 100 days in the school year. (R.T., Vols. IV, pp. 123-125 [Koh], II, p. 174 [Hendrie], IV, pp. 51-52, 57-58 [Flores], VII, pp. 100-101 [Markel].) Moreover, it is unclear how the District could have ensured that substitutes would not lose their eligibility for health benefits, if awarding a random assignment would have violated the re-negotiated priority calling order mandated by the July Side Letter.

> permanent teachers who were laid off on June 30, 2009, is to be amended as follows:
>
> 1. The prioritization of laid off non-permanent teachers employed as substitute teachers shall be discontinued, and the LAUSD/UTLA Agreement provisions (Article XIX) regarding substitute-calling order shall be effectuated commencing one week after adoption of this side letter.
>
> 2. Non-permanent contract teachers who were laid off on June 30, 2009, and who are currently serving and being paid as extended substitutes, shall continue to serve and be paid as extended substitutes for the remainder of the 2009-10 school year, based on District discretion and school needs.
>
> Please sign below if UTLA is in agreement with this side letter.

(C.P. Ex. 35.)

Duffy signed this letter on November 19, 2009. Personnel in the District's Substitute Unit began immediately to reprogram SubFinder and within three days had restored the pre-July 2009 priority calling order. (R.T., Vol. XIV, pp. 28, 41, 54 [Josaphat].)

Rescission of the July Side Letter appeared to affect substitute assignments. District records show, for example, that on November 23, 2009, there were 2,842 requests for substitutes, of which 785 were filled by laid-off teachers. On December 4, 2009, in contrast, there were 3,093 requests for substitutes, of which only 441 were filled by laid-off teachers.

Anecdotal evidence from Charging Parties is in general agreement. Although several Charging Parties alleged that the priority calling order was not fully restored for some months or that the number of calls they received did not reach the same numbers experienced in previous years (see, e.g., R.T., Vol. II, p. 134 [Patricia Hamilton (Hamilton)]), most testified to a noticeable increase in the volume of calls beginning in late November or early December and

continuing to progress in the following months. (R.T., Vols. II, p. 164 [Hamilton], II, p. 172 [Hendrie], IV, pp. 130-31 [Koh], VI, p. 90 [Bertucci].)[26]

THE PROPOSED DECISION

After granting UTLA's motion to dismiss five Charging Parties for failure to include proofs of service with their unfair practice charges, the ALJ heard several days of evidence concerned primarily with calculating the amount of income and benefits allegedly lost by Charging Parties as a result of the July Side Letter.[27] During the hearing, which lasted 19 non-consecutive days over the course of eight months, additional charge forms were filed and some Charging Parties contacted the ALJ *ex parte* to advise him that they were not represented in this matter by Raines and/or by the attorney selected by Raines.

In an effort to manage this case as efficiently as possible, given the unwieldy number of parties involved, the ALJ determined that, at this stage of the proceedings, *the sole issue* before the ALJ is whether UTLA violated its duty of fair representation, as alleged in the complaint. The ALJ advised the parties that, while they may cite any of the admitted evidence to address

[26] In approximately November or December 2009, Charging Party Patricia Hamilton called the SubFinder help desk and spoke to Echols, who told her that her number in the calling order was 56. During that time, Hamilton received no random calls for work. (R.T., Vol. II, p. 164.) In March 2010, Hamilton called again and learned that her number was 14. (R.T., Vol. II, pp. 162-163.) From mid-March onward, Hamilton received random calls for work nearly every day. (R.T., Vol. II, p. 164.) According to Hamilton, while Echols said that she did not wish to be argued with, she eventually acknowledged that a "mistake[]" had been made in the list, before Hamilton was fully restored to number 14 and resumed receiving calls for assignments. (R.T., Vol. II, pp. 162-163.)

[27] Ultimately, 22 Charging Parties presented testimony and documents allegedly demonstrating more than $173,138 in lost income and benefits due to the July Side Letter. As discussed below, UTLA contends that Charging Parties have not sufficiently proved that they have suffered *any* injury as a result of the July Side Letter because they have not eliminated other, equally plausible causes for any lost income or benefits they may have suffered during the months when the July Side Letter was in effect.

the issue of liability, they should not address other issues at this point, including who is a proper party, or what remedy would be appropriate, if liability is established.

The ALJ thus framed the issue as whether UTLA had violated its duty of fair representation, by failing to provide Charging Parties with notice and meaningful opportunity to have their views considered, before negotiating, executing and causing LAUSD to implement the July Side Letter. The proposed decision found that Duffy negotiated and signed the July Side Letter on his own authority and that, while he discussed it with some UTLA officers, he did not discuss it with or seek approval from UTLA's governing bodies or its designated representatives for substitute issues. The proposed decision also found that UTLA did not publicize or otherwise disclose the terms or existence of the July Side Letter to rank-and-file substitute teachers, until September 1, 2009, approximately one and one-half months after it had taken effect, and that an October 7, 2009, HOR meeting was the first meaningful opportunity for substitute teachers to voice their opposition to the terms of the July Side Letter.

The proposed decision found that the July Side Letter changed LAUSD policy with regard to substitute teaching jobs assigned through SubFinder's random calling system by granting laid-off probationary teachers priority over career substitute teachers who, by and large, had greater seniority. The proposed decision found that "the effects of the July Side Letter became more apparent" during September 2009, when 1,446 requests for substitutes were filled by 667 laid-off probationary teachers. The ALJ similarly found that, after LAUSD and UTLA agreed to repeal the July Side Letter, there was a noticeable decline in the number and percentage of substitute teaching assignments given to laid-off probationary teachers as opposed to career substitutes. Based on this evidence and the testimony of Charging Parties that they received fewer assignments in the Fall of 2009, the ALJ found that during the months when the

July Side Letter was in effect "the priority given to laid-off teachers cost the career substitutes hundreds of thousands of dollars in compensation." (Proposed dec. at p. 9.)

The ALJ's finding of liability was based on PERB decisional law holding that the duty of fair representation implies *some* consideration of the views of various groups of employees and *some* access for communication of those views whereas in this case, there was no notice and no meaningful opportunity for Charging Parties to communicate their views on the proposal to alter seniority rules. (*Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 681 (*Oxnard*) and *El Centro, supra,* PERB Decision No. 232; see also *Moreno Valley Unified School District* (1995) PERB Decision No. 1106, p. 11 and *Branch 6000, National Assn. of Letter Carriers v. NLRB* (D.C. Cir. 1979) 595 F.2d 808.) Although several witnesses gave testimony about UTLA's Policy Handbook and the history of various motions passed by UTLA concerning the membership ratification process for "negotiations," the proposed decision did not address the complaint's allegation that the secret negotiations resulting in the July Side Letter violated UTLA's own policies.

UTLA'S EXCEPTIONS

UTLA Exception Nos. 2, 4, 5 and 6 dispute the ALJ's finding that the July Side Letter had a substantial adverse impact on substitute teachers' employment relationship. Much of UTLA's brief in support of its exceptions is devoted to showing that Charging Parties have not sufficiently established that they have suffered *any* injury as a result of the July Side Letter because their mostly anecdotal evidence does not sufficiently eliminate other, equally plausible causes for any decline in work opportunities Charging Parties experienced during the period when the July Side Letter was in effect. For example, UTLA points out that the amount of work generally available in 2009 was significantly less than it had been in previous years, so that the fact that Charging Parties may have had fewer work opportunities in 2009 than in

previous years, while unfortunate, is not necessarily attributable to the loss of seniority under the July Side Letter.

UTLA similarly notes that the District records relied on by Charging Parties show the number of substitute requests and the number of such requests filled by either laid-off probationary teachers or career substitutes, but these records do not indicate whether these assignments were filled by "personal request" or by "random" calls. UTLA argues that, without some evidence that substitute work was assigned by SubFinder's random calling function, the loss of seniority rights under the July Side Letter would have never affected how this work was assigned.

UTLA's exceptions effectively renew its pre-hearing motion to dismiss, by arguing that the ALJ's finding that the July Side Letter "cost the career substitutes hundreds of thousands of dollars in compensation" is not supported by reliable evidence and goes beyond the ALJ's own instructions to the parties that issues of damages would be determined in separate proceedings, if Charging Parties first established liability.

UTLA Exception Nos. 3, 7, 8, 9, 10, 11 and 12, object to the ALJ's reliance on *Oxnard, supra*, PERB Decision No. 681 and/or his legal conclusion that UTLA failed to satisfy any legal obligation to provide Charging Parties with notice and opportunity to be heard before negotiating and/or entering into the July Side Letter. In addition to arguing that Duffy was not legally obligated to discuss the July Side Letter with members of UTLA's governing bodies, and that Duffy did, in fact, disclose the existence of the agreement to certain officers who, by definition, were also members of HOR and BOD, UTLA argues that Raines and other Charging Parties had notice of the potential impact of layoffs on substitute teachers and were given several opportunities to communicate their views on this subject before the July Side Letter was executed.

RAINES' RESPONSE TO UTLA'S EXCEPTIONS AND HER CROSS-EXCEPTION

Raines argues that the record supports the ALJ's finding that the July Side Letter had a sufficiently substantial impact on career substitutes' employment with the District to implicate UTLA's duty of fair representation. Raines acknowledges that, "[n]o one can state with empirical certainty" how many substitute assignments were awarded to laid-off probationary teachers instead of career substitutes under the terms of the July Side Letter, but that the impact of the loss of seniority rights was "enormous," as it affected not only substitutes' wages, but, in some cases, a loss of medical and retirement benefits for career substitutes who were unable to work a minimum of 100 hours and at least one day per month during the 2009 school year. Raines argues the impact of the July Side Letter is further demonstrated by the testimony of District witnesses who received numerous telephone calls on a daily basis from substitutes complaining about the loss of work.

Raines contends that the ALJ correctly applied *Oxnard, supra*, PERB Decision No. 681 and other authorities to conclude that UTLA breached its duty of fair representation by failing to give *any* consideration to the views of affected unit members. Raines also argues that Duffy's decision to maintain a "cone of silence" around the July Side Letter until long after it had taken effect violated UTLA's own policies requiring notice and ratification for requiring notice and ratification for modifying the collective bargaining agreement. While acknowledging that the representative need not individually advise employees of the status of every proposal passed across the table, Raines contends that neither is the broad discretion afforded the representative a "carte blanche right to withhold everything" from unit members affected by a negotiated change to their terms and conditions of employment.

DISCUSSION

Jurisdiction

EERA section 3544.9 codifies the judicially-developed duty of fair representation, which obligates an employee organization recognized or certified as the exclusive representative to "fairly represent each and every employee in the appropriate unit."[28] Although a union's breach of the duty of fair representation is an unfair practice within PERB's jurisdiction, the statutory language and purpose of the duty of fair representation limit PERB's authority to regulate matters of internal union governance, such as the establishment, enforcement or alleged violation of union bylaws or other policies or procedures governing the relationship of the employee organization with its members. (*Kern High Faculty Association, CTA/NEA (Maaskant)* (2007) PERB Decision No. 1885 (*Kern*), adopting warning letter at p. 2; *California State Employees' Association (Miller)* (1990) PERB Decision No. 819-S, p. 3.)

Because the union's duty of fair representation is a corollary of its status as the exclusive representative, the scope of rights protected by the duty of fair representation can be no broader than its members' rights to representation. (*Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106 (*SEIU (Kimmett)*), pp. 8, 17.) Consequently, the duty of fair representation is limited to conduct that substantially affects the employer-employee relationship and PERB may assert jurisdiction over matters of internal union governance only when the conduct complained of has a substantial impact on employees' relationship with their employer. (*California State Employees Association (Gonzalez-Coke, et al.)* (2000) PERB Decision No. 1411-S, pp. 22-23; *Oxnard, supra,* PERB Decision No. 681, pp. 20, 22; *California*

[28] Even without legislative recognition, California and federal courts have held that the duty of fair representation is implied by the employee organization's status as the exclusive representative of unit employees. (*Shaw v. Metro-Goldwyn-Mayer, Inc.* (1974) 37 Cal.App.3d 587, 602; *Steele v. Louisville & N.R. Co. et al.* (1944) 323 U.S. 192.)

State Employees Association (O'Connell) (1989) PERB Decision No. 726-H, p. 7; see also *California State Employees Association (Hutchinson, et al.)* (1998) PERB Decision No. 1304-S; *California State Employees Association (Hard, et al.)* (1999) PERB Decision No. 1368-S.)

To meet the "substantial impact" threshold, the union's conduct must implicate more than the relationship of the employee to the employee organization. (*Kern, supra,* PERB Decision No. 1885, adopting dismissal letter at p. 2.)

UTLA argues that Charging Parties have not sufficiently established that they have suffered *any* injury caused by the July Side Letter. UTLA argues that, Charging Parties mostly anecdotal evidence does not sufficiently eliminate other, equally plausible causes for any decline in work opportunities they may have experienced during the period when the July Side Letter was in effect. UTLA similarly notes that the District records relied on by Charging Parties show only the number of substitute requests and the number of such requests filled by laid-off probationary teachers for any given day, but do not indicate whether these assignments were filled by personal request or by random calls. UTLA correctly argues that, without some evidence that substitute work was assigned by SubFinder's random calling function, Charging Parties' loss of seniority rights under the July Side Letter would have never affected how substitute work was assigned.

Additionally, UTLA argues that because the ALJ directed the parties to focus solely on issues of liability and to reserve any issues of damages for separate proceedings, it was improper for the ALJ to conclude that the July Side Letter had a substantial impact on the employment relationship, because, according to the proposed decision, "the priority given to laid-off [probationary] teachers cost the career substitutes hundreds of thousands of dollars in compensation."

UTLA's points are well-taken. After several days of testimony concerned with payroll records and other evidence of Charging Parties' lost income and benefits, the ALJ directed the parties to focus solely on issues of liability, while damages, if any, could be determined in subsequent proceedings. At the close of Charging Parties' case-in-chief, counsel for Raines expressly acknowledged that liability was the sole issue before the ALJ at this stage of the proceeding, a recognition confirmed by Raines' post-hearing briefing before the ALJ.[29]

UTLA is also correct that, even under the terms of the July Side Letter, personal requests for substitutes continued to take priority over random calls, so that, without some indication that a particular substitute assignment was awarded on the basis of the changed priority order, *i.e.*, not by personal request, Charging Parties have not shown that the July Side Letter was the determinative cause of any lost income or benefits they may have suffered during the months when the July Side Letter was in effect.

Nevertheless, we need not quantify the amount of damages allegedly suffered to find that the loss of seniority, a negotiated benefit, was itself an injury with a substantial impact on the employment relationship. On this point, the evidence is undisputed. Lowe, a principal personnel clerk employed by the District and familiar with the operation of SubFinder, testified that, shortly after Duffy signed the July Side Letter, District personnel re-programmed SubFinder to give greater priority in "random" calls to laid-off probationary teachers and correspondingly less priority to career substitute teachers with greater seniority.[30] Lowe also testified, without

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[29] Raines' brief was captioned "Charging Parties' Brief on Liability Questions."

[30] In fact, Lowe testified that the District began following the re-ordered calling priority mandated by the July Side Letter "the same date of the letter, July 2nd, 2009." (R.T., Vol. VIII, p. 14.) More likely is that the re-programming of SubFinder did not occur until approximately July 14, 2009, which is when Duffy executed the July Side Letter. In either event, the basic thrust of Lowe's testimony, i.e., that SubFinder was reprogrammed shortly after the July Side Letter was executed is confirmed by the testimony of her superiors, Echols and Josaphat.

contradiction, that one result of the July Side Letter was that fewer random calls went to career substitutes, because SubFinder had been re-programmed to give greater priority to laid-off probationary teachers, whenever a particular teacher was not requested by name for a substitute assignment. (R.T., Vol. VIII, pp. 15, 27, 29-30, 33.)

According to Lowe and Echols, after reprogramming SubFinder, the Substitute Unit staff received calls on a daily basis from "numerous" substitutes asking about their priority number and complaining about the fact that they were no longer getting calls for work. (R.T., Vol. VIII, pp. 16, 42-38.) Lowe also testified, without contradiction, that on the Wednesday before Thanksgiving 2009, the change in priority authorized by the July Side Letter was reversed, so that laid-off probationary teachers were no longer receiving priority for random calls by SubFinder. (R.T., Vol. VIII, pp. 17-18; see also p. 46 [Echols].) Thus, even ignoring the anecdotal and largely inconclusive testimony about Charging Parties' lost income and benefits, Lowe's uncontradicted testimony is sufficient to find that, as a result of the July Side Letter, the District re-arranged the priority calling order for random calls by SubFinder, effectively negating seniority as one of the criteria used for assigning substitute teaching work.

Regardless of whether seniority was *the sole*, or the single *controlling* criterion in any given situation, its elimination from the matrix of factors used in awarding work opportunities substantially affects the employment relationship. At least one of UTLA's witnesses admitted as much. Although he defended Duffy's decision to sign the July Side Letter, Pechthalt acknowledged that it "had an adverse impact" on the District's career substitute teachers. (R.T., Vol. XV, p. 34.) According to Pechthalt, "I'm sure they suffered. Absolutely." (R.T., Vol. XV, p. 47.) Accordingly, while we do not adopt the ALJ's finding that the July Side Letter cost Charging Parties hundreds of thousands of dollars in lost compensation, the July Side Letter's

elimination of seniority as one criterion used for assigning substitute teaching duties sufficiently affected the employment relationship to establish PERB's jurisdiction over this dispute.

