subject of bargaining, it was presumptively relevant and UC was required to produce the information absent a valid justification for not doing so.

b. Production of PCS Information

An exclusive representative's right to information is not absolute and PERB has recognized employer defenses for refusing to provide relevant information based on "justifiable circumstances." (*State of California (Departments of Personnel Administration and Transportation)*, *supra*.) For example, an employer is not obligated to provide information that is unavailable to it. (*King City Joint Union High School District* (2005) PERB Decision No. 1777; *State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S.) As with all defenses to production of relevant information, the employer bears the burden of proving that the requested information was unavailable. (*Bakersfield City School District* (1998) PERB Decision No. 1262.)

"[W]here information requested by a union is in the possession of third parties with whom an employer has a business relationship, such as a subcontractor, the employer is obligated to make a good-faith, reasonable effort to obtain the information from such parties." (*NYP Holdings, Inc.* (2008) 353 NLRB No. 67, *23.) If the third party refuses to provide the information, the employer is not required to do anything more to satisfy its statutory obligation. (*Pittston Coal Group, Inc.* (2001) 334 NLRB 690, 692-693.)

Applying the above principles, we find that some of the requested information was unavailable to UC. On June 9, 2005, in response to UC's assertion that the formulas and methodology for the PCS in use at all of its medical centers were proprietary, Lindsay requested UC's contracts with the PCS vendors. At the June 22 bargaining session, Cieszkiewicz provided Lindsay with two letters from the law firm representing Catalyst, the vendor of the Evalisys PCS in use at the Los Angeles and San Francisco medical centers. The

nearly identical letters stated that Catalyst cannot honor UC's request to disclose the contracts to CNA because the documents "contain confidential and proprietary information and trade secrets" and the terms and conditions of the contracts prohibit UC from disclosing this material to third parties. These letters show that UC requested the PCS formulas and contracts from the Evalisys vendor and that the vendor refused to provide both. This satisfied UC's obligation under HEERA. Therefore, we conclude UC did not refuse to provide requested information regarding the PCS in use at the Los Angeles and San Francisco medical centers.

As to the Davis and Irvine medical centers, Cieszkiewicz provided Lindsay with documents during the June 22, 2005 bargaining session that she represented to be the vendor contracts for the PCS in use at those locations. Lindsay testified that he told Cieszkiewicz the documents were difficult to read. However, he could not recall any other comments he made about the documents and neither party's bargaining notes contain any statement by Lindsay regarding the contracts.

When an employer partially complies with an information request and the exclusive representative fails to communicate its dissatisfaction, or reassert or clarify its request, no violation will be found. (*Trustees of the California State University* (2004) PERB Decision No. 1732-H; *Oakland Unified School District* (1983) PERB Decision No. 367.) The record does not indicate that Lindsay expressed dissatisfaction with the documents produced, or reasserted or clarified CNA's request for PCS information on or after June 22, 2005. Accordingly, we conclude UC did not refuse to provide requested information about the PCS in use at the Davis and Irvine medical centers.

Regarding the San Diego medical center, Cieszkiewicz told Lindsay during bargaining on June 22, 2005, that OGC was still working to obtain a copy of the contract from the vendor. UC ultimately provided CNA with a copy of the San Diego PCS contract on August 5, 2005.

The record does not indicate that CNA ever expressed dissatisfaction with the documents produced on August 5, or reasserted or clarified its request for PCS information on or after that date. Consequently, we conclude UC did not refuse to provide requested information regarding the PCS in use at the San Diego medical center. Further, because UC had to obtain the vendor's approval to disclose the contract to CNA, we find that UC's delay in providing the San Diego PCS contract was reasonable and therefore did not amount to a refusal to provide the information. (See *Chula Vista City School District* (1990) PERB Decision No. 834 ["Unreasonable delay in providing requested information is tantamount to a failure to provide the information at all."]; *Union Carbide Corp.* (1985) 275 NLRB 197, 201 [delay in producing requested information may be found reasonable when the delay was justified by the circumstances].)

In sum, we conclude that UC satisfied its statutory obligation to provide information in response to CNA's request for the PCS "formulas and methodology" and vendor contracts. Accordingly, we dismiss the allegation that UC violated HEERA section 3571, subdivision (c) by refusing to provide CNA with necessary and relevant information regarding the PCS.

3. Threatened Strike

The ALJ found that HEERA does not prohibit strikes and that a strike provoked by an employer's unfair practices is lawful under HEERA. He then concluded that CNA's threatened strike was not an unfair practice because it was provoked by UC's bad faith bargaining, refusal to provide information and discipline of nurses for participating in sympathy strike activity. For the reasons discussed below, we agree that unfair practice strikes are lawful under HEERA but conclude that CNA's threatened strike was not an unfair practice strike and therefore violated HEERA section 3571.1, subdivision (c).

a. Legality of Strikes under HEERA

Neither PERB nor the courts have addressed the legality of strikes under HEERA. In the face of this silence, UC urges the Board to adopt the principle expressed in the lead opinion in *Compton Unified School District* (1987) PERB Order No. IR-50 that, because the statute does not explicitly grant a right to strike, *any* strike is a per se violation of the statute. An examination of decisions addressing the legality of strikes under EERA is instructive on this point.

