VERMONT LABOR RELATIONS BOARD

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF RUTLAND and CITY OF RUTLAND SCHOOL DISTRICT	)	
v.	)	DOCKET NO. 79-60R
RUTLAND EDUCATION ASSOCIATION, VERMONT EDUCATION ASSOCIATION, MARTHA TOMSUDEN, GRACE WHITNEY, ANDREA FREUND and THOMAS CARPENTER	)	
and		
RUTLAND EDUCATION ASSOCIATION, and VERMONT EDUCATION ASSOCIATION	)	
v.	)	DOCKET NO. 79-61R
RUTLAND CITY SCHOOL DISTRICT	)	

FINDINGS OF FACT, OPINION AND ORDER*, **

Statement of the Case

I. Docket No. 79-60R

On August 31, 1979, the Board of School Commissioners of the City of Rutland and the City of Rutland School District filed an unfair labor practice charge with the Vermont Labor Relations Board alleging the Rutland Education Association, et al engaged in the following proscribed activities:

1) Refusal to bargain collectively in good faith with a municipal employer as provided in 21 V.S.A. §1726(b)(4);

2) The engagement in, or inducement and encouragement of

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* Findings of Fact, Opinion and Order are printed in this volume as amended by the Board's Order, dated January 10, 1980.

** The opinion of the Honorable Thomas L. Hayes on this same matter holding that teachers were free to strike, and dissolving the teachers injunction may be found at the Rutland Superior Court, under Docket No. S371-79Rc.

persons to engage in a strike and a refusal to perform teaching services as provided in 21 VSA §1726(b)(5); and

3) Picketing, causing to be picketed or threatening picketing of the employer with the object of forcing or requiring the employer to bargain with the employees or their representatives as provided in 21 VSA §1726(b)(8).

That same day, after investigating the charges, the Labor Relations Board (hereinafter "Board") issued a complaint and notice of hearing for September 20, 1979.

Respondent filed an answer to the charges on September 17, 1979, and a pre-hearing brief on September 20, 1979.

On September 20, 1979, a hearing on this matter was held before Board members Kimberly B. Cheney, William G. Kemsley, Sr., and Robert H. Brown. The Complainant was represented by John J. Zawistoski, Esquire. Gary H. Barnes, Esquire represented the Respondent. At the hearing, Ms. Andrea Freund was dropped as a named party to the School District's complaint.

Requested findings of fact and conclusions of law were filed by the Respondent and Complainant on October 5, 1979, and October 9, 1979, respectively. Reply memoranda were filed by the Respondent on October 16, 1979, and by the Complainant on October 22, 1979.

II. Docket No. 79-61R

Also filed with the Board on August 31, 1979, was an unfair labor practice charge submitted by the Rutland Education Association and the Vermont Education Association. The charge alleged the Rutland City School District had violated 21 VSA §1726(a)(1), (3), and (5) by: 1) refusing to bargain in good faith; 2) interferring, restraining or coercing

employees in the exercise of their protected rights by paying substitute teachers more than three times the customary amount; and 3) discriminating with regards to conditions of employment with the intent of discouraging membership and participation in the Rutland Education Association.

Taking the verified allegations contained in the charge to be true, on September 5, 1979, the Board issued a complaint and notice of hearing to be held September 20, 1979.

The charge was later amended by the Complainant on September 17, 1979, and answered by the Respondent on September 18, 1979.

The hearing on this matter, as well, was held on September 20, 1979, before all members of the Board. At this time, the Complainant filed a pre-hearing brief. For the purposes of hearing evidence and making findings of fact, the Board requested the consolidation of the above-captioned cases. The parties voiced no objections. Accordingly, the findings of fact which follow pertain to Docket Nos. 79-60R and 79-61R.

Requested findings of fact and conclusions of law for No. 79-61R were included in the parties' October 5 and October 9 filings. Reply memoranda were filed by the Complainant and the Respondent on October 16, 1979, and October 22, 1979, respectively.

FINDINGS OF FACT

1. The Board of School Commissioners of the City of Rutland (hereinafter "School Board") is the governing body of the City of Rutland School District, a municipal corporation organized and existing under the laws of the State of Vermont.

2. The Rutland Education Association (hereinafter "REA") is an unincorporated teachers' association within the meaning of 16 VSA §1981(6), with a membership composed exclusively of persons who are now or formerly were employed as teachers in the City of Rutland Public School System.

3. The REA is the recognized bargaining agent for its member teachers.

4. The REA is an affiliate of the Vermont Education Association (hereinafter "VEA"), whose membership includes various member teacher associations throughout the State of Vermont, including the teachers of the REA.

5. Martha Tomsuden, Grace Whitney and Thomas Carpenter are, and at all times material were, members of the REA/VEA, holding the offices of President, Vice President and Treasurer, respectively.

6. On September 26, 1978, a Master Agreement was entered into between the School Board and the REA, covering the period July 1, 1978 to June 30, 1979, and containing provisions, inter alia, concerning salary, related conditions of employment and procedures for processing complaints and grievances relating to employment.

7. By letter dated September 26, 1978, the REA advised the School Board of its intention to negotiate a successor to the 1978-1979 Master Agreement.

8. At the time of ratification of the 1978-1979 Master Agreement, the REA membership voted that they would not perform teaching services in the 1979-1980 school year unless a new Master Agreement had been negotiated and executed.

9. Since early 1979, the parties have been involved in collective bargaining on various issues in dispute.

10. Contract negotiation sessions were held on February 6, February 16, and March 9, 1979,but failed to result in agreement on all issues.

11. At the conclusion of the meeting on March 9, 1979, the REA declared a bargaining impasse.

12. By letter dated March 9, 1979, the Federal Mediation and Conciliation Service was notified of the bargaining impasse. Although this letter was sent by the REA, it was in fact a joint request for the services of a mediator.

13. On April 4, 1979, a meeting took place between the negotiating teams for both sides.

14. Thereafter, meetings were held with the Federal Mediator on April 26, May 3 and May 14, 1979.

15. By letter dated May 10, 1979,from the School Board's chief negotiator, the American Arbitration Association was requested to submit a list from which the parties or their authorized representatives could select a neutral fact-finder.

16. Although sent by the School Board's representative, this was in fact a joint request of the parties for a list of fact-finders.

17. At another meeting with the Federal Mediator on June 7, 1979, a mutual determination was made that it would be necessary to proceed to fact-finding on a number of issues still in dispute.

18. Some major items in dispute during mediation and at the time that fact-finding was requested were salary, medical and health benefits, duty-free lunch time and the duration of the Agreement.

19. Prior to and at the time of fact-finding, the REA proposed a two-year contract and demanded a $625.00 increase in the base pay in

each of the two years, payment by the School Board of 100% of Blue Cross-Blue Shield premium for each year and provision of a 45-minute, duty-free lunch period for each teacher for the contract duration.

20. At fact-finding, the School Board proposed a three-year contract and offered an increase of $350.00 in the base pay in each of the three years, continued payment of the Blue Cross-Blue Shield premium in effect on January 1, 1979, under the 1978-1979 Master Agreement which would have the employee bear the cost of any premium increase during the term of the agreement, and retention of the 25-minute, duty-free lunch period provided in the 1978-1979 contract.

