STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 22, AFL-CIO, Charging Party, v. RIO LINDA UNION SCHOOL DISTRICT, Respondent, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 290, Respondent.	)	Case Nos. S-CE-18 S-CO-8 PERB Decision No. 71 September 18, 1978

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 22, AFL-CIO; Robert S. Shelburne, Deputy County Counsel, Sacramento County for Rio Linda Union School District; Robert Blake, Attorney for California School Employees Association, Chapter 290.

Before Gluck, Chairperson; Gonzales and Cossack Twohey, Members.

DECISION

Service Employees International Union, Local 22, AFL-CIO (hereafter SEIU) appeals from the attached hearing officer's recommended decision dismissing the unfair practice charges filed by SEIU against Rio Linda Union School District (hereafter District) and California School Employees Association, Chapter 290 (hereafter CSEA).

FACTS

On December 3f 1976 and January 7, 1977, SEIU filed an unfair practice charge and consolidated particularized statement of charge, respectively, against the District alleging that the District violated section 3543.5(a), (b) and (d) of the Educational Employment Relations Act[1] (hereafter EERA) by voluntarily recognizing CSEA in a classified unit at a time when CSEA and SEIU were competing for the support of employees in the unit. On December 21, 1976, SEIU filed an unfair practice charge against CSEA alleging that

---

[1]Government Code section 3540 et seq. All statutory references hereafter are to the Government Code.

Section 3543.5 provides:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> . . . . . .
>
> (d) Dominate or interfere with the formation or administration of any employee organization or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another....

CSEA violated section 3543.6(a) and (b)[2] by seeking and accepting voluntary recognition in the same unit at a time when CSEA and SEIU were competing for the support of employees in the unit. Both charges were based upon the following facts.

In early April 1976, CSEA filed a request for recognition with the District for a unit of all classified employees, excluding management, supervisory and confidential employees, and certain other limited classes.

In late April 1976, SEIU filed an intervening request with the District seeking recognition in an "operations" unit composed of the four job classifications of custodian, warehouseman, gardener and gardener/bus driver. This unit included approximately 50 of the District's approximately 310 classified employees.

On May 11, 1976, the District notified the Public Employment Relations Board (hereafter Board) pursuant to

---

[2]Section 3543.6 provides:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter....

section 3544.I[3] and emergency rule 30022[4] that it (1) did not doubt the appropriateness of the unit sought by CSEA, (2) did doubt the appropriateness of the unit sought by SEIU, and (3) did not desire a representation election.

Under Board procedure, the unit dispute resulting from the two employee organization petitions required the Board to

---

[3]Section 3544.1 provides:

> The public school employer shall grant a request for recognition filed pursuant to Section 3544 unless:
>
> (a) The public school employer desires that representation election be conducted or doubts the appropriateness of a unit. If the public school employer desires a representation election, the question of representation shall be deemed to exist and the public school employer shall notify the board, which shall conduct a representation election pursuant to Section 3544.7, unless subdivision (c) or (d) apply; or
>
> (b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization... If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the board shall conduct a representation election....

^Board emergency rule 30022, codified at California Administrative Code, title 8, section 30022, provided at the time in question:

> Notice of Employer Decision. Within 30 calendar days, or at the end of the 15 workday notice - posting period, whichever

conduct a hearing to determine the appropriate unit or units for negotiating.

SEIU continued to organize the District's classified employees after the District's notice to the Board. Then on

---

> is the longer period, the public school employer shall, in writing, notify the appropriate regional office of the following:
>
> (a) Whether or not the employer doubts the appropriateness of the unit described in the request for recognition;
> (b) Whether or not the employer contests the showing of majority support of the employee organization filing the request for recognition;
>
> (c) Whether during the 15 workday posting period described in Section 30015, any employee organization filed an intervention;
>
> (d) Whether the employer desires a representation election.

Currently in effect, rules 33190 and 33200 pertain to notice of the employer's decision. Rule 33190 provides:

> Employer Decision Regarding Request for Recognition and Intervention ("Format A" or "Format B"). Within 10 calendar days following receipt of the Regional Director's determination of adequacy of showing of support, the employer shall file a decision with the regional office using either "Format A" or "Format B."...
>
> (a) The employer shall use "Format A" if it has granted voluntary recognition pursuant to section 3544 and 3544.1 of the Act....
>
> (b) The employer shall use "Format B" if it has not granted voluntary recognition. A request for a representation hearing to resolve a unit dispute may be raised by "Format B" or by the employer filing a subsequent petition pursuant to section 33220....

October 21, 1976, SEIU filed an application with the Board pursuant to rule 33340[5] requesting to expand its participation at the unit determination hearing to propose and

---

Rule 33200 provides:

> Employer Decision Re Employee Petition for Representation Election and Intervention ("Format C"). Within 10 calendar days following the receipt of the Regional Director's determination on showing of support the employer shall file a decision with the regional office using "Format C." A request for a representation hearing to resolve a unit dispute may be raised by "Format C" or by the employer filing a subsequent petition pursuant to section 33220....

[5]Cal. Admin. Code, tit. 8, sec. 33340 provided at the time in question:

> Application To Join Hearing As A Party. The Board may allow an employee organization which did not file a timely request for recognition or intervention to join the hearing as a party provided:
>
> (a) The employee organization files a written application prior to the commencement of the hearing stating facts showing that it has an interest in the unit described in the request for recognition or an intervention; and
>
> (b) The application is accompanied by proof of the support of at least one employee in the unit described by the request or intervention; and
>
> (c) The Board determines that the employee organization has a substantial interest in the case and will not unduly impede the proceeding.

The similar rule currently in effect is 32165:

> Application to Join Hearing as a Limited Party. In a representation proceeding the Board agent may allow any person, employer, or employee organization which did not file

present evidence regarding a skilled crafts/maintenance unit, a food services unit and a transportation unit.

On October 27, 1976, the Board issued a notice that the hearing would be held on November 22, 1976.

In the few days immediately prior to the hearing the parties explored the possibility of a consent agreement. SEIU refused to agree to CSEA's proposal that a consent election be held in the operations unit for which SEIU originally petitioned and that CSEA be given voluntary recognition for the remainder of the employees covered by CSEA's petition.

When agreement was not reached among all three parties, on November 19, CSEA filed an amended request for recognition with the District which deleted the job classifications for which SEIU had petitioned. At a special District governing board meeting held on Saturday, November 20, the District gave voluntary recognition to CSEA for the unit specified in its amended request for recognition.

On November 22, the parties attended the Board hearing and informed the hearing officer of the voluntary recognition. CSEA then proposed that the hearing officer bring the parties together to conduct a consent election in the remaining operations unit. SEIU refused and indicated its intent to file

---

> a timely request for recognition, intervention or petition to join the hearing as a limited party provided:
>
> (a) The person, employer, or employee organization files a written application prior to the commencement of the hearing

with the Board the present unfair practice charges based on the voluntary recognition. The hearing officer did not open the record and submitted the case to the regional director.

As of March 2 and 3, 1977, when the hearing on the unfair practice charges was held, no request had been made by SEIU for voluntary recognition in the operations unit. No consent election agreement had been requested. CSEA and the District had executed a contract which extended its benefits to all classified employees except those in SEIU's proposed operations unit.

DISCUSSION

SEIU alleges that the District committed an unfair practice by voluntarily recognizing CSEA at a time when SEIU was competing for the support of employees in the recognized unit. SEIU alleges CSEA committed an unfair practice by seeking and accepting the voluntary recognition.

In deciding the issues in this case, the Board again notes the change in policy recently articulated in Centinela Valley Union High School District.[6] That case stated that the Board's policy in the past has been to accept without question the stipulations of parties regarding unit composition, so long

---

> stating facts showing that it has an interest in the proceedings; and
>
> (b) The Board agent determines that the person, employee organization or employer has a substantial interest in the case and will not unduly impede the proceeding....

[6](8/7/78) PERB Decision No. 62.

as the stipulations are "not inconsistent with a clear and specific mandate in the unit criteria provisions" of the EERA.[7] Encouraging agreement among the parties was a means of expediting represenation elections. Also, the policy was adopted because the Board itself had not yet developed any policies interpreting and applying the EERA's unit determination criteria.

Centinela went on to state that in the past two years the Board itself has decided many disputed unit determination cases and has developed certain policies in applying section 3545. It then stated:

> Henceforth, when [the Board] has jurisdiction in a representation case, it will examine stipulations between the parties to determine if the stipulations are inconsistent with the EERA or established Board policies. Established Board policies are those which the Board has developed and consistently followed.

This holding in Centinela is simply a restatement of rule 33000, which provides:

> Voluntary Resolution of Disputes. It is the policy of the Board to encourage the persons covered by the Act to resolve questions of representation by agreement among themselves, provided such agreement is not inconsistent with the purposes and policies of the Act and the Board. (Emphasis added.)

Thus as policies of the Board are developed, the parties in future stipulations should conform to such policies. This does not mean that parties must abandon stipulations upon which they

---

[7] *Id.* at pp. 2 and 3; Tamalpais Union High School District (7/20/76) EERB Decision No. 1.

have already agreed and acted. However, if the Board has jurisdiction in a representation case, past stipulations of the parties are open to Board scrutiny. Representation cases for the purposes of Centinela and this decision are those in which there is a dispute as to the appropriateness of the unit.

SEIU's intervention invoked the Board's jurisdiction because it placed the appropriate unit issue into dispute. Under section 3544.l(b),[8] when a competing claim, also known as an intervention, is filed, the employer is precluded from granting voluntary recognition to another employee organization and must notify the Board of the intervention. The Board has the power and duty under section 3541.3(a) "To determine in disputed cases, or otherwise approve, appropriate units."

The four job classifications for which SEIU petitioned are among those which the Board, beginning with Sweetwater Union High School District,[9] has generally placed in an operations-support services unit. Thus the intervention raised a question of representation about all the operations-support services employees.[10]10

---

[8]Section 3544.1(b) is quoted supra at note 3.