In *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, the California Supreme Court declined to address the legality of public employee strikes but nonetheless held that a strike prior to the completion of EERA's statutory impasse procedures could constitute an "illegal pressure tactic" in violation of EERA section 3543.6, subdivisions (c) and (d).[10] (*Id.* at pp. 8-9.) Four years later, PERB held in *Modesto City Schools* (1983) PERB Decision No. 291 that EERA grants public school employees a right to strike. In 1985, a plurality of the California Supreme Court recognized that a strike by public employees is lawful under the common law unless the strike "creates a substantial and imminent threat to the health or safety of the public." (*County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 586.) The Court also found that nothing in the Meyers-Milias-Brown Act (MMBA)[11] prohibits strikes by employees of local government agencies. (*Id.* at pp. 572-573.)

In *Compton Unified School District*, *supra*, a majority of the Board overruled *Modesto City Schools*, *supra*. The lead opinion found that EERA prohibits all strikes, even in the face

[10] EERA section 3543.6, subdivision (c) makes it unlawful for an employee organization to "[r]efuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative." Subdivision (d) of that section makes it unlawful for an employee organization to "[r]efuse to participate in good faith in the impasse procedure set forth in [EERA]."

[11] The MMBA is codified at Government Code section 3500 et seq.

of the Court's ruling in *County Sanitation District No. 2*, *supra*, that the similar language of the MMBA contains no such prohibition. Though it did not rely on *County Sanitation Dist. No. 2*, *supra*, the concurring opinion found no prohibition on strikes in the language of EERA and returned to the approach taken by the Supreme Court in *San Diego Teachers' Assn.*, *supra*, that whether a strike is an unfair practice is to be determined by the facts of the particular case. PERB has taken this approach in subsequent decisions addressing strikes. (*Santa Maria Joint Union High School District* (1989) PERB Order No. IR-53; *Vallejo City Unified School District* (1993) PERB Decision No. 1015.) Furthermore, and of particular relevance to this case, *Compton Unified School District*, *supra*, did not overrule prior PERB decisions recognizing the legality of unfair practice strikes.

As the above authority indicates, it is well-established that EERA does not prohibit all strikes by public school employees. We find nothing in the language of HEERA that compels a different conclusion regarding employees of higher education employers. Thus, we reject UC's argument that any strike constitutes a per se violation of HEERA.

In the alternative, UC argues that PERB should declare any strike at a health care institution to be a per se violation of HEERA "due to the extreme risk to public health and safety" posed by such a strike. The legality of strikes at private sector health care institutions has been recognized since at least 1974, when the National Labor Relations Act (NLRA)[12] was amended to bring health care institutions under the jurisdiction of the National Labor Relations Board (NLRB). (See 29 U.S.C. § 158, subd. (g) [requiring union to give 10 days notice prior to strike at any health care institution].) Moreover, whether a strike at a health care institution poses an imminent threat to public health or safety is to be determined on a case-by-case basis.

[12] The NLRA is codified at 29 U.S.C. section 151 et seq.

(*County Sanitation Dist. No. 2, supra*, 38 Cal.3d at p. 585.) Accordingly, we decline to adopt a rule that any strike at a health care institution is per se an unfair practice.

Given the similarity between the language and purpose of EERA and HEERA, we hold that HEERA does not prohibit strikes by employees of higher education employers. We also hold that whether a strike constitutes an unfair practice is to be determined on the facts of the particular case.

b. Legality of CNA's Strike Threat and Preparations

It is undisputed that the strike noticed by CNA would have occurred as scheduled on July 21, 2005, had the superior court not enjoined it. Because the strike never took place, we must decide whether the threat to strike and CNA's preparations leading up to the strike constituted an unfair practice in and of themselves.

In *South Bay Union School District* (1990) PERB Decision No. 815, the Board held that a strike threat and strike preparations prior to the exhaustion of statutory impasse procedures may constitute an unfair practice if the threat and preparations were intended to place pressure on the employer to reach agreement at the bargaining table. The Board examined the employee organization's conduct under the "totality of the circumstances" test but did not identify any specific factors to guide PERB's determination of when a strike threat and preparations constitute an unfair practice.

After considering PERB's prior decisions regarding strike activity, we believe that, to constitute an unfair practice, a strike threat and preparations must be: (1) in furtherance of an unlawful strike; and (2) sufficiently substantial to create a reasonable belief in the employer that the strike will occur. Our analysis in this case begins with the lawfulness of CNA's threatened strike.

A strike prior to the exhaustion of statutory impasse procedures creates a rebuttable presumption that the employee organization is refusing either to negotiate in good faith (if the strike occurs before impasse is declared) or to participate in the impasse procedures in good faith. (*Sacramento City Unified School District* (1987) PERB Order No. IR-49; *Westminster School District* (1982) PERB Decision No. 277; *Fresno Unified School District* (1982) PERB Decision No. 208; *Fremont Unified School District* (1980) PERB Decision No. 136.) The presumption of illegality is rebuttable, however, by proof that the strike was provoked by the employer's unfair practices and that the employee organization in fact negotiated and/or participated in impasse procedures in good faith. (*Westminster School District*, *supra*; *Fremont Unified School District*, *supra*.) Absent such proof, the presumption stands, and a violation is established. (*Westminster School District*, *supra*; *Fresno Unified School District*, *supra*.)

