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# SCOPE OF BARGAINING FOR TEACHERS IN CALIFORNIA'S PUBLIC SCHOOLS

Rubin Tepper\* and Byron Mellberg\*\*

## INTRODUCTION

In 1976, the California Legislature enacted a system of collective bargaining for the teachers in public schools.<sup>1</sup> Commonly referred to as the Rodda Act, the legislation mandates meeting and negotiating by public school employers and the exclusive representatives of public school employees.<sup>2</sup> Once drawn to the bargaining table, the parties are to negotiate only those matters within the scope of bargaining.<sup>3</sup> Obviously, the issue of scope is closely tied to the purpose of the Act, which is to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California. If the table is poorly set, its occupants will surely leave discontented. It is therefore crucial to determine which subjects are to be included.

There is in the Rodda Act's definition of scope of representation an obvious and unavoidable expression of legislative intent that certain matters not be bargainable. The problem for bargaining representatives and others is that Government Code Section 3543.2, defining the scope of representation,<sup>4</sup> has

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1. CAL. GOV'T CODE §§ 3540-3549.3 (West Supp. 1978). Some provisions of this Act are now superceded by the Dills Bill, codified in CAL. GOV'T CODE §§ 3512-3524, 3526, 3540.1 (West Supp. 1978), most of which becomes operative on July 1, 1978. The Rodda Act governs both certificated and classified public school employees. Classified employees are not within the scope of this article. Among other things, they cannot be part of the same bargaining unit as teachers. CAL. GOV'T CODE § 3545(b)(3) (West Supp. 1978).

2. CAL. GOV'T CODE § 3540.1(a) (West Supp. 1978).

3. "Scope of bargaining" is used interchangeably with "scope of representation" in the Rodda Act. *Id.* §§ 3540.1(h), 3543.2, 3543.3.

4. *Id.* § 3543.2 states:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6,

no exact counterpart in any labor relations law, state or federal. Accordingly, the advocates of bilateral and unilateral decision-making are left free to advance sharply conflicting ideas regarding this vital topic.

This article will examine California Government Code Section 3543.2<sup>5</sup> and the policy consideration on which it is based. A careful examination of the Rodda Act leads to the conclusion that, as to matters relating to the employment interests<sup>6</sup> of teachers, the statute should be liberally construed in favor of bilateral decision-making.<sup>7</sup>

#### SCOPE OF BARGAINING—LEGISLATIVE HISTORY

##### *National Labor Relations Act*

Legislative history is a well-recognized guide to statutory construction.<sup>8</sup> In this regard, the roots of the Rodda Act are readily traced to the National Labor Relations Act (NLRA).<sup>9</sup> At its inception in 1935, the NLRA contained no provisions specifically defining scope of bargaining. Instead, Section 9A provided that the representative designated or selected in an appropriate unit should be the exclusive representative "for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employ-

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3548.7, and 3548.8. . . . In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

5. *Id.*

6. As distinguished from "professional" interests. *Id.* § 3540.

7. The Rodda Act is administered by the Educational Employment Relations Board (now Public Employment Relations Board) which can affect the scope of representation by any of the following:

1. Adopting appropriate rules and regulations, CAL. GOV'T CODE § 3541.3(g) (West Supp. 1978);

2. Using "impasse procedures", *Id.* §§ 3541.5, 3543.5, 3543.6;

3. Using "unfair practices" provisions, *Id.* §§ 3541.5, 3543.5, 3543.6.

The Board has apparently chosen to utilize the unfair practices provisions. This system contemplates an adversary hearing before a Board agent, a formal written opinion, and judicial review.

8. *Berkeley Teachers' Ass'n v. Berkeley Fed'n of Teachers*, 254 Cal. App. 2d 660, 672, 62 Cal. Rptr. 515, 522 (1967).

9. 29 U.S.C. §§ 141-197 (1970).

ment."<sup>10</sup> This definition left the National Labor Relations Board (NLRB) with broad responsibility for determining which elements of the employment relationship were within the scope of bargaining.

In response to arguments for continued Board discretion on the grounds that scope of bargaining issues must be resolved by consideration of the customs of the particular industry,<sup>12</sup> history, and changes in structure and practice, Congress included a generic definition of bargaining in the Labor Management Relations Act (Taft-Hartley Act, LMRA).<sup>13</sup> Section 58(d) provides "to bargain collectively is . . . to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."<sup>14</sup>

This broad definition allowed the development of administrative precedent which firmly established the trend toward interpretive expansion of the scope of mandatory bargaining.

There was a time when one might have taken the view that the National Labor Relations Act gave the Board and the Courts no power to determine the subjects about which the parties must bargain . . . but too much law has been dealt upon a contrary assumption for this view any longer to prevail . . . .<sup>15</sup>

### *California Legislation*

In California, the first significant step in the development of public employee collective bargaining was the George Brown Act, passed in 1961.<sup>16</sup> Under its provisions, public employees, including public school employees, enjoyed the right "to meet and confer" with the employer to the extent that the latter deemed reasonable.<sup>17</sup> The scope of meeting and conferring under the George Brown Act was defined to include "all matters relating to employment conditions and employer and employee relations including but not limited to wages, hours and

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10. *Id.* § 15961; see also C. MORRIS, *THE DEVELOPING LABOR LAW* 379 (1971) [hereinafter cited as MORRIS].

11. MORRIS at 380-81.

12. *Hearing before Senate Comm. on Labor and Welfare on S. 55 and S.J. Res. 22*, 80th Cong., 1st Sess. 1914 (1947).

13. 29 U.S.C. §§ 141-186 (1970).

14. *Id.* § 158(d).

15. *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 219 n.2 (1964) (Stewart, J., dissenting).

16. CAL. GOV'T CODE §§ 3500-3509 (West 1966) (amended 1971).

17. *Id.* § 3505.

other terms and conditions of employment . . . .”<sup>18</sup>

In 1965, the Legislature passed the Winton Act which separated labor relations of school district employees from those of employees covered under the George Brown Act.<sup>19</sup> Still less than a collective bargaining statute, the Winton Act continued the concept of “meet and confer”, with the addition of non-binding third party fact-finding and recommendation.<sup>20</sup> The scope of “meet and confer” included both the employment and professional interests of educators:

“A public school employer . . . shall meet and confer with representatives of employee organizations upon request with regard to all matters relating to employment conditions and employer-employee relations, and in addition shall meet and confer with representatives of employee organizations representing certificated employees upon request with regard to all matters relating to the definition of educational objectives, the determination of the content of courses and curricula, the selection of textbooks and other aspects of the instructional program to the extent such matters are within the discretion of the public school employer or governing board under the law.”<sup>21</sup>

A distinctive feature of the Winton Act, then, was the formal involvement of teachers, as professionals, in major areas of decision-making formerly reserved to management. This involvement, characterized as “professionalism,” is considered to have resulted from the influence of the California Teachers Association.<sup>22</sup>

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18. *Id.* § 3504.

19. 1965 Cal. Stats., ch. 2041, § 2 at 4660 (repealed 1975). Coverage includes all school district employees, classified as well as certificated, including employees of community college districts. Teaching staffs of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction are covered by the Dills Bill, 1977 Cal. Legis. Serv. 3798 (to be codified at CAL. GOV'T CODE §§ 3512-3524, 3526, 3540.1).

20. 1965 Cal. Stats., ch. 2041, § 22 at 4661 (repealed 1975); 1970 Cal. Stats., ch. 1413, § 5 at 2686 (repealed 1975).

21. 1965 Cal. Stats., ch. 2041 *supra*.

22. The primary advocate of the Winton Act when it passed in 1965 was the California Teachers Association (CTA), which at the time was still advancing “professionalism” as an alternative to bilateral determination thru collective bargaining. Professionalism, among other things, meant the advocacy of “professional standards” and the involvement of teachers as professionals in all phases of the operation of the schools and in providing educational services to the community.

CAL. ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 124-25 (March 15, 1975).

In 1970, the Winton Act's definition of scope was clarified to restrict the meeting and conferring requirement regarding these professional issues to "procedures relating to such matters."<sup>23</sup>

From this background emerged SB 1857, the initial version of the Rodda Act. From introduction as SB 1857 to passage in 1975 as SB 160, the Rodda Act's definition of scope changed very little. It was broadened in committee to include "organizational security" and "class size" as terms and conditions of employment.

#### ANALYSIS OF SECTION 3543.2

##### *Professional Interests*

The heritage of legislative concern for the professional interests of teachers was not abandoned with the introduction of bilateral determination and exclusive representation. On its face, the Rodda Act clearly contemplates the right of public school employees to be represented in both their "professional and employment relationships"<sup>24</sup> with public school employers. The legislature has recognized the two areas of interest and has provided a distinct mechanism for decision-making in each area.

The third sentence of Section 3543.2 addresses teachers' professional interests:

In addition, the exclusive representative of certificated personnel has the right to consult on a definition of educational objectives, the determination of the content of courses in curriculum, and the selection of textbooks to the extent such matters are within the discretion of public school employer under the law.<sup>25</sup>

##### *Employment Interests*

The first sentence of Section 3543.2 relates to employment issues only and is nearly identical to that of the LMRA: "The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment."<sup>26</sup> The next sentence limits the potential scope

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23. 1965 Cal. Stats., ch. 2041, *supra* note 21. CAL. ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS, *supra* note 22, at 123.

24. CAL. GOV'T CODE § 3540 (West Supp. 1978) (emphasis added).

25. *Id.* § 3543.2.

26. *Id.*

of "terms and conditions of employment" and distinguishes them from professional matters:

Terms and conditions of employment mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.8.<sup>27</sup>

Insofar as the first sentence of Section 3543.2 adopts the private sector definition of scope, it indicates a legislative intent to follow private sector rulings.<sup>28</sup> Thus, analogous federal precedent provides reliable authority.<sup>29</sup>

*Limited subject matter.* The language in Section 3543.2 providing that scope of representation "shall be limited to wages, hours of employment, and other terms and conditions of employment" is an apparent legislative reaction to an extremely liberal construction given the Winton Act by a California appellate court. In *San Juan Teachers Association v. San Juan Unified School District*, the court held that use of the phrase "all matters relating to" to describe scope of representation meant that the legislature intended a sweeping definition of scope.<sup>30</sup>

This interpretation meant that any question of whether a specific topic was subject to the meet and confer requirement should, in turn, be resolved by meeting and conferring. The

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27. *Id.* As it stands, the enumeration of terms and conditions of employment includes "class size." Interestingly, the inclusion of class size as a condition of employment is contrary to the interpretation of analogous sister state public employment relations statutes in which "terms and conditions of employment" are not specified. *W. Irondequoit Bd. of Educ.*, 4 N.Y. PERB ¶ 4-3070 (1971); *State College Area School Dist.*, [1971] GOV'T EMPL. REL. REP. (BNA) No. 426, f-1.

28. It is a rule of broad application that when legislation is framed in terms that are identical or substantially similar to existing federal law, it is ordinarily presumed that the legislature intended that the language used in the subsequent enactment would be given a like interpretation. *Los Angeles MTA v. Bd. of R.R. Trainmen*, 54 Cal. 2d 684, 688, 355 P.2d 905, 908 Cal. Rptr. 1, 3 (1960) (rule applicable because § 2.6 of the Metropolitan Transit Authority Act identical to § 7 of Labor Management Relations Act); *People v. Nat'l Research Co.*, 201 Cal. App. 2d 763, 765, 20 Cal. Rptr. 516, 521 (1962) (rule applicable due to similar language and identical purpose of Fair Trade Commission Act § 5 and CAL. CIV. CODE § 3369); *Hamilton Jewelers v. the Dep't of Corps.*, 37 Cal. App. 3d 330, 333, 112 Cal. Rptr. 387, 390 (1974) (rule applicable because CAL. CORP. CODE § 25019 is modeled after § 2(1) of the Securities Act of 1933).

29. The EERB has followed federal precedent with respect to many provisions of the Rodda Act. *See, e.g., Lompoc Unified School Dist.*, EERB Decision No. 13, (Mar. 17, 1977) [1976-1977 Transfer Binder] 1 PUB. EMPLOYEE REP. CAL. (LRP) 80.

30. 44 Cal. App. 3d 232, 118 Cal. Rptr. 662 (1974).

plain meaning of the statute was reinforced, in the *San Juan* court's view, because the legislature intended to compensate for the employee "disabilities" of no right to bargain collectively or to strike.<sup>31</sup> The "shall be limited to" language of Section 3543.2 of the Rodda Act replacing the "all matters relating to" language of the Winton Act prevents the *San Juan* approach from being applied to the Rodda Act. Although collective bargaining is a feature of the Rodda Act, a major disability remains in the denial of the right to strike.<sup>32</sup>

*Management rights.* Section 3543.2 concludes with more limiting language in the form of a management rights clause: "all matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating . . ." <sup>33</sup> Management rights advocates have argued that this language indicates a legislative mandate for strict construction of "wages, hours of employment, and other terms and conditions of employment."<sup>34</sup> However, this management rights clause is more logically understood as addressing a different issue, namely, an effort in the context of public sector employment to avoid unlawful delegation problems in the area of permissive subject matter.

In the private sector, scope of bargaining is analyzed in terms of mandatory, permissive and illegal subjects. In *NLRB v. Wooster Division of Borg-Warner Corporation*, the Supreme Court said:

[T]he obligation of the employer and the representative of its employees [is] to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment . . ." The duty is limited to those subjects and within that area, neither party is legally obligated to yield (citation omitted). As to other matters, however, each party is free to bargain or not to bargain and to agree or not to agree.<sup>35</sup>

Thus, the Court made it clear that bargaining in the private sector need not be confined to statutory subjects. Private

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31. *Id.* at 249, 118 Cal. Rptr. at 670.

32. CAL. GOV'T CODE § 3549 (West Supp. 1978) states that the provisions of CAL. LAB. CODE § 923 (Deering 1976) are not applicable to public school employees, thereby denying the right to strike to public school employees. *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers*, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977).

33. CAL. GOV'T CODE § 3543.2 (West Supp. 1978).

34. J. Herman, *Scope of Representation under the Rodda Act: Negotiable and Non-Negotiable Issues*, 32 CPER 14 (1977).

35. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).



management is free to submit almost any subject to bilateral decision-making.<sup>36</sup> Without express preclusion, this same rule might have obtained under the Rodda Act, raising potential problems of unlawful delegation and conflict with consultation procedures on matters of professional interest.<sup>37</sup> Indeed, under the Winton Act, some of the first comprehensive agreements went considerably beyond conventional bargaining issues.<sup>38</sup> Recognizing that practical considerations, such as bargaining power, might push bilateralism beyond legally permissible grounds, the Legislature refused to extend collective bargaining under the Rodda Act to permissive subject matter.<sup>39</sup>

#### UNDERLYING POLICY

What approach should be taken regarding the penumbral matters arguably contained within the purview of specifically enumerated items of the employment relationship? They clearly are mandatory subjects of bargaining if found to be an enumerated item or "a matter relating thereto."<sup>40</sup> But, advocates of management rights contend that strict and narrow construction of these items is in accord with legislative intent. It is the authors' view that in matters relating to the employment interest (*i.e.*, wages, hours of employment and enumerated terms and conditions of employment), the rule should be liberal construction in favor of bilateralism.

The goal of the Rodda Act is to promote the improvement of personnel management and, employer/employee relations within the public school systems.<sup>41</sup> The means chosen is meeting and negotiating by the exclusive employee representative

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36. See MORRIS, *supra* note 10, at 424.

37. CAL. GOV'T CODE § 3543.2 (West Supp. 1978); MATHIASON, TERHEYDEN & SCHAPIRO, *THE PUBLIC SCHOOL EMPLOYER & COLLECTIVE BARGAINING: A GUIDE TO THE CALIFORNIA EDUCATIONAL EMPLOYMENT RELATIONS ACT 198-200* (1977) [hereinafter cited as MATHIASON].

38. In Los Angeles, in the face of a 4-½ week strike, the school board gave teachers the right to participate jointly with administrators in making decisions on everything from textbook selection and curricula to teachers' promotions. CAL. ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS, *FINAL REPORT*, *supra* note 22, at 127-28. This agreement was rejected by a California Superior Court decision. *Hayes v. Ass'n of Classroom Teachers*, 76 L.R.R.M. 2140, 2144 (Super. Ct., Los Angeles County 1970).

39. Exclusion of permissive areas of bargaining is also required to effect limited preemption of existing Education Code provisions regarding employment relations, CAL. GOV'T CODE § 3540 (West Supp. 1978). This is one of the most obscure provisions of the Act. For discussion, see MATHIASON, *supra* note 37, at 171-75.

40. CAL. GOV'T CODE § 3543.2 (West Supp. 1978).

41. *Id.* § 3540.

and public school employer in a good faith effort to reach agreement on enumerated matters.<sup>42</sup> A hard and fast refusal to open matters that are arguably within the employment interest to bilateral determination is hardly calculated to facilitate industrial harmony. Such posture would be especially anomalous in light of the fact that there is, in the final analysis, no requirement that any item actually be incorporated into a collective bargaining agreement. Good faith negotiation does not foreclose the employer from saying no. Negotiators should, however, approach the table in a spirit of meeting problems, not avoiding them.

There is, above all, a point where limitation on scope of bargaining is so constrained as to necessarily undermine the overall object of industrial harmony. A line has been drawn by the legislature between employment and professional matters. On one side is the right to meet and negotiate and on the other, the right to consult. However, as indicated, there is nothing in the Act or its history which can fairly be said to indicate a legislative policy of strict limitation of matters contained within the area of mandatory bargaining.

As to matters relating to "wages, hours of employment and terms and conditions of employment," the language of the Rodda Act is sufficiently similar to the LMRA to warrant application of the presumption that the legislature intended a like interpretation.<sup>43</sup> NLRB precedent should thus be followed. Absent a reasonable counterpart in private industry, a specific item should be included in mandatory bargaining if reasonably shown to have a direct relation to an enumerated subject. This is the plain meaning of Section 3543.2. In areas of doubt, the analysis of scope should proceed with a view toward the ultimate aim of the Act and without artificial constraints imposed by claims that, as to employment matters, the legislature intended an interpretation in favor of unilateral management prerogative.

Absent showing of a relation to an enumerated employment subject, a disputed matter might be considered within the sole province of management. However, it remains to be determined whether the impact of a particular management decision on a negotiable item must be negotiated. This approach is analogous to private sector holdings.<sup>44</sup> Again, by fol-

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42. *Id.* §§ 3540, 3540.1(h).

43. MATHIASON, *supra* note 37, at 198-200.

44. MORRIS, *supra* note 10, at 410-23; *id.* at 232-39 (Cum. Supp. 1971-1975).

lowing the LMRA model language, the legislature is presumed to intend a like interpretation. Negotiating the impact of certain management decisions is the rule under numerous sister state public employment statutes and has resulted in recognition of mandatory bargaining about impact of changes in student class hours, class size, and level of services.<sup>45</sup>

#### CONCLUSION

The definition of scope of bargaining for public school teachers is unique and, at first glance, confusing. However, after examining legislative history, the plain meaning of the language chosen, and the statutory expression of public policy, it is clear that the legislature intended to provide for two separate areas of teacher interest with two separate mechanisms for decision-making. For those matters which interest teachers as professional educators, mandatory and permissive consultation is provided. For those matters which interest teachers as employees, collective bargaining is mandated. Employment matters are those in which teachers' interests are nearly identical to those of employees in general. Accordingly, the Rodda Act defines scope of bargaining for these issues in language identical to that of the LMRA. The only material difference is that the Rodda Act preserves the integrity of its dual system of decision making by limiting "terms and conditions of employment." This limitation in no way implies strict construction of employment matters such as wages, hours of employment and enumerated terms and conditions of employment. As to these matters, the legislature intended liberal construction in favor of bilateralism.

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45. State of New Jersey (Stockton State College), 3 NJPER 62 (N.J. 1977); *W. Irondequoit Bd. of Educ.*, 4 N.Y. PERB ¶ 4-3070 (1971); *Oak Creek Educ. Ass'n v. Wis. Employment Relations Comm'n*, 91 L.R.R.M. 2821, 2824.