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Employer Unfair Practices Under California's Rodda Act and the NLRA: A Comparative Survey

I. INTRODUCTION

On July 1, 1976, California's progressive new legislation in the area of public employment relations became fully effective.¹ This legislation, which will be called the Rodda Act herein,² extends to public school employees³ many of the rights and privileges which labor in the private sector has enjoyed for many years under the National Labor Relations Act (NLRA).⁴ The Rodda Act creates a state agency, the Educational Employment Relations Board (EERB), to govern employee—employer relations;⁵ provides procedures for recognizing an organization as the exclusive representative for the employees⁶ in the appropriate bargaining unit;⁷ mandates collective bargaining or, as it

1. CAL. GOV'T. CODE §§ 3540-3549.3 (West Supp. 1977) [repealing Cal. Educ. Code §§ 13080-13090 (West 1975)].

2. This legislation is commonly called the Rodda Act after Senator Albert S. Rodda who sponsored it as Senate Bill 160 (1975).

3. "Any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this State, management employees, and confidential employees." CAL. GOV'T. CODE §3540.1(j) (West Supp. 1977). It is important to note that this legislation contains a provision allowing its expansion to include all California public employees. *Id.* §3540.

4. 29 U.S.C. §151-68 (1971) [hereinafter referred to in the text as the NLRA]. The section numbers cited in the text will correspond to the last digit of the United States Code section number; *e.g.*, Section 8(a)(1) will refer to 29 U.S.C. §158(a)(1). It should be noted that the NLRA is inapplicable to public employers and their employees. *Id.* § 153(2).

5. CAL. GOV'T. CODE § 3541 (West Supp. 1977).

6. *Id.* §§ 3544-3544.9.

7. *Id.* § 3545. At the time this comment went to the printer, the EERB had handed down seven decisions, all of which dealt with the appropriateness of bargaining units. Belmont Elementary School District, decision No. 7 (Dec. 30, 1976); Fremont Unified School District, decision No. 6 (Dec. 16, 1976); Los Angeles Unified School District, decision No. 5 (Nov. 24, 1976); Sweetwater Union High School District, decision No. 4 (Nov. 16, 1976); Pittsburg Unified School District, No. 3 (Oct. 14, 1976); Sierra Sands Unified School District, decision No. 2 (Oct. 14, 1976); Tamalpais Union High School District, decision No. 1 (July 20, 1976).

is called in the Rodda Act,⁸ meeting and negotiating;⁹ and requires a written contract as the result of collective bargaining.¹⁰ Although the Rodda Act provides no right to strike,¹¹ its many similarities with the NLRA lead inevitably to the conclusion that the legislators who drafted the Rodda Act were strongly influenced by the NLRA.

One of the most significant similarities between the two labor relations acts is the mutual inclusion of comprehensive provisions for unfair labor practices. Such provisions are particularly significant in the Rodda Act because they have been conspicuously absent from other public sector labor laws¹² and because the unfair labor practice provisions of the NLRA have been one of the most effective tools of the National Labor Relations Board (NLRB) in "balancing the rights of employees against those of the employer and, to a lesser extent, those of the union."¹³ Since the unfair practices provisions of the Rodda Act appear to have been so strongly influenced by the corresponding sections of the NLRA, all those who work with these provisions—employees, employers, attorneys, and members of the Educational Employment Relations Board (EERB)—must continue to draw on the national experience gained from working with the NLRA. Moreover, the unfair practice rulings of the NLRB, of the federal courts, and of the United States Supreme Court must be considered in interpreting the new legislation.¹⁴

The purpose of this comment is to facilitate the use of the national experience in labor relations by comparing the employ-

8. CAL. GOV'T. CODE §§ 3540.1(h), 3543.5(c), and 3543.6(c) (West Supp. 1977).

9. One commentator has explained the use of the terms "meet and negotiate" for public employees as follows:

"When a trade union bargains, it has something with which to bargain. It is bargaining for its services which it may withhold if it cannot conclude an agreement. In the public sector, we speak only of 'negotiating' since, legally, the employee organizations may not withhold their services." Cooper, *Essential Differences in Negotiations in the Private and Public Sectors*, in COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES 19 (1968).

10. CAL. GOV'T. CODE § 3540.1 (h) (West Supp. 1977).

11. *Id.* § 3548-3548.8.

12. Sullivan, *Unfair Practice Standards for Public Service Employees and Unions: An Unfulfilled Need*, 9 WASHBURN L. REV. 412, 415 (1970).

13. MORRIS, *THE DEVELOPING LABOR LAW*, 63 (1st ed. 1971) [hereinafter referred to and cited as *THE DEVELOPING LABOR LAW*].

14. The California Supreme Court has held that federal precedents which interpret or apply the NLRA are appropriate guides to the interpretation of California labor legislation which is similar to the NLRA. *Fire Fighters' Union v. City of Vallejo*, 12 Cal. 2d 608, 617, 116 Cal. Rptr. 507, 513 (1974). See also *Alameda County Assistant Public Defender Association v. County of Alameda*, 33 Cal. App. 3d 825, 109 Cal. Rptr. 392 (1933) and *Santa Clara County District Attorney Investigators Association v. County of Santa Clara*, 51 Cal. App. 3d 255, 124 Cal. Rptr. 115 (1975).

ee unfair practice provisions of the Rodda Act and the NLRA, by setting out the fundamental case law interpreting these provisions, and by then examining the possibility of applying the federal law to the practical situations confronting California school employees and employers.

II. RIGHTS OF EMPLOYEES

The heart of any legislation dealing with unfair labor practices is the provisions it makes for the rights of the employees. These provisions are vital because almost all employer unfair practices involve abridgements of these rights.¹⁵ Moreover, there are similar legislative policies behind the state and federal unfair practices statutes; both emphasize the employees' freedom to select organizations to represent them and their ability to exert some control over their fate as workers by dealing with their employers collectively through those organizations.¹⁶ Section 7 of the NLRA, in one distinctive paragraph, sets forth four basic employee rights. Each of these rights is either represented in the Rodda Act or is very conspicuously absent.

First, the initial sentence of NLRA Section 7 states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations"¹⁷ Section 3543 of the Rodda Act almost duplicates this language:

Public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.¹⁸

15. See *infra* part III on Interference with The Rights of Employees.

16. The legislative policies as stated in both the Rodda Act and NLRA are worded differently but embody the same concepts. CAL. GOV'T. CODE § 3540 states: "It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems . . . by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees" NLRA § 1 states: "It is declared to be the policy of the United States . . . [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (1971).

17. 29 U.S.C., § 157 (1971).

18. CAL. GOV'T. CODE § 3543 (West Supp. 1976).

This striking similarity in the language of the two provisions should make application of the NLRA precedents to the California school situation relatively easy in regard to practices which violate these rights as long as there is no extrinsic factor in the school situation or other California law which would demand that California treat the abridgement of these rights differently.

Second, the NLRA guarantees employees the right to "bargain collectively through representatives of their own choosing."¹⁹ Although this right is not stated as directly in the California law (the term "meet and negotiate" is used rather than the term "collective bargaining"), this right is implicit in several sections of the Rodda Act. Sections 3543.5(c) and 3543.6(c) of the Act make it an unfair practice for either the employee organization or the employers, respectively, to fail to meet and negotiate.²⁰ In a sense, the right to bargain collectively is even more forcefully presented in Section 3543 of the Rodda Act which *requires* collective action once an employee representative has been chosen:

[Employees have] the right to represent themselves individually in their employment relations, except that once the employees . . . have selected an exclusive representative and it has been recognized . . . or certified . . . , no employee in that unit may meet and negotiate with the public school employer.²¹

Thus, the Rodda Act seems to make collective bargaining mandatory; it is not simply a right which may be exercised.

Third, Section 7 also includes an omnibus provision giving employees the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" This provision, "while not unlimited, is nonetheless broad,"²² covering almost any "group action in the interest of the employees."²³ The Rodda Act contains no equivalent provision. The omission is conspicuous not only because the concerted activities provision of the NLRA is broad and flexible but also because it includes the rights to strike and to picket.²⁵ By contrast, it is obvious that, by this omission, the California legislature has refused to authorize strikes by school employees

19. 29 U.S.C., § 157 (1971).

20. CAL. GOV'T. CODE §§ 3543.5(c) and 3543.6(c) (West Supp. 1977).

21. *Id.* § 3543.

22. THE DEVELOPING LABOR LAW 65.

23. *Id.*

24. *Id.* at 522. NLRA § 13 adds: "Nothing in this Act, except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike. . . ." 29 U.S.C. § 163 (1971).

25. THE DEVELOPING LABOR LAW 592.

and, therefore, that school employees continue to be governed by California decisional law which bars strikes by public employees.²⁶ Although strikes will remain illegal without legislative sanctions, the right to picket will probably not be limited since that right receives much greater constitutional protection than that accorded the right to strike.²⁷

Finally, both the NLRA and the Rodda Act contain provisions giving employees the right to refuse to exercise any of the rights enumerated in the legislation. NLRA Section 7 states that employees have "the right to refrain from any and all such activities"²⁸ This provision was added by the Taft-Hartley Act of 1947 and was "rooted in the statutes's amended declaration of policy 'to protect the rights of individual employees in their relations with labor organizations. . . .'"²⁹ The corresponding provision of the Rodda Act is contained in Section 3543: "Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations. . . ."³⁰

The Rodda Act also includes one important right extended to employees under the NLRA, although that right is not included in Section 7. Rodda Act Section 3543 states: "An employee at any time may present his grievance to his employer, and have his grievance adjusted without intervention of the exclusive representative . . ."³¹ as long as the adjustment is reached prior

26. *Los Angeles Met. Transit Authority v. The Brotherhood of R.R. Trainman*, 54 Cal.2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960). "In the Absence of Legislative authorization public employees in general do not have the right to strike . . ." *Id.* at 687, 355 P.2d at 905, 906, 8 Cal. Rptr. at 2. Although *Los Angeles Met.* carries out an exception to the rule it sets forth, the rule itself is widely accepted. *Almond v. County of Sacramento*, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969). See *WERNE Strikes and the Rights of Public Employees in California* in 3 *THE LAW AND PRACTICE OF PUBLIC EMPLOYMENT LABOR RELATIONS* 380 (1974). Cf. *The Government Employee and Organized Labor*, 2 SANTA CLARA LAWYER 147 (1962).

27. "In *Dorchy v. Kansas* the Supreme Court enunciated the principle that 'neither the common law nor the Fourteenth Amendment confers the absolute right to strike' [272 U.S. 306, 311 (1926)]. But the Court has never clearly enunciated the degree of constitutional protection, if any, to which the strike is entitled." "THE DEVELOPING LABOR LAW 518-19. Although the right to picket is not unlimited, it is protected by the first amendment as free speech. *Id.*

28. 29 U.S.C. § 157 (1971).

29. *THE DEVELOPING LABOR LAW* 64 (quoting 29 U.S.C. § 151 (1971)).

30. CAL. GOV'T. CODE § 3543 (West Supp. 1977).

31. *Id.*

to arbitration and is not inconsistent with the employees' organization's contract. NLRA Section 9 (a) includes the same right in almost identical language except that it does not require that the adjustment be made prior to arbitration.³² In addition, the Rodda Act and the NLRA make some provision for the employee organization to respond to the employer's proposed adjustment: under the Rodda Act the employee organization may file a written response to the employer's proposal,³³ and under the NLRA a representative of the union may be present when the adjustment is made.³⁴ Also, in relation to the right to adjust individual grievances, it should be noted that both the Rodda Act and the NLRA require that the employee organization represent all employees in the bargaining unit (not just members) fairly and impartially.³⁵

III. INTERFERENCE WITH THE RIGHTS OF EMPLOYEES

Both the Rodda Act and the NLRA make it an unfair practice to abridge the rights of employees. Rodda Act Section 3543.5 states:

It shall be unlawful for a school employer to: (a) impose reprisals or threats of reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.³⁶

This section roughly corresponds to NLRA Section 8(a)(1) which provides "It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed."³⁷ The language of Section 8(a)(1) may seem more limited, but this appearance is false because, under the NLRA, the act of making reprisals (which the Rodda Act specifically mentions) has been construed to constitute interference, restraint, and coercion.³⁸ Further, the NLRA deals with the unfair labor practice of discrimination in Section 8(a)(3).³⁹

32. 29 U.S.C. § 159(a) (1971).

33. CAL. GOV'T. CODE § 3543 (West Supp. 1977).

34. 29 U.S.C. § 159(a) (1971).

35. CAL. GOV'T. CODE 3544.9 (West 1977) and 29 U.S.C. § 9(a) (1971). See *Conley v. Gibson*, 355 U.S. 41 (1941).

36. CAL. GOV'T. CODE § 3543.5 (West Supp. 1977).

37. 29 U.S.C. § 158(a)(1) (1971). Throughout the Rodda Act traditional labor management terminology is avoided: "contracts" are "agreements," "collective bargaining" is "meeting and negotiating," and "unions" are "employee organizations." However, the term "unfair practice" is used in §§ 3541.3 and 3541.5 dealing with the procedure for filing an unfair practice charge.

38. 29 U.S.C. § 158(c) (1971) guarantees the employers freedom of expression if such expression contains no "threat of reprisal or force, or promise of benefit." See generally THE DEVELOPING LABOR LAW 94.

39. See part IV *infra* on Discrimination.

In reality, it is the California statute which is more limited because it enforces a narrower range of guaranteed employee rights. But, regardless of differences in drafting, it seems likely that the EERB will be confronted with the same broad categories of complaints concerning employer interference, restraint, and coercion in organizational activities. These types of unfair practices will be discussed under the following headings: interrogation, solicitation and distribution, surveillance, and employer anti-union statements.⁴⁰

A. *Interrogation*

Interrogation is a broad term referring to both the act of an employer questioning employees individually and to his polling them collectively regarding their union activities, affiliations or sympathies.⁴¹ Interrogation violates an employee's rights because there is an "inherent danger of coercion" when the employer seeks organizational information;⁴² the employer's interrogation has a "natural tendency to instill in the minds of employees fear of discrimination on the basis of information that the employer has obtained."⁴³ However, at certain times an employer may have a genuine need to know the extent of union organization in his company: "an employer has a legitimate purpose for questioning his employees regarding their union sympathies in order to verify the union's claimed majority status and determine whether he should recognize the union."⁴⁴

As to the questioning of individuals, the approach of both the NLRB and of the Courts has been to view the interrogation not as an unfair practice *per se* but rather as a violation which must be factually determined "in light of all the surrounding circum-

40. These four categories represent what are commonly called "independent violations" of Section 8(a)(1) as opposed to "derivative violations" a term which means that "A violation . . . of any of the four subdivisions of Section 8, other than sub-division one, is also a violation of subdivision one." 3 NLRB ANNUAL REPORT 52 (1939).

41. See 48 AM. JUR. 2d, *Labor and Labor Relations* §§ 561-568 and Cannon Electric Company, 151 N.L.R.B. 1465 (1965).

42. *Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 774 (1964).

43. *NLRB v. West Coast Gasket Co., Inc.*, 205 F.2d 902, 904 (9th Cir. 1953). It is important to note that questioning is not protected by the first amendment or by Section 8(c). *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

44. 48 AM. JUR. 2D *Labor and Labor Relations* § 562.

stances, including the time, place, personnel involved, and the known position of the employer.”⁴⁵ This rule was first enunciated in the controversial *Blue Flash Express* case⁴⁶ which also provided four criteria which must be established before it may be determined that the factual situation presented does not constitute an unfair practice: (1) the employer must have had a valid purpose for the information, (2) he must have communicated this purpose to the employees, (3) he must have given assurances against reprisals, and (4) he must have avoided engaging in any unfair practices or in the creation of a coercive atmosphere.⁴⁷ Of these four factors, the first and the fourth are the most important. As was stated in the case of *NLRB v. Firedoor Corp.*:

The most relevant factors are whether there has been a background of employer hostility to and discrimination against the union and whether the questions seem to seek information which the employer in good faith needs—as when individuals are asked whether they belong to the union so that the employer can check the union’s claim to represent a majority or, to the contrary, seem to seek information most useful for discrimination—as when employees are asked who organized the union or whether named fellow workers belong.⁴⁸

At one time the NLRB also used the *Blue Flash* standard to determine polling violations; it would look to all the surrounding circumstances. However, the federal courts enforcing NLRB rulings which followed *Blue Flash* varied greatly in their application of the surrounding circumstances test to polling violations.⁴⁹ Consequently, in *Struksnes Construction Company* the NLRB provided more stringent requirements which a poll of employees must meet in order not to be subject to NLRB action:

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of the union’s claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.⁵⁰

45. THE DEVELOPING LABOR LAW 102. See *Daniel Construction Co. v. NLRB*, 341 F.2d 805, (4th Cir. 1965) and *Reserve Supply Corp. v. NLRB*, 317 F.2d 785, 787 (2nd Cir. 1963) which states “[t]he Board is required to consider not only the information sought but also the manner and content in which the questioning was conducted.”

46. 109 N.L.R.B. 591 (1954).

47. THE DEVELOPING LABOR LAW 101, 102 summarizing *Blue Flash*, *id.*

48. 291 F.2d 328, 331 (2nd Cir. 1961), *cert. denied* 368 U.S. 921 (1962).

49. THE DEVELOPING LABOR LAW 101.

50. *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1063 (1967). NLRB actions in regard to interrogations which violate section 8(a)(1) are not limited to

These safeguards are basically the same factors considered in *Blue Flash*. However, they are now mandatory, and there is one significant addition in the secret ballot requirement.⁵¹ The NLRB added this new safeguard because "secrecy of the ballot will give further assurances that reprisals cannot be taken against employees because the views of each individual will not be known."⁵²

Another important aspect of *Struksnes* is that it limits polling to that period of time commencing after a union has made a demand on the employer for recognition but before the union has filed a petition for an election with the NLRB.⁵³ The rationale for restricting polls to this interim period is that only then does an employer have a legitimate interest in taking a poll—to determine the validity of the claim for recognition—that can be successfully balanced against the employees' right to be free from coercion. Only after a claim has been made does the employer need to ascertain its validity, and once an election has been requested this interest ceases. At that point the employer has evidently refused to recognize the union, and a poll would serve no purpose "that would not be better served by the forthcoming Board election."⁵⁴ The rationale for prohibiting polls at both of these times is the same: the employer has no legitimate interest to balance against the employee's right to be free from possible reprisals.

There is one other time when the NLRB will allow an employer to interrogate an employee. In *Johnnie's Poultry Company* the NLRB held that, when the interrogation of an employee is for the purpose of investigating facts concerning issues in an unfair practice proceeding and the investigation is necessary to enable the employer to prepare his defense, interrogation will be allowed provided the employer observes even more extensive safeguards than those set forth in *Struksnes*.⁵⁵ The em-

the various remedial orders. The NLRB may also set aside an election which follows the violation. THE DEVELOPING LABOR LAW 102.

51. See also *O'Leary Food Store*, 167 N.L.R.B. 543 (1968) and *NLRB v. Kingston*, 172 F.2d 771 (8th Cir. 1949).

52. *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1063 (1967).

53. *Id.*

54. *Id.*

55. *Johnnie's Poultry company*, 146 N.L.R.B. 770 (1964). The following is a summary of the required safeguards from THE DEVELOPING LABOR LAW 104:

ployer's right to prepare his defense takes priority over the employee's right to be free from the inherent coercion of interrogation as long as the safeguards insulate the employee from possible reprisals.

Since the Rodda Act and the NLRA have similar provisions designed to protect employees from interference, restraint, and coercion, the EERB could adopt the entire framework developed by the NLRB and by the federal courts to control employer interrogation. However, under the Rodda Act, employers must be allowed to interrogate at certain times since the California Legislature has provided that employers may recognize employee organizations prior to certification elections.⁵⁶ Nevertheless, an essential difference between the nature of employment in the private sector and of employment in the public schools may make it unnecessary to adopt such an elaborate scheme. This difference is that, during organization, public school employees may not be as susceptible to the inherent coercion of interrogation as are workers in private industry. Public school employees are not as insecure because their employers do not have the same capacity to make reprisals as do private employers; the school employer's relative impotence stems from the restrictions on dismissing employees imposed by the tenure and civil service laws which still govern hiring and firing in the public schools.⁵⁷

Yet, since public school employers can still impose reprisals regarding transfers, work assignments, and working conditions based upon information garnered through their interrogations of employees, it seems likely that some restrictions will still have to be maintained under the Rodda Act even if they are not so stringent as those under the NLRA. The EERB could follow the non-mandatory approach of *Blue Flash* which looks to the total context of the interrogation to determine if there has been an unfair practice. This total context approach could be coupled with the *Struksnes* requirement that all polls must be taken by

"(1) The purpose of the questioning must be communicated to the employee.

2 An assurance of no reprisals must be given.

3 The employee's participation must be given on a voluntary basis.

4 The questioning must take place in an atmosphere free from anti-union animus.

5 The questioning must not be coercive in nature.

6 The questions must be relevant to the issues involved in a complaint.

7 The employee's subjective state of mind must not be probed.

8 The questions must not otherwise interfere with the statutory rights of the employee."

56. CAL. GOV'T. CODE § 3544 (West Supp. 1977).

57. CAL. EDUC. CODE §§ 856, 13304, and 13583 (West 1975).

secret ballot. However, by refusing to adopt the mandatory approach of *Struksnes* the EERB would retain much more flexibility in confronting the more open and potentially less coercive atmosphere of public school employment.

B. Solicitation and Distribution

One problem of the NLRB has been to strike a balance between the employer's right to control his own property and maintain discipline among his workers and the employees' right to have free access to information regarding the unions which seek to represent them. Workers have sought to distribute literature and to solicit union membership while on the job, and unions have also attempted to enter work sites for solicitation and distribution purposes. Employers have traditionally controlled this situation by banning all solicitation and distribution. The result is that the NLRB and the courts have established a rather intricate scheme governing what restrictions the employer may impose upon the solicitation of membership and the distribution of literature on his premises without committing unfair practices.⁵⁸ However, this scheme is probably not applicable to public school employment problems simply because Rodda Act Section 3543.1(b) contains a broad access provision for the public school employee organization:

Employee organizations shall have the right to access at reasonable times to the areas in which the employees work, the right to use institutional bulletin boards, mailboxes and other means of communications, subject to reasonable regulation and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.⁵⁹

Since the statute gives this right to the employee organization, non-employees who work for the organization should accordingly be allowed access to school sites. This provision is a broad

58. The employer may prohibit employee solicitation in both working and non-working areas only during working hours. *Stoddard and Quick Manufacturing Co.*, 138 N.L.R.B. 615 (1962). The employer may restrict distribution by employees in working areas at all hours and in non-working areas during working hours. *Republic Aviation Corp. v. NLRB* 324 U.S. 293 (1945). Both solicitation and distribution by non-employees may be completely barred except in certain limited circumstances. *NLRB v. Babcock and Wilcox*, 315 U.S. 106 (1956). See also *Amalgamated Food Employees Local 590 v. Logan Valley Plaza Inc.*, 391 U.S. 302 (1968), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), and *Hudgens v. NLRB*, 422 U.S. 196 (1976).

59. CAL. GOV'T. CODE § 3543.1(b) (West Supp. 1977).

one compared with the case law under the NLRA which bars non-employees almost entirely from the employer's premises.⁶⁰ Although no mention is made in the Rodda Act of employees' solicitation and distribution, it is unlikely that narrower restrictions would be placed on employees than on non-employees. This broad approach can be justified because violations of the employer's right to control his private property are not involved.

Although it is conceivable that there would be no need for employer restrictions on solicitation and distribution under Section 3543.1(b) because of that section's liberal approach, it still appears likely that school employers will formulate some limitations on access. If there is any similarity between public school employers and those in the private sector, the school employers will seek to regulate access as much as possible because unlimited access, if fully exercised, probably would disrupt the functioning of schools.

Since Section 3543.1(b) itself limits access to "reasonable times," one logical approach for the EERB would be to make "reasonable times" the major criteria for all solicitation and distribution rather than the private property and territorial considerations which are so important under the NLRA.⁶¹ For those employees directly involved in the educational process—teachers, teacher's aids, counselors, etc.—reasonable times could mean those times when the organizational activities are isolated from the educational process. This formulation would be easy to apply by simply limiting solicitation and distribution to those times when employees have no responsibilities for students. Further, it would undoubtedly provide a great deal of time for solicitation and distribution on the school premises.

For those employees who are not directly involved in the education process—*e.g.* maintenance or clerical employees—the regulation of solicitation and distribution could borrow more heavily from the national law because of the greater concern for control over production. A good compromise between the right of access in Section 3543.1(b) and the public school employer's needs to maintain production would be to designate reasonable times to mean that when employees are on their own free time—

60. See note 58 *supra*.

61. The statute itself, Section 3543.1(b), uses two phrases, "reasonable regulation" and "reasonable times." Since the phrase "reasonable regulation" appears to refer specifically to the use of bulletin boards, mailboxes, and other means of communication, "reasonable times" should be the guiding concept in determining what limitations should be placed upon solicitation and distribution.

before and after working hours, and during rest breaks and lunch hours—there would be no restrictions on solicitation and distribution even though the employees remain on the school premises. Of course, the on-premises organizational activities of these employees could be curtailed or eliminated if they in any way interfered with the educational process.

C. Surveillance

Surveillance is a broad term covering many types of employer activity: *e.g.* observing union meetings, photographing workers engaged in union activities, eavesdropping on workers' conversations, and employing labor spies to infiltrate a union. Like interrogation, surveillance is also inherently coercive because the workers know that the information gathered could easily be used against them. However, in contrast to interrogation, surveillance has been held to interfere with the employees' rights regardless of the psychological effect it has upon the workers because the potential for reprisals or discrimination is so great.⁶² Surveillance is also more offensive than other unfair practices not only because it violates an employee's rights under Section 7 of the NLRA but also because it impinges upon his personal right to privacy. If surveillance were to become a problem in school employee-employer relations, it would be appropriate for the EERB to adopt the strict rules of the NLRB if only for their deterrent effect.

Although there is some disagreement among the federal circuits as to whether surveillance constitutes a *per se* violation of Section 8(a)(1) or whether it must exist in the context of some other type of violation,⁶³ the NLRB has consistently held that surveillance alone violates employees' rights whether it is done by the employer or by his agents.⁶⁴ Because the coercive effect of surveillance is so strong, it is not even necessary for the employer to be aware of the surveillance;⁶⁵ and, indeed, it will be enough if the employer wilfully leads the employees to believe that they are under surveillance even if such a belief is false.⁶⁶

62. See 48 AM. JUR. 2D *Labor and Labor Relations* §§ 569-76.

63. *Id.* § 569.

64. THE DEVELOPING LABOR LAW 104.

65. NLRB v. Growers-Shippers Vegetable Association, 122 F.2d 368, 376 (9th Cir., 1941).

66. THE DEVELOPING LABOR LAW 104.

However, there is one important exception to these rules: an employer may observe his employees for the purpose of determining whether they are participating in prohibited solicitation and distribution activities.⁶⁷

D. Employers' Anti-Union Statements

Rodda Act Section 3543.5(a) makes it unlawful for an employer to "threaten to impose reprisals" against an employee because of the employee's exercise of his statutory rights.⁶⁸ Under the NLRA an employer's threatening statements fall within the scope of Section 8(a)(1), the general provision against interference, restraint, and coercion.⁶⁹ However, the criteria for determining which employer statements will be considered coercive stem from Section 8(c) which has no counterpart in the Rodda Act:

The expressing of any views, arguments or opinions, or the dissemination thereof whether in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expressions contain *no threat of reprisal or force, or promise of benefit*.⁷⁰ (Emphasis added.)

Although this provision is an embodiment of an employer's first amendment freedom of expression,⁷¹ in practice it balances the employer's right to free speech against the employee's right to be free from coercion and to exercise free choice in choosing a representative.

The NLRB and the courts have always considered the "threat" concept to be extremely broad because of the psychological effect that the employer's words may have on those who work under him and who may be subject to his wrath:

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than a vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.⁷²

This psychological effect has also been noted by the United States Supreme Court: "Slight suggestions as to the employer's

67. NLRB v. R. C. Mahon Co., 269 F.2d 44, 46 (6th Cir. 1952).

68. CAL. GOV'T. CODE § 3543.4(a) (West Supp. 1977).

69. THE DEVELOPING LABOR LAW 94.

70. 29 U.S.C. § 158(c) (1971).

71. 48 AM. JUR. 2D *Labor and Labor Relations* § 549.

72. NLRB v. Federbush Co., 121 F.2d 954, 957 (2nd Cir. 1941).

choice between unions may have a telling effect among men who know the consequences of incurring that employer's strong displeasure."⁷³ In determining which statements constitute valid exercises of the employer's freedom of speech and which may be threats (however thinly veiled) in the workers' minds, the NLRB will examine the statements in the "total context" in which they were made.⁷⁴ The statements will not be considered in isolation but rather in light of all the relevant circumstances, including the conduct of the parties and their relative positions; "If, [ect] when so considered, the employer's statements form a part of the general pattern or course of conduct which constitutes coercion and deprives employees of their free choice guaranteed by [Section 7], the statements are a basis for an unfair practice finding."⁷⁵

This total context view has been carefully delineated because of the difficulty in distinguishing between an employer's mere prediction of what might happen if the workers unionize and his threat of taking action in that event. The United States Supreme Court squarely confronted this problem in the landmark case of *NLRB v. Gissell Packing Company*:

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstratively probable consequences beyond his control or to convey a management decision already arrived at If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.⁷⁶

73. *International Association of Machinists v. NLRB*, 311 U.S. 72, 78 (1940) (quoted with approval in *NLRB v. Virginia Electric Power Co.*, 314 U.S. 469, 477 (1941)).

74. *Arch Beverage Corp.*, 140 N.L.R.B. 1385, 1387 (1963).

75. 48 AM. JUR. 2D *Labor and Labor Relations* § 549.

76. 395 U.S. 575, 618 (1969). The Court upheld an unfair practice charge against an employer who predicted that unionization would close the plant where the employer sincerely believed that closing would result but where such closing was not "capable proof."

Thus, a prediction must have been based either upon demonstrable objective facts or upon a management decision reached before union organization had begun.

However, this objective fact test is not always helpful when the statements of the employer are particularly ambiguous. In such situations the NLRB has tended to look to the actual or possible subjective reactions of the employees to the statements. If the effect of the statements is to create an attitude of fear in the minds of the workers,⁷⁷ an unfair practice will be deemed to have taken place. Such employer statements are often couched in terms which create an atmosphere of futility; that is, employers often convey the idea that choosing a union will not make a difference in their own unilateral policies.⁷⁸ As another common example, employers often convey to their workers the impression that the workers will inevitably suffer economic loss by choosing a union to represent them.⁷⁹

Yet, regardless of these rules that predictions must be grounded on objective facts and that ambiguous statements will be judged by their effects on the hearers, many statements by employers concerning unions are not considered unfair practices. Employers may explain to their workers that the workers may *choose* whether or not to join a union⁸⁰ and they may argue against the workers' joining *any* union. Employers may also air their opinions regarding unions in general or even particular unions where the total context does not reveal a threat.⁸¹ Further, they may state their hopes that the workers will vote against a union⁸² and may point out a host of actual disadvantages that unionization might foster.⁸³

Section 8(c) also forbids statements which interfere with an employee's freedom of choice because the statements contain a "promise of benefit," *e.g.*, a wage increase or an improvement in working conditions. This provision is founded on the policy that

[t]he danger inherent in well-timed increases and benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss

77. THE DEVELOPING LABOR LAW 94-96. Of course, if it can be shown that the employer intended to cause fear an unfair practice will have been committed regardless of the employees reaction.

78. Trane Co., 137 N.L.R.B. 1506, 1510 (1962). American Greeting Corp., 146 N.L.R.B. 1440, 1444 (1964), and Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1985 (1962).

79. Storkline Corp., 142 N.L.R.B. 875 (1963).

80. NLRB v. Dale Industries Inc., 355 F.2d 851 (6th Cir. 1966).

81. NLRB v. Gissel Packing Co., 374 U.S. 575 (1969).

82. NLRB v. Uniform Equipment Rental Service Inc., 398 F.2d 912 (6th cir. 1968).

83. 48 AM. JUR. 2D *Labor and Labor Relations* § 550.

the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.⁸⁴

Promises of benefits have been interpreted to include announcements of new economic benefits, whether they will be received before or after a representation election.⁸⁵ This provision encompasses all cases where the promised benefits are conditioned upon the workers' rejecting the union,⁸⁶ but such a condition is not a prerequisite to a finding that a violation has been committed. The promises need only impinge upon "freedom of choice for or against unionization and [be] reasonably calculated to have that effect."⁸⁷

Although the Rodda Act does ban "threats of reprisal" against employees who exercise their rights, there are two good reasons why such threats may not be such a major problem for school employees. First, public school employers simply may not be tempted to express themselves in a threatening manner. Employers usually commit unfair practices involving threats during organizational campaigns in which they seek to prevent unionization among their workers. But, with California school employees, the real organizational activities and the real conflicts may not be between employers and organizations but rather among the organizations which are vying for the employees' election votes. Since these organizations are already established in most school districts and since many employees already have some affiliation with one employee organization or another, employers are likely to view the certification of some union as inevitable. Second, even if school employers make ambiguous statements which could be interpreted as "threatening," there is a greater possibility that the employees themselves will not interpret those statements as threats. Public school employees are less apprehensive regarding job security simply because their employers do not have the absolute power over hiring and firing enjoyed by employers in the public sector.

84. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

85. *Tonkawa Refining Co.*, 175 N.L.R.B. 619 (1969) and *NLRB v. Bailey Co.*, 180 F.2d 278 (6th Cir. 1950).

86. *NLRB v. Brennan's Inc.*, 366 F.2d 560 (5th Cir. 1966).

87. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). *See also* *Macy's Missouri-Kansas Div. v. NLRB*, 389 F.2d 835 (8th Cir. 1968).

However, the possibility still exists that the EERB will be forced to establish regulations such as those developed under the NLRA. Public school employers may still threaten reprisals regarding such matters as transfers, working conditions, and promotions. Moreover, it must be remembered that the Rodda Act does not protect the employer's freedom of speech as does the NLRA's Section 8(c). If public school employers do make statements which could elicit fear of reprisals, then Rodda Section 3543(a) should be sufficient statutory authority to justify incorporating any or all of the NLRA law on this subject.

IV. DOMINATION AND SUPPORT

The Rodda Act and the NLRA contain nearly identical provisions regarding unfair practices involving employer domination or support of employee organizations. Rodda Act Section 3543.5(d) states that it is unlawful for the employer to

Dominate or interfere with the formation or administration of any employee organization, or contribute financial support to it, or in any way encourage employees to join any organization in preference to another.⁸⁸

NLRA Section 8(a)(2) is the same although it does not include the final Rodda Act phrase prohibiting the encouragement of membership.⁸⁹ The framers of Section 3543.5(d) apparently borrowed their section almost entirely from the NLRA; the added provision only sets forth an element of the unfair practice of support that had already existed under Section 8(a)(2). Because of this similarity it is reasonable to infer that the framers of the Rodda Act intended that the pertinent NLRA case law should be closely followed in this area.

Domination can be distinguished from support in that "support involves mere assistance to a favored union while domination means actual control of it."⁹⁰ Interference involves more than support of or assistance to a union in that an element of control is essential before interference can be found. It differs from domination in that "control is not so great that the organization is subjugated to the employer's will."⁹¹ Although these labels are helpful both in discussing and in prosecuting these unfair practices, their main significance becomes apparent when unfair practice penalties are assessed. For example, the

88. CAL. GOV'T. CODE § 3543.5(d) (West Supp. 1977).

89. N.L.R.A. Section 8(a)(2) also adds a provision stating that this section shall not prevent an employer from conferring with his employees during working hours without their loss of pay. 29 U.S.C. § 158(a)(2) (1971).

90. 48 AM. JUR. 2D *Labor and Labor Relations* § 582.

91. THE DEVELOPING LABOR LAW 138.

penalty for domination is extremely harsh: the union is completely disestablished as a bargaining representative.⁹²

It is important to a discussion of the violations of Section 8(a)(2) to note which acts of domination, interference, or support committed by the employer's agents will be attributed to the employer. This determination does not hinge upon the rules of respondeat superior nor does it involve the usual concepts of agency.⁹³ The concern is not with the legal relationship between the employer and his agent but rather with the effects of the agent's actions upon the free exercise of the employee's rights. Consequently, the test is whether "the employees will have just cause to believe" that the agent is acting for the employer.⁹⁴

If a reasonable man, in the position of an employee, could conclude or infer that the acts and deeds of the supervisory officials represented the attitude of the employer, then the Board may find that such acts and deed were the acts and deeds of the employer.⁹⁵

The provisions making domination an unfair practice were originally intended to prohibit company unions (those unions which were created by the employer to prevent outside organization and which were held under the employer's control) to minimize the effects of collective bargaining.⁹⁶ Although these company unions were **very, popular** during the 1930's, they are no longer a serious **problem**, largely because of these unfair practice provisions.⁹⁷ There seems to be little likelihood of the reemergence of the company union under the EERB because large employee organizations exist with national affiliations vying to represent the employees. The small, independent union which represented only the workers in one company and which was more susceptible to the charge of company domination does not have its equivalent organization in the public school employment arena. Of course, if such an independent employee organization were to develop and it was found to be controlled by the employer, the EERB would certainly want to root it out.

92. NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938).

93. International Association of Machinists v. NLRB, 311 U.S. 72 (1940). The Court's approach is perhaps closest to the traditional agency concept of apparent authority.

94. *Id.*

95. NLRB v. Pacific Gas and Electric, 118 F.2d 780, 787 (9th Cir. 1941).

96. Note, *Section 8(a)(2): Employer Assistance to Plant Unions and Committees* 9 STAN. L. REV. 351 (1957).

97. THE DEVELOPING LABOR LAW 137.

The dominated union is perhaps one of the most insidious infringements of employees' rights because the employees appear to have union representation while actually they do not.⁹⁸ Section 3543.4(d) will provide the appropriate vehicle for the Board's actions in such situations.⁹⁹

The term "interference" has usually denoted attempts by an employer to exert control over a union even though he had not actually created it as a company union.¹⁰⁰ These attempts to control have usually been manifested by the participation of supervisory employees in union activities. The degree of activity by supervisors does not have to be great for the NLRB to find an unfair practice. Employers have been held to have committed unfair practices where the supervisory employees aided in the formation of a union either with or without the employer's express authorization¹⁰¹ and even where one union had sought the support of friendly supervisors against a rival union.¹⁰² Unfair practices have also been found where supervisors collected authorization cards,¹⁰³ where they participated in the collective bargaining committee of the union¹⁰⁴ and where they merely retained their membership in the union and voted in a union election after having become supervisors.

The NLRA concept of employer interference with employee organizations could be extremely relevant in construing the Rodda Act because in public school employment it is very common for the supervisory personnel to emerge from the ranks of the employees they supervise. The crucial question is whether the EERB will choose to find unfair practices in acts as insignificant as some of those mentioned above. There may be additional legislative justification for the EERB to follow the NLRB in this area because the California Legislature has expressed its dissatisfaction with the possibility of managerial or supervisory participation and influence in employee organizations. Rodda Act Section 3543.4 specifically prevents managerial employees from being represented by an employee organization and Sec-

98. See *Pennsylvania Greyhound Lines*, 303 U.S. 261 (1938), *NLRB v. Brown Paper Mill Co.*, 108 F.2d 867 (5th Cir. 1940), and *Wahlgreen Magnetics*, 132 N.L.R.B. 1613 (1961) for examples of domination and resulting disestablishment.

99. CAL. GOV'T CODE § 3543.4(d) (West Supp. 197).

100. THE DEVELOPING LABOR LAW 138.

101. *Local 636, Plumbing and Pipefitting Industry v. NLRB*, 287 F.2d 354, 361 (D.C. Cir. 1961).

102. *Wolfe Metal Products*, 11 N.L.R.B. 659 (1957).

103. *American District Telephone Co.*, 89 N.L.R.B. 1635 (1950).

104. *Nassau and Suffolk Contractor's Ass'n*, 118 N.L.R.B. 174 (1957).

105. *Id.*

tion 3545(b)(2) prevents supervisory employees from being in the same bargaining unit as other employees.¹⁰⁶

Employer domination and interference are relatively easy to categorize as constituting unfair practices, but employer support and assistance present a far more difficult problem. The difficulty lies in distinguishing support from cooperation. Cooperation between employee and employer is not to be discouraged since it aids in the peaceful settlement of differences between labor and management. But support is prohibited because it impinges upon an employee's freedom of choice and taints the collective bargaining process.

The difficulty of distinguishing between cooperation and support has forced the NLRB and the courts to act cautiously in this area. Support or assistance will not constitute a violation of the NLRA if it is "minimal and does not endanger the independence of the labor organization."¹⁰⁷ To determine which acts of support will be considered unfair practices, the NLRB will look to the employer's "overall pattern of conduct";¹⁰⁸ it will attempt to ascertain whether the employer has generally attempted to manipulate either the union or the workers through acts of coercion, interference, or propaganda. However, there is one important situation in which this total context approach will be inapplicable: when two rival unions vie for employee support, the employer must act with neutrality. Giving aid to one union but not to the other will be scrutinized and may constitute a *per se* violation of Section 8(a)(2).¹⁰⁹

The three most important classifications of support or assistance violations under the NLRA are those involving financial aid, use of company facilities, and pre-election campaigns. First, giving direct financial aid to a union creates such a potential for interference and coercion that it will usually be considered a violation of Section 8(a)(2) even if, in context, the support is relatively free from other manipulations by the employer.

106. CAL. GOV'T. CODE § 3545(b)(2) (West Supp. 1977). For a distinction between management and supervisory employees, see CAL. GOV'T. CODE §§ 3540.1(h) and (m) (West Supp. 1977).

107. THE DEVELOPING LABOR LAW 141.

108. 48 AM. JUR. 2D *Labor and Labor Relations* § 582.

109. THE DEVELOPING LABOR LAW 142.

Examples of such aids are gifts of money to the union, payment of union expenses, and payment of union fees for the workers.

The real issue in regard to financial aid arises when the union is allowed to take the profits from catering concessions which serve the workers. Obviously, the distinction at this point between support and cooperation is a fine one. *NLRB vs. Post Publishing Company*, a fairly recent case, held that the company's relinquishment of vending machine proceeds to an independent union was not an unfair practice. Even though the unfair practice charge was made by a rival union, the Court of Appeals looked at the total context of the relationship between the employer and the union during the 35 years the union had represented the workers and found no other evidence of company support.¹¹¹ There are, however, several cases to the contrary.¹¹² This split of authority is significant because it shows that a determination as to whether such proceeds constitute unlawful financial support should be based upon the particular circumstances of each case.

Second, the use of company facilities by the union is a common practice from which an inference of employer support may be made. This use is evidence which may be considered in the total context of employer/employee relations. Standing alone, however, it is not a *per se* violation of Section 8(a)(2).¹¹³ This particular problem has been resolved under the Rodda Act because Section 3543.1(b) gives employee organizations the right to use institutional facilities for meetings at reasonable times.¹¹⁴ The ultimate effect of this provision is twofold: no employer commits the unfair practice of supporting an employee organization if he allows the organization to use school facilities; but he does commit such a violation if he denies their use to all organizations or to a particular one.¹¹⁵

Third, as discussed previously, when two unions are both seeking recognition under the NLRA, the act of aiding one of them will be scrutinized. Generally, a violation will be found.¹¹⁶ The employer must treat both unions the same; he must remain

110. 48 AM. JUR. 2D *Labor and Labor Relations* § 582. See THE DEVELOPING LABOR LAW § 582.

111. *NLRB v. Post Publishing Company*, 311 F.2d 565 (7th Cir. 1962).

112. 48 AM. JUR. 2D *Labor and Labor Relations* § 585.

113. *Id.* § 586.

114. CAL. GOV'T. CODE § 3543.1(b) (West Supp. 1977).

115. CAL. GOV'T. CODE § 3543.5(b) (West Supp. 1977) makes it an unfair practice to deny an employee organization its rights.

116. THE DEVELOPING LABOR LAW 142.

neutral.¹¹⁷ The most significant violation of the employer's duty of neutrality toward competing unions occurs when he recognizes and begins to bargain with one of the unions prior to an NLRB certification election. The rationale for making such pre-election acts a violation of Section 8(a)(2) was stated by the United States Supreme Court in *NLRB v. Pennsylvania Greyhound Lines*:

Once an employer has conferred recognition on a particular organization, it has a marked advantage over any other in securing adherence of employees, and hence, in preventing the recognition of any other.¹¹⁸

The NLRB subsequently formulated the following rule with respect to support for rival unions:

Upon presentation of a rival claim which raises a *real question concerning representation*, an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until the question concerning representation has been settled by the board.¹¹⁹ (Emphasis added.)

The NLRB has also created an exception to the above rule. Where an established reason exists—such as a contract bar—that allows recognition of an incumbent union,¹²⁰ the employer may do so. Despite this exception, the key to finding an unfair practice is still to determine whether there is a “real question” concerning representation.¹²¹

One other important situation must be mentioned in regard to employer recognition. The Supreme Court has held that an employer who recognizes or bargains with a union which does not have majority support will have committed an unfair practice even if he possessed a good faith belief in the union's majority status.¹²² Of course, if the employer did not have a good faith belief the violation would be even more apparent.

There is justification for the EERB to develop similar provisions regarding the premature recognition of one of two com-

117. *Id.* See also *NLRB v. Brown Paper Co.*, 160 F.2d 449 (1st Cir. 1947).

118. *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938).

119. *Shea Chemical Corp.*, 121 N.L.R.B. 1027, 1028 (1958).

120. *Id.*

121. See *Retail Clerk Ass'n v. NLRB*, 37 F.2d 805 (9th Cir. 1948). One criterion for determining a “real question” is whether the unrecognized union has sufficient support—usually 30 percent of the employees—to justify an election.

122. *International Ladies Garment Workers' AFL-CIO v. NLRB*, 366 U.S. 731 (1961).

peting employee organizations. Some public school employers may be confronted with hotly contested recognition campaigns by well-established and well-financed employee organizations, one of which may be looked upon more favorably by the employer. In this situation, the wise thing for the employer to do would be to request an election under Rodda Act Section 3544.1(a);¹²³ nevertheless, the temptation would exist for the employer to offer support by recognizing the favored organization.

V. DISCRIMINATION

Rodda Act Section 3543.5(a) includes provisions which make it unlawful for the employer to "discriminate or threaten to discriminate against employees . . . because of their exercise of their [guaranteed] rights. . . ."¹²⁴ The equivalent provision under the NLRA, Section 8(a)(3), is stated somewhat differently:

It shall be an unfair practice for an employer

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .¹²⁵

Despite their apparent differences, these two provisions are basically the same. Although the Rodda Act does not mention encouraging or discouraging union membership, this concept is implicit in Section 3543.5(a) since the right protected under this section is the right to participate in, to join, or to refuse to join an employee organization. Further, if an employee is discriminated against because he exercised these rights, the discrimination could also impinge upon the freedom of choice of his fellow employees: they might also be discouraged from joining the union or perhaps might even be encouraged to join. The purpose behind the NLRA provision also points to its basic similarity to the Rodda Act:

[This purpose is] to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.¹²⁶

Although discrimination charges comprise the majority of all NLRA unfair practice cases,¹²⁷ most of these cases are not relevant to the California school employment situation because of differences in labor practices in the public and private sectors. A great many of the cases under the NLRA involve discrimina-

123. CAL. GOV'T. CODE § 3544.1(a) (West Supp. 1977).

124. *Id.* § 3543(a).

125. 29 U.S.C. § 158(a)(3) (1971).

126. *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954).

127. *THE DEVELOPING LABOR LAW* 111.

tion against employees who engage in "concerted activities" such as strikes, boycotts, or picketing, activities which are not protected under the Rodda Act. Moreover, discrimination by the employer in the private sector often involves management practices which have no equivalent in the public schools; public school employers cannot "shut down" the plant or "run away" from the union organization. It is also doubtful whether the public school employers could "lock out" the employees since that would mean closing the schools.¹²⁸ Public school employers must also act in ways which make many of the cases under NLRA Section 8(a)(3) inapplicable to the California situation. As has been mentioned previously, public school employers do not have the means to discriminate which are available to their private counterparts. They do not have an absolute power over hiring and firing practices; the tenure and civil service laws have established strict criteria which govern the dismissal of permanent employees. There are also limitations on the employer's ability to discriminate in the area of wages and fringe benefits; the traditional practice of publishing a salary and fringe benefit schedule (very much like salary schedules in labor contracts) makes discriminatory practices that much more difficult. Further, progression on the salary schedule is usually governed exclusively by seniority and other objective factors such as the accumulation of college credits.

However, the rules established by the NLRB and by the courts may be relevant to many other discriminatory acts which could be perpetrated but which perhaps are not quite as severe as many of the forms of discrimination regulated by the NLRA. Examples of these lesser discriminatory acts include demoting and promoting certain employees, transferring them between departments or between work sites, assigning them to disagreeable tasks, and firing non-tenured personnel. Therefore, the basic attitude of the NLRB and of the federal courts is still applicable to the implementation of the Rodda Act. This attitude is embodied in two basic rules. The first, stated in its simplest form, is that treating union workers differently than non-union workers is a *per se* violation of section 8(a)(3) regardless of whether the union or the non-union worker is benefited.¹²⁹

128. *Id.* at 117-32.

129. *See* Note 54 *supra*.

The second rule encompasses a more complicated form of discrimination and is used in situations in which employers take action against both non-union and union workers in plants or shops where the majority of the employees have supported the union. The *per se* violation rule mentioned above is not applicable because union and non-union workers have been treated alike. However, the majority of the workers have suffered discrimination in that the manner in which they are treated after unionizing is inferior to the treatment they would have received had they not joined a union. In this situation, the test for discrimination has been whether the unilateral action of the employer was in response to union activity. If the action would not have been taken in the absence of such activity, then there has been discrimination.¹³⁰ It is unclear to what degree the employer's motive must be taken into consideration in this situation to establish the unfair practice; however, if the employer can demonstrate a valid motive for his actions other than simply responding to the workers' unionization he may have a valid defense to the charges.¹³¹

VI. CONCLUSION

The Rodda Act has specific provisions defining employer unfair practices which must have been modeled after the NLRA. Most of these provisions are phrased so that they could be applied and interpreted in the same manner as their NLRA equivalents. In some cases the Rodda Act has added new provisions which will rule out the application of NLRA precedents. In other situations the differences between employer-employee relations in the public schools and in the private sector may make the national labor law experience irrelevant to the application of the Rodda Act. In the last analysis, the EERB may be in an enviable position. It is founded upon well-considered legislation patterned after the NLRA, and it has the entire corpus of NLRB and federal court case law to draw upon as the needs of public school employees and employers require.

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130. *Allis-Chalmers Mfg. Co. v. NLRB*, 162 F.2d 435, 440 (7th Cir. 1947). See also *Republic Aviation Corp. v. NLRB*, 324 U.S. 783 (1945).

131. *Getman, Section 8(a)(3) of the N.L.R.A. and the Effort to Insulate Free Choice*, 32 U. CHI. L. REV. 736, 743 (1965).