To establish that a strike is an unfair practice strike, the employee organization must prove that: (1) the employer committed an unfair practice (*Basic Industries, Inc.* (2006) 348 NLRB 1267, 1274); and (2) the employer's unfair practice provoked the strike (*Rio Hondo Community College District* (1983) PERB Decision No. 292). As the Board explained in *Rio Hondo Community College District*, *supra*:

> Provocation is a question of fact. Under the NLRA, for a strike to be deemed an unfair practice strike, it must be caused by an unfair labor practice. The mere fact that an unfair labor practice is committed prior to a strike does not necessarily render that strike an unfair practice strike. [Citations.] Rather, the burden rests with the striking employee organization to prove, in the nature of an affirmative defense, that the District's unfair labor practice in fact caused the strike. To ascertain the actual cause of a strike, it is necessary to consider the record as a whole [citation], including such indicators as union statements as to the cause of the strike in testimony [citation] at the time a strike vote was taken, or in the content of picket signs and handbills used during the strike [citation], the closeness in time between the unfair practice and the strike, union expression of opposition to the unfair practice prior to the strike [citation], and the nature and

seriousness of the unfair practice, as well as any other relevant evidence.

We need not reach the issue of provocation because CNA has failed to prove that UC committed any unfair practices. As discussed above, CNA failed to prove that UC bargained in bad faith over CNA's staffing ratio proposal or refused to provide requested PCS information. Further, the ALJ's conclusion that UC did not bargain in bad faith over its proposal to add a prohibition of sympathy strikes to the "no strike" clause of the CBA stands because neither party excepted to it. (*City of Torrance* (2009) PERB Decision No. 2004; *Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96.) Thus, none of the unfair practices alleged in the complaint were proven by CNA.

In addition to the evidence introduced in support of the three allegations in the complaint, the ALJ also considered evidence of UC's discipline of nurses for engaging in sympathy strike activity in determining provocation for the strike. UC contends that the ALJ improperly admitted this evidence over UC's relevance objection and improperly considered it in the proposed decision. We agree on both points.

As discussed above, to establish that a strike was an unfair practice strike, the employee organization must establish that the employer committed an unfair practice. The allegation that UC unlawfully disciplined nurses for engaging in sympathy strike activity was deferred to binding arbitration on July 26, 2005. Thus, as the ALJ acknowledged in the proposed decision, PERB could not find that UC's discipline of nurses constituted an unfair practice. Therefore, any evidence regarding that discipline was not relevant and should not have been admitted or considered by the ALJ.

Based on the totality of the circumstances, we conclude CNA failed to rebut the presumption that its threatened pre-impasse strike was an unfair practice because it did not

prove that UC engaged in any unfair practices that could have provoked CNA's strike. Instead, we find the record clearly demonstrates that CNA's threat of strike and strike preparations were done for the purpose of placing pressure on UC to reach agreement at the bargaining table prior to the exhaustion of statutory impasse procedures.[13]

Turning to CNA's strike threat and preparations, it is difficult to imagine pre-strike conduct more substantial than CNA's in this case. CNA members took a much-publicized strike vote from June 28 through July 7, 2005, with over 95 percent of the bargaining unit voting in favor of a strike. On July 8, 2005, CNA gave UC written notice of a 24-hour strike to begin at 6:45 a.m. on July 21, 2005, at all UC locations that employ CNA-represented nurses. Sometime after notice was given, CNA issued a "One Day Strike Manual" to members of the bargaining unit with a strike date of July 21, 2005. CNA officials' comments about the pending strike were published in UC campus newspapers in early to mid-July. One of these articles indicated that CNA had established an "emergency task force" to provide emergency treatment to patients during the strike. Based on this undisputed evidence, we find that CNA's strike threat and preparations were sufficiently substantial to support a reasonable belief by UC that the strike would occur as noticed.

For these reasons, we find that CNA failed to meet and confer in good faith in violation of HEERA section 3571.1, subdivision (c) by credibly threatening to engage in, and making extensive preparations for, a pre-impasse economic strike.[14]

---

[13] Because we find CNA's threatened strike was unlawful on these grounds, we need not address whether the strike would have been unlawful under *County Sanitation District No. 2*, *supra*, as an imminent threat to public health and safety.

[14] Because we find CNA's threatened strike would have constituted an unfair practice, we need not and do not address whether the threat of, or preparations for, a lawful strike could constitute an unfair practice.