9(11/23/76) EERB Decision No. 4. See also Fremont Unified School District (12/16/76) EERB Decision No. 6; San Diego Unified School District (2/18/77) EERB Decision No. 8; Antioch Unified School District (11/7/77) EERB Decision No. 37.

[10]This case is distinguished from Hartnell Community College District (6/5/78) PERB Decision No. 54 in which the charging party failed to file an intervention or otherwise raise a question of representation concerning the unit in which the voluntary recognition occurred.

In this case, after the intervention was filed the District and CSEA stipulated to the voluntary recognition of CSEA in a unit consisting of basically all classified employees, excluding the four job classifications of custodian, warehouseman, gardener and gardener/bus driver. The Board has never found such a unit to be appropriate. The unit does not conform to the instructional aides (paraprofessional), operations-support services and office-technical and business services units the Board has generally found appropriate. The unit also divides the operations-support services employees. For these reasons, the voluntary recognition should not have covered only a portion of the operations-support services employees and excluded the other portion.

The Board finds that the hearing officers and regional directors should in the future, when the Board has jurisdiction in a representation case, not approve a voluntary recognition to which the parties wish to stipulate if the unit does not conform to established Board policy. In such a situation, the Board should investigate by obtaining stipulations of fact or hold a hearing to determine the appropriateness of the unit in which the voluntary recognition will occur.

The Board does not decide whether the conduct of the District and CSEA was lawful. The conduct occurred pursuant to the Board's old policy on voluntary recognitions and other stipulations. Centinela and this decision have articulated a new policy which shall apply in the future. Thus a decision on the lawfulness of the conduct would serve no purpose.

REMEDY

In this case, the result of following the old policy was a voluntary recognition in an apparently inappropriate unit and a group of approximately 50 employees who have remained unrepresented. In order to remedy this situation, the Board finds it necessary to remand this case to the executive director who shall conduct a unit determination hearing to determine the appropriate unit or units for negotiating.[11]

Pursuant to its intervention, SEIU may participate at the hearing with regard to the unit placement of the operations-support services employees. It may also make an application pursuant to rule 32165 to further participate at the hearing with regard to the other employees in issue as a result of CSEA's petition. SEIU's previous application to join the hearing as a party pursuant to old rule 33340 is no longer effective because that rule in no longer in effect.

Any contract presently in effect between the District and CSEA covering the unit in which CSEA was voluntarily recognized shall continue in effect unless and until there is final determination by the Board that the unit is inappropriate, or until the contract expires, whichever occurs sooner.

---

[11]The Board finds that the remand is the proper action to be taken in this case. Rule 32320 provides:

> (a) The Board itself may:
>
> (1) Issue a decision based upon the record of hearing, or
>
> (2) Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper.... (Emphasis added.)

ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

1. This case is remanded to the executive director who shall conduct a unit determination hearing to determine the appropriate classified unit or units for negotiating.

2. Any contract presently in effect between the District and CSEA covering the unit in which CSEA was voluntarily recognized shall continue in effect unless and until there is a final determination by the Board that the unit is inappropriate, or until the contract expires, whichever occurs sooner.

By: Raymond J. Gonzales, Member Harry Gluck, Chairperson

Jerilou Cossack Twohey, Member, dissenting:

I disagree with my colleagues that Rio Linda can be dealt with as a representation case and disposed of under Centinela[1] without any consideration of the underlying unfair practice charges that brought this case before the board in the first place. Because this is an unfair practice case, Centinela is inapplicable. There we found that "[h]enceforth, when [the Board] has jurisdiction in a representation case, it

[1]Centinela Valley Union High School District (8/7/78) PERB Decision No. 62.

will examine stipulations between the parties to determine if the stipulations are inconsistent with the EERA or established Board policies."[2] I do not believe that Board Rule 32320[3] is so elastic that it can strip the Board of its statutory duty "[t]o investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter."[4] After all, the Board's rule-making authority is designed by statute to expedite the administration of the EERA,[5] not to stand as a stumbling block between public school employees and their right "to select one employee organization as the exclusive representative of the employees in an appropriate unit,..."[6]

---

[2]Id. at 4 (emphasis added).

[3]Board Rule 32320 provides that when exceptions to a Board Agent Decision are filed with the Board:

"(a) The Board itself may:

(1) Issue a decision based upon the record of hearing, or

(2) Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper."

[4]Section 3541.3(i).

[5]Section 3541.3(g) gives the Board the power and duty "[t]o adopt ... rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter." (Emphasis added.)

[6]Section 3540.

The critical issue presented by Rio Linda is not whether the District voluntarily recognized an appropriate or an inappropriate unit, but whether CSEA and the District violated the EERA by agreeing on any unit at all in the face of known competing representational claims by SEIU. The majority found that SEIU raised a question of the representation only of all operations-support services employees, and only by virtue of its timely intervention pursuant to section 3544.1(b)[7] seeking recognition in four operations-support job classifications. The majority's remand of this case to the executive director for a unit determination hearing may result in SEIU's vindication, since at that hearing SEIU may apply for expanded recognition under Board rules 32165 and 32166.[8]

---

[7]Section 3544.l(b) provides in pertinent part:

> The public school employer shall grant a request for recognition filed pursuant to Section 3544 unless:
>
> .....
>
> (b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request.

[8]Board Rule 32165 provides that:

> In a representation proceeding the Board agent may allow any person, employer, or employee organization which did not file a timely request for recognition, intervention or petition to join the hearing as a limited party provided:
>
> (a) The person, employer, or employee organization files a written application

SEIU's ability to obtain relief from PERB should not depend upon CSEA's mistaken application of Board Rule 33100,[9] however. For it is clear that under the majority's

> prior to the commencement of the hearing stating facts showing that it has an interest in the proceedings; and
>
> (b) The Board agent determines that the person, employee organization or employer has a substantial interest in the case and will not unduly impede the proceeding.
>
> The Board agent may grant participation in the hearing which shall be limited to the right to make an oral statement on the record and to file a written brief subject to such conditions as may be prescribed.

Board Rule 32166 provides that:

> An employee organization may be allowed to participate in a representation hearing provided:
>
> (a) it has filed a written application; and
>
> (b) the Board agent determines that the organization has 10 percent support in a unit in dispute at the hearing; and
>
> (c) the Board agent determines that the organization will not unduly impede the hearing; and
>
> (d) this participation is limited to discussion of issues raised by the petition, response thereto, or question of representation.

[9]Board Rule 33100 provides in pertinent part:

> (a) A request for recognition or intervention may be amended to correct technical errors or to delete job descriptions from the proposed unit at any time prior to the commencement of a representation hearing. (Emphasis added.)

construction of the EERA and the Board's rules, if CSEA had deleted all operations-support service job classifications from the unit it sought, any question of representation would have been summarily resolved. In other words, by shrewd manipulation of Board Rule 33100, CSEA could have foreclosed PERB consideration of SEIU's claim of expanded support.

As I expressed in my dissent in Hartnell,[10] and reiterate here, the EERA provides for two ways in which questions of representation can be raised. Under section 3544.1(b), SEIU's intervention raised a question of representation. In addition, the District and SEIU both requested PERB to schedule a representation hearing.[11] According to section 3544.7(a), in pertinent part:

> (a) Upon receipt of a petition filed pursuant to Section 3544.3 or 3544.5, the board shall conduct such inquiries and investigations or hold such hearings as it shall deem necessary in order to decide the questions raised by the petition. The determination of that board may be based upon the evidence adduced in the inquiries, investigations, or hearing; provided that, if the board finds on the basis of the evidence that a question of representation exists, or a question of representation is deemed to exist pursuant to subdivision (a) or (b) of Section 3544.1, it shall order that an election shall be conducted by secret ballot and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast. ... (Emphasis added.)

---

[10]Hartnell Community College District (6/5/78) PERB Decision No. 54.

[11]On May 24, 1976, SEIU requested by letter that PERB schedule a representation hearing. The District also requested a representation hearing on October 20, 1976.

A question of representation exists when two or more rival employee organizations claim the support of employees in the same or overlapping units. A long line of NLRB cases follow the principle established in Midwest Piping and Supply Co.[12] 12 that an employer confronted with conflicting representational claims must remain neutral until the question is resolved by the procedures provided by statute.[13] 13 The NLRB does not require the filing of petitions to create a question of representation,[14] nor is any numerical percentage of support required to raise this question.[15]

> In fact, the sole requirement necessary to raise a question concerning representation within the meaning of the Midwest Piping doctrine...is that the claims of the rival union must not be clearly unsupportable and lacking in substance.[16]

As articulated by the NLRB in Belleville News Democrat, Inc.:

---

[12](1945) 63 NLRB 1060, 17 LRRM 40.

[13]Id. at 1070. See also e.g. Turbodyne Corp. (1976) 226 NLRB 522, 524 [93 LRRM 1379]; Traub's Market (1973) 205 NLRB 787 [84 LRRM 1078]; Air Master Corporation, Etc. (1963) 142 NLRB 181, 186-7 [53 LRRM 1004]; Shea Chemical Corporation (1958) 121 NLRB 1027, 1029 [42 LRRM 1486]; The Wheland Company (1958) 120 NLRB 814, 817 [42 LRRM 1054]; Novak Logging Company (1958) 119 NLRB 1573 [41 LRRM 1346].

[14]Higgins Industries, Inc. (1964) 150 NLRB 106, 119 [58 LRRM 1059]; Air Master Corporation, supra; Deluxe Metal Furniture Company (1958) 121 NLRB 995 [42 LRRM 1470].

[15]McKees Rocks Foodland (1975) 216 NLRB 968, 972 [88 LRRM 1575]; Playskool, Inc. (1972) 195 NLRB 560 [79 LRRM 1507].

[16]Playskool, inc., supra, at 560.

> The Midwest Piping doctrine is intended to implement the [National Labor Relations] Act's objective of assuring employees the right to select "representatives of their own choosing." It prohibits an employer faced with conflicting claims from according such treatment to one of the rivals as will give it an improper advantage or disadvantage in its contest for the employees' favor.[17]

A colorable claim of employee support is sufficient to invoke the Midwest Piping doctrine and the employer neutrality it demands.