Case-Processing Issues: Board Authority to Review Issues *Sua Sponte*

Pursuant to PERB regulations, parties may file with the Board itself a statement of exceptions to a proposed decision and/or responses thereto, and supporting briefs. (PERB Regs. 32300, subd. (a)(2), 32310.) As part of its de novo review, the Board may affirm, modify or reverse a proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper. (PERB Reg. 32320; *Los Rios College Federation of Teachers, Local 2279 (Deglow)* (2003) PERB Decision No. 1515, p. 5.) Although the Board will generally defer to the issues decided by the ALJ and raised in the parties' briefing, the Board is not precluded from reviewing unappealed matters or applying legal analysis not urged by the parties. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259a, pp. 5-6; *Apple Valley Unified School District* (1990) PERB Order No. Ad-209a, p. 3; *ABC Unified School District* (1991) PERB Decision No. 831b, p. 4.) The ultimate "determination of the issues to be considered in an unfair practice proceeding before PERB is made by the Board and its agents, and not by the parties to the proceeding." (*Barstow Unified School District* (1996) PERB Decision No. 1138a, p. 10.)

In the past, the Board has raised and decided issues not raised by the parties' exceptions and responses to a proposed decision when necessary to correct a serious mistake of law and thereby prevent an erroneously-decided issue from becoming Board precedent. (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; *Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 21-22, fn. 13; *Fresno Unified School District* (1982) PERB Decision No. 208, pp. 23-24.) We do so here to address questions about the manner in which this case was processed by the Office of the General Counsel and the ALJ.

1. Whether PERB Regulations and Decisional Law Permit Class Treatment of Unfair Practice Charges.

As a preliminary matter, we find no fault in the Office of the General Counsel's decision to process the more than 150 separate charges it received as a single case, nor in its decision to acknowledge Raines, the "person filing [the] charge" for each of the original Charging Parties, as the representative for other Charging Parties. The Legislature granted PERB broad authority to determine whether an unfair practice or other violation of EERA has been committed and to fashion remedies necessary to effectuate the statute's purposes and policies. (EERA, § 3541.3, subd. (i); *Los Angeles Council of School Nurses v. Los Angeles Unified School Dist.* (1980) 113 Cal.App.3d 666, 670.) Subject only to a few limitations, which are not at issue here, the Board may "delegate its powers to any member of the board or to any person appointed by the board for the performance of its functions," and the Board or its delegates may "take any other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter." (EERA, § 3541.3, subds. (k), (n).) As part of PERB's broad authority to investigate and remedy unfair practice allegations, Board agents may sever, consolidate, expedite, place in abeyance, or otherwise alter the timeline or sequence for processing some or all of the allegations in a charge to promote administrative efficiency and to ensure uniformity in decisions. (*Trustees of the California State University* (2014) PERB Decision No. 2384-H (*Trustees of CSU*), p. 4; *Victor Valley Community College District/Victor Valley College Faculty Association, CTA/NEA* (2002) PERB Order No. Ad-317, p. 2; *Washington Teachers Association (McFarland)* (1990) PERB Order No. Ad-208, pp. 1-2; *Mount Diablo Unified School District, et al*. (1977) EERB[31] Decision No. 44, p. 2.)

[31] Before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

EERA and PERB's regulations neither expressly authorize nor prohibit the agency from processing unfair practice cases as representative or "class" actions. (*Paulsen v. Local No. 856 of Intern. Broth. of Teamsters* (2011) 193 Cal.App.4th 823, 834.) In the absence of limiting language, we encourage the Office of the General Counsel to use its discretion to process cases in the manner that best effectuates the policies and purposes of the PERB-administered statutes, conserves the agency's resources and ensures fairness to all parties.

At the same time, processing numerous charges as a single, representative or "class" action poses certain challenges for safeguarding the rights of all parties to notice and meaningful opportunity to participate in the proceedings. In this respect, the agency was deficient.

2. Notice to Non-Raines Charging Parties.

Between October 22, 2009 and January 21, 2010, when the Office of the General Counsel issued the complaint, 155 individuals filed charges, each alleging the same factual allegations. As of the date of the complaint, each of the Charging Parties had affirmatively identified Raines on the charge form as the "person filing [the] charge," which the Office of the General Counsel treated as authorization for Raines to act in a representative capacity. However, other Charging Parties joined the action but either did not identify or consent to Raines and/or Evans as their representative, or affirmatively indicated that they did not consent to representation by Raines and/or Evans.[32]

[32] Charges filed by Theresa Averiette, Ronald Steinhauser, Henry Parke and Stephanie Parke incorporated the factual allegations of the Raines charge but each of these charging parties identified himself or herself as the "person filing [the] charge," i.e., as self-represented. Additionally, Jill Rosalie Balogh filed an "[a]mended" charge indicating that she wished to join Case No. LA-CO-1394, the file number assigned to this matter, but neither incorporating the factual allegations of the Raines charge nor identifying Raines or Evans as the representative. However, on March 25, 2015, Evans advised the Board that Balogh had signed a retainer agreement with Evans and that he was representing her in this matter. McCready informed the ALJ *ex parte* that he was no longer represented by Raines and/or Evans, while Raines and Morgan informed the ALJ that Bregere had since died and that Raines was no longer the representative of Bregere's interests in this matter. (R.T., Vol. I, p. 5.)

The record indicates that Raines and/or Evans did not represent all Charging Parties. On November 17, 2010, the ALJ began the sixth day of the hearing by observing that, "We have a new representative *for at least some* of the Charging Parties," after which Evans was asked to identify himself. (R.T., Vol. VI, p. 4, emphasis added.) Evans did not clarify the ALJ's introduction or otherwise specify *which* Charging Parties he represented.[33]

Despite statements by Raines and Evans that they did not represent *all* Charging Parties, there is no indication that the Non-Raines Charging Parties were given notice of hearing dates or other proceedings in this action. For example, on January 27, 2011, approximately 1-1/2 months after receiving McCready's e-mail message, which clearly advised the ALJ that McCready did not consent to representation by Evans, the ALJ sent notice of additional hearing dates to Raines, Evans and counsel for UTLA, but not to McCready. Likewise, no notice was sent to Bregere's last known address, as indicated on her charge form, in the event the administrator or other authorized representative of her estate wished to make an appearance in this matter. It is also impossible to know from the record whether any of the Non-Raines Charging Parties were present when the ALJ, and counsel for Raines and UTLA agreed on a post-hearing briefing schedule.

Nor is there any indication that the Non-Raines Charging Parties even had notice of the proposed decision. The proof of service accompanying the ALJ's proposed decision indicates that it was sent to counsel for UTLA and Raines and at least *some* of the Charging Parties, but

[33] In subsequent pleadings filed with the ALJ and the Board, Evans continued to identify himself, without qualification, as "attorney of record for the Charging Parties" in this matter. (See, *e.g.*, Declaration of William D. Evans in Support of Charging Parties' Motion to Permit Filing of Reply Briefs, p. 1.) Raines' response to UTLA's exceptions also states that Evans has retainer agreements with Charging Parties, without, however, identifying *which* or *how many* of the nearly 180 individuals who filed charges are his clients.

not to Non-Raines Charging Parties, such as Averiette, Bregere, or McCready, who were not represented by Raines and/or Evans. In effect, the ALJ regarded Raines as the class representative and Evans as class counsel, without the benefit of a class certification motion or hearing or a determination that the present action is appropriate for class treatment.

We regard these oversights as serious errors in the processing of this case. PERB Regulation 32620, subdivision (d), and decisional law require a Board agent to advise the charging party in writing of any deficiencies, so that "prior to dismissal of any allegations contained in the charge," the charging party has an opportunity to provide additional information or otherwise correct the deficiencies. (*County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 8.) Nothing in the language of the regulation suggests that Board agents, including those responsible for conducting a hearing after a complaint has issued, may dismiss "*any* allegations contained in the charge" (emphasis added) that were not previously addressed or included in the complaint. To the extent substitute teachers who filed charge forms were not included in the complaint, they were never advised in writing of any deficiencies and their allegations were therefore not properly dismissed.

PERB Regulation 32180 also sets forth the rights of parties at a formal hearing, including the right to appear in person, by counsel or by other representative; the right to call, examine and cross-examine witnesses; and the right to introduce documentary and other evidence. Those rights are meaningless, however, if there is no notice of the time and place of a hearing or even of its occurrence. Resolution of an issue without providing all parties or their designated representative an opportunity to be heard does not yield a just result. (*State of California (State Personnel Board)* (2002) PERB Decision No. 1491-S, p. 9.)

Unfortunately, the right of regulated parties to a full hearing cannot always be reconciled with the modern administrative state's need for its various agencies to function expeditiously, or else the process of administration itself must halt. (*Dami v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 144, 150-151 (*Dami*).) After 19 days of formal hearing, extensive briefing and preparation of a proposed decision, it would serve neither the interest of justice nor efficiency to permit some of the parties to restart the litigation from scratch. Re-litigation of the issues would create the possibility of inconsistent judgments and cause further delay and unfairness to those parties who have already presented their evidence and legal issues to the ALJ and the Board.

Because "[d]ue process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities" (*Dami, supra,* at p. 151), the present decision will constitute the law of the case for all parties. The Non-Raines Charging Parties cannot re-litigate issues considered in the present decision, though they are entitled to notice and meaningful opportunity to participate in any further proceedings in this matter, until it has been determined that they are not proper parties or their allegations have otherwise been dismissed with notice.

3. Whether the ALJ Properly Dismissed Five Charging Parties for Failure to Include Proof of Service with their Charge Forms.

3.1. Whether Board Review of this Issue is Proper at this Stage of the Proceedings.

An initial matter is whether this exception is "ripe" for Board review in the current "unfinished" nature of these proceedings. Notwithstanding his ruling that he would not decide who is a proper party in this case, the ALJ granted UTLA's motion to dismiss five individuals—Garcia-Murphy, Gramblin, Vines, Gayer and Druss—for failure to complete and file proof of service with their unfair practice charge forms. The five individuals had completed and timely filed charges with PERB but failed to serve copies on UTLA and/or to

include proof of service with their charge forms, as required by PERB regulations. (PERB Reg. 32140, subd. (a); see also 32164, subd. (c).) In granting UTLA's motion, the ALJ reasoned that, "Under PERB regulations, essentially everything that's filed with PERB needs to be accompanied by a proof of service." Because no proof of service accompanied the unfair practice charge forms filed by the five individuals, they were dismissed from the case. (R.T., Vol. I, pp. 15, 22.)

Charging Parties opposed UTLA's motion to dismiss, arguing that the five individuals had substantially complied with PERB's requirements for filing and serving documents, and that UTLA would not be unfairly surprised or prejudiced by their participation in the action. (R.T., Vol. I, pp. 14-15.) In their cross-exception, Charging Parties also urge PERB to follow National Labor Relations Board (NLRB) and federal court precedent under which the "relation back" doctrine permits additional parties to join a case in which they allege the same general set of facts and the same injury as has been previously alleged by other parties. (*Longshoremen & Warehousemen Local 19 (Waterfront Employers of Washington)* (1952) 98 NLRB 284, 293 (*Longshoremen*), enforced *sub. nom. NLRB v. Waterfront Employers of Washington et al*. (9th Cir. 1954) 211 F.2d 946 (*Waterfront Employers*); *NLRB v. Gaynor News* (2d Cir. 1952) 197 F.2d 719, 721-722, affd. *sub nom. Radio Officers' Union of Commercial Telegraphers Union, A. F. L. v. NLRB* (1954) 347 U.S. 17.

The ALJ's dismissal of Garcia-Murphy, Gramblin, Vines, Gayer and Druss ended their interest in the matter. The fact that a ruling or order dismisses some parties but allows others to continue the litigation makes it no less "final" as to those parties who were dismissed from the action. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699; see also (*State of California (Department of Corrections)* (1992) PERB Order No. Ad-231-S, pp. 6-8.) Charging Parties'

cross-exception is therefore appropriate for Board review, notwithstanding the ALJ's decision to deferral determination of who is a proper party to the case.

3.2 Whether Defective Service Should be Excused under the Circumstances.

PERB Regulation 32140, subdivision (a), requires that proof of service accompany unfair practice charges filed with the Board. The service requirements found in PERB's regulations "are not merely ritualistic." Rather, they are "basic to providing due process to the involved parties." (*Los Angeles Community College District* (1984) PERB Decision No. 395, pp. 5-6.) A party that disregards the service requirement runs the risk that its filings will be rejected and that it will be dismissed from the action. (*Ibid*.; *Coronado Unified School District* (1989) PERB Order No. Ad-188, p. 6.)

However, the purpose of the service requirement is to protect against stale claims and to provide notice of the issues, so that parties can preserve evidence and prepare their claims or defenses (*San Diego Community College District* (1988) PERB Decision No. 662, affd., in relevant part, *sub nom*. *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 1131-1132); its purpose is not to dismiss parties or entire actions on legal technicalities. (*Fontana Unified School District* (2003) PERB Order No. Ad-324 (*Fontana*), pp. 6-7; *State of California (Department of Developmental Services)* (1996) PERB Decision No. 1150-S (*DDS*), pp. 2-3, fn. 2, citing *Hammer Collections Co. v. Ironsides Computer Corp*. (1985) 172 Cal.App.3d 899, 902.) Following California appellate practice, our precedents hold that the service requirement should be liberally construed and pragmatically applied, so as to ensure notice but not to deprive a party of the opportunity to have its issues heard on the merits. (*DDS, supra*, at pp. 2-3, fn. 2, citing *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778.) Accordingly, PERB has long held that the service requirement may be excused if other parties have actual notice of the issues and would not be

unfairly surprised or unduly prejudiced. (*Fontana, supra,* at pp. 6-7; *Santa Monica-Malibu Unified School District* (1987) PERB Order No. Ad-163, pp. 2-3, fn. 3.)

Thus, *unlike* PERB's regulations and decisional law governing reconsideration or Board consideration of new evidence on appeal, "good cause" is not required to excuse defective service. (*Fontana, supra*, PERB Order No. Ad-324, p. 7, fn. 5; *California School Employees Association (Kotch)* (1992) PERB Decision No. 953, p. 2, fn. 2; *cf. California State Employees Association (Hackett)* (1993) PERB Decision No. 1012-S, p. 2.) Additionally, PERB has held that the omission of one or more named parties from a pleading is not fatal to their continued participation in the case, if the respondent had notice that the matter was being continued on their behalf by others asserting the same issues. (*Santa Ana Educators Association (O'Neil, et al.)* (2009) PERB Decision No. 2087 (*Santa Ana*), p. 1, fn. 1.)[34]

Under the present circumstances, it is difficult to imagine how UTLA would be unduly prejudiced or unfairly surprised by the participation of Garcia-Murphy, Gramblin, Vines, Gayer and Druss in this action. The fact that the motion to dismiss identified each of the five individuals *by name* and, that the motion was brought *before* any evidence was presented indicates that UTLA had constructive notice of their charges and would not be unfairly surprised or in any way prejudiced by their participation in this action, notwithstanding defective service of their charge forms.

[34] Charging Parties are correct that amendments under the relation back doctrine are also governed by equitable principles - above all, whether the proposed amendment would unfairly surprise or unduly prejudice other parties. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1253, p. 697; 1 Cal. Affirmative Def. § 25:77 (2d ed.) However, because *Fontana* and similar authorities set forth the standard for excusing defective service, we find it unnecessary to review the ALJ's dismissal of Garcia-Murphy, Gramblin, Vines, Gayer and Druss under the relation back doctrine and instead address the applicability and scope of the relation back doctrine *below* with respect to the timeliness of charges filed after March 1, 2010.

In support of UTLA's separate motion to sequester witnesses, UTLA's attorney argued that, "all of the Charging Parties are coming forward as individuals, but *they all have the same claim*" and "UTLA will be asking these individuals *basically all the same questions* in relation to the evidence that they put forward." (R.T., Vol. I, p. 15, emphasis added.)[35] While the ALJ's denial of UTLA's motion to sequester is not at issue, UTLA's arguments in support of that motion effectively admit that no unfair surprise or undue prejudice would result by including the five individuals in this case.[36] Generally, a party does not establish unfair surprise or undue prejudice, simply by the passage of time or because it must gather additional evidence regarding the same general set of facts of which it was already aware. (*DDS, supra*, PERB Decision No. 1150-S, pp. 2-3, fn. 2; *Lamont v. Wolfe* (1983) 142 Cal.App.3d 375, 381; *California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 280 (*California Casualty*) disapproved of on other grounds by *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390.)

UTLA's reliance on *State of California (Department of Corrections)* (1999) PERB Decision No. 1329-S is unpersuasive. In *Department of Corrections*, employees and officers of an employee organization filed a charge alleging, among other things, that the employer had unilaterally altered its contractual sick leave usage and medical verification policy. A Board agent dismissed the charge for various reasons, including lack of standing, because the

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[35] According to Martinez, "if the witnesses are in the room, the testimony of witnesses who are testifying prior to the next witness will certainly influence the witness's testimony, and we want to prevent any bias." (R.T., Vol. I, pp. 15-16.) The ALJ appropriately denied this motion because the "witnesses" to be sequestered were *parties* who, according to the ALJ, generally have an absolute right to attend a PERB hearing in a case to which they are parties, subject to space considerations or disruption of the proceedings. (R.T., Vol. I, p. 16.)

[36] Statements made by a party's attorney regarding the subject matter of the litigation are presumed authorized by the client and are normally treated as authorized admissions. (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 523.)

charging parties had indicated on the charge form that they were acting as individual employees, and not on behalf of the organization. On appeal, the employee organization requested to join the matter to cure the employee's lack of standing. In a footnote, the Board denied the employee organization's request, stating that the employee organization had not complied with the written application for joinder procedure set forth in PERB's regulations. The Board's decision does not explain how the employee organization's application for joinder was deficient. On the facts provided, it cannot be determined whether the request was denied for failure to file a proof of service form, or for some other reason(s). The case therefore offers only limited guidance, at best, on whether a party's failure to file a proof of service form, by itself, is fatal to the charge or to the party's continued participation in the case.

Because UTLA acknowledged that it had notice of the five individuals' charge forms before the hearing began and because its counsel essentially admitted that it would not be unfairly surprised or unduly prejudiced by asking *the same questions* regarding *the exact same claims* of five additional parties, Charging Parties have met the equitable standard under *Fontana*, *supra*, PERB Order No. Ad-324, and other cases for excusing defective service. We reverse the ALJ's decision to grant UTLA's motion to dismiss.

4. Application of the Relation Back Doctrine to this Action.

As framed, Charging Parties' cross-exception is concerned only with the ALJ's ruling on UTLA's motion to dismiss five individuals for failure to serve their charge forms on UTLA. However, Charging Parties' brief in support of their cross-exception also argues that, if remanded, *additional* Charging Parties should be permitted to join this action under the so-called relation back doctrine. While Charging Parties have taken no exception nor made a formal motion to amend the complaint to include other individuals, they have thus given notice that this issue will be before the Board if there is any finding of liability in this case.

In response to the Board's request for supplemental briefing, UTLA opposes application of the relation back doctrine to permit any party to join this action. UTLA argues that under California civil procedure an amended pleading that adds a new plaintiff will not relate back to the filing of the original complaint for statute of limitations' purposes, if the new party seeks to enforce an independent right or to impose greater liability against the defendant. (*Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526, 533–534; *San Diego Gas & Elec. Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1550.) According to UTLA, adding new parties to this case necessarily involves asserting independent rights and/or seeking to impose greater liability because, unlike California class action procedure and practice, under PERB precedent *only named parties* can be granted a remedy. (*California Union of Safety Employees (Trevisanut, et al.)* (1993) PERB Decision No. 1029-S (*CAUSE (Trevisanut)*), pp. 9-10.) Because an employee lacks standing to challenge a violation of another employee's rights (*Modesto Irrigation District* (2006) PERB Decision No. 1856-M, adopting warning letter at p. 2; *IBEW Local 1245 (Tacke)* (2006) PERB Decision No. 1857-M, adopting warning letter at p. 2; *United Teachers of Los Angeles (Hopper)* (2001) PERB Decision No. 1441, p. 6.), the rights of each substitute teacher represented by UTLA are independent of any rights asserted by others and the addition of charging parties would likewise seek to impose greater liability against UTLA.

We find it unnecessary to resolve this issue. PERB does not issue advisory opinions or generalized declarations of law on issues not raised by the facts of a case or not necessary for its resolution. (*City & County of San Francisco* (2014) PERB Order No. Ad-419-M, p. 9, fn. 11; *San Marcos Unified School District* (2003) PERB Decision No. 1508, p. 22; *Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506, pp. 27-28; see also *Breaux v. Agricultural Labor Relations Bd.* (1990)

217 Cal.App.3d 730, 741.) Nor does PERB decide issues that will not affect the outcome of a controversy before it. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 5; *Fremont Unified School District* (2003) PERB Decision No. 1528, pp. 2-3.) We therefore decline to address Charging Parties' argument that the relation back doctrine authorizes *additional* parties to join this action on remand.

However, the Board has requested supplemental briefing on the scope of the relation back doctrine to address another issue that *is* raised by the facts and procedural posture of this case. That is whether all of the *existing* parties to this case have timely joined the action, either by filing an unfair practice charge form within the six-month limitations period or through application of the relation back doctrine.

Although not part of the charging party's prima facie case, the timeliness of a charge is ordinarily determined, along with standing and other issues of jurisdiction, during the agency's initial investigation of the charge. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 28; *Los Angeles Community College District* (1994) PERB Decision No. 1060, p. 8; see also *County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 14.) If, as part of the initial investigation, a Board agent determines that a charge is untimely, it is unnecessary to determine whether it alleges sufficient facts to state a prima facie case. (*Long Beach Community College District* (2002) PERB Decision No. 1475, p. 3; *Service Employees International Union, Local 790 (Rax)* (2002) PERB Decision No. 1488, pp. 1-2.) By contrast, issuance of a complaint by the Office of the General Counsel signifies that the dispute is not only one the charging parties wish to pursue, but also one that the agency has determined meets all jurisdictional and timeliness requirements and should be pursued. (*County of Fresno* (2014) PERB Decision No. 2352-M, p. 4; *Los Angeles Unified School District, supra,* PERB Decision No. 2359, p. 28.)

Here, the Office of the General Counsel's decision to issue a complaint on January 21, 2010 includes an implicit determination of timeliness as to each of the Charging Parties who had filed charge forms as of that date of the complaint, even if the complaint itself nowhere identifies by name any of the Charging Parties other than Raines. No party has excepted to that implicit determination of timeliness by the Office of the General Counsel and we find no reason to disturb it.

However, after the complaint issued, additional charge forms were filed with the agency and continued to be filed, even while the hearing was underway. (Proposed dec. at p. 2.) Because the ALJ addressed only the liability issue, and expressly declined to determine who is a proper party, he also made no determination whether some, all or any of the charge forms filed after January 21, 2010 were timely. Although such questions could, in theory, be resolved in later compliance proceedings, we believe resolution of this issue before the matter proceeds to compliance is more consistent with our regulations and would better protect the parties' rights to notice and meaningful opportunity to be heard on the issues. (PERB Reg. 32620, subd. (d).)[37]

We adopt the ALJ's finding that Charging Parties first knew or only could have known about the change in priority calling order under the July Side Letter on or after September 1, 2009, when Duffy issued his September 1, 2009 letter to substitutes and UTLA posted a copy

[37] Although the Office of the General Counsel and presiding ALJ have considerable discretion to investigate and decide charges in a manner that best conserves the agency's resources and protects the rights of the parties (*Trustees of CSU, supra*, PERB Decision No. 2384, pp. 3-4 and cases cited therein; PERB Reg. 32170; *State of California (Department of Corrections)* (2006) PERB Decision No. 1806-S, pp. 5-6), in the current posture of this case, no one knows precisely who is a party or how many Charging Parties are encompassed by this action, a situation that has undoubtedly caused some uncertainty and confusion for the parties. For example, since the complaint does not identify *any* Charging Parties by name, other than Raines, it is unclear whether substitute teachers wishing to join the action after January 21, 2010 must move to amend the complaint. For its part, UTLA cannot fully assess its risk of liability, if it wishes to engage in settlement discussions.

of the July Side Letter on its website. (R.T., Vol. XII, pp. 57-58 [Segal].) In so finding, we reject UTLA's argument that Charging Parties' claims are barred in whole or in part by the doctrine of waiver. As discussed elsewhere in this decision, the record demonstrates, at most, that some Charging Parties were aware of *the issue* of teacher layoffs as early as Spring 2009, and of *the possibility* that substitute teachers' seniority rights *might* be sacrificed to avoid laying off probationary teachers, particularly at the more difficult-to-staff schools. However, while there was certainly considerable fear and speculation among substitutes about the possibility of layoffs and the potential ramifications for their job security in Spring 2009, the record amply demonstrates that the July Side Letter and its essential terms were not known, even to UTLA's own substitute representatives, until late August 2009 at the earliest. Whatever their suspicions, rank-and-file substitutes had no actual notice of the agreement and its contents until September 1, 2009 or sometime thereafter. Accordingly, charges filed on or before March 1, 2010 are within the six-month statute of limitations. Because each of the remaining charge forms was filed outside the six-month limitations period, we consider whether the relation back doctrine permits additional charging parties to join this action.

Section 3541.5, subdivision (a)(1), of EERA precludes PERB from issuing "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." The limitations period begins to run once the charging party knew or reasonably should have known of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177 (*Gavilan*), p. 4; *San Dieguito Union High School District* (1982) PERB Decision No. 194, p. 14.) While the six-month limitations period for allegations in an amended charge or complaint is ordinarily calculated from the filing date of the amendment (*Trustees of the California State University* (2010) PERB

Decision No. 2151-H, adopting dismissal letter at p. 4; *The Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H (*UC Regents (LLNL)*), p. 10), an exception may be made where an amended charge or complaint is found to "relate back" to the original pleading because both the original and the amended pleading are based on and allege the same general set of facts. (*Temple City Unified School District* (1989) PERB Order No. Ad-190 (*Temple City*) and cases cited therein; *Willits Unified School District* (1991) PERB Decision No. 912, adopting proposed dec. at p. 12; *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 Cal.2d 596, 600-601 (*Austin*).) That is, allegations in an amended unfair practice charge or complaint that merely clarify the existing allegations or that add a new legal theory based on the same general set of facts as were previously alleged are said to "relate back" for statute of limitations purposes to the date of the original pleading. (*Office of Professional Employees International Union, Local 29, AFL-CIO & CLC (Fowles)* (2012) PERB Decision No. 2236-M, p. 8; *City of Escondido* (2013) PERB Decision No. 2311-M, pp. 6-7; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1235, p. 672.)[38]

To relate back, a newly-added legal theory need not be derivative or a "lesser included" allegation; it may be new or entirely different in its elements from the original theory, so long as it relies on the same general set of facts as previously alleged, so that the charged party would not be unfairly surprised or prejudiced by the amendment. (*Gonzales Union High School District* (1984) PERB Decision No. 410 (*Gonzales*), pp. 18-20; *Temple City, supra,* PERB Order

[38] Some California appellate courts have articulated a slightly more elaborate test for the doctrine, according to which an amendment relates back to the original complaint, if it: (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same "instrumentality," or theory of causation. (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 276-277.) However, the California Supreme Court has never overruled *Austin, supra*, 56 Cal.2d 596 and similar cases articulating the "same general set of facts" test. Moreover, it does not appear that use of the three-part test would alter the result in the present case.

No. Ad-190, pp. 8, 9-10; *Inglewood Unified School District* (1990) PERB Decision No. 792, pp. 6-7; *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 937-938.)

By contrast, the relation back doctrine does not apply when the amendment raises new factual allegations or separate conduct or acts not sufficiently related to or raised by the previous charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959, adopting proposed dec. at p. 18; *UC Regents (LLNL), supra,* PERB Decision No. 1221-H, p. 10, fn. 6; *Los Angeles Unified School District* (1992) PERB Decision No. 918, pp. 3-4; *Burbank Unified School District* (1986) PERB Decision No. 589, adopting warning letter at p. 3; *Monrovia Unified School District* (1984) PERB Decision No. 460, pp. 9-10; see also *Kim v. Regents of Univ. of Calif.* (2000) 80 Cal.App.4th 160, 168.)

The relation back doctrine is a pragmatic accommodation between principles of fair notice and considerations of procedural efficiency, as it would be overly formalistic, impractical and burdensome on the parties to insist that they litigate each theory stemming from the same operative facts in separate proceedings. (Code Civ. Proc., § 473; *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565; see also *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 34-40, esp. p. 37; *Riverside Unified School District* (1985) PERB Decision No. 553, p. 7; *Brawley Union High School District* (1982) PERB Decision No. 266, p. 11.) The doctrine seeks to balance two important but potentially conflicting policies: the policy favoring resolution of disputes on their merits (*Trustees of the California State University* (1989) PERB Order No. Ad-192-H, pp. 4-5; *United Farm Workers v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 916); and the policy underlying statutes of limitations, which is to give parties notice of a dispute in time to preserve evidence and prepare a fair defense. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 512-513; *Austin, supra,* 56 Cal.2d 596, 602-603.)

If the original charge or complaint would reasonably put the respondent on notice to identify and preserve evidence necessary to respond to the allegations of the proposed amendment, then no unfair surprise or prejudice will result from permitting the proposed amendment and applying the relation back doctrine to preserve its timeliness. (1 Cal. Affirmative Def. § 25:77 (2d ed.).) In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, the critical inquiry is whether opposing parties had adequate notice of the amended claim or defense based on the contents of the original pleading. A party cannot claim that it has been unfairly surprised or prejudiced by a proposed amendment, when it was already aware of the factual predicate of the amendment, and where the claim or defense to be asserted by the amendment was already suggested by the original pleading. (*California Casualty, supra,* 173 Cal.App.3d 274, 280; *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965, declined to follow by *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 202-205, as modified on denial of rehg. (August 29, 1994).)

Moreover, a charged party does not establish that it would be unduly prejudiced by a proposed amendment, simply because it must gather additional evidence to defend against a new or different legal theory arising from the same general set of facts, as it was already on notice of the need to preserve evidence relating to the underlying facts. California courts are particularly unlikely to find a proposed amendment would cause prejudice, when the key witnesses to the allegedly unlawful conduct are the charged party's own officers, employees or agents. (*Lamont v. Wolfe, supra,* 42 Cal.App.3d 375, 381; *California Casualty, supra,* 173 Cal.App.3d 274, 280.)

The issue presented here is whether the relation back doctrine permits additional parties, all allegedly injured in the same manner by the same course of conduct, to join an existing action outside the six-month limitations period. Because this issue appears to be a matter of first

impression for PERB, we may look to California civil procedure and to federal practice under the NLRB and the federal courts for guidance.[39]

Charging Parties have urged PERB to follow federal precedent on this issue. Under the federal cases, a timely and otherwise properly filed and served charge identifying one employee may provide sufficient basis for litigating the same claim(s) or category of claims brought by another employee who has not filed and served a timely or otherwise proper charge. (*Longshoremen, supra,* 98 NLRB 284, 293.) In *Longshoremen*, the original charge involved one employee who alleged that he had been discriminated against on the basis of his union membership. The charge was later amended to add another employee who also alleged discrimination. Although the number of employees alleging discrimination increased, the NLRB permitted the amendment, reasoning that it could not prejudice the employer's preparation of its case, or mislead it as to what exactly was being alleged. On review, the U.S. Court of Appeals for the Ninth Circuit affirmed the NLRB's reasoning and enforced its order. The Court opined that no separate charge must be filed as to each individual employee alleging discrimination, where a properly filed and served charge furnished the basis for a complaint alleging discrimination pursuant to the same unlawful policy or practice. (*Waterfront Employers, supra,* 211 F.2d 946, 957.)

[39] When interpreting the California labor relations statutes, PERB may take guidance, as appropriate, from administrative and judicial authorities interpreting analogous provisions of federal labor law. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617 (*City of Vallejo*).) Similarly, as an administrative agency, PERB is not subject to the California rules of court or necessarily bound by California civil procedure, but may look to California judicial practice and procedure where consistent with the provisions, policies and purposes of the PERB-administered statutes and PERB's regulations. (*The Regents of the University of California* (1997) PERB Decision No. 1188-H, pp. 33-35.) As indicated in the above-cited decisions, PERB's application of the relation back doctrine has borrowed from both the NLRB and California courts and we express no overarching preference for the applicability of either body of law outside the specific facts of this case.

Although the NLRB's *Longshoremen* decision and the resulting opinion by the Ninth Circuit Court are now more than 60 years old, UTLA has cited no subsequent decision by either tribunal disavowing the reasoning or result.[40] To the contrary, UTLA concedes that subsequent NLRB decisions affirm the "class action" approach announced in *Longshoremen*. UTLA cites *Regional Import and Export Trucking Co.* (1988) 292 NLRB 206 (*Regional Import*), reversed and remanded on other grounds by *Truck Drivers Local Union No. 807, I.B.T. v. Regional Import & Export Trucking Co., Inc.* (2d Cir. 1991) 944 F.2d 1037, in which the NLRB explained that, where "there is discrimination against a class of employees, the General Counsel need not name each of them at the unfair labor practice hearing stage of the proceeding," because, if necessary, "their identity may be resolved at the compliance stage." (*Regional Import, supra,* at p. 232.)

UTLA argues, however, that these federal authorities are inapplicable to the present dispute, because PERB's regulations and decisional law do not permit the agency to process unfair practice charges on a "class" or "representative" basis. According to UTLA, the NLRB's willingness to award a remedy to "unnamed parties," i.e., employees who are adversely affected by an unfair labor practice, but who do not themselves file charges, is incompatible with PERB cases holding that "only named parties should be granted a remedy" (*CAUSE, supra,* PERB Decision No. 1029-S, pp. 9-10), and that an individual charging party "can only assert [his or her] rights and cannot initiate a 'class-action' type charge" on behalf of other, non-party employees. (*California Faculty Association (Hollis)* (1988) PERB Decision No. 709-H (*CFA (Hollis)*), adopting warning letter at p. 1, unnumbered footnote.)

[40] In addition to the *Longshoremen* cases, in a case decided almost two decades *earlier*, the NLRB had permitted a proposed amendment to a complaint to add another employee alleging retaliatory discharge where five employees had initially made the same allegations. On review by the U.S. Supreme Court, the Court concluded that the NLRB's decision to allow the amendment provided no ground for challenging the validity of the hearing or the result. (*Consolidated Edison Co. of New York v. NLRB* (1938) 305 U.S. 197, 224-225.)

UTLA thus urges PERB not to follow NLRB precedent here and instead relies on California judicial opinions holding that an amended pleading that adds a new plaintiff will not relate back to the filing of the original complaint, if the new party seeks to enforce an independent right or to impose greater liability against the defendant. (*Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526, 533–534; *San Diego Gas & Elec. Co. v. Superior Court, supra,* 146 Cal.App.4th 1545, 1550.) In *Basin Construction Corp. v. Department of Water & Power* (1988) 199 Cal.App.3d 819, the appellate court affirmed a trial court's refusal to apply the relation back doctrine when the proposed amendment would change the parties and assert damages not previously brought to the opposing party's attention. (*Id*., 199 Cal.App.3d 819, 826.)

Although we agree with UTLA that our regulations and decisional law generally distinguishes between named parties to an action and other persons,[41] there is also appellate authority holding that PERB's regulations neither expressly authorize nor prohibit processing unfair practice charges as class actions. (*Paulsen v. Teamsters, supra,* 193 Cal.App.4th 823, 834.) More importantly, we find UTLA's gloss on the relation back doctrine under California civil procedure unpersuasive and generally inapposite to the facts and issues presented by this case.[42]

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[41] See, e.g., *Regents of the University of California (Lawrence Berkeley National Laboratory)* (2013) PERB Order No. Ad-397-H, pp. 4-5; *Santa Maria-Bonita School District* (2013) PERB Order No. Ad-400, pp. 4-5; *John Swett Unified School District* (1981) PERB Decision No. 188, pp. 8-9.

[42] If applied strictly, UTLA's argument that ***only*** named parties are entitled to a remedy would produce absurd and unfair results in the present case because Raines is the only charging party named in the complaint. Thus, ***all other*** Charging Parties, including those whose charges were without question timely filed and properly served, would be dismissed because, through no fault of their own, they were not identified by name in the complaint.

In California civil procedure, the relation back doctrine is perhaps most often used to identify a party by its proper name, to correct an omission or error in the original pleading, or to elaborate on facts previously alleged. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945; *Pasadena Hospital Assn., Ltd. v. Superior Court* (1988) 204 Cal.App.3d 1031, 1035.)[43] When a timely complaint is amended only to identify a party by its proper name, to correct an omission or error in pleading, or to elaborate on facts previously alleged, but the gravamen of the complaint remains the same, the amended complaint relates back to the original pleading. (1 R. Weil & I. Brown, C*alifornia Practice Guide, Civil Procedure Before Trial* 6:715 et seq. (2007); 1 Cal. Affirmative Def. § 25:77 (2d ed.).)

Contrary to UTLA's contention, however, the doctrine has also been applied to add one or more parties to the action after the statute of limitations has run, including not only defendants but also plaintiffs. (See, e.g., *American Western Banker v. Price Waterhouse* (1993) 12 Cal.App.4th 39, 47-49, citing 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 1151, p. 569 [relation back doctrine equally applicable to amendments involving plaintiffs as well as defendants].) In fact, California courts have routinely granted leave to amend a complaint to substitute proper plaintiffs where the original plaintiff lacked standing. (*California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 850-851; *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 790; *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, 720; *California Air Resources Bd. v. Hart* (1993) 21 Cal.App.4th 289, 300; *Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1677-1678; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004-1008, 1011; *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 507-508.) As with other amendments that seek to clarify existing facts, or introduce new legal theories,

[43] Unlike PERB's regulations and decisional law, under California's "DOE Defendant" practice, if unknown when a complaint is filed, the precise name or identity of a party may be provided at a later date. (Code Civ. Proc., § 474.)

when an amended complaint seeks to substitute or add a new plaintiff, application of the relation back doctrine is "dependent upon whether recovery is sought on the same general set of facts as those [originally] alleged." (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 160.)

In such cases, California courts make no distinction between *substituting* one plaintiff for another and *adding* one *or more* plaintiffs where previously there had been only one. In *Jensen v. Royal Pools*, for example, an amended complaint filed by *two* condominium owners acting in their capacity as individuals and on behalf of other owners related back to the original complaint, which had been filed by only *one* plaintiff, the condominium association. (*Id.*, 48 Cal.App.3d 717, 720.) According to Witkin,

> [T]he allowance of amendment and relation back to avoid the statute of limitations does not depend on whether the parties are technically or substantially changed; rather the inquiry is whether *the nature of the action* is substantially changed. And most of the changes in parties do not change the nature of the action.

(5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1151, p. 654, emphasis added; see also *Mayo v. White* (1986) 178 Cal.App.3d 1083, 1092.)

Application of the relation back doctrine essentially follows the equitable doctrine of laches, which requires both an unreasonable delay in one party asserting its rights and prejudice to another party resulting from that delay. (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 188; see also *Vernon Fire Fighters Assn. v. City of Vernon* (1986) 178 Cal.App.3d 710.) As with laches, the relation back doctrine can be defeated, if the defendant shows that the plaintiff was dilatory in amending the complaint, and that the defendant suffered prejudice caused by such delay. (*Okoro v. City of Oakland* (2006) 142 Cal.App.4th 306, 313-314.) A consideration relevant to both factors is whether the proposed

amendment, if permitted, will necessitate postponement of the hearing to allow other parties to respond to any new issues raised by the amendment.

Turning to the record before us, we find no grounds to presume that UTLA would suffer prejudice by permitting substitute teachers who joined either after January 21, 2010, when the complaint issued, or after March 1, 2010, when the six-month limitations period had run, to remain parties to this action. Because Charging Parties did not complete the presentation of their case-in-chief until January 21, 2011, by definition, UTLA could not have been required to postpone the hearing to respond to any "new" issues even potentially raised by the addition of new Charging Parties. Additionally, unlike *Vernon Fire Fighters Assn. v. City of Vernon, supra,* 178 Cal.App.3d 710, there is no evidence to suggest that any witnesses were no longer available due to death, resignation, or retirement when UTLA began presenting its case-in-chief on January 24, 2011. The only witness who became unavailable was Bregere, who had already died before the hearing began, and whose unavailability was therefore not caused in any way by other substitute teachers filing charges after March 1, 2010 when the six-month limitations period had run.

Nor does the record or UTLA's supplemental brief contain any evidence or compelling argument that UTLA would be unfairly surprised or prejudiced by the inclusion of Charging Parties who did not file and serve their forms until after the six-month limitations period had run. The fact that additional Charging Parties may result in a greater *amount* of damages does not constitute a different *kind* of liability or establish prejudice, when any potential remedies in this case stem from *the same underlying facts or course of conduct*.

The cases relied on by UTLA are inapposite. *Bartalo* and similar cases, which hold that the relation back doctrine is inapplicable to an amendment to add a new plaintiff typically claims for personal injury in which not only the amount of damages, but *the very nature of the injury*, is

peculiar to each plaintiff. *Bartalo*, for example, involved loss of consortium claims, which necessarily differ, depending upon whether asserted by the decedent's spouse or offspring. Similarly, *San Diego Gas & Electric* involved the separate claims of a decedent's heirs in a wrongful death suit. Although each heir in a wrongful death suit is required to file his or her claim in the suit in order to recover a share of any lump sum verdict, the division of the overall amount of recovery is determined according to each heir's separate and personal interest in the decedent's life. (*San Diego Gas & Elec. Co. v. Superior Court, supra,* 146 Cal.App.4th 1545, 1551.) By contrast, in cases where different plaintiffs allege that they have suffered the same kind or category of injuries, even if their actual damages vary, the courts have permitted different or additional plaintiffs to join the action. (*Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19; *Jensen v. Royal Pools, supra,* 48 Cal.App.3d 717, 720-23; *Mayo v. White, supra,* 178 Cal.App.3d 1083, 1092.)

UTLA's supplemental brief also argues that no Charging Parties should be permitted to join this action under the relation back doctrine because none have sought to amend the complaint. We reject this contention as contrary to the record and sound policy. In fact, some Charging Parties did file and serve with their charge forms additional papers explicitly styled as a "motion to amend the complaint." On May 24, 2010, Flores filed with PERB and served on UTLA a completed charge form and correspondence styled as a motion to amend the complaint, pursuant to PERB Regulation 32647. On November 1, 2011, PERB received correspondence from Laura Moneymaker (Moneymaker), which also explicitly sought to amend the complaint in this case. Moneymaker's correspondence also included an executed charge form, along with W-2 forms for 2008 and 2009 and proof of service indicating that the "LAUSD PERB Complaint" and unspecified "papers" had been served on UTLA. Other

charging parties, such as Aloysius D'Sa, filed separate correspondence with their charge forms which, while not specifically identified as a "motion to amend the complaint," nonetheless clearly indicated the individual's desire to join this case, either by referencing the PERB case number and/or the caption: *Raines et al. v. UTLA.* Even without filing a separate motion to amend the complaint, the filing of the charge form which incorporated by reference the factual allegations of the Raines charge and which indicated that it was an amended charge in Case No. LA-CO-1394-E was surely sufficient to indicate the intent. Additionally, it is not clear why a putative charging party must move to amend the complaint in the absence of some determination as to who was already encompassed by the complaint. As noted above, although the case is captioned *Kennon B. Raines et al. v. United Teachers Los Angeles,* it does not list the names of the Charging Parties or otherwise indicate who is intended by the term "*et al*."

Under the circumstances, we must also reject UTLA's argument on policy grounds. If one were to follow the interpretation of PERB case law urged by UTLA, then *no Charging Party*, other than Raines, would be entitled to *any* remedy in this case, because Raines is *the only* Charging Party identified by name in the complaint. Such a result would be absurd, as the complaint clearly intended to include other Charging Parties besides Raines, even if they were not individually identified by name in the complaint. Moreover, it would entail a colossal and inexcusable waste of PERB's and the parties' time and resources, given that 21 Charging Parties *besides Raines* testified and presented documentary evidence at the hearing.

CAUSE (Trevisanut), supra, PERB Decision No. 1029-S, and other cases relied on by UTLA to support its argument are also inapposite to the facts and issues of this case. In *CAUSE (Trevisanut),* 97 employees filed charges against their exclusive representative for allegedly interfering with their right to withdraw their union membership. At the hearing, the ALJ denied

charging parties' motion to certify a class comprised of all similarly-affected employees, including those who had filed no charge. After denying the motion, the ALJ made no subsequent determination as to whether the case was appropriate for class treatment. (*Id*. at p. 10.) However, after concluding that the union had interfered with employee rights, the ALJ proposed a remedy that would have provided dues refunds to *all* affected employees, regardless of whether they were part of the 97 employees who had filed charges.

The Board agreed with the ALJ as to the union's liability, but reversed the proposed remedy because it would permit employees who were ostensibly harmed by the union's conduct, but who had not filed charges, to recover lost dues money. The Board reasoned that "only named parties," i.e., those who had filed charges, "should be granted a remedy." *(CAUSE (Trevisanut)*.)[44]

Unlike *CAUSE (Trevisanut)*, in the present matter, we are concerned *only* with whether *named parties*, that is, persons who have filed a charge, and who have alleged the same general set of facts as those alleged by Raines, should be barred from further participation in this action by the six-month limitations period. We conclude that neither EERA, nor PERB regulations and decisional law, nor equitable doctrines of laches, prohibits application of the relation back doctrine to the facts of this case.

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[44] Although we do not disturb *CAUSE (Trevisanut), supra*, PERB Decision No. 1029-S, pp. 9-10, *Hollis, supra*, PERB Decision No. 709-H, and similar cases relied on by UTLA, we caution against expansive readings that go beyond their facts and holdings. Those cases considered whether individual employees, who were *not* acting as officers, representatives or agents of an employee organization, have standing to bring charges on behalf of other, *unnamed* employees. Even a cursory review of Board precedent reveals that Board-ordered remedies are not limited to named parties in all circumstances. Since the agency's inception, the standard Board-ordered remedy for a bargaining violation has entailed restoration of the status quo ante, including reinstatement, back pay and back benefits *for affected employees without regard* to their status as named parties. (*Santa Clara Unified School District* (1979) PERB Decision No. 104 (*Santa Clara*), pp. 26-27; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13.)

Consistent with PERB regulations and decisional law, no employees may join this action without "opting-in" by filing a charge form. Under the relation back doctrine, charge forms will be considered timely filed only if submitted on or before January 21, 2011, the date when Charging Parties concluded their case-in-chief. Accordingly, we dismiss the charges filed by Henry Parke and Stephanie Parke on November 19, 2013, and by Jill Balogh on November 27, 2013 as untimely.

Whether UTLA Breached its Duty of Fair Representation

1. The Substantive Terms and Purpose of the July Side Letter are Not Evidence of Arbitrary, Discriminatory or Bad Faith Conduct by UTLA.

The duty of fair representation requires the exclusive representative to "fairly represent each and every employee in the appropriate unit" when negotiating, administering and enforcing its collective bargaining agreements. (EERA, § 3544.9; *Redlands Teachers Association (Faeth and McCarty)* (1978) PERB Decision No. 72 (*Redlands)*, adopting dismissal letter at pp. 2-3; *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124 (*Rocklin (Romero)*), p. 8.) Under federal judicial precedent, as codified in EERA and followed by PERB, a union violates its duty of fair representation when its representation of employees is "arbitrary, discriminatory, or in bad faith." (*Vaca v. Sipes* (1967) 386 U.S. 171, 190; *Redlands*; *City of San Diego* (2005) PERB Decision No. 1738-M, pp. 6, 9.) Under this three-prong standard, a union's conduct must conform to each of these standards: it must treat all factions and segments of the unit without hostility or discrimination; it must act in complete good faith and honesty when exercising its broad discretion; and it must avoid acting on the basis of "irrelevant, invidious, or unfair" criteria when representing bargaining unit employees. (*Teamsters (Ind.) Local 553 (Miranda Fuel Co., Inc.)* (1962) 140 NLRB 181, 185; *Mount Diablo Education Association (DeFrates)* (1984) PERB Decision No. 422, pp. 5-6 (*Mt. Diablo (DeFrates)*);

Hardcastle v. Western Greyhound Lines (Division of Greyhound Corp.) (9th Cir. 1962) 303 F.2d 182, 185-188; see also *Rakestraw v. United Airlines, Inc.* (7th Cir. 1992) 981 F.2d 1524, 1534-1536.)

In adopting the duty of fair representation from the federal courts, the Legislature did not intend "that the union will be exposed to harassing litigation by dissident members over every arguable decision made in the course of day-to-day functioning of the union." (*SEIU (Kimmett), supra*, PERB Decision No. 106, p. 10; see also *Gilliam v. Independent Steelworkers Union* (N.D.W. Va. 1983) 572 F.Supp. 168, 171-172.) The union's duty to represent all unit members fairly and in good faith sometimes requires it to take a position contrary to the immediate interests of an individual employee or group of employees in the bargaining unit. (*California School Employees Association and its Chapter 107 (Chacon)* (1995) PERB Decision No. 1108, adopting warning letter at p. 3; *Shaw v. Metro-Goldwyn-Mayer, Inc., supra,* 37 Cal.App.3d 587, 602.) Because the representative is not obligated to bargain a particular benefit for any unit members (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889, pp. 8-9; *Los Rios College Federation of Teachers, CFT/AFT (Baker, et al.)* (1991) PERB Decision No. 877 (*Los Rios (Baker)*), p. 11), the fact that an agreement disadvantages some members of the bargaining unit, such as part-time vs. full-time employees, does not, by itself, violate the representative's duty. (*Ibid*.; *Baldwin Park Education Association (Hayek, et al.)* (2011) PERB Decision No. 2223, p. 4; *Redlands, supra*, PERB Decision No. 72, adopting proposed dec. at pp. 3, 5, citing *Steele v. Louisville & N.R. Co.* (1944) 323 U.S. 192.) The representative is thus entitled to a wide range of reasonableness in serving the interests of the unit it represents, which includes negotiating changes to seniority rights. (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338-339; *Stationary Engineers Local 39 (May)* (2010) PERB

Decision No. 2098-M (*Stationary Engineers*), pp. 6-7.) Generally, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness" (*Ford Motor Co. v. Huffman, supra,* at p. 338), that it is wholly "irrational" or "arbitrary." (*Air Line Pilots Assn., Intern. v. O'Neill* (1991) 499 U.S. 65, 78; *Rocklin (Romero), supra*, PERB Decision No. 124, p. 8; see also *SEIU (Kimmett), supra*, PERB Decision No. 106, citing *Branch 6000, National Assn. of Letter Carriers v. NLRB* (D.C. Cir. 1979) 595 F.2d 808; *Santa Ana, supra*, PERB Decision No. 2087, p. 8.)

In particular, a union may alter the contractual rights of bargaining unit employees, including seniority rights or other criteria used for making employment decisions, without violating its duty of fair representation, so long as some rational basis exists to support the change. (*Mt. Diablo (DeFrates), supra,* PERB Decision No. 422, pp. 5-6; see also *Stationary Engineers, supra*, PERB Decision No. 2098-M; *Service Employees International Union Local 250 (Stewart)* (2004) PERB Decision No. 1610-M; *Ramey v. District 141, Intern. Assn. of Machinists and Aerospace Workers* (2d Cir. 2004) 378 F.3d 269, 277; see also Barry Winograd, *California Public Employees and the Developing Duty of Fair Representation* (1987) 9 Indus. Rel. L.J. 410, 433.) Even where modification of seniority or other preference rights favors a majority group over a minority within the unit, the modification itself does not breach the union's duty of fair representation, unless it has *no other rational basis* than to curry favor with the majority or punish the minority. (*Borowiec v. Local No. 1570 of Intern. Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America* (D. Mass. 1986) 626 F.Supp. 296, 302-304, cited with approval by *Oxnard, supra*, PERB Decision No. 681, p. 20; see also *Humphrey v. Moore* (1964) 375 U.S. 335; *Beriault v. Local 40, Super Cargoes and Checkers of Intern. Longshoremen's and Warehousemen's Union* (D. Or. 1978) 445 F.Supp.

1287, 1293-1294; *Williams v. Pacific Maritime Assn.* (9th Cir. 1980) 617 F. 2d 1321, cert. denied (1981) 449 U.S. 1101.)

Here, there is no basis for concluding that the *substantive* terms of the July Side Letter violated UTLA's duty of fair representation, or that UTLA's *purpose* in negotiating the July Side Letter was arbitrary or discriminatory. Although it undoubtedly disadvantaged the interests of Charging Parties, the substantive terms of the July Side Letter did not violate UTLA's duty of fair representation because the desire to preserve the jobs of probationary teachers at "hardest-to-staff" schools and to prevent further increases in class sizes are rational bases for temporarily sacrificing the priority rights of career substitutes. In fact, several of Charging Parties *agreed with* Duffy's stated goal in negotiating the July Side Letter, even if they did not agree with his secretive methods. Raines and several others attended rallies and demonstrations or otherwise participated in UTLA's campaign to save teachers' jobs and prevent increased class sizes.

Additionally, Charging Parties have failed to show that the July Side Letter was not a good-faith effort to achieve UTLA's publicly-stated goals. Even some of UTLA's witnesses expressed the view that the July Side Letter was "a mistake" or produced the unintended consequence of turning Union members against each other. (R.T., Vol. XI, pp. 28-29 [Washington].). There was no credible testimony, however, that it was negotiated in bad faith or with an improper motive. In the context of the budget crisis facing the District and the entire bargaining unit, even Raines' unproven suggestion that the July Side Letter was part of a secret plan between UTLA and the District to save money would not necessarily constitute arbitrary, discriminatory or bad-faith conduct, since a union may legitimately choose to preserve jobs by reducing the wages or benefits of those still employed.

However detrimental the July Side Letter may have been to the interests of career substitute teachers, it was negotiated in an effort to preserve the jobs of laid-off probationary teachers at the District's disproportionally affected "hardest-to-staff" schools. Because this objective provides a rational basis for the July Side Letter that is well within the wide range of reasonableness afforded to a representative, we conclude that the substantive terms of the July Side Letter do not violate UTLA's duty to represent all unit members fairly.

However, this conclusion does not exhaust our inquiry.

2. Lack of Notice as Breach of the Duty of Fair Representation.

EERA and PERB decisional law do not mandate a ratification vote or other formal procedures when the bargaining agent negotiates or modifies employees' collectively-bargained rights. (*El Centro, supra,* PERB Decision No. 232, adopting proposed dec. at pp. 14-15; *Stationary Engineers, supra,* PERB Decision No. 2098, pp. 6-7.) Under the *SEIU (Kimmett)* standard, a union has substantial leeway in its internal procedures for developing its bargaining strategy, selecting its negotiating team, and ratifying or otherwise approving the results of negotiations. (*SEIU (Kimmett), supra,* PERB Decision No. 106, pp. 10-12.)

However, our cases hold that the representative must at least provide notice and "*some* consideration of the views of various groups of employees and *some* access for communication of those views." (*SEIU (Kimmett)*; *Fontana Teachers Association, CTA/NEA (Alexander, et al.)* (1984) PERB Decision No. 416; see also *Santa Ana, supra,* PERB Decision No. 2087, pp. 17-18.) PERB does not prescribe the precise contours of this requirement. Meetings to discuss the progress of negotiations and to determine bargaining parameters may be held at times and locations aimed at attracting the largest number of unit members, even though some shifts or groups of employees are thereby precluded from participation. (*SEIU (Kimmett), supra,* at pp. 10-11.) Some employees may, as a practical matter, be excluded from such meetings, so long as they may make their views known to the organization's leadership

through other means, such as surveys or representative groups. (*Fontana, supra*, PERB Decision No. 416, adopting warning letter at pp. 3-4, fn. 2; *El Centro, supra*, PERB Decision No. 232, adopting proposed dec. at p. 14.) Additionally, the representative need not provide detailed notice to unit members of every proposal and counterproposal during negotiations, but there must be *some* form of notice and meaningful opportunity for employees to communicate their views *before* an agreement becomes final. Whether the organization utilizes pre-negotiation surveys to establish bargaining parameters, post-negotiation ratification of tentative agreements, or some other procedures, "[t]he essential ingredient to this process is the provision of notice and an opportunity for [unit] members to be heard *before* the collective bargaining agreement becomes final and binding." (*Oxnard, supra*, PERB Decision No. 681, p. 21, emphasis added.)

Federal precedent offers additional guidance on the subject. Since its inception in the federal courts, the duty of fair representation has obligated the representative to give employees notice and opportunity to have their views considered when negotiating their terms and conditions of employment. (*Steele v. Louisville & N.R. Co., supra*, 323 U.S. 192, 204; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76* (1944) 323 U.S. 210, 212, 213-214.) In these early cases, the lack of notice and opportunity to have employees' views considered were often accompanied by hostile or discriminatory intent on the part of the union. (*Ibid*.) However, subsequent cases have clarified that the duty of fair representation includes an obligation to avoid *arbitrary* conduct, which is not limited to *intentional* conduct. (*Vaca v. Sipes, supra*, 386 U.S. 171, 190.) Thus, "[t]he addition of arbitrariness to the catalogue of conduct the union is obliged to avoid reflects a calculated broadening of the fair representation standard, and a rejection of . . . cases . . . holding that a bad faith motive [or] an intent to hostilely

discriminate is required." (*Robesky v. Qantas Empire Airways Ltd.* (9th Cir. 1978) 573 F.2d 1082, 1086 (*Robesky*), citing *Retana v. Apartment Workers Local 14* (9th Cir. 1972) 453 F.2d 1018, 1023 (*Retana*), n. 8, internal quotation marks omitted.) Though mere negligence is not enough to breach the duty of fair representation, a union may engage in acts or omissions not intended to harm employees that are "so egregious, so far short of minimum standards of fairness to the employee[s] and so unrelated to legitimate union interests as to be arbitrary" and therefore in violation of the organization's duty to employees. (*Robesky, supra,* at p. 1090.)

In varying contexts, including the negotiation or modification of employees' collectively-bargained rights and obligations, the NLRB and several federal courts have repeatedly held that the representative cannot purposely or recklessly keep employees uninformed or misinformed as to matters affecting their employment, when the representative is the employees' only reasonable source of such information. (*Teamsters Local 282* (1983) 267 NLRB 1130, 1130-1131, enforced (2d Cir. 1984) 740 F.2d 141 (*Teamsters Local 282*); *United Auto Workers Local 417 (Falcon Industries, Inc.)* (1979) 245 NLRB 527.)[45] If the representative "makes no effort to communicate with the persons directly affected by its actions and takes action without investigation or adequate notice and opportunity to be heard, these acts and omissions may constitute a breach of the duty of fair representation." (*NLRB v. American Postal Workers Union, St. Louis, Mo. Local AFL-CIO* (8th Cir. 1980) 618 F.2d 1249, 1255; see also *Teamsters Warehouse Union, Local 860* (1978) 236 NLRB 844, enforced (D.C. Cir. 1981) 652 F.2d 1022; *Teamsters Local 435 (Super Valu, Inc.)* (1995) 317 NLRB 617, 629, enforced (10th Cir. 1996)

[45] See also *International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 310 v. NLRB* (D.C. Cir. 1978) 587 F.2d 1176, 1184-1185; *Robesky, supra,* 573 F.2d 1082, 1088-1089 (grievance handling); *Retana, supra,* 453 F.2d 1018, 1023-1024 (grievance handling); *Serv. Employees Local 3036 (Linden Maint.)* (1986) 280 NLRB 995, 996 (grievance handling); *Local No. 324, Operating Engineers* (1976) 226 NLRB 587 (administering exclusive hiring hall); and *International Union of Elec., Radio and Mach. Workers, AFL CIO, Frigidaire Local 801 v. NLRB* (D.C. Cir. 1962) 307 F.2d 679, 683-684 (union security provisions).

92 F.3d 1063; and *Branch 6000, Nat. Assn. of Letter Carriers v. NLRB, supra,* 595 F.2d 808, 813.)[46]

In *Teamsters Local 282, supra,* 740 F.2d 141, a union's collective bargaining agreement provided that laid-off employees were not required to "shape up," i.e., report for service when work was available, in order to preserve their seniority and other recall rights. The union's representatives also assured employees of this right. In response to a dispute between the union

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[46] Our dissenting colleague criticizes our failure to rely on the federal Second Circuit Court of Appeal's opinion in *White v. White Rose Food, a Div. of DiGiorgio Corp.* (2d Cir. 2001) 237 F.3d 174. In that case, laid-off employees alleged that their local union had breached its duty of fair representation by secretly agreeing to allow an employer to deduct payroll taxes from a previously-negotiated settlement fund, when the initial agreement had not specified whether the amount of the settlement was net or inclusive of payroll taxes. The case thus turned on whether the terms of the initial agreement had been altered by the amendment and, if so, whether ratification or some form of notice was required for the amendment. Reversing the trial court, the Second Circuit Court of Appeals observed that the initial settlement agreement had not specified whether payroll taxes would be deducted from the settlement fund and thus concluded that the terms of the initial agreement ***had not been changed*** by the amendment. (*Id*. at pp. 180, 181-182.) Thus, ***unlike*** the present case, in which ***all parties agree*** that the July Side Letter altered the previous seniority rights of substitute teachers, *White Rose* holds that a union does not violate its duty of fair representation when a subsequent agreement ***does not alter*** previously negotiated wages and benefits. Although the *White Rose* court also offered its view of whether notice and a ratification vote ***would have been necessary***, if the amendment had altered terms and conditions of employment, given its own the factual findings, the court's views on this issue were not essential to the outcome and may be disregarded as *dicta*.

Although PERB may take guidance, as appropriate, from authorities interpreting analogous provisions of federal labor law (*Fire Fighters Union v. City of Vallejo, supra,* 12 Cal.3d 608, 616-617), the decisions of federal courts are not controlling on matters of state law. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 507, p. 570.) As we recently noted in *Capistrano Unified School District* (2015) PERB Decision No. 2440, the federal circuit courts of appeal are often in disagreement among themselves and with the NLRB. (*Id*. at p. 35.) Consequently, the touchstone for whether federal decisional law or authority from any other jurisdiction is applicable to the PERB-administered statutes is whether the underlying reasoning is consistent with the language, policies and purposes of the California statutes. (*Ibid*.) However, other than the fact that she agrees with *dicta* found in the *White Rose* opinion, it is unclear why this particular federal court decision is any more persuasive than the ***several other*** NLRB and federal court decisions discussed in the body of this decision, and previously relied on in developing PERB's own case law. See, e.g., the Board's discussion of *Retana, supra,* 453 F.2d 1018, *Teamsters Local 310 v. NLRB, supra,* 587 F.2d 1176, and other cases in *SEIU (Kimmett), supra,* PERB Decision No. 106, pp. 9-11.

and the employer, an arbitrator ruled that employees must shape up, call or contact the employer at least once each year in order to retain seniority. Recognizing that the arbitrator's award effectively altered the union's interpretation of the agreement, a union official instructed stewards to "get the word out" about the arbitration award. The following day, the union's chief steward advised employees who appeared at the employer's morning "shape up" about the arbitrator's award. However, the union made no further attempts to publicize the award or to notify those employees who were not present on the one occasion when oral notice of the award had been communicated. (*Id*. at pp. 143-144.)

The NLRB held that because the arbitrator's award effectively altered the union's interpretation of the agreement, it had an affirmative obligation effectively to communicate to all affected employees the terms of the arbitration award. It also held that the union had failed to satisfy this obligation by merely making an oral announcement on one morning when it was apparent that not all employees affected by the change in seniority rules were present or had any reason to know that the seniority rules, as previously communicated by the union, had been changed as a result of an arbitrator's award. (*Teamsters Local 282, supra,* 740 F.2d 141, 146-147.)

The Second Circuit Court of Appeals affirmed the NLRB's reasoning that, even absent evidence that union officials acted with hostile or discriminatory intent, their acts and omissions in failing to inform represented employees of the change in seniority rules and their reliance solely on word of mouth to notify employees, was "so egregious, so far short of minimum standards of fairness to the employees and so unrelated to legitimate union interests as to be arbitrary." (*Teamsters Local 282, supra,* at pp. 147-148, citing *Robesky, supra,* 573 F.2d 1082 and *Warehouse Union, Local 860, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. NLRB* (D.C. Cir. 1981) 652 F.2d 1022 (*Warehouse Union, Local 860*).)

The appeals court observed that the NLRB's decision was consistent with federal judicial precedent holding that "the fiduciary duty which a union owes to its members requires it to inform them of their obligations so that they may take whatever steps are necessary to protect their interests in their job." (*Teamsters Local 282, supra,* at p. 147, citing *NLRB v. Local 182, International Brotherhood of Teamsters* (2d Cir. 1968) 401 F.2d 509, 510, cert. denied (1969) 394 U.S. 213; and *NLRB v. Hotel, Motel & Club Employees' Union, Local 568* (3d Cir. 1963) 320 F.2d 254, 258.)

Similarly, in *Teamsters Warehouse Union, Local 860* (1978) 236 NLRB 844, 851, the NLRB held that a union had violated its duty of fair representation in negotiating a collective bargaining agreement by failing to inform clerical employees of the employer's position that granting their demand for a wage increase equal to that received by warehouse workers would result in layoffs. The Court of Appeals for the District of Columbia affirmed the NLRB's decision. (*Warehouse Union, Local 860, supra,* 652 F.2d 1022.) The NLRB and the reviewing federal court disregarded evidence that the union's leadership had been motivated by discriminatory intent against the predominantly female clerical employees in favor of male employees in the warehouse. (*Id*. at p. 1024.) Rather, the NLRB's finding of liability, which was affirmed by the appeals court, stemmed solely from the union representative's failure to mention the possibility of layoffs to clerical employees at two meetings when the tentative agreement was explained. (*Id*. at p. 1025.) As in *Teamsters Local 282*, in *Warehouse Union, Local 860,* the reviewing court cited with approval language from the Ninth Circuit's *Robesky* decision that "[a]cts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to

legitimate union interests as to be arbitrary." (*Warehouse Union, Local 860, supra,* at p. 1025, citing *Robesky, supra*, 573 F.2d 1082, 1090.)[47]

Robesky and other cases lay out a three-part inquiry for evaluating a union's unintentional conduct (or omissions) against the *arbitrariness* prong of the duty of fair representation. Such conduct violates the union's duty when: (1) it reflects a reckless disregard of the rights of employees; (2) its results severely prejudice employees; and (3) the policies underlying the duty of fair representation would not be served by shielding the union from liability in the particular circumstances of the case. As explained by the *Robesky* Court, requiring disclosure of information would not undermine duty of fair representation policies if it would not impair the interests of other workers, would not impose undue costs or burdens on the union, and would not erode the union's bargaining strength. (*Robesky v. Qantas, supra*, 573 F.2d at p. 1090 and other cases cited therein; see also *IBEW v. Foust* (1979) 442 U.S. 42, 50-51.)[48]

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[47] In *Robesky,* the Ninth Circuit Court of Appeals found that a union breached its duty of fair representation by failing to tell the plaintiff, a discharged employee, that her grievance would not proceed to arbitration, which led her to reject a settlement offer involving reinstatement that she would otherwise have accepted. (*Id.* at p. 1085; Accord: *Coleman v. Outboard Marine Corp.* (1979) 92 Wis.2d 565, 579-581.)

[48] *Oxnard, supra,* PERB Decision No. 681 and other PERB authorities teach that there is no ratification requirement *because* there is prior authorization or, at minimum, notice and *some* meaningful opportunity for input from affected employees "*before* the close of negotiations." (*Id*. at p. 21, original emphasis; see also *El Centro, supra*, PERB Decision No. 232, proposed dec. at p. 16.) Contrary to the view of our dissenting colleague, these cases do not hold that, so long as there is no express ratification requirement in the organization's by-laws, there can be *no duty at all* to inform employees of adverse changes to their collectively-bargained terms and conditions of employment until long after the ink is dry. The duty of fair representation standard affords considerable deference to unions, which is appropriate and necessary to protect against government intrusion into private associational conduct. (*National Assn. for Advancement of Colored People v. Button* (1963) 371 U.S. 415, 428-31; *National Assn. for Advancement of Colored People v. State of Ala. ex rel. Patterson* (1958) 357 U.S. 449, 460-63; see also *In re Berry* (1968) 68 Cal.2d 137, 151-157.) However, our colleague would apparently do away with *any* statutory duty to give exclusively represented employees notice and opportunity for input, unless the organization has already *voluntarily* conferred such rights in its constitution or by-laws. As a practical matter, our colleague's approach would make any *statutory* obligation superfluous and ignores the fact that the duty of fair representation was

Here, Duffy negotiated and signed the July Side Letter on his own authority and under what he described as a "cone of silence." However, Duffy's explanation for this secrecy is irrelevant here, as it pertains only to proposals *still under negotiation*. As noted in the front-page *United Teacher* article, which was presumably published with Duffy's approval, once a tentative agreement has been reached, it would be subject to approval by a membership ratification vote. Although Duffy discussed the July Side Letter with some officers, he did not disclose it to the organization's governing bodies or to its representatives responsible for substitute issues, including Segal, Peters, or even Solkovits, who described himself as UTLA's highest-ranking official for substitute issues. Moreover, although there is no evidence that UTLA asked the District to keep the July Side Letter secret after it was concluded, UTLA did not disclose its existence to affected employees until almost two months after it had taken effect.

Under the circumstances, we agree with the ALJ's finding of liability. Because substitute teachers were unaware that elimination of their seniority was even under discussion, they lacked *any* notice and meaningful opportunity to have their views heard or considered until months after the agreement took effect. (*Oxnard, supra*, PERB Decision No. 681, p. 21.) Timely notice might have allowed substitutes to protect their interests by renewing and developing new contacts to obtain assignments by personal reference, as opposed to random calls or to pursue alternative sources of income, particularly for those who continued part-time employment outside the District. (R.T., Vols. VI, p. 7 [Zigman], VI, pp. 70-71 [Bertucci], VII, p. 91 [Markel]; see also Vol. VII, p. 69 [Lincoln].)

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imposed by the courts and eventually codified by the Legislature *precisely because* unions would not voluntarily "opt-in" to minimum standards of notice and procedural fairness when dealing with the employees they represent. (See *Steele v. Louisville & N.R. Co., supra*, 323 U.S. 192, 204; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, supra*, 323 U.S. 210, 212, 213-214.)

We reject UTLA's argument that Charging Parties were made aware of the July Side Letter by virtue of UTLA's campaign to preserve probationary teachers' jobs and prevent class size increases. The record demonstrates, at most, that in Spring 2009, *some* Charging Parties knew that layoffs *might* affect *probationary* teachers. At this point, some substitutes worried that they might also lose work as a result of increased competition from the laid-off probationary teachers for substitute teaching assignments. (R.T., Vols. IV, pp. 100-101 [Engel], IV, pp. 150-151 [Koh], V, p. 67, 70 [Howard Meibach], V, pp. 126-127 [Raines], VI, pp. 63-64 [Negrete], and XII, p. 24 [Fredrick Bertz].) To the extent any discussion about eliminating substitutes' seniority rights in favor of laid-off probationary teachers occurred before July 2009, it consisted entirely of speculation and rumors, none of which was attributable to UTLA. In fact, when asked, Duffy, Solkovits and LAUSD representatives uniformly denied these rumors and offered assurances that no such proposal was under consideration. (R.T., Vols. IV, pp. 127-28, 145 [Koh], V, p. 22-23 [Seigle], VII, pp. 62-63 [Cohen], and XII, pp. 24-26 [Bertz].) According to Koh's undisputed testimony, "our main concern was if the [probationary] teachers would be laid off they were going to be coming to the sub pool [and] were going to be put ahead of us" and "Duffy's assurance was that *that's not going to happen*." (R.T., Vol. IV, p. 145, emphasis added.)

There is no evidence to suggest that Duffy's denials and assurances *at that time* were untrue or disingenuous. However, unconfirmed rumors or speculation, all of which Duffy himself denied, were not meaningful notice of his apparent change in position several weeks later. (*State of California (Water Resources Control Board)* (1999) PERB Decision No. 1337-S, pp. 5-6.) The fact that UTLA's governing bodies made job restoration for the laid-off probationary teachers the organization's "top priority" and directed UTLA's officers to negotiate immediately with the District to find a solution to the crisis and even the well-publicized nature

of this campaign do not constitute *meaningful notice* of the District's proposal to *sacrifice substitute teachers'* then-existing rights to priority in the assignment of work.[49]

The testimony of UTLA officers acknowledges this distinction. Duffy described the series of telephone conversations he had with Ekchian and Avila which eventually resulted in the July Side Letter as occurring "on two levels." One level, according to Duffy, was "how to mitigate the effects of the layoffs," and, "at the very end … there were discussions about the

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[49] Our dissenting colleague's assertion that substitute teachers had meaningful notice and "several opportunities to make their opinions known on the issue of their seniority rights and the potential compromise of those rights" likewise lacks support in the record and relies on a concept of "notice" that is inconsistent with PERB precedent. Under PERB's *Gavilan* "knew or should have known" standard, parties are responsible only for what they *actually knew* (*California School Employees Association (Spiegelman)* (1984) PERB Decision No. 400, pp. 2-3) or for what they *should have discovered* through the exercise of reasonable diligence. (*Gavilan, supra,* PERB Decision No. 1177, pp. 4-5; *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944, adopting warning letter at p. 4; *United Teachers of Los Angeles (Thomas)* (2010) PERB Decision No. 2150, adopting dismissal letter at p. 2.) PERB applies the *Gavilan* standard, regardless of whether the case involves DFR allegations (see, e.g., *Teamsters Locals 78 & 853 (Hinek)* (2009) PERB Decision No. 2056-M, p. 4; *Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889, p. 7) or other categories of unfair practices. (*Los Angeles Unified School District* (1996) PERB Decision No. 1180, adopting proposed dec. at pp. 9-11; *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, pp. 15-17; *Standard School District* (2012) PERB Decision No. 2273, pp. 8-10.)

To qualify as "notice," the pertinent information must be communicated in a manner which clearly informs the recipient of the intended action. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 29; *Victor Valley Union High School District* (1986) PERB Decision No. 565, p. 5.) Ambiguous, conditional or equivocal statements do not constitute meaningful notice. (*Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652, adopting proposed dec. at p. 6; *Alameda County Management Employees Association (Harper)* (2011) PERB Decision No. 2198-M, pp. 4-5; *Regents of the University of California* (2004) PERB Decision No. 1585-H, pp. 6-7.) Even when notice is adequate, it becomes ineffective, and must therefore be renewed, if subsequent events evince a wavering of intent to follow through with the proposed action. (*City of Livermore* (2014) PERB Decision No. 2396-M, p. 6.) Under the *Gavilan* standard, we would not conclude that a union had waived its right to bargain a change in policy because it had failed to act on mere suspicions or unconfirmed rumors of a change in policy (see *Water Resources Control Board, supra,* PERB Decision No. 1337-S, pp. 5-6) and our colleague has offered no authority or compelling policy reason for abandoning *Gavilan* and creating a lesser standard for "notice" applicable only to duty of fair representation cases.

specifics," one of which was the proposal concerning career substitute priority. (R.T., Vol. XIX, p. 43.) Solkovits similarly testified that, during the period March-July 2009, he knew that UTLA "was trying to negotiate *some* kind of settlement that would bring all RIF teachers back."[50] However, he did not know that Duffy was negotiating with LAUSD over the possibility of providing priority rights to laid-off teachers for substitute teaching assignments. (R.T., Vol. XVIII, p. 7, emphasis added.)

Washington, who was UTLA's lead officer in negotiations, confirmed this distinction. She testified that, to her knowledge, granting priority to laid-off teachers for substitute assignments was *not* a subject of negotiation between March and July 2009, while "trying to save the teachers' jobs" *was* the subject of negotiations with the District during these months. (R.T., Vol. XI, pp. 10-13.)

It is also undisputed that there was no directive or decision by BOD or HOR to alter the contractual priority order for determining substitute teach assignments. (R.T., Vols. XVII, p. 66, 73 [Forrester], and XI, p. 33 [Washington].) The general directive to do what was necessary to get laid-off teachers back to work was, according to Forrester, only intended to get them back to work "*at their school, in the assignment that they had been in, in the commitment they'd been in, to continue for the kids the continuity and stability of the school sites*." (R.T., Vol. XVII, p. 76 [Forrester], emphasis added.)

From the above testimony, it is apparent that even UTLA's officers recognized a distinction between the organization's well-publicized *objective* of preserving teachers' jobs and *the particular path* Duffy chose to further that goal. While PERB is not in a position to second-guess that choice, it may mandate that unit members whose livelihoods are affected by

[50] The neologism RIF is an abbreviation for "reduction in force." In this context, it refers to the District's laid-off probationary teachers.

the decision have notice and "*some* consideration of [their] views… and *some* access for communication of those views." (*El Centro, supra,* PERB Decision No. 232, adopting proposed dec. at pp. 15-16, emphasis added.) "Notice" is not meaningful when provided after the close of negotiations: "The essential ingredient to this process is the provision of notice and an opportunity for members to be heard *before* the collective bargaining agreement becomes final and binding." (*Oxnard, supra,* PERB Decision No. 681, p. 21.)[51]

Moreover, it would not subvert the policies underlying the duty of fair representation doctrine to impose liability for Duffy's failure to provide notice in the circumstances of this case. (*Robesky, supra,* 573 F.2d 1082, 1090) Disclosure would not have impaired the interests of other workers, except in the sense that probationary teachers would not have temporarily acquired greater seniority rights, which UTLA's membership ultimately rejected once the terms of the July Side Letter became public. However, because the representative is not required to bargain any particular benefit for certain unit members (*Los Rios (Baker), supra,* PERB Decision No. 877, p. 11), while laid-off probationary teachers may have benefitted by obtaining greater rights than previously existed under the collective bargaining agreement, this is not the kind of "interest" a labor board is authorized to protect. (*City of Pasadena, supra,*

[51] Our dissenting colleague's assertion that Duffy "considered and attempted to accommodate the interests of the substitute teachers when he negotiated the July Side Letter" is contradicted by the record. Duffy testified that concerns that laid-off teachers might get priority for substitute assignments was "never raised" at meetings of the BOD or HOR between March and June 2009. (R.T., Vol. XIX, p. 10.) Duffy was aware of a conversation occurring about this time and on this topic between Solkovits and Peters and Segal, though Duffy apparently heard about it only from Solkovits and admitted that he had no direct personal knowledge of it. (R.T., Vol. XIX, p. 11.)

The evidence cited by our colleague for her assertion that Duffy somehow considered the views of substitutes consists of the fact that, in sacrificing the seniority rights of substitutes, Duffy did not ***also*** give up the separate right of priority for substitutes who are requested by name. This right was not negotiated by Duffy in return for sacrificing seniority preference, as implied by our dissenting colleague, but was *an existing right* under the collective bargaining agreement. (C.P. Ex. 7, Art. XIX, § 5.3, subd. (c).)

PERB Order No. Ad-406-M, pp. 13-14; see also *H. K. Porter Co. v. NLRB* (1970) 397 U.S. 99, 106 (*H. K. Porter*).)

As noted above, timely disclosure of a tentative agreement would not have dissipated UTLA's bargaining strength or disrupted the flow of negotiations, since the "cone of silence" was intended only to prevent public posturing and gamesmanship during negotiations. Once the negotiators had come to terms, both sides could expect that the negotiators would not torpedo the tentative agreement (*Alhambra City and High School Districts* (1986) PERB Decision No. 560, p. 14; *Kern High School District* (1998) PERB Decision No. 1265, pp. 2-4) and neither side had any legitimate interest in the other's internal affairs, including how or whether the deal was presented to or ratified by the respective principals. (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 56; *NLRB v. Wooster Div. of Borg-Warner Corp.* (1958) 356 U.S. 342, 350.)

Nor would timely disclosure have entailed substantial costs or created undue burdens that would weaken UTLA's financial stability or impair its ability to function effectively as the collective bargaining agent. (See *IBEW v. Foust, supra,* 442 U.S. 42, 50-51; *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, 1274.) Throughout July 2009, when Duffy was secretly negotiating and finalizing the July Side Letter, UTLA was routinely communicating with bargaining unit members through phone, fax and e-mail blasts, informational flyers, and direct mail to both members and agency fee payers. It also published the *United Teacher* in both paper and electronic format. As the editor-in-chief of the *United Teacher*, and "the last approval point" for all matters appearing in publication, Duffy himself was aware of and approved many of these communications. (R.T., Vols. XIX, p. 6 [Duffy], and XVII, pp. 8-9, 39, 42 [Forrester].) On July 17, 2009, the lead article in the *United Teacher*

assured readers that, "Any agreement reached with LAUSD would be put to a vote of the membership and would not be implemented unless a majority approves it." According to the article, "[i]f a tentative agreement is reached with LAUSD to save jobs and stop class-size increases, details will be posted online, emailed, and mailed to members as soon as possible." (C.P. Ex. 38.)

It is difficult to imagine how timely disclosure of the July Side Letter would have imposed *any* additional costs or burdens on UTLA and, under the facts and circumstances of this case, certainly none were implicated that would be significant enough to affect the organization's ability to function effectively as the bargaining agent. Indeed, UTLA ultimately did inform substitutes of the July Side Letter on September 1, 2009, by mailing Duffy's letter to each substitute teacher, and by publishing the agreement on its website. (C.P. Ex. 3; R.T., Vol. XII, pp. 57-58 [Segal].) There was no evidence to suggest that taking the same or similar measures two months earlier, before the July Side Letter took effect, would have entailed significantly greater costs or otherwise been onerous to UTLA.

The only other justification offered by UTLA for Duffy's delayed disclosure to substitutes and their designated representatives was that UTLA's governing bodies "almost never convene" in the month of July, because "nobody is in town" during the summer break. (R.T., Vol. XV, p. 40 [Pechthalt].) Following federal authority, PERB has previously rejected this argument as a defense for a union's failure and refusal to meet and negotiate with the employer. (*Gonzales Union High School District* (1985) PERB Decision No. 480, adopting proposed dec. at pp. 38-40; see also *Solo Cup Co.* (1963) 142 NLRB 1290, 1295; *Exch. Parts Co.* (1962) 139 NLRB 710, 714.) While we do not hold that the exclusive representative's duty to meet and negotiate promptly with the employer is identical in every respect to its duty to represent employees fairly, the two are sufficiently similar to make the *Gonzales* decision analogous here. Like the duty to bargain, EERA imposes a statutory obligation for the bargaining agent to

represent all employees in the unit fairly and, like its duty to bargain, the union's duty of fair representation stems from its status as the organization certified or recognized as the exclusive representative of employees in an appropriate unit. Nothing in the language of section 3544.9 suggests that the representative may suspend its statutory duty to represent employees for months on end because its officials are out of town or on their summer break from teaching, and we can discern no sound policy reasons or special circumstances in this case for inferring such an exception to the union's obligation to represent employees. (See, e.g., *Parker v. Local 413, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America* (S.D. Ohio 1980) 501 F.Supp. 440, 448, affd. (6th Cir. 1981) 657 F.2d 269 [union official's travel plans did not excuse failure to give employees notice of ratification vote to adopt flexible work week schedule and forego overtime compensation].) We therefore affirm the ALJ's conclusion that UTLA breached its duty of fair representation by negotiating, performing and giving effect to the July Side Letter and thereby changing the contractual priority order for assigning substitute teaching work, without notice or some consideration of the views of substitute teachers affected by the agreement.[52]

3. Whether UTLA Violated its Own Policies.

The prohibition against arbitrary conduct announced in *Vaca v. Sipes* and clarified by *Robesky*, *Retana* and similar authorities may include an organization's irrational or unexplained deviation from its own policies or procedures on matters substantially affecting the employment relationship. (*Teamsters Local 282, supra*, 267 NLRB 1130, 1130-1131.) While PERB has no authority to prescribe the internal policies or procedures for how an employee organization will represent its members, when the organization itself has adopted

[52] Because we affirm the ALJ's finding of liability on the insufficient notice theory, we find it unnecessary to decide whether UTLA also violated its own internal rules by failing to subject the July Side Letter to a ratification vote, as alleged in the complaint.

such polices, they may provide the appropriate standard for assessing whether the organization has acted irrationally or arbitrarily in derogation of its duty of fair representation. (*Ibid*.; see also federal authorities discussed above.)

Charging Parties have not demonstrated any violation of UTLA's policies governing the authorization, negotiation or execution of side letters as those policies existed in July 2009. Testimony as to the definition of a side letter was notably vague, although Higuchi described it as an agreement designed to address a time-sensitive issue or problem that arises during the life of the collective bargaining agreement *without reopening the collective bargaining agreement*, and thus submitting the matter to a ratification vote of the membership, or going through the "time consuming" and "cumbersome" process of obtaining authorization or approval from UTLA's governing bodies. (R.T., Vol. XVI, pp. 19-21; see also Vols. XI, pp. 68-72 [Solkovits], and XIX, pp. 7-8, 41 [Duffy]; and C.P. Ex. 7, Art. XXXII, § 1.0.) The historical practice of former Assistant to the President Kressner was often invoked, but no specific examples were provided in which *contractually-guaranteed* rights were in fact *reopened* and modified to the detriment of a significant number of unit employees by a side letter. (R.T., Vols. XVI, pp. 34-36 [Higuchi], and XI, pp. 66-67 [Solkovits].)

Dreebin testified that UTLA's policy requires that ***all*** negotiations to ***change***, rather than ***apply***, existing contract language must include the chair of standing committees affected by the change(s), including the chair of the Substitute Committee when negotiations affect the rights of substitute teachers. (R.T., Vol. X, pp. 18, 58.) Dreebin's and Johnson's testimony suggested that Duffy's nondisclosure and use of the side letter procedure to "nullif[y] parts of the contract which have been voted upon by the entire membership" was not the intended purpose of a side letter or the appropriate use of this instrument. (R.T., Vols. X, p. 58, and XII, p. 38.)

We stress here the limits of our jurisdiction. We neither suggest nor seek to prescribe ratification or any other specific procedures for a duly-recognized representative to negotiate and modify collectively-bargained rights and obligations. (*El Centro, supra,* PERB Decision No. 232, proposed dec. at pp. 14-15; *Stationary Engineers, supra*, PERB Decision No. 2098, pp. 6-7.) Had UTLA followed the above-described protocol for negotiating and ratifying the July Side Letter by including the Substitute Committee chair in negotiations affecting substitutes' seniority rights, it would have been neither arbitrary nor irrational.[53] However, it is by no means certain that, even in that instance, Duffy's "cone of silence" would not have also encompassed the substitute committee chair or other substitute representatives present for such negotiations, and thereby precluded notice to substitute teachers of any resulting agreement, notwithstanding compliance with the provisions of UTLA's Policy Handbook. For these reasons, we conclude that we should await another day to consider whether and in what circumstances PERB should adjudicate allegations of arbitrary or irrational departure by an exclusive representative from its internal rules governing negotiation and ratification of agreements substantially affecting the employment relationship.

[53] Contrary to the assertion of our dissenting colleague, this decision neither creates a new "per se" rule in place of a case-by-case analysis for DFR liability nor second-guesses Duffy's assessment of what was rational under the circumstances. As explained above, PERB has long held that employees whose terms and conditions of employment are substantially affected by a collective bargaining agreement are entitled to notice and opportunity to be heard before the agreement is final. (*Oxnard, supra*, PERB Decision No. 681, p. 21.) The notice requirement is as old as the duty of fair representation itself. (*Steele v. Louisville & N.R. Co., supra*, 323 U.S. 192, 204; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, supra*, 323 U.S. 210, 212, 213-214.)

Guidelines on Damages

On remand we offer the following guidelines on the determination of damages, if any:

1. Charging Parties Must Prove the July Side Letter was the Proximate Cause of Any Damages to be Awarded.

A Board-ordered remedy is "designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act." (EERA, § 3541.5, subd. (c); *Santa Clara, supra,* PERB Decision No. 104, p. 26, citing *NLRB v. Rutter-Rex Mfg. Co., Inc.* (1969) 396 U.S. 258.) Uncertainty as to the *amount* of damages must be resolved against the party whose wrongful conduct caused the loss. (*City of Pasadena, supra*, PERB Order No. Ad-406-M, pp. 26-27.) A different rule applies, however, when there is uncertainty as to the *fact* of damages, *i.e*., whether *any* loss was caused by a wrongful act. (*Id*. at p. 14, citing *Ex-Cell-0 Corp.* (1970) 185 NLRB 107; *H. K. Porter, supra*, 397 U.S. 99, 106.) PERB does not presume damages on the part of employees, even where the representative has failed to adequately represent them. (*Amalgamated Transit Union, Local 1704 (Buck)* (2007) PERB Decision No. 1898-M, p. 16; *United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453, adopting proposed dec. at p. 56.)

In cases involving roughly analogous facts, *i.e.*, a material misrepresentation or omission by union agents about collective bargaining matters being negotiated, adversely affected employees are only entitled to an award of back pay or other damages where they can show that the union's breach was the actual or proximate cause of their injuries. (*Santa Ana, supra*, PERB Decision No. 2087, p. 19; *California State Employees' Association (O'Connell)* (1986) PERB Decision No. 596-H (*CSEA*), pp. 3-4; *Anderson v. United Paperworkers Intern. Union, AFL-CIO* (8th Cir. 1981) 641 F.2d 574, 577-578; *St. Clair v. Local Union No. 515 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America* (6th Cir. 1969) 422 F.2d 128, 132; *Deboles v. Trans World Airlines, Inc*. (3d. Cir. 1977) 552 F.2d 1005, 1018-1020, cert.

denied (1977) 434 U.S. 837; *Retana, supra,* 453 F.2d 1018.) As one federal court has explained, employees alleging that a union's misrepresentation or omission of material facts about negotiations violated the duty of fair representation must show that: (a) absent the material misrepresentations or omissions, the outcome of the ratification vote would have been different; *and,* that (b) had the membership rejected the tentative agreement, the employer would have agreed to the union's demands to negotiate different terms more favorable to the complaining employees. (*Ackley v. Western Conference of Teamsters* (9th Cir. 1992) 958 F.2d 1463, 1472; see also *CSEA, supra,* PERB Decision No. 596-H, pp. 3-4.)

Charging Parties must show through competent evidence that the July Side Letter was the proximate cause of any losses suffered. Under the terms of the July Side Letter, personal requests continued to have priority over random calls assigned through SubFinder. To prove up their losses, Charging Parties must therefore show that assignments were awarded based on the altered seniority order under the July Side Letter rather than by personal request.

2. <u>UTLA May Not be Held Responsible for any Loss Caused by the District's Failure or Delay in Rescinding the July Side Letter</u>.

As a general principle, liability is to be apportioned between the employer and the exclusive representative according to damages caused by the fault of each. (*Vaca v. Sipes, supra,* 386 U.S. 171, 197-198; see also *San Ramon Valley Unified School District* (1989) PERB Decision No. 751 (*San Ramon*), pp. 7, 10-12; and *Westminster School District* (1982) PERB Decision No. 277, pp. 19-20.) An employer may not hide behind the union's breach of its duty of fair representation as a way to reduce or eliminate liability for its own wrongful act. (*Vaca v. Sipes, supra,* at p. 197.) The Board may, either on the motion of a party or on its own motion, order that an employer or exclusive representative be joined as a party to a case where necessary to afford complete relief or to prevent substantial risk of inconsistent judgments. (PERB Reg. 32164, subd. (d).) However, the agency may not create a statutory obligation and assign

liability or award damages where the Legislature has not authorized it to do so. (*San Ramon, supra,* at pp. 7, 10-12; *Ventura Unified School District* (1989) PERB Decision No. 757, pp. 3-5.)

Several Charging Parties testified that they continued to experience problems getting calls, even after the July Side Letter was rescinded and their seniority rights were restored in the District's SubFinder System in November 2009. Segal testified that he learned from conversations with Echols, in the course of rescinding the July Side Letter and restoring the previous seniority order of career substitutes, that the District's substitute unit discovered "there were a lot of other substitute teachers who were not in the correct seniority order" and "they told us it took them until sometime in May [2010] before they finally had all the substitute teachers in their correct seniority order, which then affects how many days you work and whether you worked enough days to get your health benefits." (R.T., Vol. XII, pp. 72-73, 101.)

This issue was not before the ALJ and, on the record before us, ULTA cannot be held responsible for damages allegedly incurred *after* the SubFinder system was reprogrammed in November 2009. The evidence suggests that to the extent there were any errors or delays in correcting the seniority order of substitute teachers, they were not within the control of UTLA. Because unfair practice charges are filed and processed according to whether the respondent is an employer or an employee organization, any such errors or omissions by the District would need to be the subject of a separate unfair practice charge filed against the District. (See, e.g., *San Ramon, supra,* PERB Decision No. 751, pp. 9-12 and *Washington Unified School District* (1985) PERB Decision No. 549, pp. 4-7.)

3. <u>Charging Parties' Damages, if Any, Do Not Include Reimbursement of Membership Dues or Agency Fees Paid to UTLA</u>.

Charging Parties have also requested reimbursement of membership dues and/or agency fees, presumably because UTLA did not fulfill its duty of fair representation. We regard this remedy as duplicative and/or excessive. Charging Parties commenced this action to be made

whole as a result of an alleged breach of UTLA's duty of fair representation. They should not be permitted to *both* demand recovery of wages or benefits allegedly lost as a result of that breach *and* simultaneously be excused from contributing the dues or agency fees that permit UTLA to continue functioning as their exclusive representative. The underlying purpose of Board-ordered remedies is, as near as possible, to place the injured parties in the position they were in before the wrongful conduct occurred. (*City of Pasadena, supra,* PERB Order No. Ad-406-M, pp. 13-14.) To make employees whole for damages caused by a breach of their representative's duty of fair representation and order their dues or agency fees refunded would be excessive, in that it would place them in a financially *better* position than they occupied before the breach occurred. (*Santa Clara, supra,* PERB Decision No. 104, p. 26.)

ORDER

The dismissal of unfair practice charges filed by Victoria Garcia-Murphy, Juana Gramblin, Valerie Vines, Jessie Gayer, and Leslie Druss is hereby REVERSED.

The unfair practice charges filed by Henry Parke, Stephanie Parke and Jill Balogh are DISMISSED as untimely.

Upon the foregoing findings of facts and conclusions of law, and the entire record in the ease, it is found that United Teachers Los Angeles (UTLA) violated the Educational Employment Relations Act (EERA), Government Code section 3544.9, by failing to provide Charging Parties with notice and meaningful opportunity to communicate their views on a side letter agreement (July Side Letter) which altered Charging Parties' seniority rights or other matters substantially affecting the employment relationship. It is hereby ORDERED that this matter be remanded to the Office of the General Counsel for compliance proceedings to determine the amount(s) of damages, if any, suffered by Charging Parties as a result of the altered seniority rules set forth in the July Side Letter.

UTLA and its representatives shall:

A. CEASE AND DESIST FROM:

Failing to provide bargaining unit members with notice and meaningful opportunity to communicate their views on negotiations affecting seniority rules or other matters substantially impacting their employment relationship before entering into collective bargaining agreements to alter such matters.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICES OF EERA:

1. Within 10 workdays of service of a final decision in this matter, post at all work locations where notices to bargaining unit members customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of UTLA, indicating that UTLA will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by UTLA to communicate with employees represented by UTLA.

2. Written notification of the actions taken to comply with this Order shall be made to the Office of the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. UTLA shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Charging Parties and/or their designated representatives.

Member Huguenin joined in this Decision.

Member Winslow’s concurrence and dissent begins on page 96.

WINSLOW, Member, concurring and dissenting: While I agree with the majority's conclusion that the substantive terms of the July Side Letter do not violate the duty of fair representation, I respectfully disagree with its conclusion that United Teachers Los Angeles (UTLA) nevertheless violated its duty of fair representation by failing to inform employees of the terms of the July Side Letter for approximately six weeks after it was executed and by allegedly failing to solicit the substitutes' views regarding negotiations that culminated in the July Side Letter.

The complaint in this case describes three distinct acts UTLA was alleged to have committed: 1) negotiating an agreement that had a substantial negative impact on the Los Angeles Unified School District (District)-substitute teacher relationship; 2) conducting those negotiations in secret and not allowing for consultation with or input from the affected employees; and 3) by doing so, failing to comply with its own internal rules. With respect to each of these allegations, UTLA's conduct must be arbitrary, discriminatory, or in bad faith before liability for a breach of the duty of fair representation attaches. (*Barstow College Faculty Association (Cauble)* (2012) PERB Decision No. 2256, [adopting dismissal letter, p. 3] [*Barstow*].) To hold otherwise risks creating a per se rule in place of the case-by-case, fact-based analysis that has characterized the treatment of duty-of-fair-representation cases since the early days of the Public Employment Relations Board (PERB).

While hindsight shows that UTLA's President A.J. Duffy (Duffy) made an unpopular decision in entering into the July Side Letter agreement, the evidence shows his decision to keep the terms of the agreement secret until negotiations aimed at bringing back the laid-off probationary teachers either succeeded or failed was not "without a rational basis or devoid of honest judgment." (*Inland Boatmans Union of the Pacific* (2012) PERB Decision No. 2297, p. 6;

Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.) The evidence also shows that Duffy considered and attempted to accommodate the interests of the substitute teachers when he negotiated the July Side Letter. For example, in negotiations with the District, Duffy insisted that any substitute teachers requested by name would have priority over laid-off probationary teachers.

The evidence also demonstrates that the substitute teachers had several opportunities to make their opinions known on the issue of their seniority rights and the potential compromise of those rights. Greg Solkovitz (Solkovitz), a UTLA secondary vice president and point person for substitute issues, testified that he was aware through his discussions with Leonard Segal, the substitute committee co-chair, that substitute teachers were concerned that the laid-off probationary teachers would receive some sort of priority in substitute assignments. Solkovitz conveyed these concerns at UTLA officers' and managers' meetings at least a couple of times between March and June, 2009, before the July Side Letter was negotiated. Thus, it cannot be said that Duffy, who routinely attended these meetings, was unaware of the substitutes' concerns or that he failed to give any consideration to those concerns.

Nor can it be concluded that the delay in informing unit members of the terms of the July Side Letter was arbitrary, discriminatory or in bad faith. Duffy's explanation for why there was a "cone of silence" over the negotiations regarding the July Side Letter was reasonable. He said: "there is an understanding between the parties . . . that the information that is shared *and the agreements that are come to* are kept secret until the final agreement is signed as a tentative agreement, at which time it is given to the governing bodies, and if appropriate, the membership." (Reporters Transcript [RT], Vol. XIX, p. 51; emphasis added.) UTLA and the District were negotiating throughout the summer of 2009, not only about seniority and recall

rights, but about whether all of the laid-off probationary teachers could be returned to their jobs. Obviously, if the entire reduction-in-force could be rescinded, there would be no need for the July Side Letter. As Duffy explained in his testimony:

> We were still in full negotiations about the remaining RIF teachers. And we were trying to figure out a way to bring back all the teachers, so we waited on this item [the July Side Letter] until we were done with the complete negotiations. When it became clear at the end of the summer that the negotiations had collapsed and we would not be able to bring back the remaining eight or nine hundred teachers that we would lose, then we made it clear about this agreement.

[RT, Vol. XIX, p. 51.] This is a rational explanation for why Duffy did not publicize the July Side Letter before September 1. It is not for this Board to second-guess this assessment, especially where the delay in notification did not cause employees any economic harm. The harm caused to employees was from the substantive terms of the July Side Letter, which we all agree does not breach the duty of fair representation.

I read the holdings of *El Centro Elementary Teachers Association (Willis and Willis)* (1982) PERB Decision No. 232 (*El Centro*) and *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 681 (*Oxnard*) differently than the majority and do not believe that these cases compel the majority's conclusion. Those cases dealt with contract ratification and the negotiation process, respectively. *El Centro* held that the exclusive representative did not violate its duty of fair representation by forbidding non-members to vote on contract proposals or on contract ratification, "provided some consideration of the views of various groups of employees and some access for communication of those views is still provided" by the exclusive representative. (*El Centro*, proposed dec., p. 16.) That access was

provided through meetings of the exclusive representative that were open to all bargaining unit members.

Oxnard, *supra*, PERB Decision No. 681, presented a slightly different issue: "does the union's failure to provide notice of, and information on, a heretofore unknown bargaining proposal before the close of negotiations constitute a breach of the duty of fair representation?" (*Id.* at p. 19.) The Board noted that while members' opinions about proposals will carry greater weight if heard before the close of negotiations, "[i]t cannot be said however, that the Association must consult its members every time there is a proposal and/or counterproposal made that differs from previously communicated proposals during the course of negotiations. To place such a restriction on the Association would create unnecessary interference with the fluidity of the give and take that constitute negotiations." (*Id*. at p. 21.) Because there was a ratification process in *Oxnard*, the Board determined that such a procedure served as a check on errant provisions with which the majority of bargaining unit members does not agree.

Neither *Oxnard*, *supra*, PERB Decision No. 681 nor *El Centro*, *supra*, PERB Decision No. 232 address the issue presented in this case, viz., whether in the absence of union rules requiring ratification of side letters, the exclusive representative violates the duty of fair representation when it agrees to a side letter without notifying and seeking the approval from unit members. Although we can agree that best practice dictates that unions seek consent of employees before entering into binding agreements with the employer, UTLA's failure to do so in this case does not rise to arbitrary, capricious, discriminatory or bad faith conduct.

In so concluding, I am persuaded by *White v. White Rose Food* (2nd Cir. 2001) 237 F.3d 174. [*White Rose*]. In that case union members challenged an amendment to a settlement agreement their union reached with the employer concerning severance pay after a plant

closing. The amended agreement, concluded without prior consultation or approval from members, provided that payroll taxes be taken out of the lump sum allocated for severance pay, while the original agreement was silent on how payroll taxes would be allocated. Thus, the amended agreement removed any ambiguity about who was responsible for payroll taxes.

The Court of Appeal first determined that the substance of the amended agreement was not arbitrary. It then considered whether the district court erred in finding that the union leadership acted in bad faith by not seeking member ratification of the amended agreement and by not providing the members with notice and an opportunity to be heard regarding the amendment.[1] The ratification issue was quickly dispatched—federal law does not require rank-and-file ratification of employer-union agreements in the absence of internal union rules providing for ratification. (*International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 310 v. NLRB* (D.C. Cir. 1978) 587 F.2d 1176, 1182 [*International Brotherhood of Teamsters, Local 310*].) As to the notice and opportunity to be heard, the Court said:

> Having found (i) that the leadership acted reasonably in negotiating and executing the Amendment, and (ii) that the leadership had no duty to seek rank-and-file ratification of the Amendment, we are strongly disinclined to view the leadership's failure to provide such notice and opportunity to be heard as evidence of the leadership's intent to deceive or defraud the members. To be sure, where a union has a duty to secure rank-and-file ratification of an agreement, the union also has a duty to explain the agreement to the rank-and-file. [Citations omitted.] Where . . . [a] ratification requirement is lacking . . . the union has no duty to inform the members of the agreement. Hence, in such circumstances, the mere failure to provide notice and an

[1] This issue was squarely before the Court of Appeal. See *White Rose, supra*, 237 F.3d at p. 182. There is therefore no basis for the majority to characterize the portion discussed herein as dicta.

> opportunity to be heard regarding the agreement, without more, does not amount to bad faith.

(*White Rose*, *supra*, 237 F.3d at p. 183.)

As the majority opinion in this case acknowledges, PERB's case law does not mandate ratification votes or other formal procedures when an exclusive representative bargains a modification in terms and conditions of employment. Like federal law, there is no duty established by our case law requiring the exclusive representative to submit any agreements to a ratification vote. Of course, when a union does submit negotiated tentative agreements to a ratification vote, our case law requires that non-members and members alike have some opportunity for input. (*El Centro*, *supra*, PERB Decision No. 232.) But where no ratification vote or other procedure is prescribed by the union's by-laws or other policies and practices, I agree with *White Rose*, *supra*, 237 F.3d 174 that the mere failure to provide employees with notice and an opportunity to be heard, without more, does not violate the duty of fair representation. The union's conduct must be judged on a case-by-case basis in which it must be determined that the union's conduct was arbitrary, discriminatory, or undertaken in bad faith. (*Barstow*, *supra*, PERB Decision No. 2256.)

The facts in this case do not demonstrate arbitrary, bad faith, or discriminatory conduct. First, there was no by-law, policy or practice that dictated what subjects are appropriate for inclusion in a side letter, as opposed to re-opener or successor negotiations. As former UTLA president, Day Higuchi (Higuchi) testified, a side letter was an agreement designed to address time-sensitive issues arising during the term of a collective bargaining agreement without re-opening the contract. From UTLA's viewpoint, using a side letter was advantageous because it foreclosed the possibility that the District could bring up unrelated matters for re-negotiation.

(RT, Vol. XVI, pp. 20-21.) UTLA officers, including its president, were authorized to enter into side letters with the District.

Second, according to uncontradicted testimony, prior authorization from UTLA's Board of Directors (BOD) or their House of Representatives (HOR) was not required for side letters, and they were not subject to member ratification. It was understood by Higuchi and Solkovitz that various internal UTLA resolutions, such as the requirement that committee chairs be involved in negotiations over their subject areas, did not apply to side letters. The same was true for a requirement that the BOD and HOR receive written reports regarding negotiations. Solkovitz testified that this requirement did not apply to side letters. In sum, both Solkovitz and Joshua Pechthalt, another vice president of UTLA, testified without contradiction that no UTLA policy prohibited an officer from entering into a side letter agreement with the District without first seeking authorization from the officers or HOR, and there was no requirement for membership ratification for side letters.[2]

Given that UTLA's by-laws or policies do not require that side letters be ratified, that the UTLA president was authorized to enter into agreements without consultation with the BOD or HOR, and that there were no clear guidelines on what subject should or should not be encompassed by a side letter agreement, it is clear that UTLA did not violate its internal rules or policies when Duffy negotiated the July Side Letter without obtaining prior or subsequent approval from UTLA's governing bodies and without obtaining member ratification.

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[2] The majority opinion cites the testimony of Johnson, characterizing his testimony as a contrary view to Solkovitz and Pechthalt regarding whether previous authorization and or ratification was required for a side letter. However, Johnson's testimony is better characterized as his personal incredulity that the July Side Letter had occurred, and whether such an agreement was legal under the Educational Employment Relations Act. His testimony does not offer a counter-weight to the others' because he did not say that UTLA policy required ratification of side letters.

Nor do the facts of this case demonstrate that the acts or omissions in question—alleged failure to consult with affected unit members prior to agreeing to the July Side Letter and failing to promptly notify the membership of the July Side Letter—amount to arbitrary, discriminatory or bad faith conduct. At most, it could be described as poor judgment, an assessment that was borne out by the relatively swift rebuke the membership delivered by demanding the July Side Letter be revoked when the HOR met in October 2009. A breach of the duty of fair representation will not be found where the exclusive representative is guilty of "mere negligence or poor judgment." (*California State Employees Assn. (O'Connell)* (1989) PERB Decision No. 726-H, p. 8, quoting *Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO (Scates and Pitts)* (1983) PERB Decision No. 341.) Moreover, a settlement is not irrational or arbitrary simply because it turns out in retrospect to have been a bad settlement. (*Air Line Pilots Ass'n. v. O'Neill* (1991) 499 U.S. 65, 79.)

The majority cites to several private sector cases, including *NLRB v. Teamsters, Local 282* (1983) 267 NLRB 1130 [Teamsters Local 282], *Local 417, UAW* (1980) 245 NLRB 527, etc., for the proposition that the exclusive representative cannot "purposely or recklessly keep employees uninformed or misinformed as to matters affecting their employment." (See Decision, p. 76.) Few could disagree with such a general clarion call for good union practice and governance. However, I do not find that the cases on which the majority relies for this statement are apposite to the facts of this case. Each of the cases cited by the majority involve situations in which the union's actions have concealed or misrepresented information that resulted in employees acting (or failing to act) to their detriment. In this way, these cases are

distinguishable from *White Rose*, *supra*, 237 F.3d 174 and why I therefore consider *White Rose* more persuasive authority.

In *Teamsters, Local 282*, *supra*, 267 NLRB 1130, the union failed to inform employees of an arbitrator's ruling that effectively changed the rules on how often employees needed to report for service in order to preserve their seniority and recall rights. As a result of the union's failure to notify employees of the changed rule, they were unable to take the necessary action to save their jobs. As the National Labor Relations Board (NLRB) concluded:

> [W]e find that Respondent [union] was under an affirmative obligation to inform those employees when it learned that [previously conveyed] information was no longer valid so that they could take actions to protect their interests.

(*Id.* at p. 1131.)

In *Local 417, UAW* , *supra*, 245 NLRB 527, the union refused to process an employee's grievance for invidious reasons and lied to her about its status. Relying on the union's false assurances that her grievance was to be arbitrated, the employee refrained from contacting another union official who ultimately arranged for her reinstatement, although without back pay.

Robesky v. Qantas Empire Airways Ltd. (9th Cir. 1978) 573 F.2d 1082, is of no applicability to this case either. There, the union breached its duty by failing to inform a grievant that her grievance would not be taken to arbitration. Not knowing this, the employee rejected the employer's offer of settlement which would have reinstated her to her job. The court held that the union's deliberate (as opposed to negligent) decision not to inform the grievant that her case would not be arbitrated was without rational basis and extremely prejudicial to the employee. Thus, the union's conduct breached its duty of fair representation.

In *International Brotherhood of Teamsters, Local 310 v. NLRB, supra*, 587 F.2d 1176, the union's failure to notify a group of bargaining unit members of a strike settlement precluded those employees from ceasing their strike activity and subjected them to termination for breaching the settlement agreement.

International Union of Electrical, Radio and Machine Workers, AFL-CIO, Frigidaire Local 801 v. NLRB (D.C. Cir. 1962) 307 F.2d 679 stands for the proposition that a union has a duty to inform non-members of the union security provisions of the collective bargaining agreement so the employees can take all necessary steps to protect their jobs.

In *NLRB v. American Postal Workers Union, St., Louis, Missouri Local AFL-CIO* (8th Cir. 1980) 618 F.2d 1249, a union official arbitrarily revoked permission for an employee's shift change. The revocation was based on the official's personal and capricious interpretation of a union policy, and was done without notifying the employee or investigating the circumstances under which her request had been previously approved. The court held that the union violated its duty of fair representation because of the official's "impulsive and fanciful" interpretation of an internal rule. Alternatively, the court found a violation in the union's failure to communicate with the employee and taking action without investigation.

Likewise, in *Teamsters Warehouse Union, Local 860* (1978) 236 NLRB 844, the union breached its duty of fair representation when it failed to inform the clerical workers in the bargaining unit that the employer intended to close the clerical operations if the union persisted in the wage demands on their behalf. The NLRB reasoned that if the workers had been informed of the employer's threats, they would have adjusted their wage demands in order to avoid layoff. Here, by contrast, UTLA did not fail to communicate critical information to its

constituents that caused them to persist in a position that was ultimately detrimental to their interests.

In *Teamsters Local 435 (Super Valu, Inc.)* (1995) 317 NLRB 617, the union negotiated an end-tailing seniority arrangement that measured seniority by time spent as a union member. There was evidence that this was done in retaliation toward the group of employees who were end-tailed because they had previously voted against representation by the Teamsters. Compounding this arbitrary and bad faith decision was the union's false representation to the end-tailed group that they did not need to participate in the negotiation of this agreement because it did not concern them.

Branch 6000, National Association of Letter Carriers v. NLRB (D.C. Cir. 1979) 595 F.2d 808, stands for the principle that a union must take into consideration the wishes and interests of non-members. In that case, the union was deemed to have violated the duty of fair representation by permitting a poll of only members on the issue of preferences for rotating days off. This was an abdication of the union's representative function because it allowed the personal preferences of members to determine the days off, without consideration of the non-members' wishes. That case is analogous to *El Centro*, *supra*, PERB Decision No. 232 and is inapplicable to the instant controversy where members' personal preferences did not dictate the substantive terms of the July Side Letter.

Local 324, Operating Engineers (1976) 226 NLRB 587 held that the duty of fair representation encompasses a duty to provide employees information regarding the hiring hall list so that the employees can investigate whether their referral rights were protected.

The lesson from these cases is that a union will be liable for a breach of the duty of fair representation when it arbitrarily or in bad faith conceals information from unit members and

when that concealment detrimentally affects an employee's economic interest. Unions must provide requested information to allow employees to investigate whether their contract rights are being enforced (*Local 324*, *supra*, 226 NLRB 587), a principle not applicable in this case.

Here, UTLA's negotiations under a "cone of silence" and the six-week delay in informing its members of the terms of the July Side Letter did not cause them to take action or refrain from taking action required by the employer which in turn caused them to lose any employment-related benefit.[3] And unlike the cases discussed above, Duffy's reasons for not disclosing the terms until September 1 were not capricious, arbitrary, or motivated by bad faith.

In sum, the Charging Parties have not established the necessary elements to support a conclusion that UTLA has violated its duty of fair representation. As we agree, the substance of the July Side Letter is well within the broad discretion the law permits to labor unions in negotiating terms and conditions of employment. As for the remaining aspects of the complaint against UTLA—that the side letter was negotiated in secret, did not allow for consultation with or input from substitute teachers and was inconsistent with internal union rules—it must be determined whether such conduct was arbitrary, capricious or done in bad faith.

As explained earlier in this dissent, Charging Parties, in my view, have failed to establish these necessary elements. The evidence shows that the substitutes' point of view was communicated to UTLA's board of directors, including Duffy; that he represented their interests, albeit not to their satisfaction, by assuring that the July Side Letter permitted the

[3] Arguably, it was the substantive terms of the July Side Letter itself that caused economic harm, and we conclude that the substantive terms of that agreement have not violated the duty of fair representation.

substitutes requested by name to maintain their assignment priority over the laid-off probationary teachers.

With respect to not revealing the terms of the July Side Letter until September 1, Duffy's explanation for that decision passes a reasonableness test. While hindsight arguably shows that Duffy made a significant miscalculation concerning the wishes of employees, we cannot use the subsequent revolt against the July Side Letter by the HOR to "prove" that Duffy's judgment, exercised a few months earlier, amounted to arbitrary, capricious or bad faith conduct. (*White Rose*, *supra*, 237 F.3d at p. 179.) There was no evidence that he harbored improper or irrational personal motives, or that he viewed the substitutes with contempt, or that he sought to bestow favor on the probationary teachers for an irrational or capricious reason, or that he kept the July Side Letter secret for six weeks for any invidious reason. No evidence contradicts his own explanation as to why he did not divulge the content of the July Side Letter until the entire negotiations concerning the 2009 layoff collapsed, and that explanation was reasonable. Nor have the Charging Parties established that UTLA's by-laws, practices and procedures were violated by Duffy using the July Side Letter to make changes in recall order, or that he was not authorized to enter into such an agreement.

Nor has it been established that the delay in revealing the July Side Letter and the failure to seek employee approval of it has been the cause of the economic harm to the Charging Parties. An element in a duty of fair representation claim is that there is a causal connection between the union's wrongful conduct and the employees' injuries. (*Spellacy v. Airline Pilots Assn.—Int'l.* (2d Cir. 1998) 156 F.3d 120, 126.) Charging Parties have simply not proven that element, in my view.

I fear that the impact of the majority's decision is that hereafter, all negotiated agreements between the union and management—from mid-term changes, to side letters, to grievance settlements—will be subject to potential duty-of-fair-representation charges if the exclusive representative fails to engage in some "procedures" (whether formal or informal) used for communicating proposals and receiving input from unit members. This is not what is required by our precedent and it will unduly burden a process predicated on a fluidity of give-and-take between labor and management.

Procedural Issues

While I appreciate the majority's thoughtful treatment of the several difficult procedural issues presented by this case, most notably, the administrative law judge's refusal to determine who is a party and his failure to properly notify individuals of hearing dates, etc., I nevertheless dissent from the majority's determination to apply the relation back doctrine in order to waive the six-month statute of limitations for individuals who did not file an unfair practice charge before the statute of limitations ran on March 1, 2010. The complaint issued on January 21, 2010, approximately five weeks before the statute of limitations ran. By that time, there were 150 original charging parties that identified Raines as "the person filing the charge." This number grew to 175 by the time the administrative hearing ended. As noted in the majority opinion, 26 other substitute teachers filed identical charges after October 22, 2009, the date the initial unfair practice charge was filed. It is unclear how many of these 26 charges were filed after the complaint issued but before the six-month statute of limitations ran, but clearly, some were filed after March 1, 2010.

Government Code section 3544.5, subdivision (a) is clear in its interdiction against PERB issuing complaints based on an alleged unfair practice occurring more than six months

prior to the filing of the charge. Exceptions to this rule have been established by statutory tolling found in subdivision (a)(2) of Government Code section 3541.5, by the doctrine of equitable tolling (*Long Beach Community College District* (2009) PERB Decision No. 2002, p. 13-14, overruled in part on other grounds by *Los Angeles Unified School District* (2014) PERB Decision No. 2359). The relation back doctrine has also been applied by PERB to permit amendments to unfair practice complaints made after the statute of limitations has expired, but this doctrine has been applied in limited circumstances, i.e. when the amendment seeks to clarify facts that were alleged within six months of the complained-of conduct, and/or to add a new legal theory based on facts alleged within the statute of limitations. (*City of Escondido* (2013) PERB Decision No. 2311-M, p. 6.)

The majority would expand the relation back doctrine to permit new charging parties to be added to the case even though those particular parties have not filed a timely charge. This situation is different from *City of Escondido*, *supra*, PERB Decision No. 2311-M and the cases cited in that decision where the charging party has filed a timely charge and simply seeks to amend it outside the limitations period in order to clarify facts or add a new legal theory based on the timely alleged facts in the original charge. I understand that in this case not all charging parties were represented by Raines or the attorney she eventually retained, and that fact may have precluded her or those seeking to join the case from amending the complaint to add new parties. But that fact does not excuse any proposed charging party from the requirement that an unfair practice charge be filed within six months of the alleged unlawful conduct. Indeed, in this case, more than 150 individuals did file their charges before the statute of limitations expired, including several who filed after the complaint issued but before the statute ran. As to those individuals, I agree with the majority that they should be considered parties to this case.

But I see no reason in law or equity to include as parties those individuals who filed charges after March 1, 2010. There is no evidence that would excuse their late filing, such as misrepresentation by a Board agent that would lull them into sleeping on their rights. I disagree that these employees should be included in the case as parties simply because they presumably have identical claims as those who timely filed charges and therefore UTLA would not be prejudiced by their inclusion. UTLA is indeed prejudiced by their inclusion because its potential financial liability increases with each additional charging party. More importantly, in determining whether to carve an additional exception to the statute of limitations, the focus should be on why the late filer should be allowed in the case based on equity and fairness. Exception to the rule should not be based only on the assumption that the respondent will not be harmed.

I do not read California case law on relation back as does the majority. When plaintiffs have been added to a case after the statute of limitations expired, it was in limited circumstances, e.g., to join a party essential to a complete determination of the original cause of action, or to correct technical defects in the plaintiff's status. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleadings, § 1224.) In this case, the employees who filed their unfair practice charges after the statute of limitation expired are not necessary parties, their addition is not essential to a complete determination of the original unfair practice charge, or necessary to correct a technical defect. Nor is their participation necessary to correct for a lack of standing on the part of any of the more than 150 charging parties who are legitimate parties. In the absence of evidence justifying an excuse for the late filing, there is no reason to allow their participation in this case.

I do not find that *Citizens Association for Sensible Development of Bishop Area v. City of Inyo* (1985) 172 Cal.App.3d 151 nor *Klopstock v. Superior Court in & for City & County of San Francisco* (1941) 17 Cal.2d 13 compels a different conclusion. The newly added plaintiff in *Citizens Association* was not seeking new damages above and beyond what was requested by the original plaintiffs. *Klopstock* was a derivative action on behalf of a corporation. The court permitted the complaint to be amended to substitute as a proper plaintiff the administratrix of the estate of a deceased shareholder. There was no increase in liability as a result of the additional substituted plaintiff.

Both *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717 and *Mayo v. White* (1986) 178 Cal.App.3d 1038 permitted the addition or substitution of plaintiffs after the statute of limitations had run, but the addition did not potentially increase the defendants' liability.[4]

Because the addition of an unstated number of charging parties to this case will potentially increase liability to UTLA, and in the absence of any justification to permit their late entry into the case, I disagree that the relation back doctrine justifies their inclusion as parties.

[4] In *Jensen*, *supra*, 48 Cal.App.3d 717 the original plaintiff, a condominium association, was held in an unrelated action not to have standing to recover in negligent construction causes of action. The permitted amendment simply substituted the association with two members of the association who did have standing. *Mayo v. White*, *supra*, 178 Cal.App.3d 1038 involved a similar principle—amendment of the complaint was permitted to correct a technical pleading defect, i.e., naming heirs in an action brought by the decedent's estate's administrator.

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-CO-1394-E, *Kennon B. Raines et al. v. United Teachers of Los Angeles*, the Public Employment Relations Board has determined that United Teachers of Los Angeles (UTLA) violated the Educational Employment Relations Act (EERA), Government Code section 3544.9, by failing to provide Charging Parties notice and meaningful opportunity to communicate their views on a side letter agreement (July Side Letter) which altered Charging Parties' seniority rights and substantially affected their employment relationship.

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

CEASE AND DESIST FROM:

Failing to provide bargaining unit members notice and meaningful opportunity to communicate their views on seniority rules or other matters substantially affecting the employment relationship before entering into collective bargaining agreements to alter such matters.

Dated: _____ UNITED TEACHERS OF LOS ANGELES

By: _____
Authorized Agent

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