4. Remedy

Prior to the hearing, CNA filed a motion in limine to exclude evidence of strike-related damages, or in the alternative, to bifurcate the hearing and only take evidence of damages if it was determined that CNA's threatened strike was unlawful. The ALJ granted the motion, ruling that the amount of monetary loss can be determined in compliance proceedings and declining to rule on CNA's argument that PERB has no statutory authority to award strike damages. In its exceptions, UC contends that if the Board finds CNA's strike threat and preparations violated HEERA, it should reopen the record to allow UC to present evidence of damages it sustained as a result of CNA's unfair practice. To determine if further evidence is necessary, we must first address whether PERB may award damages in this matter.[15]

a. PERB's Authority to Award Make Whole Damages for Unlawful Strike Activity

The Board's remedial powers are set forth in HEERA section 3563.3:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including, but not limited to, the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The issue of PERB's authority to award damages for unlawful strike activity has arisen in several cases. (*Los Angeles Unified School District* (1990) PERB Decision No. 803; *El Dorado Union High School District* (1985) PERB Decision No. 537; *Westminster School District*, *supra*.) In each case, the record failed to establish that the employer suffered any

[15] Amicus curiae University Council – American Federation of Teachers and University Professional and Technical Employees, CWA Local 9119, contend that the Board should remand this issue to the ALJ. Typically, the Board will remand a case to an ALJ for further hearing when additional factual evidence is necessary to decide the case. (*San Diego Unified School District* (1991) PERB Decision No. 885.) PERB's remedial authority is a purely legal issue that does not require the presentation of additional facts by the parties. Moreover, the Board has the authority to issue a decision in a case without an ALJ having previously rendered a proposed decision. (PERB Reg. 32215.) Accordingly, we find no reason to remand this issue to the ALJ.

actual monetary loss as a result of the strike activity. Accordingly, the Board has never ruled on whether it has the authority to award damages as a component of make whole relief for unlawful strike activity.

UC contends that an award of damages is both authorized by HEERA and appropriate in this case. Conversely, CNA and amici curiae proffer several reasons why the Board lacks authority to award damages. For the following reasons, we hold that PERB has the authority to award damages to make an employer whole for expenses necessarily incurred or economic harm suffered as a direct result of unlawful strike activity.

"An administrative agency may - consistently with the 'judicial powers' doctrine - make restitutive money awards provided (i) doing so is reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the 'essential' judicial power remains ultimately in the courts, through review of agency determinations." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 359.) In *Walnut Creek Manor v. Fair Employment and Housing Comm.* (1991) 54 Cal.3d 245, the California Supreme Court delineated the scope of an administrative agency's remedial authority. Applying *McHugh*, *supra*, the Court held that administrative agencies have the inherent authority to award "restitutive damages," which it defined as "expenditures incurred or economic harm suffered by one party in consequence of another party's violation of a law or regulation the agency is empowered to enforce." (*Id.* at p. 263.) The Court observed that "[r]estitutive damages, in short, are akin to special damages, i.e., they are quantifiable amounts of money due an injured private party from another party to compensate for the pecuniary loss directly resulting from the second party's violation of law." (*Ibid.*) The Court thus upheld the Fair Employment and Housing Commission's (Commission) award of "out-of-pocket expenditures for increased rent and utilities" to a plaintiff who had been unlawfully denied housing because of his race and

marital status. (*Id.* at p. 266.) The Court found such damages were easily quantifiable and incidental to the Fair Employment and Housing Act's (FEHA) regulatory purpose of preventing discrimination in housing.[16] (*Id.* at pp. 263-264.)

The Court further held that, in the absence of express statutory authorization, administrative agencies have no authority to award compensatory or punitive tort damages. (*Id.* at p. 264.) Rather, those types of damages may only be awarded by a court. (*Ibid.*; *Youst v. Longo* (1987) 43 Cal.3d 64, 80.) Accordingly, the Court ruled that the Commission exceeded its authority by awarding the plaintiff damages for emotional distress. (*Id.* at p. 265.)

PERB's interpretation of its remedial authority has been consistent with the rule set forth in *Walnut Creek Manor*, *supra*. PERB has long recognized that it has broad authority to award "make whole" relief to remedy an unfair practice, including an award of out-of-pocket expenses. (*County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M; *Los Angeles Unified School District* (2001) PERB Decision No. 1469; *West Covina Unified School District* (1993) PERB Decision No. 973; *Temple City Unified School District* (1990) PERB Decision No. 841.) Nonetheless, PERB's remedial authority is limited to remedies that address rights granted by the applicable statute. "Not every individual monetary or other personal loss related to a violation of [the statute] is compensable under PERB law." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.) Thus, the Board has held PERB has no authority to award damages for emotional or psychological injury resulting from an unfair practice. (*State of California (Secretary of State)* (1990) PERB Decision No. 812-S.) The Board has also recognized that PERB's power to remedy unfair practices does not allow PERB to award punitive damages. (*Mark Twain Union Elementary*

[16] The FEHA is codified at Government Code section 12900 et seq.

School District (2003) PERB Decision No. 1548; *State of California (Secretary of State)*, *supra*.)

CNA and amici curiae assert that PERB cannot award make whole damages for unlawful strike activity because HEERA does not expressly grant PERB the authority to award such damages. In support of this argument, CNA and amici curiae rely on *Dyna-Med, Inc. v. Fair Employment and Housing Comm.* (1987) 43 Cal.3d 1379, and *Peralta Community College Dist. v. Fair Employment and Housing Comm.* (1990) 52 Cal.3d 40. In *Dyna-Med, supra*, the Court held that the FEHA did not authorize the Commission to award punitive damages. (43 Cal.3d at p. 1404.) Similarly, the Court ruled in *Peralta Community College Dist.*, *supra*, that the FEHA did not grant the Commission authority to award damages for emotional distress. (52 Cal.3d at p. 60.) Both of these decisions involved damages that went beyond making the injured party whole for monetary losses directly attributable to the statutory violation. Indeed, the decisions addressed precisely the type of damages, punitive and emotional distress damages, that PERB has expressly held it has no authority to award. Therefore, because they do not address make whole relief, *Dyna-Med, supra*, and *Peralta Community College District*, *supra*, do not preclude PERB from awarding "restitutive damages" to make a public employer whole for expenses necessarily incurred or economic harm suffered as a direct result of unlawful strike activity.