PERB has a statutory obligation to restrain employers and employee organizations from striking deals and negotiating contracts when a question of representation exists. A colorable claim to employee support raises a question of representation, whether or not the latecoming challenger has formally intervened pursuant to section 3544.1(b).[18] Since the facts here indicate that SEIU's continued organizational campaign resulted in employee support in additional job classifications,[19] I would find that the District's voluntary

---

[17]Belleville News Democrat, Inc. (1972) 195 NLRB 431, 436 [79 LRRM 1376].

[18]Section 3544.l(b) is set forth at note 7, supra.

[19]0n October 21, 1976, SEIU informed EERB, CSEA and the District that it intended to introduce evidence of additional support at the hearing scheduled for November 22, 1976. Three authorization cards were included in the letter SEIU sent, implying its intention to invoke the "one card" rule. Former Board Rule 33340 provided that:

> The Board may allow an employee organization which did not file a timely request for recognition or intervention to join the hearing as a party provided:

(cont.)

recognition of CSEA interfered with the rights of its employees and SEIU and gave unlawful support to CSEA.[20] In addition, I would find that CSEA violated sections 3543.6(a) and (b)[21] by unlawfully entering into a recognition agreement with the District while a question of representation was pending before PERB.

.....

> (b) The application is accompanied by proof of the support of at least one employee in the unit described by the request or intervention; ...

[20]SEIU alleged that the District's voluntary recognition of CSEA violated sections 3543.5(a), (b) and (d), which provide:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> .....
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

[21]Sections 3543.6(a) and (b) provide that:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (cont.)

If Board Rule 33000[22] is interpreted to condone sleight-of-hand recognition agreements in spite of existing questions of recognition, the purposes of the EERA are undermined. This tension between the rule and the law[23] it supposedly implements creates an intolerable situation in which employers and employee organizations are effectively rewarded for embracing each other, however prematurely, and no matter what the employees themselves desire.

Accordingly, I dissent.

Jerilou Cossack Twohey, Member

> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[22]Board Rule 33000 provides that:

> It is the policy of the Board to encourage the persons covered by the Act to resolve questions of representation by agreement among themselves, provided such agreement is not inconsistent with the purposes and policies of the Act and the Board.

[23]Rules promulgated by administrative agencies may not be incompatible with the purposes of the legislation they are designed to implement. See e.g., Cooper v. Swoap (1974) 11 Cal. 3d 856, 864 [524 P. 2d 97, 115 Cal. Rptr. 1] (U.S. cert. den. 419 U.S. 1022); Clean Air Constituency v. California State Air Resources Board (1974) 11 Cal. 3d 801, 815 [523 P. 2d 617, 114 Cal. Rptr. 577]; Morris v. Williams (1967) 67 Cal. 2d 733, 748 [433 P. 2d 697, 63 Cal. Rptr. 689]; Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal. 2d 753, 757 [151 P. 2d 233].

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
	)	
SERVICE EMPLOYES INTERNATIONAL UNION, Local 22, AFL-CIO,	)	Unfair Practice Case Nos.
	)	S-CE-18
Charging Party,	)	S-CO-8
vs.	)	
	)	
RIO LINDA UNION SCHOOL DISTRICT,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
RIO LINDA CHAPTER 290, CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,	)	
	)	
Respondento	)	

Appearances: Van Bourg, Allen, Weinberg and Roger by Robert J. Bezemek for Service Employees International Union, Local 22, AFL-CIO; Robert S. Shelbourne, Deputy County Counsel, Sacramento County for Rio Linda Union School District; Robert Blake, Attorney, for California School Employees Association.

Before Terry Filliman, Hearing Officer.

STATEMENT OF THE CASE

On December 3, 1976, Service Employees International Union, Local 22, AFL-CIO (hereinafter Charging Party or Local 22) filed an unfair practice charge against the Rio Linda Union School District (hereinafter Respondent or District) alleging violations of Sections 3543.5(a), (b) and (d) of the Educational Employment Relations Act (hereinafter EERA or Act).[1]

[1]Government Code Section 3540 et seq. All statutory citations are to Government Code Sections unless otherwise noted.

On December 20, 1976, Charging Party filed an unfair practice charge against California School Employees Association, Chapter 290 (hereinafter Respondent or CSEA) alleging violation of Sections 3543.6(a) and (b) of the Act.

Both charges arise from the same factual setting. The essence of the charges is that the District violated the Act by granting recognition to CSEA at a time when both CSEA and Local 22 were competing for support. The recognition occurred following receipt of an amendment to CSEA's petition whereby the four job classifications covered by Local 22's intervention petition were deleted from CSEA's wall-to-wall unit. The alleged violation is grounded upon the bases that: (1) the recognition occurred at an illegal meeting; (2) a question of representation was pending before the EERB; (3) a representation hearing was imminent; (4) the recognition was motivated to avoid a hearing or election; (5) the recognition occurred in an inappropriate unit; and (6) that recognition occurred over the objection of the Charging Party which had demonstrated a substantial interest in the employees recognized and represented a majority of employees in an appropriate unit. Respondents filed answers denying that unfair practices had been committed and specifically denying that the District was faced with a real question of representation outside of the petition filed by Local 22 for an operations unit.

On December 20, 1976, the Educational Employment Relations Board (hereinafter EERB or Board) issued an order directing the Charging Party to particularize the charges.

On January 6, 1977, Local 22 filed a consolidated particularized statement of charges.

On January 21, 1977, the District filed an amended answer to the particularized charge.

On January 27, an informal conference was conducted but no settlement was reached.

On March 2 and 3, 1977, a consolidated hearing was held in Sacramento, California. CSEA failed to file an amended answer to the particularized charge prior to the date of the formal hearing. An amended answer was filed at the commencement of the hearing.[2] All parties participated in the hearing and were given full opportunity to present written evidence and call witnesses bearing on the issues. Between April 11 and May 6, 1977, all parties filed post-hearing briefs.

2At the hearing Local 22 moved to have all charges contained in the particularized statement of charges as against CSEA be deemed admitted because CSEA did not file an amended answer pursuant to EERB rules. At the same time, both respondents moved to dismiss the charge on the basis that it does not assert that any violation of the EERA or Board Rules and Regulations was committed. Finally, CSEA urged that if the dismissal was not granted, that the issue should be appealed immediately to the Board itself without continuing the hearing pursuant to Cal. Admin. Code, Tit. 8, Section 35014."

The motion by Local 22 to have the charges in the particularized statement against CSEA be deemed admitted was denied on the basis that Cal. Admin. Code, Tit. 8, Section 35008 is discretionary and the Charging Party made no showing of prejudice should the late answer be accepted. Similarly, the motions by both Respondents to dismiss the charge without hearing were denied. A motion to appeal the denial of the dismissal immediately to the Board itself pursuant to Cal. Admin. Code, Tit. 8, Section 32200 was not concurred in by the hearing officer.

Upon the entire record and from observations of witnesses, the hearing officer makes the following findings and conclusions.

FINDINGS OF FACT

The parties stipulated that Local 22 and CSEA are employee organizations within the meaning of Section 3540. l(d) and Rio Linda Union School District is a public school employer within the meaning of Section 3540.l(k). These stipulations are accepted without inquiry.

The District is located in Sacramento County, California. It employs approximately 310 classified employees, including 48 operations employees, 12 skilled crafts employees, 18 transportation employees, 37 food service employees, 141 instructional aides, and 54 clerical employees.

Petitions for Recognition (CSEA) and Intervention (Local 22)

In late February, 1976, Local 22 began organizing custodians, gardeners and warehousemen in the District.

During February and March, 1976, the District developed a program to provide information to classified employees concerning the implementation of the Act. The program included the preparation and dissemination of an informational brochure entitled, "Uncle Funky's Magic Book and SB 160." The publication was previewed with representatives of CSEA and the California Teachers Association to determine whether the organizations had any objections to proposed district presentations to staff. Informational meetings were conducted at each school during March, 1976.

In an uncontested statement, the superintendent stated that neither the American Federation of Teachers nor SEIU[3] participated in the meetings because he had no knowledge of any organizational activities within the district by those two organizations.

On April 5, 1976, CSEA, filed a request for recognition with the school district for a unit including all classified employees, excluding management, supervisory and confidential employees and certain other limited classes. The showing of interest filed by CSEA, amounted to approximately 96 percent of the classified employees in the proposed unit. On April 9, CSEA filed an amended request for recognition in the broad classified unit, deleting short-term and substitute employees from its original petition.

On April 28, 1976, Local 22 filed an intervening request with the District seeking recognition in an "operations unit" composed of four job classifications: custodian, warehouseman, gardener and gardener/bus driver. The unit included approximately 50 classified employees. Accompanying the request was a petition containing names and signatures of 16 classified employees within the unit.

On May 11, 1976, the District filed an employer's response with EERB pursuant to Emergency Rule 30022 indicating its refusal to recognize either Local 22 or CSEA, as the exclusive representative of its employees. The District stated that it (1) did not doubt the appropriateness of the wall-to-wall unit sought by CSEA, (2) did doubt the appropriateness of the Local 22 intervention and (3) did not desire a representation election.[4]

---

[3]Charging Party is a local affiliated with SEIU.

[4]Official notice is taken that EERB procedures require the processing of representation, case disputes based upon the chronological order of requests for recognition filed in each regional office. Rio Linda case S-R-122 was scheduled for hearing on November 22, 1976. All parties were notified of the pending hearing by written notice served on October 27, 1976.

Local 22 Continued. Organizing After **Filing Deadline**

The record does not reveal any further activities by either employee organization between April 28 and late June, 1976.

On June 17, Local 22 officials met with several employees to develop a proposal to be submitted for school board consideration on July 12, calling for salary increases and benefits for custodial, gardening and warehouse employees. The proposal was submitted on June 30. On July 12, a presentation was made to the school board.