21. Just before the end of the school year, on June 12, 1979, the School Board distributed directly to all teacher employees within the bargaining unit a memorandum concerning the status of collective bargaining negotiations. That memorandum provided in pertinent part:

> "[There] was little or nothing we could say or offer the Rutland Education Association. [T]hey just aren't interested formally, informally, or otherwise. . . ."

22. On or about June 15, 1979, a fact-finding panel was appointed, composed of Perry Kacek of the VEA, as representative of the REA, Dr. Joseph Igoe of Thelan Associates, representing the School Board, and John Van N. Dorr, III, the third member chosen by the other two members of the panel.

23. With Mr. Van Dorr as Chairman, the fact-finding panel held hearings on July 20 and July 31, 1979, at which point the parties presented evidence on their positions.

24. Following conclusion of the fact-finding hearings, the parties filed memoranda and briefs in support of their respective positions.

25. Under cover letter of August 21, 1979, a thirty-three page report, dated August 14, 1979,and containing the unanimous recommendations of the fact-finding panel for settlement of matters in dispute, was mailed to the parties.

26. On the major issues in dispute previously referenced, the unanimous recommendation of the fact-finders was:

(a) Adoption of the REA proposal of a two-year agreement;

(b) Implementation of a $500.00 increase in base salary in each of the two years;

(c) Payment by the School Board of 100% of the health insurance premiums in the first year, with the School Board and teachers each paying 50% of premium increases, if any, in the second year; and

(d) Expansion of the duty-free lunch period over the prior year, with the proviso that an effort would be made to schedule daily 45-minute lunch periods and teachers assigned noon duty would be released earlier than usual at the end of the work day to make up the balance of the REA proposal of 45 minutes of duty-free time.

27. The parties were orally advised on August 21, 1979, of the contents of the fact-finding report.

28. Throughout the collective bargaining process and with increasing frequency in June, July and August of 1979, the authorized representatives of the REA, including its President, issued press releases to the public and reiterated to the School Board its decision of September 1978 that unless a contract agreement was reached prior

to commencement of the 1979-1980 school year, the teachers would not work.

29. The Rutland City School Calendar for 1979-1980 provided for a teacher meeting day on August 29, 1979, with students scheduled to arrive for the first day of classes on August 30, 1979.

30. The School Board met and received an oral summary of the contents of the fact-finding report on August 21, 1979.

31. On August 21, the School Board authorized its negotiating team to attempt to resolve the remaining disputes in accordance with the fact-finders' unanimous report, provided that the written document reflected the conclusions orally reported to the School Board.

32. The written fact-finding report was received in hand by the parties on August 22, 1979.

33. The parties met on August 22, 1979, after receipt of the report.

34. After considerable informal discussion between Steven Adams chief negotiator for the REA, and John Nord, chief negotiator for the School Board, and private caucuses between the negotiating teams of the respective parties, the two teams met for a brief period of time.

35. At that time, the School Board indicated to the REA its acceptance of the fact-finders' report in its entirety and its offer to resolve the remaining disputes on that basis.

36. At the meeting of August 22, 1979, the REA negotiating team advised the School Board that it would not accept the fact-finders' report on the above-referenced issues with the exception of the proposal concerning the two-year contract and reiterated its demand for an increase of $625.00 on the base salary in each of two years, 100% Blue Cross-Blue Shield premium benefits in each of two years and a 45-minute, duty-free lunch period.

37. The demands of the REA concerning these issues were the same as they had been since prior to the composition of the fact-finding panel.

38. At the August 22 negotiating session, negotiators for the School Board and the REA spoke informally away from the bargaining table and the School Board negotiators indicated that they may be willing to compromise on the issues other than salary. However, when the parties returned to the bargaining table, School Board negotiators refused to negotiate on those topics and adhered to the fact-finders' report as the sole basis for settling negotiations.

39. The REA then advised the School Board that a meeting of its membership was scheduled for August 27, 1979, at which time it would submit the fact-finders' report to the membership for a vote - recommending rejection.

40. On August 27, 1979, the REA membership voted to reject a contract containing terms specified in the fact-finders' report.

41. On numerous occasions between August 21, 1979 and August 28, 1979, authorized representatives of the REA, including its President, Martha Tomsuden, issued public statements and formal press releases reiterating the fact that the REA would reject the fact-finders' report and would not perform work services in the absence of a contract.

42. On August 28, 1979, the School Board met to discuss the existing situation regarding the collective bargaining process and the threatened refusal to work by the REA. A discussion was had concerning the temporary employment of substitute teachers in the event of a refusal of the regular teachers to perform teaching services.

43. Vermont law limits use of substitute teachers to thirty days.

44. Using the recommendations of the fact-finders' report for salaries for the 1979-1980 school year and applying it to the regular

teaching staff, the average teaching salary was computed to be $14,677.19.

45. Prior contracts between the School Board and the REA provided that average daily rates of pay for teachers would be determined by taking teaching salary and dividing it by the number of work days in the school year, which number had in the past been and was projected in the 1979-1980 school year to be 185 days.

46. By dividing the number of days into the average salary, the average daily wage of the average teacher in the Rutland School District was computed to be $79.34. In view of the expected efforts of the REA to deter substitutes and the difficulties which could be expected in a strike and picketing situation, and the School Board's desire to communicate to the public how much the District was willing to pay their teachers, the School Board decided that temporary substitutes be offered the sum of $80.00 per day in the event of a strike.

46(a). In the 1978-1979 academic year, the School Board compensated substitute teachers in the amount of $25.00 per day.

47. At the August 28, 1979 School Board meeting, the REA appeared and requested further negotiations round the clock. The School Board did not act on their request immediately, but went into executive session. At 11:45 p.m., REA negotiators were contacted by telephone and were told that a negotiating session was scheduled for 2:00 p.m. the following day, Wednesday, August 29.

48. At the conclusion of the meeting of August 28, 1979, the School Board voted, in the event of a strike, to authorize the chairman and the attorney for the School Board to take whatever action was deemed necessary to protect the interests of the Rutland City School District.

49. On August 29, 1979, members of the REA attended the teachers' work meeting scheduled on the school calendar.

50. On Wednesday, August 29, Mrs. Dorothy Plue, Chairman of the School Board, gave interviews to representatives of the television and radio news media at approximately 10:00 a.m., in which interview she indicated that the School Board would be willing to pay $80.00 per day to any substitutes in the event of a strike, and further indicated telephone numbers that persons interested in serving as substitutes could call.

51. In the afternoon of August 29, 1979, the negotiating teams of the two parties held a meeting, which meeting had been requested by the REA.

52. The REA formally advised the School Board that the School Board's proposal of the fact-finders' report was rejected at the meeting of August 27, 1979. Steven Adams, chief negotiator for the REA, offered to reduce the teachers' first-year salary demands from an increase of $625.00 on the base to $600.00 on the base and inquired if such a reduction would prompt the School Board to negotiate further on base salaries. Negotiators for the School Board indicated that it would not. He then inquired whether an offer for a somewhat smaller increase on the base would prompt the School Board to negotiate further on base salaries, and the School Board representatives indicated that it would not. He then inquired whether the School Board would be willing to negotiate further on base starting salaries if the teachers presented a request for an increase in the base salary substantially less than $600.00. Once again, representatives of the School Board indicated that such an offer would not prompt further negotiations. Mr. Adams then offered to negotiate the rollback of certain matters already agreed to in exchange for some movement of the School Board to improve base starting salaries.

Representatives of the School Board refused to consider such an approach to negotiations, and indicated that they adhered to the fact-finders' report as the sole basis for settling negotiations. At that point, the negotiating session ended.

53. Following the meeting between the negotiating teams on August 29, 1979, the REA held a meeting of its membership, at which meeting the REA voted to go on strike, commencing the morning of August 30, 1979.

54. Steven Adams left the meeting shortly thereafter and walked to the REA Crisis Center to call School Board representatives and inform them of the REA vote. When he arrived at the Crisis Center at approximately 5:00 p.m., he heard an interview with Mrs. Plue over the radio in which Mrs. Plue solicited substitute teachers at the rate of $80.00 per day in the event of a strike. He then called the telephone number given in the radio solicitation, and his call was answered by a person who was already making preparations for hiring substitute teachers in the event of a strike. After this telephone conversation, Mr. Adams then called a representative of the School Board, and informed him of the Association vote. This telephone call took place at approximately 5:15 p.m.

55. On August 30, 1979, the REA its officers and member teachers commenced a total work stoppage and refusal to provide teaching services to the Rutland City School District.

56. Only 10 of approximately 238 teachers reported to work on August 30, 1979 and on each workday thereafter; the remainder of the teachers being involved in the strike activities, including total work stoppage and refusal of teaching services.

57. Additionally, commencing on August 30, 1979, and continuing each work day thereafter, the REA, its officers, agents and members,

conducted picketing activities at the various schools in the City of Rutland.

58. Throughout the period commencing on or about August 27, 1979, and continuing thereafter, the VEA, its authorized agents and officers, encouraged the REA and its membership to engage in the strike, total work stoppage, withholding of services and picketing activities and actively joined with them.

59. On Thursday, August 30, 1979, the teachers went out on strike. The teachers picketed peacefully in accordance with the directions of law enforcement officers. The object of the picketing was to express dissatisfaction with the School Board's contract offers. The picketing was not carried out with the aim of requiring the School Board to recognize or bargain with the REA, but, rather, with the aim of obtaining negotiating concessions in the pending contract negotiations. This was the first day on which students were scheduled to arrive at school.

60. On August 30, 1979, the School Board commenced legal action in the Rutland Superior Court, requesting, among other things, a declaration that teachers have no legal right to strike, imposition of monetary damages in favor of the School District for tortious conduct of the teachers and a temporary restraining order or injunction.

61. On August 30, 1979, the School Board went to the Rutland Superior Court and filed a complaint seeking to enjoin the teachers' strike. During the day on Thursday, Mr. Ron Savage, a member of the Association's negotiating team, contacted Mrs. Dorothy Plue and asked to schedule a negotiating session. Mrs. Plue directed Mr. Savage to conduct all requests for negotiations through the School Board's professional negotiator, Thelan Associates. She also indicated that the

School Board would not negotiate further unless the REA first proposed a substantial negotiating concession.

62. Throughout the weekend of September 1 and 2, representatives of the REA made numerous telephone calls to Thelan Associates attempting to schedule a negotiating session. Finally, after representing that they had a substantial negotiating concession to make, a negotiating session was scheduled for Labor Day, Monday, September 3, 1979.

63. On September 3, 1979, the School Board and REA met, at which time the REA proposed a two-year contract containing the following terms:

(a) An increase of $600.00 on the base pay, plus an additional step at the bottom of each column on the pay scale. In the second year, a similar increase in the base pay would prevail, with an escalator on the base increase, dependent on the rise of the Consumer Price Index between February 1979 and February 1980. Additionally, a step would be added at the bottom of each column.

(b) Blue Cross-Blue Shield benefits would be funded 100% in each of the two years.

(c) Teachers would be guaranteed a 45-minute, duty-free lunch period.

64. The proposal advanced by the REA indicated no change in its pre-fact-finding position relative to duty-free lunch and Blue Cross-Blue Shield benefits. The salary portion of the new proposal would increase the cost to the School District over projected costs of the REA pre-fact-finding position of $625.00 on base pay in each of two years.

65. On September 3, 1979, the School Board rejected the REA

proposal, reiterated its willingness to enter a two-year agreement based on the fact-finders' report and proposed, in the alternative, a three-year contract containing the following provisions:

(a) An 8% increase over 1978-1979 salary to returning teachers, plus an additional $425.00 to those teachers whose educational qualifications met a change of column under the expired schedule with an identical salary increase and increment for column changes in the second and third years of the proposal.

(b) The provisions of the fact-finders' report relative to Blue Cross-Blue Shield benefits and duty-free lunch.

66. The proposal by the School Board would eliminate incremental increases, other than educational advancement, contained in prior contractual agreements.

67. Under this proposal, 53% of the teachers in the system would receive a smaller increase in the first year and 47% would receive a larger increase than they would receive if the School Board's previous proposal had been accepted. The overall effect of this proposal was an increase in cost to the School Board over its previous proposal and redistribution of money among the teachers. REA negotiators rejected the proposal, and it was withdrawn.

68. On September 4, 1979, the fact-finding panel released the fact-finding report for publication.

69. On September 4, 1979, copies of the fact-finders' report were provided to the Rutland Herald and local radio and television news reporters.

70. On September 4, 1979, a copy of the fact-finding report was duly filed in the Office of the City Clerk of the City of Rutland.

71. On September 4, 1979, Chairman Dorothy Plue gave an interview to a representative of the news media and stated that the negotiators rejected the 8% across-the-board increase because they would personally do better under the previous proposal that the School Board had submitted. She indicated that the Association negotiators were looking out for their own personal interests, rather than the interests of the bargaining unit as a whole.

72. On three separate dates following September 4, 1979, an advertisement appeared in the Rutland Herald indicating the availability of the fact-finding report for public inspection in the Office of the City Clerk of the City of Rutland and at the Office of the Superintendent of Schools for the Rutland School District.

73. A temporary hearing was held at the Rutland Superior Court on September 5, 1979; and at 1:00 a.m. on September 6, 1979, Judge Thomas L. Hayes issued a temporary injunction, concluding that the strike posed a "clear and present danger to a sound program of school education which in the light of all relevant circumstances it is in the best public interest to prevent" under 16 V.S.A. §2010.

74. On and after September 7, 1979, pursuant to the Temporary Order of the Rutland Superior Court, the REA stopped picketing and strike activities pending final hearing in the litigation.

75. A further hearing is tentatively scheduled in the Rutland Superior Court action for October 25, 1979,on the School Board's request for declaratory relief, monetary damages and an injunction.

76. On September 12, 1979, at the request of the Association, another negotiating session was held, with the presence of a federal mediator. At that negotiating session, the School Board negotiators

again offered to settle negotiations on the basis of the fact-finders' report. The REA at this time presented a three-year agreement counter-proposal which retained its positions prior to fact-finding relative to the duty-free lunch period and Blue Cross-Blue Shield benefits but altered its proposal regarding wages. The School Board "costed out" the September 12 offer and determined the proposal's total cost to the School District was considerably higher than all prior REA proposals. Accordingly, it was rejected. The September 12, 1979 negotiations produced no agreements on these issues.

OPINION

I
The Strike

We are called upon to determine whether a strike by teachers, enjoined at present by the Superior Court, was an unfair labor practice which we should take affirmative action to prevent recurring. We have previously held a strike to be an unfair practice but intimated some strikes would be legal. Green Mountain Union High School Board of Directors et al v. Chester Education Association et al 2 VLRB 90 (1979). Both parties argue that case was wrongly decided and urge us to overrule it: the School Board as it wrongly legalizes any form of strike, the Association because it limits the unfettered right to strike. Each makes essentially the same arguments advanced in Green Mountain Union, supra. We need not repeat all those arguments here.

On the facts of this case, we need only decide whether an economic strike by teachers within eight days of receipt of a fact-finders' report, prepared and submitted to the parties agreeably to 16 V.S.A. §2007, is an unfair labor practice. Each party agrees that the concerted work

stoppage here was a "strike" as defined in 21 V.S.A. §1722(16).

The answer to that question requires review of the Association's position, since it maintains its members are free to strike anytime unless prevented by a court injunction issued under 16 V.S.A. §2010, which provides:

> "No restraining order or temporary or permanent injunction shall be granted in any case brought with respect to any action taken by a representative organization or an official thereof or by a school board or representative thereof in connection with or relating to pending or future negotiations, except on the basis of findings of fact made by a court of competent jurisdiction after due hearing prior to the issuance of the restraining order or injunction that the commencement or continuance of the action poses a clear and present danger to a sound program of school education which in the light of all relevant circumstances it is in the best public interest to prevent. Any restraining order or injunction issued by a court as herein provided shall prohibit only a specific act or acts expressly determined in the findings of fact to pose a clear and present danger."

That statute, the Association characterizes as a "Mini Norris-LaGuardia Act", 29 U.S.C. §§101-115, which prohibits courts from enjoining strikes. 16 V.S.A. §2010 is similar, except the prohibition is not absolute. The Association then argues because the Norris-LaGuardia Act has been given substantive effect to legalize private sector strikes, we should conclude the Vermont law has the same effect. See Morris, The Developing Labor Law, Chap. 1, (1971). If this were so, then despite 21 V.S.A. §1726(b)(5) expressly making strikes an unfair labor practice, the Association argues we are powerless to issue a cease and desist or other remedial order.

It is true that the U.S. Supreme Court in United States v. Hutcheson 312 U.S. 219 (1941) read the anti-injunction provision in the Norris-LaGuardia Act to prohibit a criminal indictment under the conspiracy provisions of the Sherman Act. But that result was reached by reading Norris-LaGuardia into Section 20 of the Clayton Act, a law which expressly provided that

strikes shall not "be considered or held to be violations of any law of the United States". Vermont does not have the functional equivalent of Section 20 of the Clayton Act to expand 16 V.S.A. §2010 into a provision granting the breadth of strike rights contended for. [A review of state mini Norris-LaGuardia Acts can be found in 29 ALR2d 323 (1953).] This seems particularly true where public sector strikes are traditionally illegal, 37 ALR3d 1147, 18I Kheel, Labor Law §57.02(1), and our Supreme Court requires clear and express legislative intent to overcome common law principles. Fairchild v. West Rutland School District 135 Vt. 282, 286 (1977).

Even so, 16 V.S.A. §2010 enacted in 1969 undoubtedly expresses a legislative policy that courts should not precipitously intervene to prevent strikes. In this respect we believe it has some of the same consequences of the federal law to convert a no-injunction policy into a substantive right to strike after certain bargaining duties are suspended by a legal impasse..As one observer of the federal scene, while commenting on injunctive termination of strikes, has aptly stated:

> "One can, I believe, sum up the themes of federal concern with reasonable accuracy in a few words, although documentation would require a sensitive recollection of two generations of history. The core of the danger is improvident inhibition of protected strikes - in practice not often undone by subsequent lifting of the restraint - through fallible factfinding or overboard decrees. The development of the preemption doctrine has made clear the central concern, in the Court's perception of national labor policy, that protected concerted activities have 'breathing space to survive'. Lesnick, State Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia 79 Harvard L.Rev 757, 761.

So too, the New Hampshire Supreme Court has recognized, even without a statute such as §2010, that in public sector bargaining, injunctions against strikes should be used sparingly. Otherwise there is an "effect of heavily weighing the collective bargaining process in favor of the government." Timberlane Reg. School Dist. v. Educ. Assn. 114 N.H. 245, 317 A.2d 555 (1974). We, too, believe that our Legislature in enacting §2010 and 21 V.S.A. §1730 recognized that some freedom of collective action is necessary if collective bargaining in the public sector is to be given the required "breathing space to survive." Thus we conclude that 16 V.S.A. §2010 was enacted to permit some strikes in order to enhance teacher bargaining power.

When the Legislature enacted the Municipal Employees Labor Act in 1973, 21 V.S.A. §1720 et seq., it gave a limited right to strike to covered employees in 21 V.S.A. §1730 by limiting the power of courts and this Board to prohibit them. Thus there appears a consistent legislative policy to permit strikes under certain conditions.

Assuming, however, that the Legislature intended to permit strikes under certain circumstances, the question remains whether the Legislature intended a strike such as this, at this time, to be an unfair labor practice.

We think it necessary to look first to the total scheme of the teachers' collective bargaining law. The Legislature has prescribed a lengthy bargaining process. We have indicated before that school boards may not invoke "finality" under 16 V.S.A. §2008 (or otherwise) until that process is complete. Chester Education Association v. Chester-Andover School Board 1 VLRB 426 (1978) and North Country Educ. Assn. v. Brighton School Board VLRB Opinion, Jan. 23, 1976.

In the public sector, the duty to bargain by both employees and employers continues beyond a declaration of impasse. As one writer has observed:

> "Most public employers in jurisdictions which require collective negotiations must bargain at least to impasse. However, the duration of the duty to bargain in the public sector may extend beyond impasse because most states and the federal government prescribe elaborate impasse resolution mechanisms, including mediation, fact-finding, legislative hearings, and compulsory arbitration, which may be invoked following impasse. Both the public employer and union are required to participate in the impasse procedures, once invoked, in a further effort to reach a mutually satisfactory settlement. Impasse procedures thus clearly contemplate further 'negotiations' by the parties even where both sides have declared an impasse. As a result, a public employer may not be able to take unilateral action with regard to a mandatory subject, if at all, until after all impasse procedures have been exhausted. Edwards, "The Emerging Duty to Bargain in the Public Sector", 71 Mich. L.Rev. 885, 924 (1973). (emphasis added)

See also, East Hartford Educ. Assn. v. East Hartford Board of Educ. 30 Conn. Super. 63, 299 A.2d 554 at 556 (1972), which states:

> "... To argue that a board of education or teachers' union that remains obdurate throughout the statutory procedures provided for has complied with the policy of the act is to exalt form over substance."

Moreover, the duty to bargain may only be suspended, not absolutely extinguished. NLRB v. Tex-Tan, Inc. 318 F.2d 427 (CA5, 1963). After all statutory impasse procedures are utilized, the duty is dormant until a changed circumstance indicates agreement may be possible. Hi-Way Billboards, Inc. 206 NLRB 22, 84 LRRM 461 (1973). Any indication to the contrary in Chester, supra, is a misreading of that case.

The principle that economic sanctions may not be used until the statutory impasse procedures are completed applies to the Association in determining when a strike may be initiated. Under 16 V.S.A. §2007(d), the fact-finders' report is given to the parties, and is to be made public 10 days later "if the issues in dispute have not been resolved", presumably to permit public

opinion to be brought to bear on the parties to conclude a settlement. We infer from the 10-day secrecy provision, and the language of §2007(d) itself, a duty to bargain during that period exists. We see no merit in the Association's contention that delay in issuing the fact-finders' report beyond the 30 days in which the statute directed it to issue, resulted in a waiver of the duty to bargain, and gave the Association the right to strike in accordance with our Green Mountain opinion. No notice was given by the Association of its claim of waiver. Moreover, the Association itself has charged the School Board with an unfair labor practice for failure to bargain during this very time period. Accordingly, we conclude this strike, within the 10-day period, violates the duty to bargain contained in 16 V.S.A. §2001 and §2007(d), and 21 V.S.A. §1726(b)(4), and is an unfair labor practice for that reason, even apart from claimed illegality under the prohibition against strikes contained in 21 V.S.A. §1726(b)(5).

We could rest our decision on this ground alone. We note, however, that this strike is not protected under the rationale of Green Mountain, supra. It is an unfair labor practice because it is contrary to the express language of 21 V.S.A. §1726(b)(5). It is not subject to the protection of 21 V.S.A. §1730 because it occurred prior to 30 days after receipt of the fact-finders' report.

Though not necessary for a decision in this case, we make the observations which follow, on points argued by the parties to give guidance to others who may be concerned with our views. Compare the discussion on Mootness and Remedy, infra.

The Teachers Labor Relations Act, leaving aside for the moment the impact of 21 V.S.A. §1735 bringing unfair labor practice jurisdiction into

the analysis, establishes an uncertain period of time, more than 10 days after fact-finding, during which the duty to bargain continues. This is the time for the public to make its views known. After a reasonable time to allow public reaction to the fact-finders' report has elapsed, the school board can impose "finality". Teachers by the same token, are then given the limited right to strike by 16 V.S.A. §2010. The whole process is then subject, we believe, to court control. Presumably a court would not order striking teachers to work even in the face of a school board invoking "finality", unless a sound program of education was jeopardized.

We find the Legislature did not intend to change this scheme significantly by enacting 21 V.S.A. §1735. That statute provides:

> "For the purposes of representation in, and prevention of, unfair labor practices under sections 1726-1729 of this title, a teacher who is a certified employee of a school district shall be considered a municipal employee; and any school district, which includes any public school district or any quasi-public or private elementary or secondary school within the state which directly or indirectly receives support from public funds shall be considered a municipal employer. Nothing in this section shall be taken to alter or repeal the provisions of chapter 57 of Title 16, relating to labor relations for teachers, except that enforcement and review under section 1729 of this title shall not be subject to the provisions of section 2010 of Title 16."

It plainly directs this Board, and any reviewing court, to ignore 16 V.S.A. §2010. We believe, as we said in Green Mountain, supra, this direction is given because 21 V.S.A. §1730 expresses the same policy, is a limitation on both this Board and the courts, and avoids a conflict in the applicable criteria for prohibiting strikes contained in 21 V.S.A. §1730 and 16 V.S.A. §2010. There is no statutory evidence of legislative intent to make teachers the sole class of municipal employees without strike rights. Such they would be if we ignore §1730.

We conclude for the reasons given here and in Green Mountain, supra, that the Legislature intended at least a 30-day cooling off period after fact-finding before a strike is permitted. We believe the same limitation applies to invoking "finality" under 16 V.S.A. §2008, as well. We adhere to that view because it is consistent with both laws as we understand them, and is consistent with public sector impasse procedures which encourage mechanisms other than strikes and "finality" to promote agreement between the parties.

II

Employer's Alleged Intransigent Bargaining Position As Evidence of Bad Faith

We are required here to determine whether "hard bargaining" constitutes bad faith and a violation of the duty to bargain. The Association charges the Employer with bad faith because it claims, it entered negotiations subsequent to fact-finding with a fixed and unalterable bargaining position regarding salaries, steadfastly refusing to offer more than recommended by the fact-finder.

Generally, employer bad faith bargaining can be characterized either as a means to an illegal end or an attempt to expedite or "short-cut" normal collective bargaining deliberations. Bad faith may be manifested in many ways. The employer may intend to subvert the authority of the bargaining representative, avoid settlement altogether, or to effect an agreement on terms substantially dominated by management. The totality of the conduct must be analysed to determine if bad faith exists. See e.g.: Borg-Warner, Corp. 198 NLRB No. 93, 80 LRRM 1790 (1972) (Employer "surface bargaining" evident by 1) refusing to negotiate major economic issues after making an initial proposal, and 2) offering proposals for non-economic

issues on terms less favorable than the prior contract); H. K. Porter Co. v. NLRB 397 U.S. 108, 25 L.Ed.2d 146, 90 S.Ct. 821 (1970) and Alba-Waldensian, Inc. 167 NLRB No. 101, 66 LRRM 1145 (1967) (No real factual basis for employer rejection of dues check off—Refusal to agree was irrational and intended to frustrate the making of an agreement.); Sweeney and Co. 176 NLRB No. 27, 71 LRRM 1197 (1969) (Demonstrated desire to produce stalemate by adherence to position of little economic value); and Safeway Trails, Inc. 233 NLRB No. 171, 96 LRRM 1614 (1977) (Employer's letter-writing campaign disparaging union negotiator prolonged and aggravated strike, thereby transforming an economic strike into an unfair labor practice strike.)

One form of bad faith bargaining involves a technique whereby the employer submits a package of bargaining positions to the union which it holds fast as a "fair and firm offer". A requisite element in this technique which has become known as "Boulwarism" from General Electric Co. 150 NLRB No. 192 (1964), enf., 418 F.2d 736 (1969), cert. denied, 397 U.S. 965 (1970), is a massive public relations campaign, portraying the employer as the "true defender" of employee interests.

Absent any evidence of bad faith for illegal or quixotic reasons, we are asked to consider whether the Employer acted in bad faith characteristic of "Boulwarism". The Association charges the Employer's insistence on adoption of the fact-finders' report as a basis for settlement was not "hard bargaining" but a failure to bargain at all, inasmuch as the Employer made no substantial concessions relating to salaries.

Landmark private sector precedents treating "hard bargaining" and the duty to negotiate hold an employer is not required to make concessions as evidence of good faith but may hold a bargaining position to the point of

impasse, so long as that position is based on sound reasons and it is not taken to frustrate bargaining. NLRB v. American National Insurance Co. 343 U.S. 395, 96 L.Ed 1027, 72 S.Ct. 824 (1952). And, neither the Board nor a court can order an employer to agree to a contract provision even in the guise of an enforcement order. H.K. Porter Co. v. NLRB, supra.

Public sector cases as well have adopted national precedent in assessing good faith. Where a legitimate reason exists for firmness, bad faith does not exist. See e.g.: Edgeley Educ. Assn. v. School District #3 256 N.W.2d 348 (North Dakota Supreme Court, 1977) (School board's firm adherence to initial salary offer not bad faith where offer equalled wages paid in surrounding school districts and was within available funds.); and PLRB v. Pennsylvania 94 LRRM 2346 (Pennsylvania Commonwealth Court, 1977) (Employer's "hard bargaining" by insistence on wage increase of only 3.5% did not constitute a refusal to bargain where it agreed to a 2.5% additional increase within six months and 6% the following year.). Illegitimate "hard bargaining", however, was found in Town of New Canaan v. Connecticut State Board of Labor Relations 160 Conn. 285, 278 A.2d 761 (1971) (Employer bad faith evidenced by insistence to point of impasse on postponement of contract date where no added costs would be incurred.)

Kheel, commenting on the duty to bargain in the public sector and the right to maintain a position without making concessions states:

> "... A party ... may engage in 'hard bargaining' by maintaining a steadfast position on an issue to the point of impasse without violating its good faith bargaining duty, so long as such adamant insistence is in good faith and not for the purpose of frustrating the bargaining process or making it futile." 18I Business Organizations, Kheel, Labor Law, §54.02(3) at 54-35.

This Board, too, has referred to the employer's right to engage in "hard bargaining" in Chester Educ. Assn. v. Chester-Andover School Board of Directors 1 VLRB 426 (1978).

We find no evidence of employer bad faith in the instant case characteristic of "Boulwarism". Here the Employer had made a substantial concession in adopting the fact-finders' recommendations on salary. There was no publicity campaign designed to subvert the Association which accompanied the "firm offer". Absent is any proof that the School Board's reasons for its offer were illegal or destructive of collective bargaining.

Moreover, with a unanimous fact-finding report on record, consisting of recommendations for settlement made by the parties' mutually agreed upon representatives, we find adherence to the panel's recommendations on the part of the Employer constitutes a prima facie showing of good faith. For the Association to claim otherwise, especially where an illegal strike occurred within eight days of the issuance of the report, would require strong evidence wholly lacking here.

Finally, the cases previously cited demonstrate we must evaluate the context in which the bargaining took place and look to the entire conduct of the parties before evaluating an unfair labor practice charge. Here, the actions the Association complained of took place in the face of its own "no contract-no work" ultimatum of September 1978. A firm position calling for a strike on the first day of school is an indication itself of a refusal to bargain. Accordingly, we cannot sustain the Association's charge of employer bad faith bargaining when its own conduct is so suspect. We are particularly inclined to this conclusion where the burden of proof is on the Association to prove the School Board did not bargain in good faith. Edgeley Educ. Assn., supra.[1]

[1]Nothing contained in the Association's Motion to Amend and Reopen dated October 2, 1979, would lead to a different conclusion and thus the motion is denied.

III

Substitute Teacher Pay

The Association charges that the payment to substitute teachers during the strike of more than three times the normal rate constitutes further evidence of the Employer's failure to bargain in good faith and disparagement of the Association. We agree, for reasons somewhat different than the Association urges.

The Association relies principally on the private sector cases of Sweeney and Co., 176 NLRB No. 27, 71 LRRM 1197 (1979)(Employer promise of increased wages to abandon union is unfair practice); Alba-Waldensian, Inc., 167 NLRB 695, 66 LLRM 1145 (1967)(Employer's raise of rates in non-union plant while negotiating with union is unfair); and Sinclair Glass, 76 LRRM 1289, enf'd, 80 LLRM 3082, 465 F2d 209 (7th Cir. 1972). These cases, however, are not uniformly in point. In them, the employer's actions were designed to woo workers away from the union by demonstrating the employer's largesse toward non-union workers. Here the Employer's actions as we see them, had quite different motives.

The School Board chairman testified that the reasons for deciding to pay substitutes $80.00 per day was primarily to keep the schools open. The Chairman also testified that since $80.00 per day was the average budgeted teacher wage, an ingredient in the decision was the desire to demonstate to the public how much, on the average, it was willing to pay teachers under its last "firm offer." By this second motivation, the School Board apparently hoped to turn public incredulity over such a wage to its own advantage by fostering a climate of public opinion hostile to the teachers. If so, this Employer action is the converse to the strike, by means of which the teachers hoped to arouse public opinion to support their wage demands.

NLRB v. Katz 369 U.S. 736 (1960) teaches that an employer may not unilaterally increase wages to a level rejected by union negotiators while bargaining continues because such action destroys collective bargaining. Similarly, strike replacements may not be given benefits of such a magnitude that the union will be destroyed, because that action destroys the bargaining process. See NLRB v. Erie Registor Corp. 373 U.S. 221 (1963). Actions which are inherently destructive of employees collective rights are unfair labor practices. This is so even in the face of an illegal strike because the illegal strike does not terminate the employer-employee relationship, Rockwell v. School District of Crestwood 393 Mich. 616, 227 N.W.2d 736, 744 (1975), or the duty to bargain. See pp. 266-273 supra.

The existence of this duty is particularly compelling where, as in this case, the Employer has available a legal remedy to end the strike and promptly avails itself of that remedy. While this duty to bargain exists, the parties must conduct themselves in a manner which contemplates the resumption of productive bargaining.

We believe the wages paid here to substitutes, one purpose of which was to make a public demonstration of the size of the School Board's wage offer, are inherently destructive of the employees' collective bargaining rights for these reasons:

1) Payment of the "average" wage to substitutes ignores completely the traditional and bargained-for distinctions in teachers' compensation based on experience, qualifications, and responsibility. These bases for differentials in teachers' compensation are so ingrained that they are reflected in our statutes. See 16 V.S.A. §1792. But under the School Board's plan, all substitutes were paid the same regardless of their prior experience as teachers; and all were paid the same regardless of their professional qualifications.

2) Payment of the "average" wage is disparaging. The "average" disparages regular teachers normally paid less by comparing them artificially with their higher paid co-workers. The substitutes were in fact paid more than approximately one-half of the striking teachers. Use of the "average" similarly disparages teachers paid above the average, only perhaps this disparagement is more telling since the substitute pay plan included elements suggesting that these higher paid teachers were already overpaid yet were seeking more.

3) No apparent effort was made by the Rutland School Board to match the pay of substitute teachers to its last offer to the striking teachers except through the "averaging" device. No effort was made to differentiate in pay to substitutes based on their relative experience, qualifications, or responsibility in the same manner that such differentiations were made in determining compensation offered to the striking teachers. The substitute pay plan then leads to the inference that all these factors which are being bargained over are irrelevant and anyone can teach.

4) The sheer magnitude of the pay differential going from $25.00 per diem to $80.00 per diem also is suspect. This Board recognizes that some premium may be necessary to attract substitutes during a strike. The necessity of crossing picket lines and the other circumstances of a strike may well merit some additional inducement in order to procure teachers. But the wage offered here was so dramatically higher than past practices that payment of it has the effect of disparaging the bargaining process itself. This is especially so in absence of any evidence of the necessity of it.

This Board recognizes that public-sector bargaining contemplates that both parties may ultimately seek to bring the weight of public opinion to bear to settle their differences. See Part I of this Opinion at pp. 270-272. But not all appeals to public opinion can be condoned. Those appeals which are unduly destructive of the bargaining process frustrate the statutory scheme which exalts the bargained settlement of disputes as the preferred route to labor-management harmony.

Appeals to public sentiment which include unilateral changes in mandatory subjects of bargaining and which disparage the union and its members are, we believe, destructive of the bargaining process. This Board holds that in the circumstances of this case, payment of the "average" regular teachers' daily wage to substitutes is an unfair labor practice prohibited by 21 V.S.A. §§1726(a)(3) and (5).

Finally, we believe that this case falls within the principles enunciated in NLRB v. Great Dane Trailers, Inc. 388 U.S. 26 (1967), In re: Southwestern Vermont Education Assn. 136 Vt. 490 (1978), and Vermont Education Assn. v. Rutland School Dept. 2 VLRB 186 (1979). Thus where the union has introduced evidence of employer conduct which adversely affects employee rights, the burden shifts to the employer to establish that its motives were legitimate. We find it has not satisfied that burden and accordingly the Association has introduced adequate proof of an employer unfair labor practice.

IV

Employer's Remarks as Disparagement of the Complainant

This charge was prompted by the School Board chairman's statement to the news media suggesting the Association's negotiators were looking out

for their own personal interests, rather than the interests of the bargaining unit as a whole. Specifically, Chairman Plue indicated the negotiators rejected the eight percent across-the-board salary increase because they would personally make more money under the School Board's previous proposal. Such remarks certainly questioned the integrity and authority of the Association's negotiators.

The Association directs us to Safeway Trails, Inc., supra, and General Athletics Products Co. 227 NLRB No. 220, 95 LRRM 1130 (1977), wherein the employer's tactics of disparagement by questioning the union negotiators' effectiveness and integrity are not unlike the character of Mrs. Plue's remarks. The chairman's remarks could be construed to:

> "... demonstrate the Respondent's predilection for suggesting to employees that the major stumbling block preventing an agreement and labor peace was the presence of [the] negotiator." Safeway Trails, supra at 1616.

And, as the NLRB stated:

> "The tack taken by this Respondent was to insist upon acceptance [of] its offer and no other by disparaging the [u]nion and by casting doubts in the minds of the membership as to the bona fides of the efforts of the union representatives in advancing the interests of its membership, thus driving a wedge between union representatives whom it had previously invited to step aside from active negotiations and the employees on whose behalf they were negotiating." Safeway Trails, supra at 1618.

Even though the remarks were delivered in the "heat of battle," perhaps under emotional stress or as an expression of exasperation, they were undeniably an impediment to negotiations. Only if the Employer could prove the truth of these charges would we decline to find an unfair labor practice. Accordingly, we find these remarks constitute an unfair labor practice under 21 V.S.A. §1726(a)(5).

V

The "8% Solution" as a Predictably Unacceptable Offer

The Association also charges as evidence of bad faith, the Employer's September 3 proposal to increase teacher salaries 8% across the board. This offer would eliminate the step system salary schedule and effect decreases for fifty-three percent of the work force. The Board believes that it was predictable that any proposal to eliminate the step system salary schedule would require a significantly larger economic concession than was made. On record as a response to this "predictably unacceptable offer" is the Association's September 12 counter-offer which was more costly than any previous salary offer made by the Association.

We suspect these negotiations should be characterized as tentative. Each proposal was not delivered in bad faith but was offered in an attempt to test the climate of negotiations in the wake of litigation and a strike. Given the uncertainties regarding the legality of the strike, we cannot evaluate the seriousness of the Employer's September 3 offer and can find no evidence to substantiate a refusal to bargain charge in that offer, any more than we can with respect to the Association's counter-offer. Our opinion might be different if these offers were exchanged after a prolonged strike or where other circumstances indicated negotiations should be fruitful. See General Athletics Products, supra.

VI

Picketing by Strikers

The Employer submits the Association's picketing activity constitutes an unfair labor practice in violation of 21 V.S.A. §1726(b)(8), because the purpose of that picketing is to force the Employer to bargain with

an employee organization. On the contrary, we think the purpose was to win economic concessions. But, having determined the strike in this case to be illegal, this charge requires little discussion. The nature of the picketing in this case is irrelevant. Here, we have determined the strike to be illegal which has the effect of making any related picketing proscribed as well. Therefore, we uphold the Employer's charge under these circumstances.

VII

Mootness

Because the strike which is the subject of the unfair labor practice charge has been enjoined, the Association argues that part of the case is moot and should be dismissed. We disagree. To be sure, our Supreme Court in North Country Educ. Assn. v. Brighton 135 Vt. 451 (1977) held a bad faith bargaining charge to be moot after the parties had reached an agreement. Here the parties have not agreed and but for the court's injunction, the strike would undoubtedly resume. Moreover, as we point out in considering the remedy to fashion here, our powers go beyond issuing a cease and desist order. We have the power to order "affirmative action." That action may take the form of monetary restitution. Our statute 21 V.S.A. §1727(d) gives this Board the power to act if any person "has engaged in ... any unfair labor practice." It obviously contemplates that the Board has authority to make orders based on past practices.

Even if the sole remedy here was a cease and desist order, the case would still not be moot. We noted in Woodstock Union High School Teachers' Assn. v. Woodstock School Board 1 VLRB 423 (1978), the U.S. Supreme Court cases indicating the National Labor Relations Board's orders are not moot merely because complained of conduct has ceased. As the Court said in

NLRB v. Mexia Textile Mills, Inc. 339 U.S. 567, 568 (1950), "The act does not require the Board to play hide and seek with those guilty of unfair labor practices."

The Court has also noted that a declaratory judgment action challenging the legality of payment of welfare benefits to strikers does not become moot once the strike is settled:

> "But the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. U.S. Dept. of Labor, Bureau of Labor Statistics, Analysis of Work Stoppages 1971, Table A-3, p. 16 (1973). A strike that lasts six weeks, as this one did, may seem long, but its termination, like pregnancy at nine months and elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present." Super Tire Engineering Co. v. McCorkle 416 U.S. 115 (1974).

True, this case does not require review of "state policies" but it does concern functioning of governmental units in which the general public has an interest.

Some courts clearly recognize a public interest exception to the mootness doctrine. In City of Albuquerque v. Campos 86 N.M. 488, 525 P.2d 848 (1974) the Court held that settlement of a strike by virtually all city employees did not moot the question of whether anti-strike injunctions were proper. Settlement by the parties, the Court said, cannot terminate the right of the public to have important questions answered. We are satisfied that a continuing dispute exists between the parties concerning teachers' right to strike, and that we have authority to determine whether this strike was an unfair labor practice. Otherwise this strike would be an action "capable of repetition, yet evading review." Super Tire, supra. For these reasons we decline to dismiss this cause as moot.

VIII

Remedy

We have considered various remedies applicable to the melange of unfair labor practices we find here. One remedial purpose is to make the innocent party whole for losses occasioned by the unfair labor practices of the other. Another purpose is to prevent future unfair labor practices. Our aim is to do both.

Pursuasive cases our research has brought to light lead us to the view that this Board is a proper forum to redress inequities growing out of unfair labor practices. In states with a comprehensive collective bargaining law for public employees, courts have held that a public employee labor relations board is the only appropriate agency to assess make whole orders. This is true because the board has jurisdiction over unfair labor practices and some strikes, although prohibited, may be in retaliation for an employer unfair labor practice. In that instance, the board is then required to balance competing equities. Lamphere Schools v. Lamphere Federation of Teachers 67 Mich. App. 331, 240 N.W.2d 792, aff. 400 Mich. 104, 252 N.W.2d 818 (1977). See also Burke and Thomas Inc. v. International Organization of Masters, Mates and Pilots 48 Law Wk 2311 (Wash. Sup. Ct. 10/11/79) holding that businessmen who lost revenue as a result of illegal ferry boat workers strike had no cause of action in tort against the union for damages. A separate action would not be allowed because judicial restraint is needed so that the delicate balance of labor relations established by the legislature can function without the coercive power of the courts; and because recognition of a tort action on behalf of third parties would have a detrimental effect on the public employment relations commission authority to adjust labor disputes. Contra, Pasadena Union School District v. Pasadena Federation of Teachers 72 Cal. App. 3d

100, 140 Cal. Rptr. 41 (1977). But, c.f. Green Mountain, supra.

The authority vested in this Board by 21 V.S.A. §1727(d) includes the power to take "affirmative action" to prevent unfair labor practices. The United States Supreme Court has characterized similar language in the National Act as giving the Board "broad powers." H.K. Porter Co. v. NLRB, supra. In exercising this power we are mindful that our orders are to be remedial not punitive.

We have considered various remedies possible which would make the District whole for losses suffered as a result of the illegal strike. Other public employee relations boards have issued such "make whole" orders which consisted of awarding the complainant attorney's fees and litigation costs incurred in the prosecution of the complainant.[2] For example, faced with an illegal strike in Rumford School Dept. v. Rumford Teachers Assn. NLRB Opinion No. 79-15 at 7 (1979), the Maine Labor Relations Board ordered the association to "take the affirmative action of reimbursing the school department for expenses it incurred as a result of the teachers' association strike." Likewise, the comparable Florida board has in cases where a party has committed an unfair labor practice "in blatant violation of well-settled law," ordered reimbursement of attorney's fees to the prevailing party. See: Village of Miami Shores 1 NPER 10-10200 (FL 6/20/79), Fla. PERC; City of Ocala 1 NPER 10-10088 (FL 4/30/79), Fla. PERC; and Sheriff and County of Carson City 1 NPER 29-10001 (NV 5/22/79), Nev. PERB. (Employers were ordered to rectify the complaint by reimbursing the unions for fees

[2]Opinions of all State Public Employee Relations Boards are compiled by the Public Employment Relations Services and Labor Relations Press, P.O. Box 579, Fort Washington, PA 19034, and may be obtained there. Such opinions are digested and indexed by this publisher in the National Public Employment Reporter. Opinions cited by this Board are on file in the Board office.

and costs incurred in pursuance of the charge.) We distinguish these "make whole" or affirmative relief orders from the established practice of assessing legal expenses as punitive damages. Such punitive damages have been assessed against parties pursuing frivolous litigation, offering ridiculous arguments as defenses as in Rochester School Board v. New Hampshire PERB 398 A.2d 823 (N.H. 1979), and against second offenders of the same charge, Lewis County Washington PERC Opinion, May 1979. Such action might be warranted in view of Green Mountain, supra, but that is not our intent.

The United States Supreme Court has encouraged the National Labor Relations Board to make more assertive use of its remedial powers under Section 10(c) of the National Act, 29 U.S.C. §160(c). See Morris, Reflections on the Role of the NLRB and the Courts in the Collective Bargaining Process--A Fresh Look at Conventional Wisdom and Unconventional Remedies, Developing Labor Law, at p. 18 (ABA Section of Labor Relations Law 1977). The National Board has responded in decisions such as IVE v. NLRB (Tiidee Products), 426 F.2d 1243 (D.C.Dir. 1970), cert. denied, 75 LRRM 2752 (1970), 194 NLRB 1234, 79 LRRM 1175 (1972), remanded and modified, 502 F.2d 349, reh. denied, 502 F.2d 349 (1974). Decisions by other state labor relations boards cited above further persuade this Board to invoke 21 V.S.A. §1727(d) in appropriate cases.

This Board is persuaded that this matter presents an appropriate circumstance for remedial, affirmative remedies. We view an order for payment to reimburse the School District for some amount of incurred expenses including attorney's fees as an appropriate "make-whole" order, rather than punitive action. In our view, after balancing the parties' equities, we order the Rutland Education Association and/or the Vermont Education Association to pay to the Rutland School District its reasonable expenses, including attorney's fees, incurred in these proceedings.

The Board is mindful that proceedings concerning the subject matter of this Order are under way before the Rutland Superior Court. The Board is aware that such proceedings are time-consuming and expensive for the parties involved. The Board is also aware that the instant proceedings have been costly for this Board to hear and determine. While the expenses of parties in related court proceedings and of this Board in these proceedings may be an appropriate element of relief in some circumstances, the Board has decided not to include these elements in its remedy in this matter. The Board prefers not to engage in an evaluation of the necessity, propriety, and amount of expense and hardship imposed upon the parties by the court proceedings and has no desire to speculate in this area. The Superior Court's own equitable jurisdiction allows it to make an award for expenses in its proceedings, if appropriate, and the Superior Court is in a better position to determine whether and to what extent an award of such expenses is appropriate for either party. Because of the availability of other remedies in another forum which is well suited to consider proceedings before it, this Board will confine its remedy to matters within its own experience and expertise.

ORDER

For the foregoing reasons and consistent with the findings of fact and conclusions of law stated here and pursuant to the powers vested in the Vermont Labor Relations Board by 21 V.S.A. §1727(d) to prevent unfair labor practices, it is hereby ORDERED:

I. That the Rutland Education Association, the Vermont Education Association, Martha Tomsuden, Grace Whitney, and Thomas Carpenter;

   A. Permanently cease and desist from engaging in or encouraging any work stoppages, strike, picketing or other withholding of services prior to the completion of all statutory impasse resolution procedures, and bargaining required by this Order.

II. That the Rutland City School District and Board of School Commissioners shall:

A. Cease and desist from payment of substitute teachers at the average rate of pay for all teachers, unless that rate is needed to obtain necessary substitute teachers.

B. Cease and desist from making and communicating any untrue statements which have the purpose or effect of questioning the personal integrity and good faith of the Association negotiators.

III. That the Rutland Education Association and the Vermont Education Association take the following affirmative action:

A. Rescind the strike vote of August 29, 1979.

IV. That the Rutland Education Association and the Rutland City School District, through its Board of Commissioners, shall:

A. Bargain in good faith for a period of thirty days, commencing from the date of this Order; notifying this Board in writing of times, locations and proposals of further negotiations.

B. Post copies of this Order on all School bulletin boards customarily used for employer-employee communications, for a period of sixty consecutive days.

C. Notify this Board in writing of all steps taken to comply with this Order.

D. Attempt in good faith to reach a stipulation as to the amount which must be paid to the Rutland City School District to compensate it for attorney's fees in accordance with the terms of this Order. Any amount agreed upon shall be paid by the Rutland Education Association or Vermont Education Association to the Rutland School District within thirty days of this Order. If no agreement is reached, the Rutland School Board shall notify this Board of that fact and a hearing on the issue will be set.

Dated this 10th day of January, 1980, at Montpelier, Vermont.

Appeal dismissed by Stip - 6/18/80

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

Robert H. Brown