In a similar vein, CNA and amici curiae contend the California Supreme Court has held that injunctive relief is the only remedy available for unlawful public sector strike activity. We disagree that *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d

946,[17] and *City and County of San Francisco v. United Assn. of Journeymen etc. of United States & Canada* (1986) 42 Cal.3d 810, can be read so broadly.

In *El Rancho Unified School Dist., supra*, the Court found that PERB's inability to award the full array of damages available in a civil tort action did not divest PERB of exclusive initial jurisdiction over whether a strike constitutes an unfair practice. (*Id.* at p. 960.) In discussing why PERB is a more appropriate body than the courts for determining the proper remedy for unlawful strike activity, the Court suggested that an injunction, with the possibility of contempt sanctions for its violation, would better accomplish the Legislature's goal of curtailing public school employee strikes than "an after-the-harm-is-done award of damages." (*Id.* at p. 961.) However, the Court did not hold, as CNA asserts, that injunctive relief is the *only* remedy available for unlawful strike activity.

In *City and County of San Francisco, supra*, the Court held that "until the Legislature enacts to the contrary, the illegality of a strike without more is not grounds for a damage suit by the employer." (*Id.* at p. 819.) In reaching this conclusion, the Court observed that public employee strikes are now governed by specific collective bargaining statutes and courts should not create judicial remedies that conflict with the remedies provided by those statutes. (*Id.* at

---

[17] UC asks the Board to take judicial notice of three briefs filed with the Supreme Court in *El Rancho Unified School District, supra*. PERB may take judicial notice of materials from other legal proceedings when the materials are relevant to issues before the Board. (*The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H.) Because the Supreme Court's decision in *El Rancho Unified School District, supra*, speaks for itself, we find the briefs are not relevant to this matter and therefore decline to take judicial notice of them.

UC also asks the Board to take judicial notice of two temporary restraining orders. The first, issued by the Sacramento Superior Court against CNA on July 20, 2005, is already a part of the record in this matter. The second, issued by the San Francisco Superior Court against the American Federation of State, County and Municipal Employees, Local 3299, on July 11, 2008, is not relevant to the issues before the Board in this matter. Accordingly, we decline to take judicial notice of the July 11, 2008 injunction.

p. 816.) Nevertheless, the Court also recognized that some types of strike damages fall outside the purview of collective bargaining statutes and thus may be awarded by the courts, such as damages for "tortious acts occurring during the conduct of a strike," e.g. personal injury or property damage, or damages for breach of a contractual "no strike" clause. (*Id.* at p. 819.)

CNA places particular reliance on the following passage from this decision:

> There remain today relatively few cases in which the imposition of a judicial remedy of tort damages would not impinge directly upon an established administrative mechanism for resolving disputes between a public employer and its employees. The possible scope of a damage remedy has been so greatly narrowed that one senses that it would be fundamentally unfair to hold a few public employee unions liable for damage awards when teachers' unions, state employee unions, and many local employee unions would not be liable for the same conduct.

(*Id.* at p. 816.)

We disagree that this language precludes PERB from ordering *any* damages to remedy unlawful strike activity. Consistent with *McHugh*, *supra*, and *Walnut Creek Manor*, *supra*, we find this passage merely states the Court's view that, because teachers' unions, state employee unions and other unions under the jurisdiction of PERB would not be liable for the full array of damages available in a civil tort action, it would be unfair to impose such broad liability on the union representing the City's plumbers.[18]

Taken together, these Supreme Court decisions establish that: (1) courts may not award damages for unlawful strike activity by public employees, except in the limited circumstances set forth in *City and County of San Francisco*, *supra*, and (2) PERB cannot award the full array of damages available in a civil tort action. Significantly, in none of these decisions did the

[18] The striking employees in *City and County of San Francisco*, *supra*, were subject to the MMBA. At the time of the Court's decision, the MMBA was enforced in the courts. Effective July 1, 2001, the Legislature granted PERB jurisdiction over the MMBA (with a few exceptions). (Stats. 2000, ch. 901, § 8.)

Court hold that PERB has no authority to award damages to make an employer whole for unlawful strike activity. Consequently, these decisions simply say that it is for PERB, not the courts, to decide in the first instance whether a monetary make whole remedy would effectuate the purposes of the applicable collective bargaining statute on the facts of each case.[19]

CNA and amici curiae further argue that PERB lacks authority to award damages for unlawful strike activity because the Agricultural Labor Relations Board (ALRB) has no such authority. In support of this argument, CNA and amici curiae rely heavily on a court of appeal case interpreting the Agricultural Labor Relations Act (ALRA).[20] In *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, the court held that ALRA section 1160.3[21] does not grant the ALRB "the authority to award compensatory damages to persons injured in their business or property" by a union's unlawful secondary boycott. (*Id.* at p. 325.) This case has no bearing on PERB's authority to award strike damages as part of make whole relief for three reasons.