During July, Fat Hallahan, business representative for Local 22, conducted two or three meetings in the maintenance shop, which were attended by electricians, carpenters, maintenance men, bus drivers and gardeners.

On August 3, 1976, Mr. Hallahan forwarded a letter to Mr. William Murchison, personnel director of the Rio Linda School District, requesting information about classified enployee job descriptions. On the same date, Hallahan presented a letter to the Board of Education on behalf of all classified employees relating to their concerns about salary and step increases for the 1976-77 fiscal year.

On September 13, 1976, Mr. Hallahan again presented to the School Board salary proposals for all classified employees. Hallahan requested the Board to grant an interim wage increase to all classified employees. The Board declined, stating that it was waiting for EERB to set a date for a hearing concerning the rival petitions.

On September 17, District Superintendent Floratos responded to a form questionnaire forwarded by the EERB Sacramento Regional Office supplying certain information and clarification of the employer decision which had been filed earlier. He noted that at the time the CSEA petition was filed, approximately 217 classified employees were in the proposed unit. Of those, 98.7% signed CSEA authorization petitions. He also indicated that the unit proposed by Local 22 included approximately 46 employees and stated the district doubted the appropriateness of the "operations" unit because it excluded stock-clerk, deliveryman, gardener/maintenance man, bus driver, head bus driver, assistant mechanic and head mechanic. Copies of the letter were served on Local 22 and CSEA.

During September, October and November, 1976, Hallahan met with cafeteria employees, operations employees, maintenance employees, transportation employees and instructional aides. During the meetings, he distributed authorization cards and explained to employees how they could be represented in separate negotiating units. During this period, several other classified employees also distributed Local 22 authorization cards. Forty-seven signed authorization cards were returned to Pat Hallahan.[5]

---

[5] Of the 47 cards, 45 were from employees who work in operations, skilled crafts, transportation and food services. The remaining 2 were from aides. Five of the 45 cards were signed by custodians and duplicate the original petition for intervention filed by Local 22. Considering the 40 remaining authorization cards, together with the 16 signatures on the original petition for intervention, a total of 56 classified employees expressed interest in Local 22 by late October, 1976.

At least three witnesses—Larry Gordon, Dan McAleer and Kathleen Abbott—testified that they were informed that by signing SEIU cards they were not committed to vote for SEIU but were given the right to get an election. Of the employees who signed SEIU cards, a majority had previously signed the CSEA petition.

Parties File Requests with EERB Prior to Unit Determination Hearing

On September 17, Superintendent Floratos sent a letter to the EERB Sacramento Regional Office requesting an advisory opinion regarding the legality of an employee organization splitting a previously filed petition for recognition into two separate requests.[6]

On October 21, Local 22 sent a letter to the EERB Sacramento Office. In the letter, Hallahan noted Local 22 had received a strong showing of support from several groups of employees in the Rio Linda District in addition to those petitioned for on April 28. Mr. Hallahan requested permission pursuant Cal. Admin. Code, Tit. 8, Section 33340[7] to introduce evidence on behalf

---

[6] No response was received per the policy of EERB not to render written advisory opinions. Oral advice rendered by staff in an attempt to assist a party is in no manner binding upon the Board itself when adjudging the same facts in a disputed case.

[7] Section 33340 states: Application To Join Hearing As A Party. The Board may allow an employee organization which did not file a timely request for recognition of intervention to join the hearing as a party provided:
(a) The employee organization files a written application prior to the commencement of the hearing stating facts showing that it has an interest in the unit described in the request for recognition or an intervention; and
(b) The application is accompanied by proof of the support of at least one employee in the unit described by the request or intervention; and
(c) The Board determines that the employee organization has a substantial interest in the case and will not unduly impede the proceeding.

of three additional proposed units of employees at the future unit determination hearing. The units included skilled crafts/maintenance, food services and transportation. Attached to the request was one authorization card from an employee in each of the proposed units. Local 22 stated that it was prepared to demonstrate a sufficient showing of interest in these units at the unit determination hearing and to qualify eventually to be on the ballot for elections in those units if the units were deemed appropriate by the Board. Copies of the letter were sent to the District and CSEA. A single page petition signed by ten maintenance and operations employees indicating their interest in being represented in a separate unit was attached to the letter.[8]

On October 27, 1976, the EERB issued a Notice of Hearing and prehearing conference in case S-R-122. The hearing was scheduled to be held on November 22, 1976.

Local 22 Prepares to Contend for Additional Employees

During late October and early November, both organizations stepped up their representation campaigns. On November 10, Hallahan met with William Murchison to obtain information from the District in order to allow Local 22 to prepare for the upcoming EERB hearing.

During the meetings, Hallahan reaffirmed Local 22's intent as stated in its October 21 letter to argue on behalf of negotiating units different than that proposed by their intervention; namely, a maintenance and

[8]On November 3, Hallahan delivered to the EERB Sacramento Regional Office three additional pages of a petition signed by District employees requesting an election.

operations unit, a transportation unit, a food services unit, and an aides unit. Local 22 requested a variety of information regarding these classified employees.

In a hearsay statement, Hallahan attributed a statement to Murchison that he saw a justification for a separate unit of blue collar employees, specifically maintenance and operations. Further, Hallahan related that Murchison stated he was aware that Local 22 had quite a bit of union activity among the different units and he had not heard or seen anything of CSEA, and the District wondered why they had not been out. He speculated that CSEA, and Local 22 had cut a deal and that CSEA, was going to back out of the District. Murchison on the other hand testified that he referred to what CSEA, might do statewide and his statements did not relate directly to the Rio Linda Union School District. While the hearsay statement infers a District position as to the appropriateness of the operations unit, it is unsupported by other evidence and is contradicted by the District's official position on the units.[9]

On November 12, 1976, a meeting of classified employees was held at the Frontier School. The meeting was called by Floratos to discuss the EERA. Approximately 18 employees attended. During the meeting, Floratos *explained* the District's position that instructional aides should not be represented in a separate unit and only one organization had petitioned to represent aides. Hallahan was present and stated that in view of Pittsburgh Unified School District (EERB Decision No.3,

[9]8 Cal. Adm. Code 35026 allows inclusion of hearsay evidence but will not allow unconfirmed hearsay to form the basis of a finding of fact unless admissible in civil court.

October 14, 1976) it was possible for aides to be represented in a separate negotiating unit. He further explained that Local 22 would be arguing on behalf of various units at the EERB hearing. Two aides filed authorization cards with Hallahan.

During the week of November 15, Robert Shelbourne, counsel for the District, telephoned Hallahan to discuss possibilities for settlement of the case. Shelborne asked whether Local 22 would agree to two negotiating units: the custodial unit as filed for by Local 22 and a residual unit. Hallahan notified Shelbourne that Local 22 wanted to argue on behalf of separate units at the hearing.

On November 18, a joint meeting was conducted by Local 22 and CSEA at the Rio Linda School. Hallahan represented Local 22 and Ron McGhee represented CSEA before approximately 40 classified employees. During the meeting, Hallahan stated that Local 22 supported the concept of separate units as opposed to a wall-to-wall unit which CSEA supported. On the same day, the two individuals also conducted a debate at the maintenance shop where maintenance employees were present.

Employer Accepts CSEA Amended Unit Petition

In an uncontradicted hearsay statement, Ted Costa, a former CSEA field representative, testified that Eva McLain, the assistant field director for the Sacramento Office of CSEA, told him that she had put together a smaller wall-to-wall unit than originally petitioned for in Rio Linda and that it would be recognized by the school district and could effectively keep SEIU from litigating the unit question at a hearing. Little weight is given to this testimony because scant evidence supported the hearsay statement as to intent of either CSEA or the District.

On November 18, Eva McLain was contacted by the Board agent assigned to conduct the hearing scheduled for November 22. The Board agent indicated that he was going to be contacting all parties to the hearing asking their consideration in working out a consent agreement due to an EERB backlog of cases and the Board's impetus toward settlement wherever possible. McLain responded to the Board agent that she would propose a consent election agreement for an operations unit as filed by Local 22 and split the original CSEA petition to delete the 48 operations employees covered by Local 22's intervention in order to gain exclusive recognition for the remaining comprehensive unit. The same day, McLain called Superintendent Floratos and indicated her intent on behalf of CSEA to amend their original request for recognition. Floratos indicated that he would contact the District's counsel. Several hours later, Mr. Shelbourne contacted McLain and verified her conversation with the superintendent. The Board agent also contacted Hallahan who stated that Local 22 would not enter into a consent agreement on the units being considered.

On November 19 at approximately 8:30 a.m. McLain hand-delivered an amended petition to Mr. Floratos' secretary. In addition, she hand-delivered the amended petition to the Board agent and to the Local 22 office. The amended petition was filed pursuant to Cal. Admin. Code, Tit. 8, Section 33100(a). The amended petition was not posted by the District.

It is found that McLain did not propose or discuss setting up a special Board meeting to act on the amended petition during her phone conversation with Mr. Floratos on November 18. During their phone conservation, Mr. Floratos did not indicate to McLain whether or not the District would recognize CSEA's amended petition. Following his

phone conversation with McLain, Floratos contacted the president of the Board of Education on November 18, requesting that the president call a special meeting to consider the anticipated amended petition. The regular bi-monthly meeting of the Board was scheduled for November 22. Mr. Floratos testified that he requested the meeting to be called prior to actually receiving the CSEA petition because it was his understanding following his conversation with McLain and the conversation by Mr. Shelbourne and McLain that the amended petition would be filed prior to Saturday November 20, the date proposed for the special Board meeting. No facts are found to contradict this testimony. McLain stated to Shelbourne during their conversation that the amended petition would be filed in the superintendent's office early the morning of November 19.

On the same morning (November 19) that Mrs. McLain filed the amended CSEA petition with the District, Hallahan was meeting with Mr. Murchison at the District office. Floratos called Hallahan into his office to explain to him that a Board meeting had been called for the next day to consider the proposed amendment by CSEA.. Hallahan protested, explaining that it was an effort to circumvent the entire process regarding the unit determination hearing, especially since the hearing was scheduled for the following Monday. He also stated that it was an obvious effort to block Local 22 from arguing on behalf of other units at the hearing and to prevent employees from voting in separate units. Floratos stated that he believed the amended petition was lawful and could be rightfully considered by the School Board.

Floratos testified that the notice of the special Board meeting was posted at all school locations on November 19. The School Board met in special hearing on November 20 to consider recognizing CSEA in a

comprehensive unit excluding those job descriptions originally filed for by Local 22 in its intervention. Approximately 50 employees were in attendance. Five or six employees spoke in favor of having an election following a unit hearing and against the proposed Board action. Hallahan spoke against the motion and he] d up a stack of authorization cards indicating that numerous employees, namely maintenance, transportation, cafeteria and aides wanted the opportunity for an election. The authorization cards were neither presented nor shown to the Board. Eva McLain spoke for CSEA and mentioned that 98 percent of the classified employees had signed the CSEA petition. Hallahan indicated that of the 98 percent, many had also signed cards of Local 22. Following the discussion, the School Board voted unanimously to approve the amended CSEA petition to recognize the amended unit.

District Executes Contract with CSEA

On November 22, the parties attended the scheduled EERB hearing and informed the hearing officer that a voluntary recognition had occurred pursuant to the amended petition filed with the EERB on November 19. At that time, CSEA proposed that the hearing officer bring the parties together to conduct a consent election in the remaining operations unit. SEIU refused and indicated its intent to file an unfair practice complaint. Based upon the previous events, the hearing officer did not open the record and submitted the case back to the regional director.

The hearing officer apprised Local 22 of its right to file an appeal of his inaction to the Sacramento Regional Director. On December 2, counsel for Local 22 filed a motion to proceed to hearing with the Sacramento Regional Director. On January 11, 1977, Local 22 filed another letter with the Regional Director relating to the same subject.

The regional office took no action. No appeals were filed with the Board itself.

Subsequent to November 20, SEIU continued organizing, conducted additional meetings, and solicited support from maintenance, transportation, operations and cafeteria employees. As of the date of the hearing, no request was made by Local 22 for voluntary recognition of its operations unit nor has CSEA, requested recognition. No consent election agreement has been requested. Following recognition, CSEA and the District executed a contract. Benefits under this contract have been extended to classified employees except those covered by the Local 22 proposed operations unit.

ISSUES

A. Charges Against the District

Did the District's voluntary recognition of CSEA as the exclusive representative of the comprehensive unit excluding operations employees:

1. Contribute unlawful support to CSEA (or encourage employees to join CSEA in preference to Local 22) in violation of Section 3543.5(d) of the Act; or

2. Deny Local 22 its rights guaranteed by the Act in violation of Section 3543.5(b); or

3. Interfere with, restrain or coerce employees because of their exercise of rights under the Act in violation of Section 3543.5(a).

The above issues may be resolved only upon determination of the following subissues.

a. Did the employer's recognition occur at a time when activities by Local 22 raised a real question of representation?

(1) Does the NLRB precedent under Midwest Piping Co. and similar cases apply with equal force in determining when a "question concerning representation" exists under the EERA?

b. Was the recognition given to preclude Local 22 from participating at the scheduled EERB hearing or election?

c. Was the recognition granted to one of two competing labor organizations in a presumptively inappropriate unit? If so, what is the appropriate remedy?

d. Was recognition granted to a labor organization which did not have an uncoerced majority support in the unit recognized?

e. Was the recognition accomplished at an illegally called School Board meeting? If so, what is the appropriate remedy?

B. Charges Against CSEA

1. Did CSEA cause or attempt to cause the District to violate Section 3543.5(a), (b) and (d) in violation of Section 3543.6(a).

2. Did CSEA interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by the statute in violation of Section 3543.6(b).

The issues relating to the charges against CSEA may be resolved only upon the resolution of the same subissues underlying the charges against the District.

CONCLUSIONS

Although extensive testimony was taken in this matter, the ultimate conclusion as to whether unfair practices have occurred will rest primarily upon interpretation of procedural rules, and established fundamental policy as well as cumulative facts. However, because of the abundance of facts, a summarized version of the relevant facts and laws is presented. The conclusions of law as to each allegation are made with the following summary in mind:

1. CSEA filed a petition supported by an uncontested at least 50 percent support in a comprehensive classified unit in accordance with Section 3544 and Cal. Admin. Code, Tit. 8, Section 33050.

2. Local 22 filed an intervention in an operations unit which covered a portion of the unit petitioned for by CSEA. The intervention was accompanied by an uncontested "at least 30 percent" showing of support and was timely filed pursuant to Section 3544.1(b) and Cal. Admin. Code, Tit. 8, Section 33070.

3. The District did not recognize either unit petitioned for at the time it filed an employer's decision on May 11, 1976, pursuant to Cal. Admin. Code, Tit. 8, Section 30022.

4. Approximately 7 months transpired between the employee organizations' request for recognition and intervention and the date of the scheduled EERB hearing to resolve the unit dispute.

5. Official notice is taken that Cal. Admin. Code, Tit. 8, Section 33100(b) extended an opportunity to Local 22 to amend its original intervention to add additional job classifications only up to the date of the employer decision (May 11).

6. While no such interpretation has been made by the EERB, it will be assumed that Cal. Admin. Code, Tit. 8, Section 33340 does allow a party or prospective party to expand its original request or to propose new units with the approval of the hearing officer once an EERB hearing commences (hearing scheduled for November 22).

7. Local 22 did continue organizing additional employees subsequent to April 28 in anticipation of proposing additional negotiating units at a future EERB hearing.

8. Both CSEA and the District knew at least by October 21 of Local 22's proposed actions at the prospective EERB hearing.

9. Local 22 obtained signed authorization cards from approximately 40 employees in job classifications outside title unit covered by its original intervention (an operations unit). The organization had at least one signed authorization card from employees within the maintenance, food services and transportation groupings.

10. Official notice is taken that Cal. Admin. Code, Tit. 8, Section 33100(a) allows amendments of a petition to correct errors or to delete job positions at any time prior to the commencement of a representation hearing. No posting is required.

11. CSEA amended its original petition into two petitions; i.e., an operations unit identical to Local 22's petition and a residual unit, purportedly under the authority of Cal. Admin. Code, Tit. 8, Section 33100(a).

12. At a specially called meeting, the District granted recognition in the residual unit on the basis that no existing intervention covered any positions overlapping with the amended unit. The recognition was granted immediately prior to the scheduled EERB hearing over the protests of Local 22.

13. The record contains no showing of hostile motive on the part of either the District or CSEA to deprive Local 22 from participating in an EERB hearing.

14. CSEA and the District executed a contract for the employees in the unit recognized.

15. No EERB hearing was held. No disposition of the employees in the operations unit covered by the Local 22 intervention had occurred at the close of the hearing.

CONCLUSIONS OF LAW

The Charges Against the District

1. Section 3543.5(d)

The main thrust of the charge is that the District, by recognizing CSEA in an amended unit at a time when the rival organizations were competing for employees and when an EERB representation case hearing had been scheduled, has assisted CSEA's organizational effort and has discriminated against Local 22 in violation of Section 3543.5(d) .[10] While the Charging Party does not specify which provisions are allegedly violated, the first clause of this section is not considered because there is no allegation that the District was involved in the formation of CSEA or has attempted to influence management of the organization. Therefore, the charge shall be limited to the second and third clauses of this section.

The second clause , "contribute financial or other support" , has been found by the Board to be identical to Section 8(a)(2) of the National Labor Relations Act, as amended (hereinafter the NLRA; 29 USC 141 et. seq.) (See San Juan USD, EERB Decision No. 12, at page 8,9.)

The third clause appears to be somewhat similar to Section 8(a) (3) of the NLRA, as amended.[11]

10[10]Section 3543.5(d) provides: "It shall be unlawful for public school employer to dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it or in any way encourage employees to join any organization in preference to another." (emphasis added).

[11]Section 8(a)(3) (29 USC Section 158 (a)(3)) provides in part" ...by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization..."

In its early decisions the EERB determined that where provisions of federal labor legislation are parallel to the Act, the use of the **federal statutes and decisions arising therefrom** to **interpret identical provisions is desirable.**[12]

Local 22 supports its claim with a plethora of NLRB cases emanating from the [Midwest Piping Co., Inc. 63 NLRB 1060, 17 LRRM 40 (1945)], which holds that an employer is required to maintain strict neutrality when a question concerning representation is pending between two rival labor organizations.

Respondent District counters that recognition was granted to CSEA strictly according to EERB procedural requirements, at a time when no question concerning representation existed as to the amended unit. Both Respondents further contend that "The Federal Labor Management Act is so fundamentally different from the Rodda Act and its implementing regulations that cases construing it and NLRB regulations are of no precedent value whatsoever."

At this point, consideration of the subissues upon which Charging **Party rests its "unlawful support" clause is necessary.**

A. Did the employer's recognition occur at a time when a "real question concerning representation" existed? Does the line of National Labor Relations Board (NLRB) precedent under Midwest Piping apply with equal force in determining when such a "question concerning representation" exists under the EERA?

---

[12]See Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976. See also Firefighters Union v. City of Vallejo, 12 C. 3rd 608, 87 LRRM 2453 (1974).

The second question must be addressed first:

Local 22 asserts that the longstanding Midwest Piping doctrine under the NLRB is applicable to the present case. In Midwest Piping, supra, the employer recognized one of two rival unions which had filed representation petitions with the NLRB. A contract was then negotiated. The NLRB held that the contract violated enployee rights under Section 7 and employer obligations under Section 8(a)(l)[13] to avoid unlawful interference and unlawful support under 8(a)(2) of the NLRA. In its decision the Board emphasized the exclusive jurisdiction of the NLRB over a case once conflicting claims of representation were filed:

> The Congress has clothed the Board with the exclusive power to investigate and determine representatives for the purposes of collective bargaining....In this case...the respondent elected to disregard the orderly,representative procedure set up by the Board under the Act for which both unions had heretofore petitioned tie Board..., such' conduct by tie respondent contravenes the letter and spirit of the Act...Id., at 1070.

In Shea Chemical Corp. [121 NLRB 1027, LRRM 1486 (1958)]. the NLRB upheld and slightly refined Midwest Piping by stating:

> Upon a presentation of a rival or conflicting claim which raises a real question concerning representation, an employer many not go so far as to bargain collectively with tie incumbent (or any other) union unless and until the question concerning representation has been settled by tie Board. (emphasis added) Id. at 1028.

"While certain aspects of tie Midwest Piping doctrine have been disputed by federal appellate courts, it is clear under tie NLRB that tie employer should not interfere once a real question concerning representation

[13]Section 3543.5(a) is the general corollary to 8(a)(l). See separate discussion on page 39.

exists.[14] The question is, then, when does a real question of representation commence.

The term "question of representation" is found in the NLRA, as amended, and the EERA.

While the term is not expressly defined by the NLRA, generally a question concerning representation arises when one of tow competing unions files a petition with the NLRB requesting an investigation supported by the required showing of interest. Swift and Company, 128 NLRB 732, 46 LRRM 1381 (1960).[15]

How does this procedural definition apply to the EERB? The EERA also recognizes the existence of a "question of representation" and a related "question of representation deemed to exist" in Sections 3544.1 and 3544.7. The term is not defined. In addition, the EERB has noted the existence of the term in San Juan Federation of Teachers (EERB

---

[14]Federal courts have disagreed on the grounds that more substantial evidence of enployee rivalry, than a mere filing of a petition by a rival union must be shown. (See NLRB vs. Swift and Co., 294 F 2d 285, 48 LRRM 2699 Ca 3, 1961); Playskool, Inc. 195 NLRB 560, 79 LRRM 1507 (1972); enf. denied 477 F 2d 66, 82 LRRM 2916 (CA 7, 1973) supp. dec. 205 NLRB 1009, 84 LRRM 1129 (1973).

Charging Party correctly cites subsequent authority indicating that the Midwest Piping doctrine is still upheld by the NLRB itself. Vanella Buick Opel, 194 NLRB No. 123, 79 LRRM 1090 (1971); St. Louis Independent Packing Co., 129 NLRB No. 71, 47 LRRM 1021 (196077 enforced 291 F 2d 700, 48 LRRM 2469 (CA 7, 1961); Shreveport Packing Corp.. 196 NLRB No. 78, 80 LRRM 1206 (1972); Mosler Safe Co., 209 NLRB No. 6, 85 LRRM 1392 (1974).

[15]Sec [15] Sec 9(c) (1) of the LMRA, as amended, provides "Whenever a petition shall have been filed, in accordance with such regulations as prescribed..., the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for a hearing upon due notice...
If the Board finds upon the record of the hearing that such a question of representation exists, it shall direct an election..."

Decision No. 12, March 10, 1977) and in Board Resolution No. 4 adopted on May 18, 1976.[16]

Yet in attempting to apply the NLRB definition under Midwest Piping, supra, to the EERA several fundamental distinctions arise. Under the Act, petitions by employee organizations calling for an election as well as voluntary recognition are filed with the employer rather than with the agency. In accordance with Board representation regulations, an organization may request EERB intervention only when the employer refuses to recognize an uncontested majority organization or submit to the agency a dispute for investigation or election itself in an employer's decision. EERB rules appear to *allow* a majority organization petitioning for a large unit to reduce its proposal in order to eliminate a "question concerning representation" previously existing while prohibiting[17] a minority organization from expanding upon its initial request.

---

[16]Resolution No. 4. states:

> An employer may not grant voluntary recognition where a question of representation exists pursuant to a petition filed under Section 3544.5 of the Rodda Act.

[17]Cal. Admin. Code, Tit. 8, Section 33100 states:

> (a) A request for recognition or intervention may be amended to correct technical errors or to delete job descriptions from the proposed unit at any time prior to the commencement of a representation hearing. The amendment shall be filed with the employer and concurrently served on any other employee organization known to be seeking recognition. No posting shall be required.
>
> (b) A request for recognition or intervention may be amended to add new job descriptions to a proposed unit at any time prior to receipt by the requesting party of the employer decision served pursuant to Section 33190. The amendment shall be filed with the employer. The employee organization shall concurrently send a copy of the amendment to the regional office. The employer shall post a notice of the amended request or intervention within three workdays following receipt of the amendment. The notice shall conform to the requirements for posting an original request for recognition or intervention and shall remain posted for 15 workdays. The deadline for an employer decision regarding an amended request for recognition shall be extended pursuant to Section 33210.
>
> (c) An employee organization may not, by means of an amendment, add to or modify the proof of support accompanying a request for recognition or intervention.

A brief analysis of several major differences between the NLRA and the EERA may assist in revealing why such procedural "inequities" may be intentional.

The NLRB was established by federal legislation at a time when great turmoil and unrest existed between private sector employers and employees. Because of a general animosity between parties, Congress established a strong administering agency and provided that all lengthy organizing battles be resolved by free elections. Ordinarily an employer may recognize an uncontested union displaying majority support. However, when the employer, the union or a rival union files a petition with the NLRB and a probable "question concerning representation" is determined to exist, the NLRB steps in and asserts exclusive control over the dispute. Furthermore, even a recognized union often seeks the additional benefits of being "certified" which results from a Board directed election.

A probable "question concerning representation" is raised by the filing of a petition with the NLRB which meets administrative requirements. A petition claiming representation in a unit substantially different from an appropriate unit does not raise the "question" and may be dismissed. On the other hand, all unions are allowed to freely amend their proposed units and accompanying support during the course of the NLRB proceedings because the NLRB controls the representation process and the ultimate outcome is determined by a free choice by the employees. Only after the NLRB fully investigates the petition to determine the status of the labor union, whether jurisdiction exists, and whether the unit is appropriate, is a "real question concerning representation" declared as a condition to setting the election. Once the case is presented to the NLRB virtually any party to the proceedings

which has an interest may appear on the ballot in an election despite its small showing of interest during the organizing drive. Given the significance of the election process under the NLRA and the role of the NLRB in resolving representation disputes, it is apparent that voluntary recognition under the NLRA has taken a back seat to elections as a meaningful conflict resolution device.

The EERA was established to strengthen a prior labor relations law for school employees and to bring a more bipartisan system of participation in establishing working conditions. Both the statute and EERB regulations strongly emphasize a rapid determination of exclusive representation in negotiating units through mutual settlements between the parties without the agency's intervention. Section 3544 of the Act mandates voluntary recognition upon a majority demand unless certain circumstances arise. Section 3544 and 3544.1 severely limit the time period during which employee organizations may compete for exclusive representation once the process commences. In addition the initial petitioner must present majority support in order to file, thus setting up the strong likelihood of voluntary recognition. Because the Act requires all union petitions to be filed directly with the employer rather than with the agency, the EERB has no opportunity to investigate and dismiss petitions in presumptively inappropriate units. Once an initial unit dispute is established by the filing of an intervention, EERB rules specifically limit the opportunities for the intervening union to change its position. (Cal. Admin. Code, Tit. 8, Section 33100.) Furthermore, Board rules and decisions emphasize the desirability of partial agreements between the parties without agency intervention and encourage submission of only issues directly in dispute to the Board. Other rules permit mutual withdrawal of a dispute from the agency's processes at any time when settlement occurs. Parties

are free to fashion a consent agreement or voluntary recognition in any unit which does not violate the specific prohibitions of the EERA (such as a unit containing both classified and certificated employees). When the Board takes jurisdiction over an unsettled case and reviews the proposed units in light of presumptively appropriate units, only those parties with a substantial support from employees are allowed on the election ballot. In many cases this requirement results in a voluntary recognition of the only union eligible for certification.

Noting the distinctiveness of both the NLRB and the EERB and their respective Acts, it is apparent that procedural and representation rights must be interpreted according to each Act and the rules and regulations that are generated therefrom. The concept of "employer neutrality in determining an exclusive representative," as promulgated in Midwest Piping, may be adopted[18] or refined by the Board itself. Considering the fundamental differences between the Acts (NLRA and EERA), federal case law interpreting procedural definitions under the NLRA such as "when a question concerning representation exists", is not found to be binding on resolution of the issues at hand. Thus relevant federal case law must be considered on a case by case basis to determine if it is applicable to resolution of conflicts arising under the EERA.

Two examples serve to illustrate: (1) an employer, confronted with two validly filed overlapping petitions under the EERA, chooses to ignore the intervention because the intervenor's showing of interest is doubted and grants voluntary recognition to the majority petition despite overlapping proposed units, (2) on the eve of consent election the employer grants recognition to the majority petitioner without concurrence by the other party to the election. In both these situations, a "question concerning representation" exists or is deemed to exist clearly under the NLRA and the EERA.

[18] The EERB adopted its own doctrine in principle by Resolution No. 4.

On the other hand, where the NLRA and EERA and the rules relating to filing and amending petitions reflect a philosophical difference in purpose, the EERB is free to reject a literal application of NLRB precedent, such as Midwest Piping, which could require a finding of "unlawful support."

Did a "real question concerning representation" exist under the EERA at the time of the voluntary recognition?

Section 3544.1(a) and (b) state that a "question of representation is deemed to exist" when the appropriateness of the unit is not in doubt but either the employer or a rival union force an election. Section 3544.7 states that a "question of representation" exists after the Board has determined the appropriate unit in a disputed case and prior to scheduling the election. From these sections, which are comparable to NLRB procedures, an actual question of representation is declared only after all preliminary issues are resolved and an election is required.

The more difficult question is to determine whether a threshold period exists, analogous to the "probable question" raised when a petition is filed with the NLRB, requiring employer neutrality.

In San Juan Federation of Teachers, the Board noted that "voluntary recognition may be defeated if an intervening employee organization triggers a question concerning representation and an election by making a 30 percent proof of support." (supra, at p. 8)

It should be noted that the Board in San Juan faced an issue of an unfair labor practice charge stemming from a district's providing a rival organizing employee organization with access to proof of support petitions supplied by a second organization. San Juan did not address directly the specific issues of when a question of representation exists or when such a question may be removed according to EERB Representation Rules and Regulations.

Board Resolution No. 4 states that "An employer may not grant voluntary recognition where a question of representation exists pursuant to a petition filed under Section 3544.5 of the Rodda Act." The Board Resolution is recognized but it is also recognized that such a resolution was generated out of a dispute wherein two proposed units overlapped to cover the same employee classifications and arose in a particular case where the showing of interest of one organization was unilaterally determined by the employer rather than referring the matter to EERB. Notwithstanding that Board Resolution, it must also be recognized that the Board has adopted certain rules and regulations applied in representation disputes. It is not the position of this hearing officer to create a novel policy declaring rights of the parties but instead to recognize and give credence to existing rules, regulations and policies in order to effect a dispute resolution within the spirit and intent of the EERA.

Thus credence must be given to the policy favoring voluntary recognition of employee organizations under appropriate circumstances and the right of employee organizations to remove their representation efforts from dispute by amending their petitions to delete job descriptions.

Section 3544.l(b) allows an intervening employee organization only 15 work days following the posting of a majority petition to challenge the appropriateness of the unit or demand an election. Section 3544.1 and Cal. Admin.

Code, Tit. 8, Section 33070 requires each intervention to be accompanied by at least 30 percent support in the unit claimed to be appropriate. In effect the intervenor cannot expect voluntary recognition absent a significant support showing, but may block recognition by a rival employee organization until it can gain adequate employee support.

Clearly at the time a valid intervention is filed with the employer a colorable question of representation exists. Yet unlike the NLRA **it is apparent that the question exists only to the extent to which the proposed intervening unit overlaps or conflicts with the original request for representation.**

Cal. Admin. Code, Tit. 8, Section 33100(b) **requires** that an amendment to a request for representation or intervention to add new job classification be made prior to the filing of an employer's decision. Furthermore, Cal. Admin. Code, Tit. 8, Section 33100(c) adds a further stabilizing effect by preventing the amendment from becoming **a** vehicle for showing of new support. In effect, these two subsections freeze the proposed unit of the intervening employee organization within a fixed time frame. These two subsections effect that freezing in the spirit of orderly and stable representation efforts of rival employee organizations.

While nothing in the Act or the rules prevents an intervenor or any organization from continuing organizing efforts between the time that intervention is filed and a hearing is scheduled, the employer and the majority petitioner cannot be expected to anticipate an effort by an intervening organization to expand its proposed unit to include additional employees or additional employee units at the time of hearing. Such an expansion is effectively blocked by Cal. Admin. Code, Tit. 8, Section 33100(b).

Whenever a majority petitioner claims a wall-to-wall unit is appropriate, it appears proper for an intervening organization to discuss the community of interest of employees other than those for which it has filed a petition in order to defeat the wall-to-wall unit. Pursuant to Cal. Admin. Code, Tit. 8, Section 33340, it is assumed for this discussion that an intervenor or an outside organization may enter the hearing if one is conducted, to propose an expansion of its requested unit or to propose additional units. *On* the other hand, prior to the commencement of the hearing, the intervening employee organization has no guarantee that the majority petitioner may not amend its original petition to eliminate those positions covered by the intervention, and thereby eliminate the colorable question concerning representation. Cal. Admin. Code, Tit. 8, Section 33100(a) specifically authorizes an employee organization to amend its petition to delete job descriptions prior to the representation hearing without any posting requirement. An intervening organization has no reasonable expectancy of representation of any employees other than those covered in its intervention petition once the time for its amendment has elapsed. To decide otherwise would thwart the rigorous requirements of Section 3544.1 of the Act requiring petitions supported by showing of interest and also thwart the express policy of the Board to encourage settlements among parties. A probable question of representation did exist, but only to the extent of conflict on the face of petitions filed with the employer pursuant to EERB rules. In this case, the fact that Local 22 notified the employer in writing in advance of the hearing that it intended to expand its proposal at the hearing does not create a question of representation as to those employees not covered by its original intervention. Thus notice is ineffectual to resurrect the question once it has been laid to rest pursuant to Cal. Adm. Code, Tit. 8, Section 33100(a) and (b).

It appears that under the EERA the existence of a real question concerning representation is not a fixed concept as it is under the NLRA. Until an election is scheduled, a possibility exists that an employer may lawfully remove the "question" by granting recognition in an amended unit which does not overlap with any proposed intervening unit.

B. Did the District recognize CSEA to preclude Local 22 from participating at the scheduled EERB hearing or election in violation of the EERA?

An EERB hearing to resolve the pending unit dispute was scheduled for November 22, 1976. The recognition occurred on November 19. Having previously found that Local 22 had no right under the Act to expand upon the unit originally covered by its intervention and that the "colorable question of representation" as to the unit recognized by CSEA was lawfully removed, the organization had a right to participate in an EERB hearing only if a dispute was in existence regarding its original "operations" unit.

The record indicates no proof of intent by the District to unlawfully deny Local 22 the right to litigate any issues regarding the unit proposed by its intervention. In fact, the record reflects no evidence that the District induced CSEA to amend its petition in order to receive voluntary recognition and end the rivalry between the organizations. Actually, it was CSEA that initiated the amendment independent of the District. CSEA did seek advice from the District concerning its impending amendment and the District sought legal advice. However, such advice initiated at CSEA's request can hardly be found to be inducement by the District.

While it is recognized that the employer resolution of a question of representation while NLRB election proceedings are pending has not been condoned (Vanella Buick, supra, Shreveport Packing Corp., supra, Mosler Safe Co., supra), EERB election proceedings had not commenced here. Furthermore, as noted above, a question concerning representation had been dispelled by CSEA's amendment pursuant to Cal. Admin. Code, Tit. 8, Section 33100(a). Therefore, given the evidence, the District's recognition of CSEA was made without anti-Local 22 animus and was within the rights of the District.

C. Is recognition granted to one of two competing labor organizations invalidated where the unit covered by the recognition is not presumptively appropriate by Sweetwater Union High School District (EERB Decision No. 4, November 23, 1976) standards?

The Charging Party cites numerous cases under the NLRB standing for the proposition that when an employer recognizes a union representing an inappropriate unit, the resultant contract may be challenged. In the NLRA setting, the issue will normally arise when a rival union files an election petition during the term of a collective bargaining contract. Such a contract ordinarily operates as a bar to the rival election petition. However, when the contract embraces an inappropriate unit the "contract bar rule" is generally inapplicable. Moveable Partitions, Inc. , 175 NLRB 915, 71 LRRM 1095 (1969).

The contract bar will still apply if the NLRB, in making a separate bargaining unit determination, might have found a different unit to be

appropriate, so long as the unit recognized is not inherently inappropriate, Airborne Freight Corp., 142 NLRB 873, 53 LRRM 1163 (1963). In Monsanto Chemical Co., 108 NLRB 870, 34 LRRM 1099 (1954), the NLRB found that a contract that covered a broad unit of production, maintenance workers and guards did not operate as a bar since the unit violated the basic intent of Congress to exclude guards from units containing other employees. The NLRB has stated that the contract bar rule is based upon Board policy consideration aiming to stablize the relationship between employers and employees, American Dywood Co., 99 NLRB 78, 8030 LRRM 1028 (1952). Furthermore, in Airborne Freight (supra at 874), the NLRB noted that the contract bar rule would not be applied without restraint where the result of application would disrupt industrial stability achieved under an existing bargaining agreement. The NLRB has no duty to police every contract voluntarily entered into by the parties to determine if a different unit would be appropriate.

It is apparent from EERB practices regarding voluntary recognition and consent elections that an undisputed recognized unit which does not implicitly violate the Rodda Act is considered an "appropriate unit." The same standard of appropriateness does not apply, of course, when the EERB is called upon to determine unit appropriateness.

There is no EERB policy that recognizing an employee organization representing a presumptively inappropriate unit amounts to lending "unlawful support." Considering established voluntary recognition practices by employers under the EERA, appropriateness of a proposed unit is not at issue where there is no overlap of job descriptions in two or more proposed units requested by two or more competing employee organizations.

As a result of the District's recognition, CSEA became the recognized representative of a unit not presumptively appropriate by Sweetwater standards.[19] That recognition should not be disturbed for want of presumed appropriateness, given the EERB's policy favoring voluntary recognition.

Since CSEA amended its original petition pursuant to Cal. Adm, Code, Tit. 8, Section 33100(a) by deleting positions, it appears that organization has no further standing to contest the appropriateness of the remaining operations unit proposed by Local 22 unless it participates in a future hearing as a new party under Rule 33340 (joinder of party).

Under the EERA and the California Administrative Code, there are no provisions for subsequently determining the issue of appropriateness of a unit during the period of recognition or duration of a contract once an employee organization has been validly recognized. Thus Local 22 can no longer challenge the appropriateness of CSEA's unit. This does not mean that Local 22 is forever barred from becoming the employee representative of the employees in question. Section 3544.l(c) of the Act notes that a request for recognition may be filed during a 30 day period prior to the expiration of an existing contract between an employee organization and the employer or after a contract expires. The recognition petition may be filed in a unit different from the recognized unit. Furthermore, decertification is also available as a remedy pursuant to Cal. Adm. Code Sections 33240 and 33250.

D. Was the recognition granted to CSEA when it did not have an uncoerced majority support in the unit?

---

[19]The Board in Sweetwater found three units of classified employees to be presumptively appropriate: instructional aides (paraprofessionals), office-clerical services; and operations-support.

The issue of recognition based upon majority support is raised in two distinct contexts. First, under the NLRB, an employer commits an unfair practice by recognizing and bargaining with an employee organization when less than a majority of the employees have authorized the employee organization to represent them even though the employer acted in good faith. International Ladies Garment Workers Union v. NLRB, 366 US 731, 48 LRRM 2251 (1961).

Second, the federal appellate courts have consistently overturned the NLRB and have allowed employers to defeat an unlawful support charge by showing that recognition occurred only when one rival employee organization actually possessed a clear and uncoerced majority support. NLRB v. Peter Paul, Inc., 467 F. 2d. 700, 80 LRRM 3434 (CA 9, 1972); Playskool, Inc. v. NLRB, 477 F. 2d. 66, 82 LRRM 2916 (CA 7, 1973). Under such circumstances, the courts have found that no real question concerning representation exists to block recognition despite the filing of a request for certification by a rival employee organization. Hotel and Restaurant Employees, Local 5 v. Inter-Island Resorts Ltd., 507 F. 2d 411, 87 LRRM 3075 (CA 9, 1974); cert. denied 422 US 1042, 89 LRRM 2614 (1975).

In San Juan (supra), the EERB recognized the analogy between Section 8 (a)(2) of the NLRA and Section 3543.5(d) relating to unlawful support by recognition of a minority employee organization. The Board held that an employer must make the proof of support available upon request to any employee organization which desires to challenge a showing of interest. CSEA testified that at the time of recognition it had support of 98 percent of those employees in the amended unit. No evidence indicated that Local 22 challenged that representation.

However, the Charging Party argues that EERB procedures do not prohibit employees from signing the authorizations for more than one employee organization and, further, that NLRB precedent is applicable indicating that dual cards do not demonstrate a clear and unambiguous selection of a representative. NLRB v. Hi-Temp, 203 NLRB 119, 83 LRRM 1473 (1973); enforced 503 F. 2d. 583 87 LRRM 2437 (CA 7, 1974).

In Hi-Temp, the NLRB excluded those cards supporting the majority organization which were signed by employees who had also signed cards for the rival employee organization. After discounting the dual cards, the NLRB determined that the recognized organization lacked majority support.

Schools are an industry where dual cards are accepted under EERB procedures.

In the present case uncontradicted testimony revealed that CSEA had signed support from 98 percent of all eligible classified employees at the time it filed its original petition with the employer. At the time of recognition, CSEA represented to the employer that it had 98 percent support in the unit recognized.[20] Local 22 presented no evidence to challenge the showing of support by CSEA. At the time of filing its intervention petition, Local 22 submitted no showing of support for any employee outside its operations unit. While Local 22 did eventually submit dual authorizations covering 42 of the approximately 217 classified employees in the amended CSEA unit recognized by the District, CSEA still had a majority even after discounting dual cards.

[20]While CSEA's showing of support was not placed in evidence, no testimony contradicted the 98 percent figure. Assuming 98 percent of the 217 classified employees is 213, CSEA's uncontested support among all the classified employees, excluding those 56 employees who also signed Local 22 authorizations, would be approximately 72 percent.

In its discretion the EERB has chosen to measure proof of support at the time of initial filings under Section 3544 and 3544.1 unless an election is directed in a substantially different unit than originally filed for. At the time of recognition, CSEA had an unchallenged 98 percent support and Local 22 had no official support in the unit.

Thus, the employer would not have contributed "unlawful support" by recognizing CSEA in a unit not covered by Local 22's intervention upon a clear showing of majority support, although Local 22's intervention in another unit was pending. See NLRB v. Swift and Co., 294 F. 2d 285, 43 LRRM 2699 (CA 7, 1961). Furthermore, as noted by the NLRB, an employer does not commit an unfair practice by extending recognition to one of two competing employee organizations where the rival employee organization's claim of support is not a colorable claim. Boys Market, Inc., 156 NLRB 105, 61 LRRM 1001 (1965). That colorable claim must represent an approximate majority of the employees to be represented. Local 22's claim was less than colorable, especially noting CSEA's amended unit.

E. Did the employer recognize one of two competing labor organizations at an illegal meeting of the Board of Trustees?

The Ralph Brown Act (hereinafter the Brown Act - Government Code Section 54950 et seq.) provides that in order to hold special meetings, a legislative body must provide notice of such meetings 24 hours in advance of the special meeting, Section 54956. A member of the public has recourse in the courts in the event that the Brown Act will be or has been violated.

But even if it is found that a meeting of a legislative body was held in violation of the Brown Act, the action taken by that body would not be void. The action would be valid.[21]

[21] Stribing v. Milliard, 6 CA 3d 470 (1970); See 42 Ops. Cal. Atty. Gen. 61 (1963),

Local 22 contends that the special School Board meeting held on November 20, 1976, at which the Board recognized CSEA's amended petition, was an unlawful meeting and thus the actions taken by the Board are void.

The evidence indicates that the written notice sent out to the School Board members was dated the same day as the date of the special meeting—November 20, 1976. However, the evidence is unclear as to when the notices were delivered to the Board members. Even if the notice was not received within the requisite period to meet the standards of the Brown Act, the courts or the School Board would be the proper forum to bring up the matter of alleged special meeting violations. The EERB does not provide the proper forum for this dispute.

In light of the foregoing discussion, it is found that the District did not contribute "unlawful support" to CSEA in violation of Section 3543.5(d).

Considering the policies underlying the EERA and the structure established by the EERB which limit organizing campaigns to very short time periods, it is found that an advantage may be given to the first union which rapidly organizes and gathers necessary support for recognition. While competing unions are given equal opportunity to organize, a premium is placed on speed. In this sense, EERB Rules and Regulations encourage rapid settlement and promote stability in the educational industry. Moreover, it cannot be said that the employees are denied their rights to exercise their freedom of choice in selecting their negotiating agent. Such a choice was made when the employees covered by CSEA's petition effectively demonstrated majority support for that union. Although those employees did not exercise their freedom of choice at the ballot box, they nevertheless exercised that right through their petitions.

It should be noted that this hearing officer does not propose to change the EERB's policies and regulations. If a change in the policies and regulations is to be made, it is for the EERB to make this decision. This decision comports with established policies and procedures.

2. Section 3543.5(a) and (b)

In this context the alleged violation of Local 22's rights pursuant to Section 3543.5(b)[22] and the employees' rights under Section 3543.5(a)[23] must be considered a derivative of the "unlawful support" charge under Section 3543.5(d). Having found no "unlawful support," no derivative violation is found.

B. Charge Against CSEA

Did CSEA cause or attempt to cause the District to violate Section 3543.5(a), (b) or (d) in violation of Section 3543.6(a)?

As noted above, the District did not commit the alleged unfair practices. Thus CSEA did not cause a violation of Section 3543.5(a), (b) and (d).

No evidence was presented to support a finding that CSEA attempted to cause the District to violate the Act. Furthermore, the evidence does not indicate that CSEA intended such a result.

[22]Section 3543.5(b) finds it an unfair practice to "deny employee organizations rights guaranteed by this chapter."

[23]Section 3543.5(a) finds it an unfair practice, in part, to "interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter."

Thus, it is found that CSEA did not violate Section 3543.6(a).

Did CSEA interfere with, restrain or coerce employees because of their exercise of rights guaranteed by the Act in violation of Section 3543.6(b)?

Both Section 3544.1 and Cal. Adm. Code, Tit. 8, Sec. 33190(a) provide for voluntary recognition of an enployee organization by an employer. Such recognition must be supported by evidence that a majority of the employees to be represented have given their uncoerced support to the recognized organization. ILGWU v. NLRB, 366 US 731, 48 LRRM 2251 (1961). But when an employer recognizes a minority union and a minority union accepts such recognition, both the employer and the union have committed unfair labor practices. Id. at 739. In ILGWU, supra, the Supreme Court found that the employer violated Section 8(a)(l) and 9(a)(2) of the NLRA and the union violated 8(b)(l)(a) of that act.[24]

Section 3543.6(b) states that an employee organization commits an unfair labor practice when it acts to:

> "Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise interfere with, restrain, or coerce employees because of their exercise of rights..."

Section 8(b)(1)(a) of the NLRA closely resembles the latter part of Section 3543.6(b) of the Act. Since the alleged violation by CSEA does not reasonably bear on threatened or imposed reprisals nor on discrimination, it is found that Local 22's charges center on CSEA's alleged coercion,

---

[24] 29 USC 158(b)(l)(a) in pertinent part states:
"It shall be an unfair labor practice for a labor organization or its agents -
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7..."

interference with or restraint of District employees in the exercise of their rights under the Act. Thus the thrust of these alleged violations is that when an employer recognizes a minority employee organization and that employee organization accepts recognition, the employees' right freely to choose or reject negotiations or a particular employee organization is sacrificed.[25]

In the instant case, CSEA, had already secured the support of approximately 98 percent of the employees in its proposed wall-to-wall unit. After filing its intervention petition, Local 22 exhibited its requisite 30 percent showing of support. From the time of intervention until CSEA's recognition, Local 22 continued its recruitment efforts and eventually mustered the support of approximately 56 employees. As noted above, the exclusion of Local 22's 56 employees from CSEA's claimed employees still give CSEA at least 72 percent support. Furthermore, the recruitment efforts of Local 22 plus its communications alleging support together were not enough to dispel the evidence that CSEA still maintained a clear majority of support from the employees in the proposed unit, as amended. The amendment of CSEA's originally proposed unit further removed from disputed status those employees whose job classifications were within the overlapping units. Thus the evidence supports a finding that CSEA was recognized upon a showing that it maintained clear majority support and it accepted recognition under those circumstances.

Therefore, it is found that CSEA did not violate Section 3542.6(a) or (b).

---

[25] R. Gorman, Basic Text on Labor Law (1976), at 203.

RECOMMENDED ORDER

The unfair practice charges filed by Local 22 are hereby dismissed.

Pursuant to 8 Cal. Adm. Code, Section 35029, this Recommended Decision and Order shall become final on November 7, 1977, unless a party files a timely statement of exceptions. See Cal. Adm. Code, Tit. 8, Section 35030.

Dated: October 27, 1977

Terry Filliman
Hearing Officer