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ABSTRACT

After noting the NEA's adoption of a resolution establishing guidelines for the settlement of impasses during school board/teacher negotiations, the paper discusses five ways California public school boards can regard employee strikes. They may view strikes as (1) illegal; (2) illegal, but necessitating procedures to deal with situations that normally lead to strikes; (3) illegal in part -- depending on the situation; (4) legal, but necessitating procedures to control the impact of strikes on education of youth; and (5) outside the issue of legality, but necessitating efforts to improve negotiations procedures and to eliminate strike threats. (LLR)

"NEGOTIATIONS AND STRIKES"

An Address by Thomas A. Shannon, Schools Attorney
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at the Annual Joint Conference of
California School Boards Association and
California Association of School Administrators

December 9, 1968

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On July 1, 1967, the National Education Association (NEA) adopted a resolution establishing guidelines for the settlement of an impasse with a local public school board in the negotiations' situation.[1] While the NEA specifically recommended mediation, fact-finding, and arbitration as more desirable ways to solve seemingly unresolvable employer-employee disputes in school districts, it junked its previous stands on professional negotiations when it declared:

> ...The NEA recognizes that under conditions of severe stress, causing deterioration of the educational program, and when good faith attempts at resolution have been rejected, strikes have occurred and may occur in the future. In such instances, the NEA will offer all of the services at its command to the affiliate concerned to help resolve the impasse.[2]

With this soft, tentative statement, the NEA formally laid to rest the last organized official opposition to teacher strikes within the teaching profession. No longer is it either "unprofessional" or "unethical" for teachers to strike when their own views do not prevail and they are therefore under "conditions of severe stress."

The NEA affiliate in our State, the California Teachers Association, just last month changed its policy on the strike. According to a recent NEA publication,[3]

> Teachers...(in California) are still urged to avoid strikes by using alternative means of resolving disputes. But if a local association chooses to strike, the 167,000-member CTA will now "offer all of the services at its command to the chapter concerned to help resolve the impasse."

The Southern Section of the CTA underscores this policy change by identifying the teachers' strike as a

> crucial weapon in the negotiations arsenal.[4]

The other nationwide teacher organization, the American Federation of Teachers (AFT), now a rival of the NEA but most likely within a few years a partner in an NEA-AFT merger, always has had the outlook of organized labor on strikes. That is, the strike is a valid tactic to put economic pressure on a recalcitrant employer. The only attenuation made on this principle by the AFT is that, since schools are not economic enterprises and school boards are not concerned with the "profit and loss statement," a strike by teachers in the public school system is more of a political, rather than economic hammer.

The defiant attitude of the AFT on strikes was tersely summed up by Charles Cogen in June, 1967.[5] Borrowing a leaf from the book of John L. Lewis, who once told the nation when faced with the threat that troops would enforce an injunction against a mine-workers' strike: "You can't dig coal with bayonets!", Mr. Cogen said:

> Remember: you cannot teach the students with injunctions, fines, and jail sentences. You will need the teachers after all. I trust that an understanding and knowledgeable public will put the pressure on those who are responsible for the strikes -- the carefree, arrogant, and dictatorial employers, that is, the responsible public agencies.

While the Chicago Tribune[6] condemned these words as a

> ...slur on school board members, who work countless hours for no pay and are probably the most public-spirited citizens in the United States.

and decried Mr. Cogen's statement as a

...frank defense of anarchy,

the words nevertheless mirror accurately the viewpoint of the AFT. Clear evidence of this is the teachers' strike in New York City which was concluded late last month by an AFT affiliate which also has the distinction of being the largest union local in the world, the United Federation of Teachers.

Between September, 1967, and March, 1968, there were teacher strikes actually held or seriously threatened in school districts located in twenty states and the District of Columbia. These figures include the one-day teacher strike involving between 1000 - 1700 teachers in San Francisco.[7] And clearly the end is nowhere in sight. In fact, if you read the "Chapter Action Procedures"[8] recommended for adoption to the State Board of Directors of the NEA-affiliated California Teachers' Association, you will recognize a well-conceived check-list to be used in determining whether the "ultimate sanction" by a teacher organization, the strike, should be invoked in a particularly local situation.

The possibility of an increasing number of teacher strikes is very real. And California is not immune to them. This obvious fact that a teachers' strike can happen anywhere in California as the result of a breakdown in negotiations must be faced up to by school boards and school administrators. Hopefully, recognizing the possibility of a strike by school district employees and viewing it in a perspective which appears best under local circumstances should assist the school board in dealing more realistically and effectively with the problem. Action now by school boards to deal with future strike situations could include local adoption of rules and regulations or convincing the State Legislature to enact new legislation appropriate to meet the strike threat at the State level.

When teachers come under "conditions of severe stress," (to quote the NEA policy statement of 1967 and the new 1968 CTA Policy)[9] local school boards are hit with the difficult problems of meeting the myriad of emergencies posed by teachers' strike. It is questionable today whether the Public, against whom

the teachers really strike, is fully aware of all of the implications of the strike. Often, the Public blames the school board for "bum bargaining" and, with the predisposed sympathy of a great number of the Public in favor of the strike-device as a valid weapon of labor in labor disputes, clamor for the return of the teacher to the classroom with the consequent return of Junior to his studies. The Public does not view the teachers' strike as a weapon in the intensifying battle over who controls local public education, nor does it appreciate the problems incident to the transfer of the management of schools from politicians elected by the People, who are pledged to serve the People, over to teacher-politicians elected by the teachers who are pledged primarily to serve the teachers. The Public is intensely preoccupied with one idea: Get the kids back into the classroom as soon as possible! It is immeasurably easier for the irate Public to bring tremendous pressure to bear on the locally elected public school board than it is to convince a determined teachers' organization to rescind its decision calling a strike. The Public generally refuses to look at long-run implications of settling a teachers' strike until the short-run problem of getting the kids back into school quickly is resolved. But, if a strike is settled quickly, it is invariably settled on terms laid down by the employees, and, under those conditions, consideration of the long-run implications of the dispute becomes academic.

The impact of a teachers' strike upon a community is compounded because the Public often does not become aware of the deterioration of the negotiating process until some kind of split between the school board and the teacher organization has already occurred. This is due in large part to the climate of close-lipped confidentiality which is considered indispensable to the "give-and-take" of negotiations. This environment of silence in which labor negotiations thrives, coupled with the fact that the Public usually is unaware of the break-down in negotiations until a strike is imminent, have prompted one Californian to propose within the State Government the establishment of a "Department of

Public Interest" which would define the "public interest" in a labor dispute and would:

> be empowered to report to the public as to the true state of labor negotiations and the true meaning of labor settlements.[10]

In the case of school boards, whose membership is elected by the People, it is hoped that no new arm of State bureaucracy is needed to define the "public interest" or to devise means by which the Public can be informed about negotiations without jeopardizing the discussions going on at the negotiations table.

How a school board will act in the face of a threatened or actual teachers' strike generally depends on its approach to the entire negotiations process. The threatened or actual strike is really a part of the broader spectrum of negotiations between school boards and teacher organizations. Within the framework of such negotiations, though, it is possible to identify at least five basic perspectives in which California local public school board members may view strikes by school district employees. These are:

1. Strikes by school district employees are illegal.
2. Strikes by school district employees are illegal; However, procedures must be instituted that will deal with situations arising in the negotiations process which, in the private sector, normally would lead to a strike.
3. Some strikes by school district employees are illegal, some are not; Illegality of a strike depends on all the circumstances of the particular situation.
4. Strikes by school district employees are NOT illegal; However, because of the important nature of the services rendered by school district employees, procedures must be instituted to control the impact of the strike upon the education of the children of a community.

5. Disregard the issue of the legality or illegality of strikes by school district employees; Instead, concentrate all energies on ways to improve negotiations procedures and, thus, effectively eliminate the strike threat.

Let us now consider each one of these five perspectives of the threatened or actual strike situation in a California public school district.

1. Strikes by school district employees are illegal. This is today's bare-boned legal perspective, and there are two ways of approaching it: (a) reliance on the "common law" in California or (b) pressing for new State legislation which will expressly prohibit strikes by school district employees.

Considering the "common law" approach, (that is, the status of court decisions on the question of whether or not school district employees have the right to strike when the California Legislature has not provided the answer by statute) the California Supreme Court has said:

> ...in the absence of legislative authorization public employees in general do not have the right to strike.[11]

It is squarely on the basis that the State Legislature has not given school district employees the right to strike that injunctions have been issued restraining strikes by public employees in California. But, the conclusion that there is no statutory authorization for a strike by public employees has been called into question. Judge Bernard S. Jefferson of the Los Angeles Superior Court, in a lengthy opinion dated January 24, 1967, resolving the June, 1966, strike by Los Angeles County Social Workers,[12] said:

> It appears to this court...that it cannot be stated, without considerable doubt, that (the law)...does not authorize public employees...to go on strike.

Judge Jefferson based this conclusion on the fact that the State Legislature specifically prohibited California fire fighters to strike in 1959, but did not include this specific prohibition against striking when it enacted the

Public Employees Relations Law in 1961. You will recall that school district employees were under jurisdiction of this law until 1965, when the Winton Act transferred jurisdiction over school district employees from the Government Code to the Education Code. Judge Jefferson's theory, if valid, would apply equally to school district employees, because there is no specific prohibition against strikes in the Winton Act.

The Los Angeles Times[13] called Judge Jefferson's conclusion

> ...a masterful use of the reverse twist...

and remarked

> ...For decades, we have clung to the belief in California that public employees do not have (the right to strike)...Now, according to Judge Jefferson's ruling, we must face the fact that the law is, to say the least, a bit fuzzy on this point...(therefore) the State Legislature should move forthrightly to resolve the doubts in Judge Jefferson's mind.

And this brings us to another way of approaching the perspective that strikes by school district employees are illegal: pressing for new State legislation which will expressly prohibit strikes by school district employees. Such anti-strike legislation, to be reasonably effective, must contain certain elements:

(a) Not only must it include a prohibition of strikes but also any other kind of concerted effort to interfere with regular schooling, such as brief or sporadic work stoppages and slowdowns, or "legal gimmicks," such as mass resignations.

(b) There must be provision for sanctions against individuals, but considerable flexibility must be built into the legislation so that any offending person's punishment reasonably fits his offense. If the sanctions are too severe, they simply will not be invoked. Professor Nathan P. Feinsinger,

distinguished labor law professor at the University of Wisconsin Law School calls this "exposing the impotence of democracy"[14] and says that

> ...the tougher the penalty the less effective it will be in the long run.

On the other hand, it could be argued that the school board should have the right to invoke heavy sanctions if the individual's offense seems to warrant this. Flexibility in invoking sanctions against individuals will permit this.

(c) Any penalties authorized to be imposed against school district employee organizations should be capable of taking two forms:

(1) fines which may be assessed against the organization's treasury, and,

(2) action which would deprive the organization from representing school district employees for a definite time period.

(d) Require a "no-strike" pledge to be made part of a school district employee organization's application for verification which is filed for purposes of representing organization members in employer/employee relations matters.

(e) Provision should be made for the school board to make a preliminary finding that a person or employee organization is engaging in activity prohibited by the anti-strike legislation.

(f) Specific authority should be given the school board to apply to the Superior Court for and obtain preventative injunctive relief, as well as remedial injunctive relief.

(g) There should be separate sanctions for violation of the anti-strike legislation, on the one hand, and disobeying any court order issued as a result of the violation, on the other hand. This broadens the scope of discretionary authority to impose penalties.

(h) Expeditious action by a school board must be permitted under the anti-strike legislation; while hearings on preliminary findings must be

held, and they must be adequately noticed and conducted, prolonged delays will only dilute the effectiveness of the anti-strike legislation. Of course, there must be an opportunity ultimately for a final hearing which will permit extensive preparation of the case by advocates of the parties.

Regardless of whether strikes are considered illegal at "common law" or because of anti-strike legislation, the perspective which favors the viewpoint that school district employees should be prohibited by law from striking has many critics. Some of their criticisms are legalistic in nature, and some practical in type.

The Courts are in general agreement that a public employee has no federal or state constitutional right to strike. In the words of President Franklin D. Roosevelt:

> "Such action, (of striking by public employees) looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable."[15]

In the August, 1967, teachers strike in Pinellas County, Florida, the teachers claimed denial of the public employees' right to strike was a violation of the constitutional prohibition against "involuntary servitude." The Supreme Court of Florida resolved this issue in July, 1968, when it said:

> We are not here confronted by an arbitrary mandate to compel performance of personal service against the will of the employee. These people were simply told that they had contracted with the government and that they could, if they wished, terminate the contract legally or illegally, and suffer the results thereof. They could not, however, strike against the government and retain the benefits of contract positions.[16]

In December, 1967, the New Jersey Supreme Court considered the issue of whether denial of the public school teachers' right to strike when a private school teacher has such a right constituted a denial of "equal protection" and "due process" and, therefore, a violation of the public school teachers' constitutional right. The New Jersey Court said:

> The assertion that a differentiation in this area between a teacher in the public service and a teacher in a private school offends the equal-protection and the due-process clauses of the Fourteenth Amendment seems to us to be plainly frivolous.[17]

Other criticisms of the approach that strikes by school district employees are illegal are more practical in nature. Critics of anti-strike legislation aver that such legislation simply doesn't work. For evidence, they cite the growing number of teacher strikes throughout the United States, especially the "annual strikes" in New York City. The State of New York's "Condin-Wadlin Act" is generally considered as containing the stiffest anti-strike legislation in the United States, yet it has been utterly ineffective to prevent or even shorten teacher strikes in that State's largest city. Moreover, the critics argue, anti-strike legislation is esentially a negative approach and cripples school boards from seeking sound and practical solutions to avoid the deadlocked negotiations situation which invariably brings on a strike. Finally, the "embarassment factor" of a strike can be closely duplicated by school district employee demonstrations against the school board conducted on off-duty time; if such demonstrations are not otherwise illegal, participating school district employees are expressly protected by law from school board disciplinary proceedings.

The second main perspective on the problem of strikes in school districts attempts to deal not only with strikes but also the factors producing strikes.

This second perspective is: 2. Strikes by school district employees are illegal; however, procedures must be instituted that will deal with situations arising in the negotiations process which, in the private sector, normally would lead to a strike.

Arvid Anderson, Commissioner of Wisconsin's Public Employment Relations Board told a UCLA conference on public employment in February, 1967, that the only way any state could get an absolute guarantee against strikes by public employees would be to create a police state. He said:

> Legislation to prohibit strikes by public employees is meaningless unless it is accompanied by positive procedures to take away the need for such strike action.[18]

The "positive procedures" to substitute for the strike usually mean methods by which an "impasse" can be resolved. That is, when the school board and the school district employee organization are unable to come to some kind of a meeting of the minds on a fundamental issue, the employee organization will not conclude that it is forced to strike because it can make use of an impasse procedure which usually takes the form of mediation, fact-finding or arbitration. These terms are defined by the NEA as:[19]

1. mediation - effort of a neutral third party to assist the parties to reach a voluntary agreement.

2. fact-finding - investigation by a neutral third party to discover the issues and to make recommendations for settlement to the parties.

3. arbitration - arbitration by a neutral third party results in a recommendation for settlement which is binding upon the parties. The parties must agree in advance that the matter at issue is to be submitted to binding arbitration.

I am of the opinion that the Winton Act presently allows a California local public school board to adopt rules and regulations providing for mediation and fact-finding procedures in the impasse siutation.[20] These procedures would produce recommendations only, and school boards are totally free under present law to take recommendations from any conceivable source. The important element is that the school board is under no compulsion to accept the recommendations emanating from mediation or fact-finding. Of course, this does not mean that if a school board has no rules and regulations concerning mediation or fact-finding, an employee organization can force the school board to go into mediation or fact-finding under the Winton Act. It would require an amendment to the present Winton Act to give school district employee organizations this kind of power.

In the case of arbitration, present California law is less clear. In arbitration, a school board agrees to be bound in advance by a decision rendered outside of the local governmental-authority structure. This could be construed as an unauthorized and invalid delegation of legislative authority by the Courts.[21] On the other hand, if the dispute in arbitration exclusively involves wages, salaries or fringe-benefits, it could be argued that the subject-matter of arbitration involves employment contracts and not governmental issues; therefore, the school board is acting as an employer and not really as a governmental agency and arbitration is impliedly authorized in the broad discretionary grant of authority to school boards to enter into employment contracts and establish employee wage and salary levels. The arbitration, this argument concludes, is on the interpretation of employment contracts and not on legislative matters of a local governmental entity. However, unless school boards are granted express authority by the California Legislature to enter into arbitration agreements with their employee organizations, I would advise against use of the arbitration

procedure under present law because of the possibility that enormous sums of tax money could be involved in an arbitrated settlement later declared illegal by the Courts, the loss of prestige which the school board could suffer with the People and the school district employees in the event that the Court decided that the school board lacked authority to go into arbitration, and the general havoc a lawsuit could have on the levying and collecting of local property tax dollars to support the public schools in the community.

Other "positive procedures" which would supplement impasse procedures as a substitute for the strike by California school district employees are:

a. Grievance procedure - Some consider this as the quid pro quo of the right to strike. Its supporters contend that a grievance procedure, carefully drafted to limit the scope of what is grievable and retain final decision-making power in the school board, provides a fair and orderly means by which individual employee relations problems that in the broad picture of operating a school district are relatively insignificant, can be satisfactorily resolved before they touch off a conflagration which could scorch the entire enterprise. Moreover, its advocates aver, the existence of a grievance procedure is a great employee morale booster in that it is an employee's written guarantee that there is a process by which he can "have his day in court" should ever there be the need.

The opponents of the grievance procedure take the position that it is too easy to abuse, either through an attempt to resolve issues by use of the grievance procedure which more properly belong at the negotiating table or to lodge trumped-up charges against school administrators and supervisors merely to intimidate or harass them. They also contend that the grievance procedure is wasteful of time and energy by all participants and its very existence naturally results in problems which were handled in the past at a relatively low level to be escalated needlessly to the moon through the grievance procedure.

Whatever its merits, or lack thereof, a local California school board clearly has the necessary authority under the present Winton Act to adopt a grievance procedure as long as the power to make the final decision on the grievance short of the Courts is reserved to the school board.

b. Exclusive representation. In a school district having more than one teacher organization, I am of the opinion that the certificated employees' negotiating council is the exclusive representative of certificated employee organizations for purposes of "meeting and conferring" with the school board under the Winton Act.[22] But, its exclusivity is limited to organizations, and does not reach down to the individual teacher who is free to conduct his own employer/employee relations with his school board.

All vestiges of exclusive representation evaporate when the lot of the classified employee organizations under the Winton Act is considered. There is no "negotiating council" here; instead, the school board is obligated to "meet and confer" with as many classified employee organizations as there are in the district.

Advocates of exclusive representation argue that the lack of an exclusive representative of employee organizations leads to an intense level of continual inter-organizational competition and enhances the possibilities of strikes. They also claim that exclusive representation places across the negotiating table from the school board-spokesman an employee-spokesman who truly can speak for all employees, and thus increases the effectiveness of the whole negotiations process. Opponents allege that exclusive representation places too much power in the hands of the employee-spokesman and strangles creative and imaginative problem solving in the negotiations process by funneling all certificated or classified employee viewpoint through a single employee organization with its own heirarchy constantly evaluating all proposals regardless of source to determine whether each proposal is consistent with

the organization's program. They reject the contention that inter-organization rivalry hurts the school district on the grounds that "as long as they're fighting each other, they won't have the energy to fight us." Regardless of the merits of either arguments, any attempt to include individual teachers within the scope of exclusive representation by the Certificated Employees' Negotiating Council or to set up a Classified Employees' Negotiating Council unquestionably would require amending the Winton Act.

c. Collective Bargaining Agreement. A last "positive procedure" designed to deal with situations which, in the private sector, normally would lead to a strike, is a specific authorization by the State Legislature permitting California school boards to enter into binding, bilateral collective bargaining agreements with employee organizations. We are not considering here the practice of some school boards outside California to adopt as a resolution a collective bargaining document which was negotiated between their representative and the employee organization or to authorize the signing of a "memorandum of agreement" setting forth policy on employer/employee relations, both of which documents at law are merely evidence that the school board has taken a particular unilateral action, albeit at the behest and special urging of an employee organization. Rather, here we are talking about a binding, bilateral collective bargaining contract enforceable at law.

I am of the opinion that California law does not authorize a local public school board to enter into a collective bargaining contract with the certificated employee negotiating council or any certificated or classified employee organization. The Winton Act contains neither an express nor implied authorization for a local public school board to enter into such a contract.[23] Moreover, school district employees are specifically excluded from the applicability of Section 923 of the California Labor Code, which is the legal basis for collective bargaining and collective bargaining agreements in the private sector of our state. Therefore, new state legislation

would be necessary to enable a local public school board to enter into a collective bargaining agreement.

Those who would like to see a few sentences added to the Winton Act expressly authorizing collective bargaining agreements claim that a binding contract between the school board and school district employees is absolutely necessary to (a) insure some modicum of bargaining equality between the parties, (b) prevent the school board from unilaterally changing agreed-upon policies during the term of the agreement, and (c) form the legal basis by which the employee organization may enforce in Court under contract law their rights and the rights of employees specified in the agreement. Those who would resist such an amendment to the Winton Act say that collective bargaining agreements are (a) an unwise delegation of governmental legislative authority,[24] (b) ties the hands of school boards to react to changing conditions, (c) shifts tremendous power over public education from public school boards to private school district employee organizations, and (d) effectively disenfranchises many persons who are vitally interested in local public education but are absent from the negotiating table, such as parents, citizens, and college of education professors.

While not strictly a "positive procedure" in the sense which we have used those words, a very basic and important amendment to California law is necessary to give viability to the "positive procedures" we have discussed so far. This change is within the power of the State Legislature only and involves an:

d. Early decision on State support of local public education and change of lien date. The primary recurring issue in negotiations between school boards and school district employee organizations is salary and other fringe benefits. Historically, disagreement at the negotiating table over salaries and fringe benefits has been the major reason for strikes in both the public and private sectors.

If the lien date for assessed property were changed from the first Monday in March to the first Monday in January of each year and the State Legislature could decide on school finance legislation and adopt its budget by June 1 of each year, the local public school board would be in a good position to set the ensuing year's employee salary schedules and approve fringe benefit levels prior to the end of the school year in about mid-June. Not only would this be a "morale booster" to teachers who would know what next year's salary will be before the end of the current school year but also would, in the event of an impasse, permit more time for resolution of the problem without the school board being backed up against the September opening of schools date.

3. Some strikes by school district employees are illegal, some are not; illegality of a strike depends on all the circumstances of the particular situation.

The principal reason for denying school district employees the right to strike is that public education is an essential public service which must not be interrupted because of a dispute between persons charged with the responsibility of providing it. The implication is that irreparable harm will result if education is interrupted by a strike.

However, there are many who believe that a teachers' strike which is settled because of school board concessions to the demands of the striking teacher organization benefits education infinitely more than a short amount of classroom time lost by pupils. Therefore, they claim, the loss of time does not cause any irreparable harm and under those circumstances they conclude that an interruption of schooling is entirely valid.

Clearly, translating this perspective into action would require new state legislation. The only possible exception is that, in a narrow sense, a school board could tacitly follow this approach by default through its

failure to seek and obtain in a timely manner injunctive relief when a teacher strike is threatened or occurs. A proposal for new legislation undoubtedly would raise the broader question of whether there are industries in the private sector engaged in vital services which should be included within the ambit of the same legislative safeguards applying to school district employees. Regardless of whether the new state legislation covered both school district and other public and private employees or was restricted to school district employees only, some kind of state commission probably would have to be established to determine the extent of the "public interest" involved in a strike by school district employees. Strict guidelines would have to be established to guide the commission. While considerable discretionary authority to enjoin strikes and invoke penalties would have to be delegated to the commission by the legislature, in this perspective it is not contemplated that the commission would interfere with the negotiations or attempt, in any way, to intermeddle at the negotiations table. In sum, the commission would take a positive stance towards the strike and the issue of "public interest," but would assume a passive posture towards negotiations between the parties.

4. Strikes by school district employees are NOT illegal; However, because of the important nature of the services rendered by school district employees, procedures must be instituted to control the impact of the strike upon the children of a community.

This approach is inconsistent with the prevailing view of the California "common law" and therefore would require new State legislation. Of course, the California Legislature may enact such legislation . As the California Supreme Court has said:

> No case has been found holding that a statute permitting public employees to strike constitutes an improper delegation of govern-

mental authority, and courts both in this State and elsewhere, although not specifically discussing the delegation point, have recognized that statutes which permit strikes by publicly employed teachers, electrical workers, maintenance workers, and longshoremen may be validly enacted.[25]

In addition to the specific authorization for school district employees to strike, the new legislation would have to provide for the establishment of a State commission which would have authority to intervene in the strike. This intervention authority would include the power to order a "cooling off" period during which no strike could be held and to compel the school board and employee organization to submit the issue on which they are at impasse to some form of mediation, fact-finding, or arbitration. This commission differs from the commission proposed under the approach where "some-strikes-are-legal-and-some-are-not" in that this commission would become actively involved in the negotiations between the parties. In fact, this "involvement" in negotiations would really be supervisory in nature and aimed at actively influencing the differing parties to reach an early conclusion satisfactory to each, while still leaving it up to the school board to determine and defend the "public interest."

If such a commission were to be established under State law, I would hope that it would be placed in the State Department of Education to ensure that the supervisory efforts of the commission would be within a framework of understanding of public education. If the public interest in local public education is to be served by a commission which actively influences negotiations between a school board and a school district employee organization, the commission must have considerable knowledge of and experience in local public education. I believe that placing such a commission in a State agency having jurisdiction over all labor/management squabbles generally is a serious

mistake which will redound to the detriment of local public education for years to come. The reason for this conviction is that the expertise of such agencies do not extend beyond the walls of economics to political and public service problems.[26]

5. Disregard the issue of the legality or illegality of strikes by school district employees; Instead, concentrate all energies on ways to improve negotiations procedures and, thus, effectively eliminate the strike threat.

This approach demands close communication between the school board and school district employee organization, an attitude conducive to a "partnership effort," and an ability to work together and satisfactorily resolve any disputes readily and in the best interests of local public education. To some, this approach is naively utopian, but to others, it is the only ideal worthy of being guided by in their efforts to provide a sound educational program to the children of their community.

This approach, its advocates claim, also aims at keeping control of employer/employee relations in school districts at the local level. Both parties, recognizing the vagaries of life, would provide each other with certain assurances. The school board would probably assure the employee organization access to an impasse procedure, a grievance procedure, and other "positive procedures: while the school board would receive a "no strike" pledge from the employee organization or, as Professor Feinsinger has proposed, a "no strike" pledge made directly to the public by the school district employee organization. Some school boards also would want school district employee organizations to approve amendments to the California Education Code which would abolish State employee permanency or "tenure" statutes so that release of incompetent or inefficient school district employees would involve less complicated procedures. Additionally, some

school boards also would desire to establish "merit pay" plans as a substitute for the uniform or single salary schedule and abolish regular class/step increases in salary. Basically, these school boards ask that the whole school district employee tenure/dismissal/salary scheme of the State be restructured to conform with the local negotiations situation.

The hallmark of this approach is its dependence on the integrity of the other party to succeed. Those who view school district employer/employee relations as essentially a struggle for control of public education would view this approach as inopportune at this time because, in California, it involves too much "giving" on the part of the school board and not enough "receiving." Those who would favor this approach in California point to the eastern cities and say: "This approach involves no more "giving" by California school boards than that which has long since been "taken" by school district employee organizations in the eastern cities. The eastern school district employee organizations have, in their successful attempts to obtain everything they have in the negotiations formula by squeezing the school boards, developed an approach to negotiations totally adversary in nature which, in these latter days, cannot be changed. The "public servant," they say, is dead. He has been replaced by the "public employee." This "hardening of the attitudes" has not yet occurred in California and by granting employee organizations some "positive procedures," California school boards will have set a tone in school district employer/employee relations which will be of immeasurable benefit to local public education in the State for years to come. Phrased another way, California school boards will "give" nothing away in this approach, its advocates say; rather, they will be investing in a sound future of meaningful employer/employee relations.

Those are the five perspectives in which the school district employee strike problem, set within its larger framework of negotiations between school boards and employee organizations, may be viewed. School boards, assisted by the professional leadership of their school administrators, have the capacity today to influence profoundly the course which school district employee negotiations will take in California during the years ahead. Whether or not you want to act now to lay a solid foundation at the State and local levels for the future is a question which only you can answer.[27]

TAS:jh
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FOOTNOTES

1. Resolution on Impasse in Negotiations Situations, adopted by the National Education Association (NEA) at the NEA annual convention, July 1, 1967, Minneapolis, Minnesota. See also "The Tough New Teacher," The American School Board Journal, November, 1968; and 68 LRR 380 (8-12-68).

2. Ibid.

3. National Education Association Reporter, Vol. 7, No. 13, November 22, 1968.

4. The Record of the CTA Southern Section, Number 3, November, 1968.

5. Chicago Tribune, June 30, 1967.

6. Ibid.

7. ECS Bulletin, Spring, 1968.

8. Recommendations for Action of Commissions and Committees to the State Council of Education, California Teachers Association, Los Angeles, November 9, 1968.

9. California Teachers Association Action, Vol. 7, No. 6, November 15, 1968. See also The Record of the CTA, Southern Section, Number 3, November, 1968.

10. The Commonwealth, Official Journal of the Commonwealth Club of California, Vol. XLII, No. 49, December 5, 1966.

11. Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 Cal (2d) 684 (1960) at p. 687.

12. Social Workers Union, Local 535 v. County of Los Angeles, Superior Court of the State of California for the County of Los Angeles, (No. 887-678) Memorandum Opinion signed by Bernard S. Jefferson, Judge of the Superior Court, on January 24, 1967. See also "The Government Employee and Organized Labor," 2 SANTA CLARA LAWYER 147 (1962).

13. Los Angeles Times, Times Editorials, 4 - Part II, Friday Morning, January 27, 1967.

14. COMPACT, published by the Education Commission of the States; Annual Meeting Issue, August, 1968.

15. Norwalk Teachers' Association v. Board of Education of City of Norwalk, 83 A. 2d 482 (1951). See also p. 412, Federal Bar News, November, 1967, and Miami Water Works Local No. 654 v. City of Miami, 26 So 2d 194 (1946).

16. The Pinellas County Classroom Teachers Association v. The Board of Public Instruction of Pinellas County, Florida, in the Supreme Court of Florida, July Term, A.D. 1968, Case No. 36,773. (Opinion filed September 18, 1968).

17. In the matter of William Block, Woodbridge Township Federation of Teachers, Local #822, American Federation of Teachers, AFL-CIO, et al, charged with contempt of court; Supreme Court of New Jersey, A-24 September Term, 1967; Argued September 26, 1967--Decided December 18, 1967. See also "Are Strikes of Public Employees Necessary?" 53 American Bar Association Journal 808 (September, 1967).

18. Los Angeles Times, 6--Part II, Friday Morning, February 3, 1967.

19. Id, Note 1.

20. Sec. 13087, California Education Code, specifically authorizes a school board to adopt rules and regulations governing employer/employee relations under the Winton Act.

21. See 43 AM JUR, Public Officers, Sec. 295; 10 McQuillin (3rd Ed.) Sec. 29.07 entitled "Contracts Limiting Legislative Power;" and 41 CAL JUR (2d), Public Officers, Sec. 135.

22. The issue of whether a school board must deal with school district certificated employee organizations exclusively through the Certificated Employee Negotiating Council is presently being litigated by the San Francisco Unified School District Board of Education.

23. A public school board in California has only those powers which are expressly conferred by the State Legislature or are implied as necessary to the carrying out of those expressly conferred powers. As such, it has been characterized as a "corporation" of the most limited powers known to the law. See Pasadena School District v. Pasadena, 166 Cal. 7 (1913); Patterson v. Board of Trustees, 157 Cal App 2d 811 (1958); Uhlman v. Alhambra City High School District, 221 Cal App 2d 228 (1963); Yreka Union High School District v. Siskiyou Union High School District, 227 Cal App 2d 666 (1964). See also 22 Ops. Cal. Atty. Gen. 91 (1953); 39 Ops. Cal. Atty. Gen. 137 (1962); and 47 AM. JUR. Schools, Sec. 13.

24. Id, Note 21.

25. Id, Note 11.

26. Ops. Cal. Atty. Gen. No. 68/77, October, 1968, discusses Ralph M. Brown Anti-Secret meeting Act ramifications of a governing body of a local governmental entity bringing in a State Labor Conciliator under Section 25 of the California Labor Code in the impasse situation.

27. The spectre of the Federal Government making the Taft-Hartley Act applicable to all school district employees unquestionably is with us. In its decision in Maryland v. Wirtz, the U.S. Supreme Court upheld the power of Congress to set minimum wages for non-teaching local public school employees. Congress could decide to act in the public employee relations field if the State and local governments either cannot or will not find solutions to the problems.

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