First, *United Farm Workers of America, supra*, did not involve damages as part of a make whole remedy but rather an award of compensatory damages to a grocery retailer that

---

[19] An award of damages by PERB is subject to judicial review pursuant to HEERA section 3564, subdivision (b).

[20] The ALRA is codified at Labor Code section 1140 et seq.

[21] ALRA section 1160.3 provides, in relevant part:

> If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part.

suffered monetary losses as a result of unlawful secondary boycott activity by the farmworkers union. The instant case, however, does not involve a secondary boycott. Thus, the court of appeal's ruling that the ALRB did not have statutory authority to award compensatory damages for unlawful secondary strike activity does not provide guidance on whether PERB can award make whole damages for unlawful primary strike activity.

Second, the statutory provisions setting forth the remedial powers of the ALRB and PERB are different. ALRA section 1160.3 "authorizes its make-whole remedy against employers but not labor organizations." (*Ibid.*) HEERA section 3563.3 contains no similar limitation. HEERA was enacted three years after the ALRA. Thus, had the Legislature intended to include a similar limitation on PERB's remedial authority in HEERA, it presumably knew how to do so. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.) Given the difference in language between the two provisions, we cannot interpret HEERA section 3563.3 to contain the same limitation on the Board's remedial authority that ALRA section 1160.3 imposes on the ALRB. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 596.)

Third, the limitation on the ALRB's remedial authority appears to be unique to the agricultural labor relations context because unions have been ordered to pay damages to an employer under other labor relations statutes. For example, the NLRB has ordered a union found to have bargained in bad faith to pay the employer's negotiation expenses. (*Teamsters Local 122 (August A. Busch & Co.)* (2001) 334 NLRB 1190, 1195.) In that case, the NLRB held that a traditional affirmative bargaining order would not restore the status quo because of the financial losses suffered by the employer, "financial losses which the Respondent directly caused, and intended to cause, by its strategy of bad faith bargaining." (*Ibid.*) The NLRB has also ordered a union to reimburse an employer for expenses incurred under a CBA when the

employer's agreement to the CBA was coerced by the union's illegal strike. (*National Labor Relations Bd. v. Warehousemen's Union Local 17* (9th Cir. 1971) 451 F.2d 1240, 1243; *United Slate, Tile & Composition Roofers, Local 36 (Roofing Contractors Assn. of So. Cal.)* (1968) 172 NLRB 2248, 2252.) Thus, under the NLRA, a union may be ordered to pay damages to make the employer whole for expenses incurred as a result of the union's refusal or failure to bargain in good faith.

Paralleling their ALRB argument, CNA and amici curiae assert that PERB has no authority to award damages for unlawful strike activity because the NLRB cannot do so. However, the cases cited in support of this argument do not involve damages as part of a make whole remedy. In both *Dyna-Med, Inc*, *supra*, and *Peralta Community College District*, *supra*, the California Supreme Court observed that federal courts have held the NLRA limits the monetary remedy for an unfair labor practice to back pay. (*Dyna-Med, Inc*, *supra*, 43 Cal.3d at p. 1397; *Peralta Community College Dist.*, *supra*, 52 Cal.3d at p. 59.) However, the cases cited in support of the Court's observation held that the NLRB has no authority to award punitive or general compensatory damages, such as emotional distress damages. As noted above, PERB has previously held it has no authority to award such damages.

Nor are the NLRB decisions cited by amici curiae availing. *District 1199, Union of Hospital and Health Care Employees (Francis Schervier Home and Hospital)* (1979) 245 NLRB 800, and *Iron Workers Local No. 783 (BE&K Construction Co.)* (1995) 316 NLRB 1306, both held that the NLRB lacked authority to order a union to reimburse an employer for property damage caused by the union during an unlawful strike. As the California Supreme Court clearly held in *City and County of San Francisco*, *supra*, such damages are compensable in a civil action in California and thus are not awardable by PERB. (42 Cal.3d at p. 819.)

In *National Maritime Union (The Texas Co.)* (1948) 78 NLRB 971, a union committed an unfair labor practice by engaging in a strike that caused the employer to accept a hiring hall contract that discriminated against non-union members. (*Id.* at pp. 975-979.) The NLRB held that the monetary remedy for the unfair labor practice was limited to back pay for the discharged employees. (*Id.* at pp. 988-989.) Relying on legislative history, the NLRB found that by granting federal courts jurisdiction to hear suits seeking damages for certain types of unlawful strike activity, Congress intended to preclude the NLRB from awarding strike damages other than back pay. (*Id.* at pp. 989-991.) Here, the legislative history of HEERA is silent regarding both strikes and the remedies therefor.[22] Thus, unlike *National Maritime Union*, *supra*, there is no clear indication that the Legislature intended to prohibit a make whole award of damages for unlawful strike activity under HEERA.

Additionally, the argument that PERB should follow the NLRB on this matter fails to consider important differences between private and public sector collective bargaining. It is well-established that Congress, in enacting the NLRA, intended to leave certain "economic weapons" unregulated by the Act. (*Machinists v. Wisconsin Employment Relations Comm'n* (1976) 427 U.S. 132, 143-144.) Hence, one of labor's most important "economic weapons," the pre-impasse economic strike, is not an unfair labor practice under the NLRA unless it violates one of the Act's prohibitions on specific strike activity. (See *National Labor Relations Bd. v. Fleetwood Trailer Co.* (1967) 389 U.S. 375, 379 [legal economic strike is protected activity under NLRA]; 29 U.S.C. § 158, subd. (b) [listing specific types of illegal

[22] We grant CNA's request that the Board take judicial notice of two legislative history documents. The first, Senate Floor Analysis of AB 1091 (which would eventually be enacted as HEERA), dated August 29, 1978, states that the bill is "[s]ilent on the issue of strikes or lockouts." The second, an Assembly Republican Caucus memorandum dated May 31, 1977, notes that AB 1091 "does not mention 'the right to strike' and therefore current law prohibiting strikes prevail."

strike activity].) Similarly, a private employer may lawfully exert economic pressure on a union before impasse is reached by locking out employees. (*American Ship Building Co. v. National Labor Relations Bd.* (1965) 380 U.S. 300, 310.) Moreover, a private employer faced with a pre-impasse economic strike may hire permanent replacement workers. (*National Labor Relations Bd. v. Mackay Radio & Telegraph Co.* (1938) 304 U.S. 333, 346.)

California's public sector collective bargaining statutes do not establish a similar scheme of unregulated pre-impasse "economic weapons." Both the California Supreme Court and PERB have long held that an economic strike prior to the completion of statutory impasse procedures is presumptively an unfair practice because it amounts to an "illegal pressure tactic." (*San Diego Teachers Assn.*, *supra*, 24 Cal.3d at pp. 8-9; *Westminster School District*, *supra*; *Fresno Unified School District*, *supra*.) Additionally, public employers lack the "economic weapons" that private employers possess. Because a public agency must continue to provide services to the public, a lockout is usually not a viable option in the public sector. (*Fremont Unified School District* (1990) PERB Order No. IR-54.) Moreover, it is rarely feasible for a public employer to hire permanent replacements for striking workers, particularly when the bargaining unit, like the one in this case, is geographically extensive and includes many employees with highly specialized skills. Thus, for all practical purposes, a public employer lacks the "economic weapons" to effectively combat a pre-impasse economic strike.

Once the parties have exhausted the statutory impasse procedures, a union may lawfully engage in an economic strike and the employer may lawfully implement terms and conditions of employment reasonably comprehended within its last, best and final offer. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900, citing *National Labor Relations Bd. v. Katz* (1962) 369 U.S. 736, 745.) An economic strike prior to the completion of impasse procedures constitutes a failure to participate in impasse

procedures in good faith. (*Westminster School District, supra*; *Fresno Unified School District, supra*; *Fremont Unified School District, supra*, PERB Decision No. 136.) Likewise, when an employer unilaterally implements terms and conditions of employment prior to completion of impasse procedures, it has failed to participate in the impasse procedures in good faith. (*Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 205.) In such cases, PERB orders the employer to undo the unilateral change and make employees whole for any losses suffered as a result of the employer's unfair practice. (E.g., *Regents of the University of California* (2004) PERB Decision No. 1689-H [ordering that employees be reimbursed for additional health care premiums paid as a result of employer's unilateral change in premium contributions]; *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1015 [affirming Board order requiring school district "to reimburse employees' expenses incurred as a result of the change in [health plan] administrators"].)

CNA and amici curiae assert that PERB cannot order an employee organization to make an employer whole for monetary losses caused by an economic strike that constitutes a failure to participate in impasse procedures in good faith. A system whereby a failure to participate in impasse procedures in good faith subjects an employer, but not an employee organization, to monetary liability is contrary to the express purpose of HEERA "to foster harmonious and cooperative labor relations." (*Regents of the University of California* (1999) PERB Decision No. 1359-H.) This is so because absent the potential award of a monetary make whole remedy, a public sector employee organization could use a pre-impasse economic strike to pressure the employer into granting bargaining concessions with no potential harm to either the organization or its members, other than members' loss of pay during the strike, because the employer can neither lockout employees nor hire permanent replacements. Thus, an award of

damages to make the employer whole for unlawful strike activity furthers the purpose of HEERA by maintaining the relative bargaining power of the parties until the statutory impasse procedures have been completed.

CNA and amici curiae argue that imposing a remedy in this case would "necessarily have a chilling effect on the exercise of lawful collective bargaining rights and would radically alter the delicate balance of power embedded in HEERA's current form." CNA's plan to strike, however, was made for the purpose of exerting economic pressure on UC by withholding quality healthcare from California citizens. As such, this conduct was neither lawful nor protected. To suggest that imposing a remedy for illegally leveraging the health and safety of patients for the purpose of economic gain would somehow have a chilling effect on the exercise of lawful collective bargaining rights is, at the very least, disingenuous. Indeed, the only conduct that might be "chilled" by an award of damages in this case is pre-impasse strike activity that PERB has long held to be an unfair practice.

For the above reasons, we hold that HEERA section 3563.3 grants PERB the authority to order an employee organization to pay damages to make an employer whole for necessary expenses incurred and economic losses suffered as a direct result of the employee organization's unlawful strike activity prior to the completion of statutory impasse procedures.

This holding encompasses not just damages arising from a strike itself but also any damages incurred as a direct result of the strike threat and preparations. Because a threat of, and preparations for, an unlawful strike constitute an unfair practice in and of themselves, the remedy for unlawful pre-strike activity is not dependent on the occurrence of a strike or on the existence of recoverable damages resulting from the strike. A contrary holding would allow an employee organization to escape liability for damages caused by its activity in preparation for

an unlawful strike by calling off the strike at the last minute or by engaging in such conduct with the knowledge that a court will likely enjoin the strike.

Additionally, a holding that PERB may award make whole damages for unlawful strike activity does not mean that PERB must or will award damages in every case. As the California Supreme Court observed in *San Diego Teachers' Assn.*, *supra*, PERB's authority to fashion an appropriate remedy for an unfair practice includes the "discretion to withhold as well as pursue the various remedies at its disposal." (24 Cal.3d at p. 13.)

We also emphasize that our holding does not diminish the importance of seeking injunctive relief to prevent an unlawful strike from occurring nor do we hold or imply that damages are a substitute for injunctive relief. To this end, we reaffirm the Board's holding in *Fresno Unified School District*, *supra*, that damages will not be awarded unless the employer first seeks "to mitigate its losses or bring about the termination of the strike by requesting that PERB seek an injunction against it." The failure to seek injunctive relief may also be a factor in determining whether the employer sought to mitigate damages arising from a strike threat or strike preparations.

b. Determination of Compensable Damages for Unlawful Strike Activity

For guidance in determining what damages are compensable as make whole relief for unlawful strike activity, including a strike threat and strike preparations, we turn to the Board's decision in *Westminster School District*, *supra*. In that case, the employee organization engaged in a one-day strike that the Board found to be an unfair practice. The district sought to recover the cost of substitute teachers for the day, the printing and mailing of letters to parents informing them of the strike, a substitute teacher training session and overtime for employees who staffed a telephone tree in order to communicate in the event of a strike. The Board found that the substitute training session and telephone tree were not a direct result of

the strike because neither "served to obtain substitutes or otherwise insure student attendance and compensation therefore." Rather, the benefits derived from them, if any, were "highly speculative and incapable of quantification." The Board then found that the district's savings on striking teachers' salaries was more than the district expended on substitute teachers and the printing and mailing of letters to parents. Accordingly, the Board found "no compensable loss as a result of the strike."

Thus, compensable damages include, but are not limited to, the cost of replacement workers and revenue lost because of the unlawful strike activity. The employer's pre-strike preparations are compensable only if they were necessary to maintain continuity of operations during the strike and proper to mitigate any reasonably foreseeable effects of the strike. Any expenses whose benefits were speculative or cannot be quantified, or that were only indirectly related to the strike, are not compensable. Further, the employer's expenses and losses are to be offset by any savings realized as a result of the strike activity.

Because the ALJ excluded all evidence of strike-related damages, the record before us contains no evidence upon which we can ascertain whether UC is entitled to damages as part of a make whole remedy. Accordingly, the record must be reopened to allow UC to introduce relevant evidence of its expenses, losses and savings from July 8, 2005, when CNA gave notice of its intent to strike, until July 20, 2005, when the superior court enjoined the strike.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the California Nurses Association violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571.1, subdivision (c) by threatening to engage in a one-day strike on July 21, 2005, and engaging in preparations for that strike. The Board hereby REMANDS Case No. SF-CO-124-H to the Administrative

Law Judge to take evidence on the issue of the Regents of the University of California's damages and to make recommended findings of fact and conclusions of law solely on the issue of damages.

The amended complaint and underlying unfair practice charge in Case No. SF-CE-762-H are hereby DISMISSED.

Member McKeag joined in this Decision.

Member Neuwald's concurrence and dissent begins on page 51.

NEUWALD, Member, concurring and dissenting: I agree with my colleagues that the California Nurses Association (CNA) violated the Higher Education Employer-Employee Relations Act (HEERA) by threatening to engage in, and preparing for, an unlawful pre-impasse strike. I respectfully dissent, however, from the determination that an award of strike preparation damages is appropriate under the circumstances of this case.

In this case, the injunctive relief remedy afforded by HEERA was entirely effective to terminate CNA's threatened strike activity. CNA gave sufficient notice of its intent to strike to enable the Regents of the University of California to invoke the Public Employment Relations Board's (PERB) authority to seek injunctive relief. Given that CNA complied immediately with the injunction and the parties have now participated in the statutory mediation and factfinding process and reached an agreement, the legislative goal of developing harmonious and cooperative labor relations has been achieved. (HEERA, § 3560(a).)[1] I believe that in this case the availability to PERB of injunctive relief and contempt sanctions "are far more likely to accomplish the Legislature's goal of 'foster[ing] constructive employment relations (§ 3540)' and 'the longrange minimization of work stoppages' than an after-the-harm-is-done award of damages." (*El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 961.) Because the injunction and subsequent utilization of the statutory mediation and factfinding process were successful in enabling the parties to reach an agreement, awarding a monetary remedy at this time would not serve to foster harmonious and cooperative labor relations and is therefore unwarranted.

[1] HEERA section 3560(a) states: "The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees."