STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 110, AFL-CIO Charging Party, v. FRESNO UNIFIED SCHOOL DISTRICT AND ABBEY TRANSPORTATION SYSTEM, INC., Respondent.	Case No. S-CE-23 PERB Decision No. 82 January 4, 1979

Appearances; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 110, AFL-CIO; Lee T. Paterson, Attorney (Paterson & Taggart) for Fresno Unified School District; Jack M. Tipton, Attorney (Wild, Carter, Hamlin, Tipton & Quaschnick) for Abbey Transportation System, Inc.

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

DISCUSSION

Local 110, Service Employees International Union, AFL-CIO, (hereafter SEIU) appeals the hearing officer's dismissal of an unfair practice charge filed against the Fresno Unified School District (hereafter District) and Abbey Transportation System, Inc., (hereafter Abbey) alleging that employees of Abbey were terminated because of union activity. The charge asserts that Abbey is "an agent, instrumentality and/or closely related operation of the District...." The hearing officer's proposed dismissal is based on his reasoning that Abbey is not a public

school employer under the Educational Employment Relations Act[1] (hereafter EERA) and that the Public Employment Relations Board (hereafter PERB) lacks jurisdiction over the matter.

Abbey is a privately held stock corporation located in Fresno, California. Abbey's business consists primarily of providing transportation to physically handicapped, educationally handicapped and mentally retarded pupils to and from school. Approximately 40 to 50 percent of Abbey's business is with the District. (Another 40 to 50 percent of Abbey's business is with the Fresno County Superintendent of Schools.)

There is a current contract between the District and Abbey covering the period from September 4, 1975 through June 30, 1980. The contract provides for payment by the District to Abbey according to a formula based on a dollar amount per pupil. An annual adjustment in the initial payment rate, which was established by the contract, is to be based on change in the Consumer Price Index (CPI). This adjustment is self-executing. In addition, under the contract, Abbey may attempt to terminate the agreement if its increased costs substantially exceed the additional amount provided by the CPI change. No other relief from such an eventuality is provided.

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[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All section references are to the Government Code unless otherwise indicated.

The District has final approval of routes and reserves the right to adjust the hours of pick up and delivery of pupils "if it becomes educationally desireable." The contract also provides that all vehicles operated by Abbey must comply with applicable State laws and regulations, and that buses must be designed to transport handicapped students.[2]

Abbey interviews and hires its own employees without District participation. Abbey personnel also train new employees who must obtain special licenses to drive school buses. Employees' wages and fringe benefits are determined and paid by Abbey. Abbey's employees have no employment rights with the District, and are evaluated solely by Abbey.

Discipline aboard the buses is under Abbey's direction and control.

Section 3540.1(k) defines public school employer as follows:

> "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

On its face, Abbey does not fall within the specifically enumerated categories of public school employer. SEIU's appeal is based on alternative theories. SEIU contends that the

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[2]Education Code section 1850 requires that school districts provide bus transportation for physically handicapped students; the District would have to provide the bus service if it did not contract for Abbey to perform the service. Education Code section 39831 provides that the Board of Education may adopt regulations regarding school bus equipment. These may be enforced by the California Highway Patrol. Vehicle Code sections 2808 and 12522 provide additional regulations on this subject.

interrelationships between Abbey and the District constitute Abbey as an "agent, instrumentality, or representative" of the District and therefore makes the District the employer of the bus drivers. Alternatively, SEIU further contends that Abbey "stands in the shoes of" the District because the transportation services Abbey provides are 'intimately related[1] to the school district's function and it performs a public function related to the educational system of a public school employer. It is found that in neither case can Abbey be considered a public school employer within the meaning of the EERA, nor can the District be considered the employer of Abbey's drivers.[3]

The National Labor Relations Board (hereafter NLRB) has dealt with similar arguments. In Radio and TV, Local 1264 v. Broadcast Service (1965) 380 U.S. 255, [58 LRRM 2545], the NLRB developed a jurisdictional standard for determining whether separate concerns should be treated as a single employer. The factors taken into account included:

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[3]The instant case is distinguished from the Board's decision in Joint Powers Board of Directors, Tulare County Organization for Vocational Education, Regional Occupational Center and Program (TCOVE) (6/26/78) PERB Decision No. 57. In that case, the Board considered the question of whether two or more entities constituted a single school employer. There, nine school districts, through a joint powers agreement, formed a regional occupational center and a regional occupational program. The basis of the Board's finding was that TCOVE was a public entity engaged exclusively in an educational mission, employed certificated and classified employees, and that the nine districts together with the governing body of TCOVE exercised a single, cohesive managerial control over educational policy as well as personnel policy.

1. Interrelation of operations.

2. Centralized control of labor relations.

3. Common management.

4. Common ownership or financial control.

It would appear that none of the four criteria are satisfied by the facts in this case before us.

While the contract between Abbey and the District provides that "the Board of Education reserves the right to adjust the hours of pick-up and delivery of pupils if it becomes educationally desirable," and the District also has the right of approving routes established by Abbey, the hearing officer found that in practice these routes were entirely determined by Abbey. In any event, such a provision is not the kind which by itself would alter the independent nature of the bus company. The District's ability to specify routes and pickup times is a function of the need to provide adequate and timely bus service for District pupils. Thus, the District's instructions to Abbey on these matters would be analogous to the specifications attached to an order for a product.

It is particularly significant that the contract does not provide for, nor does there otherwise appear to be, any control by the District over Abbey's labor relations. Furthermore, in practice the District exercises no supervisory authority over Abbey's employees. Abbey interviews, hires, evaluates, and trains all of its employees and also determines and pays its employees their wages and fringe benefits. The testimony of the two of the fourteen employees on whose behalf the unfair

practice charge was filed indicates that their dismissals were entirely carried out by Abbey's supervisory personnel and that District personnel were not involved.

SEIU argues that Abbey is properly under PERB jurisdiction because the school bus operation is "intimately related" to a function of the District. This "public function" theory takes into account that many of the procedures to which Abbey must adhere in provision of the services, and which are included in the contract with the District, are required by statute. In support of its position, SEIU cites Roesch Lines, Inc. (1976) 92 LRRM 1313, in which the NLRB declined jurisdiction over the school bus operations of a private bus transportation company which provided school bus service, similar to that which Abbey provides for the Fresno District, on a contractual basis.[4] It was reasoned that, under the circumstances and the nature of the contract which obtained, that "the provision of transportation services for school districts is so intimately related to the school districts functions that such services are, in effect, a municipal function." Because governmental entities are exempted from the NLRA's coverage, the school bus

[4]In contrast to the case before us, however, in the Roesch case, the classroom portion of the transportation company's driver training program was conducted by an employee of the school district. That same employee, the director of transportation, also was the school district representative who oversees the contract with respect to routes and scheduling. Additionally, he occasionally held drivers' meetings.

operations of Roesch Lines apparently were found to share the exemption of the governmental entity.[5]

We decline to accept this theory. The fact that the NLRB may decline to assert jurisdiction under the NLRA as a result of its interpretation of the NLRA is neither dispositive nor persuasive as to the jurisdiction of PERB under the EERA. As the hearing officer noted "the EERB[6] cannot simply assert jurisdiction over employees not covered by the NLRB. There is nothing in the EERA which expresses the legislative intent that the jurisdiction of the EERB should extend up to the boundaries of NLRB jurisdiction."

SEIU additionally contends that Abbey is a "de facto" branch of the District, under a constitutional theory that action by Abbey was "state action." On this point, the Board affirms the hearing officer's finding that the issue in this case is limited to interpretation of the jurisdictional provisions of the EERA in light of the facts.

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[5]Public employers are not employers within the meaning of the National Labor Relations Act (hereafter NLRA). Section 2, of the NLRA states in pertinent part:

> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof....

The NLRA, as amended, is codified at 29 USC 151 et seq.

[6]Prior to the enactment of the State Employer-Employee Relations Act, effective January 1, 1978, the PERB was designated as the Educational Employment Relations Board (EERB).

Finally, SEIU appeals the hearing officer's refusal to consider evidence concerning the relationship between Abbey and the Fresno County Superintendent of Schools. The hearing officer rejected the proffered evidence on the grounds that the county superintendent had not been named as a party either in SEIU's original charge, amended charge, or at the hearing, and that the evidence was not relevant to proof of the nature of the relationship between Abbey and the District. We agree.

ORDER

Upon the entire record in this case, the Public Employment Relations Board ORDERS that the unfair practice charge filed by Service Employees International Union, Local 110, AFL-CIO, against the Fresno Unified School District and Abbey Transportation System, Inc., is dismissed.

By: Harry Gluck, Chairperson

Jerilou Cossack Twohey, Member

Raymond J. Gonzales, Member, concurring:

My reason for dismissing the unfair practice charge filed in this case is based solely on a finding that neither the employees of Abbey Transportation System, Inc., nor Abbey Transportation System, Inc., fall within the plain language of

Government Code sections 3540.1(j) and 3540.l(k),[1] provisions which define, respectively, a public school employee and a public school employer. Given the language contained therein, this Board is precluded from exercising jurisdiction in this matter.

While I can accept the notion that a public school employer can be liable for the acts of its agents, I think the facts, as recited in the majority opinion, make it eminently clear that Abbey Transportation System, Inc., is an independent contractor and not an agent of the Fresno Unified School District, and that the employees who are alleging violations of Government Code section 3543.5(a)[2] in several respects, are employees of Abbey Transportation System, Inc., not the Fresno Unified School District.

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[1]Section 3540.l(j) defines a public school employee as:

> . . . any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

Section 3540.l(k) defines a public school employer as:

> . . . the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

[2]Section 3543.5(a) reads:

> 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.

The majority's discussion regarding the National Labor Relations Board's jurisdictional standard for determining whether separate concerns should be treated as a single employer, in my view, is pure dictum. I do not wish to give the impression that had the facts been stronger, perhaps Abbey Transportation System, Inc., and the Fresno Unified School District could be considered a single employer, thereby allowing the Board to exercise jurisdiction over the employees in this case.

In all other respects, I agree with the majority decision.

Raymond J. Gonzales, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

LOCAL 110, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,	)	
Charging Party,	)	Case No. S-CE-23
vs.	)	
FRESNO UNIFIED SCHOOL DISTRICT (ABBEY TRANSPORTATION SYSTEM, INC.),	)	RECOMMENDED D~~ECISION~~ (12/21/77)
Respondent.	)	

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for the Local 110, Service Employees International Union, AFL-CIO; Lee T. Paterson, Attorney (Paterson and Taggart) for Fresno Unified School District; Jack M. Tipton, Attorney (Wild, Carter, Hamlin, Tipton and Quaschnick) for Abbey Transportation System, Inc.

Before Franklin Silver, Hearing Officer.

PROCEDURAL HISTORY AND ISSUE

On January 7, 1977 the Service Employees International Union, Local 110, AFL-CIO (hereafter "union" or "charging party") filed an unfair practice charge alleging discriminatory discharges of fourteen individuals. The charge alleged:

> The employees against whom violations were committed were employed at Abbey Transportation System, Inc., an agent, instrumentality and/or closely related operation of the Fresno Unified School District. The addresses of the above named employer are as follows....

The addresses of both the Fresno Unified School District (hereafter "district") and Abbey Transportation System, Inc. (hereafter "Abbey") are listed as those of the "employer."

Abbey and the district filed separate answers to the charge. The district denied that Abbey was an agent, instrumentality and/or closely related operation of the district, and Abbey challenged the jurisdiction of the Educational Employment Relations Board (EERB) to decide the matter.

On April 4 Abbey filed a motion for summary judgment in which it argued that the charge should be dismissed because the employees alleged to have been unlawfully discharged were not "public school employees" within the meaning of the Educational Employment Relations Act (EERA). On April 15 the district filed a motion for summary judgment supported by the declaration of the associate superintendent in charge of business to the effect that none of the individuals alleged to have been discriminated against were employees of the district.

A hearing in this matter was held on April 27-29, 1977 in Fresno.[1] At the outset of the hearing, the district presented a new motion for summary judgment with additional evidentiary support, and Abbey presented the declaration of its president, Jack Sawl, stating that Abbey is a privately held California stock corporation having a contractual

[1]The case was submitted on August 31, 1977.

arrangement with the district for the transportation of certain pupils and that the alleged discriminatees had been employed by Abbey rather than the district. Rulings on the legal issues raised by the motions were reserved for the presentation of additional evidence relating to the jurisdiction of the EERB to consider the merits of the charge.

During the course of the hearing, the union sought to introduce evidence relating to common supervision of certain employees by Abbey and the office of the Fresno County Superintendent of Schools. The evidence was rejected on the grounds that the county superintendent had not been named as a party, and it was not relevant to proof of an agency relationship or joint employership between Abbey and the district. The union specifically declined to name the county superintendent as a party to this case.[2]

Evidence was received, however, relative to the amount of revenue derived by Abbey from its dealings with both the district and the county superintendent. This evidence was relevant to the degree of control exercised

[2]During the course of the hearing, the union filed a separate charge against the county superintendent and Abbey making essentially identical allegations as in the present case. Proceedings in that case, number S-CE-57, were stayed pending determination of the jurisdictional issue in the present case. At the hearing, the union took the consistent position that it did not regard the county superintendent as a necessary party and wished to proceed without consolidating the two cases. In its post-hearing brief the union makes an oblique request to consolidate the two cases and to re-open the record to receive the proffered evidence on common supervision by the county superintendent and Abbey. Since the hearing proceeded, at the union's insistence, without joining the county superintendent, it is concluded that the union has waived any right to have the two cases consolidated.

by the district over Abbey's operations, and it showed that approximately 45 percent of Abbey's business was attributable to the district and 45 percent was attributable to the county superintendent. Based upon this evidence, the district made a motion to dismiss for lack of jurisdiction due to the failure to join indispensable parties (the county superintendent and the Fresno County Department of Education). This motion was taken under submission.

The hearing was conducted in such a manner as to allow the union to present initially its evidence pertaining to the relationship between Abbey and the district for the purpose of determining the jurisdictional issue. Evidence relating to the alleged discriminatory dismissals was deferred to the extent feasible. After three days of hearing the record was closed on the issue of jurisdiction, while it remained open to hear further evidence on the dismissals if necessary. The hearing on the dismissals was continued indefinitely due to probable lack of jurisdiction, and the parties were given the opportunity to brief that issue. This decision, therefore, addresses solely the issue of whether the EERB has jurisdiction to entertain the unfair practice charge.

FINDINGS OF FACT

Abbey is a privately held California stock corporation located in Fresno, California. Its business consists primarily of transporting physically handicapped, educationally handicapped, and mentally retarded pupils to and from school.[3] Abbey contracts to render these services with various school districts in the Fresno area, the Fresno County Superintendent of Schools, certain private schools, and individual parents. The major portion of Abbey's business, roughly 90 percent, is divided between the Fresno Unified School District, the respondent herein, and the Fresno County Superintendent of Schools. Forty to fifty percent of Abbey's business is with the Fresno Unified School District.

The district has contracted with Abbey to provide bus services since 1957. The current contract is effective for the term of September 4, 1975 through June 30, 1980. Pursuant to the contract, Abbey transports approximately 535 pupils in the district's special education program. The contract was awarded to Abbey through a competitive bidding process in which Abbey submitted the low bid.

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[3] Abbey also provides some charter services for school and community events. Student organizations within the Fresno Unified School District charter buses for their activities from Abbey, Greyhound, or other bus lines on a competitive basis. There is no arrangement between the district and Abbey to utilize only Abbey buses for charters.

The contract does not contain any provision which explicitly gives the district any control over the employment relations between Abbey and its bus drivers. The contract is basically limited to provisions concerning the manner and rate of payment for transportation of pupils, standards for equipment used in transporting pupils, maintenance of discipline on buses, and routes and time of delivery. In addition, there are provisions dealing with termination and renewal of the contract.

The contract provides that payment is based on a daily rate multiplied by the number of pupils authorized by the district to be transported. The initial rate was that submitted by Abbey when bidding for the contract. Thereafter, the contract provides that the rate is to be adjusted once each year according to a formula which is based solely on yearly variations in the average consumer price index. The rate adjustment does not take into account Abbey's costs in rendering services, although if Abbey can present proof that it has incurred substantial increases in its costs (i.e., increases out of line with the increase in the consumer price index), it may terminate the contract.

The present contractual rate adjustment formula was instituted due to problems in making rate adjustments under the previous contract. That contract allowed Abbey and the district to renegotiate the rate based upon Abbey's actual operating costs. Thus, Abbey was in the position of

having to justify increases to the district. The record is unclear as to whether Abbey's labor costs were ever a substantial problem in renegotiating the rate under the old contract. Under the new formula, however, the district clearly has no direct influence over salaries and fringe benefits paid to Abbey's employees. The formula is absolute, and if Abbey's costs increase more than the consumer price index, it must either absorb the difference or attempt to have itself released from the contract.

Payment is based on the total number of students authorized by the district for transportation. The district notifies Abbey of any additions or deletions from the authorized list. If a pupil is unable to attend school on a particular day, however, the amount payable to Abbey is not affected. In practice, parents notify Abbey's dispatcher, rather than the district, if the pupil is not able to attend school, and the driver simply does not stop for that child.

With regard to equipment, the contract provides basically that all vehicles must comply with requirements of the Education Code, the Motor Vehicle Code, and regulations of the California Department of Education pertaining to school buses. The buses must be specifically designed to transport handicapped persons and must have specified passenger capacities.

With regard to routes and time of delivery, the contract provides that pupils are to be picked up at their homes and delivered to their respective schools not earlier than thirty minutes before school starts, and they are to be returned to their homes within one hour of the time that they are picked up at school in the afternoon. The contract reserves to the district the final approval of routes,[4] although in practice the determination of routes is left to Abbey. Testimony at the hearing established that the district's department of special education provides Abbey with a list of students who need transportation and their addresses. In addition, Abbey has lists of other pupils who require transportation pursuant to various other contracts (primarily its contract with the county superintendent). Abbey then divides its total list of pupils into bus routes according to geographic areas. The routes generally include students attending Fresno city schools as well as schools outside the district's jurisdiction. There is no attempt to segregate the district's students into separate routes. The district notifies Abbey of any additions or deletions to its list of pupils authorized for transportation, and Abbey makes the necessary adjustments in routes.

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[4] The contract provides, "The routes to be followed in all cases shall be the shortest and safest practicable routes satisfactory to the Board of Education of the Fresno Unified School District and to the Director of Special Education." In addition, it provides, "The Board of Education reserves the right to adjust the hours of pick-up and delivery of pupils if it becomes educationally desirable." With these reservations, Abbey is totally free to set the routes within the time limits established by the contract.

With regard to maintenance of discipline on buses, the contract provides that the driver is responsible for the orderly conduct of the pupils, and that Abbey may refuse to transport any pupil who engages in continued disorderly conduct. When a disciplinary problem arises on a bus, the driver completes a triplicate form describing the circumstances.[5] One copy is retained by Abbey, one copy is sent to the parents, and one copy placed in the student's file in the district's department of special education. The district takes no action with regard to the report. If the parents make inquiries of the district regarding the incident, they are simply referred to Abbey.[6]

When a severe disciplinary problem arises, Abbey has the option of withdrawing its services to the student either for a limited period or permanently. The action to be taken is determined by Abbey, and Abbey merely informs the department of special education of its decision. The department informs the parents that transportation is being

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[5] The form is entitled "Fresno Unified School District Transportation Report to School Administrator." Although it is apparently a standard form used by the district's regular bus drivers, testimony at the hearing, was confused as to why this form is used by Abbey. The record is clear, however, that the form is not sent to the school administrator for action.

[6] There was testimony regarding one occasion, approximately a year before the hearing, when the district's director of special education met with an Abbey bus driver to compare the bus driver's description of an incident with that of a parent. The director did not, however, contact anyone at Abbey regarding the incident and there was no follow-up or disciplinary action.

denied and refers the parents to Abbey if necessary to discuss the appropriateness of the action. When a student is denied transportation by Abbey, the parents are responsible for seeing that the student gets to and from school.

In addition to the fact that the contract does not provide that the district has any control in the area of labor relations between Abbey and its employees, testimony at the hearing established that in practice the district exercises no supervisory authority over Abbey employees. Abbey interviews and hires its own employees without involvement by the district. All training of new employees necessary to obtain proper licenses to drive school buses is performed entirely by Abbey personnel. All route assignments are made by Abbey. Wages and fringe benefits are determined and paid by Abbey. Abbey employees have no employment rights with the district. Sick leave is granted by Abbey. Evaluations are performed by Abbey.

On occasion, parents or other members of the public call the district to lodge complaints about the manner in which particular buses are being driven or a similar problem. District personnel cannot even identify the particular driver if only the bus number or the name of a child on the bus is given, and in any case the district does no more than refer the complaint to Abbey. The district has no procedure for following up such complaints.

Two of the fourteen employees on whose behalf the unfair practice charge was filed testified as to the circumstances of their dismissals by Abbey. Since the question of whether those dismissals were based on organizational activities is not being addressed in this recommended decision, it is not necessary to make findings with respect to all circumstances of those discharges. What is relevant to the jurisdictional issue is that those dismissals were entirely carried out by supervisory personnel at Abbey and that district personnel were not in any way involved.

CONCLUSIONS OF LAW

This unfair practice charge alleges a violation of Government Code section 3543.5(a).[7] That section prohibits discrimination against "employees" by a "public school employer" because of the exercise of rights guaranteed by the Educational Employment Relations Act (EERA). Section 3540.1 provides definitions of various terms used in the EERA. Section 3540.l(j) provides:

> "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees, (Emphasis added.)

[7] Hereafter, all statutory references are to the Government Code unless otherwise noted.

Section 3540.l(k) provides:

> "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

Quite clearly, Abbey is not itself a "public school employer" as defined above. Cf. SEIU, Local No. 22 v. Roseville Community Hospital, 24 Cal.App.3d 400 (1974). Therefore, if the EERB has jurisdiction in this matter, it must be because of Abbey's relationship with the district.[8]

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[8]The union argues that Abbey is within the jurisdiction of the EERB because of its "intimate relation to the Fresno Unified School District and the Fresno County Superintendent of Schools." As previously noted (see n. 2, supra) the union specifically declined to name the county superintendent as a party to this action, and evidence of the county superintendent's control over Abbey employees was not admitted. Nowhere does the union suggest a legal basis for imputing responsibility for unfair practices to the county superintendent -- a "public school employer" within the meaning of section 3540.l(k) -- without joining the county superintendent as a party. Since the union chose to proceed in this case without affording the county superintendent the opportunity to make a presentation concerning the relationship between that office and Abbey, this recommended decision considers only whether the relationship between Abbey and the district is a sufficient basis for Jurisdiction.

One of the motions for summary judgment by the district argues that the EERB lacks jurisdiction on the grounds that the county superintendent is an indispensable party. Because this decision concludes that the EERB lacks jurisdiction on other grounds, it is not necessary to consider this argument.

This raises two questions: (1) whether the statutory-definition of "public school employer" may include by implication a private employer which is so closely related in its operations with a school district that the two employers may be considered a single employer, and (2) whether Abbey and the district are so closely related that they may be considered a single employer for jurisdictional purposes. Because the second question must be answered in the negative, it is unnecessary to make a determination with regard to the first question.

The issues can be clarified by a brief examination of the treatment of a somewhat analogous problem which arises under the National Labor Relations Act, as amended. The NLRB has jurisdiction to conduct representation elections and remedy unfair labor practices with respect to business concerns whose labor management relations "affect" interstate commerce. The NLRB, however, also has the discretion to limit its assertion of jurisdiction to those cases where there is a substantial effect upon interstate commerce. Optical Workers Local 24859 v. NLRB, 227 F.2d 687, 37 LRRM 2188 (5th Cir., 1955); Office Employees International Union v. NLRB, 235 F.2d 832, 38 LRRM 2269 (D.C. Cir., 1956). See NLRB Twenty-First Ann. Rep.; NLRB Outline of its Jurisdictional Standards, 39 LRRM 44. To determine whether to assert jurisdiction in a particular case, the NLRB has established "jurisdictional standards" relating to the volume of business in interstate commerce. If a particular

concern does not do a sufficient volume of interstate commerce, the NLRB in its. discretion will not assert jurisdiction over that concern although there may be a legal basis for jurisdiction.

In applying its jurisdictional standards, the NLRB has a practice of treating separate concerns which are closely related as being a single employer for the purpose of determining whether to assert jurisdiction. The factors which are weighed in deciding whether sufficient integration of the businesses exists include the extent of:

(1) interrelation of operations;

(2) centralized control of labor relations;

(3) common management; and

(4) common ownership or financial control.

See Radio and T.V. Local 1264 v. Broadcast Service, 380 U.S. 255, 58 LRRM 2545 (1965) .

Whether a private employer might in some circumstances be subject to EERB jurisdiction under the terms of section 3540.l(k) is at best doubtful.[9] However, even assuming that Abbey could be subject to the jurisdiction of the EERB

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[9]Although there is extensive federal precedent analyzing whether separate business concerns are a single employer for "jurisdictional" purposes, the NLRB and the federal courts have not had to confront in these cases the question of statutory interpretation which is present in this case, i.e., whether one of the concerns is an employer within the meaning of the statute which is being enforced. Since the NLRB's legal jurisdiction is broader than the area where it exercises its discretion in asserting jurisdiction, it does not need to employ the "single employer" doctrine to determine the boundaries of its legal jurisdiction.

if its relationship with the district met the NLRB criteria for finding a single employer, it is quite clear that those criteria are not satisfied in this case. The district cannot under the contract involve itself in Abbey's operations except in very limited areas. In practice, the district's involvement is minimal. With regard to route assignments, although the district has the right of final approval, in practice the routes are entirely determined by Abbey. By the new contractual formula for adjusting the rate of payment for services rendered by Abbey, the district has totally removed itself from having any direct influence over the cost of Abbey's operations. Abbey must simply keep the costs of its operations within the rate of inflation or the contract will cease to be profitable. The district exercises no supervisory control over Abbey's employees. Abbey's employees have no employment rights with the district. There is no common management of Abbey and the district.

That there is no common ownership or financial control of the two entities is self-evident. The district is a governmental body with an elected governing board. There is no evidence that the school district or any person representing the district has any financial interest in Abbey.

In New York Public Library v. New York State Public Employment Relations Board, 357 N.Y.S.2d 522, 87 LRRM 2632 (1974), aff'd 374 N.Y.S.2d 625, 90 LRRM 2463 (1975), it was decided that the public library and New York City were not

"joint public employers" within the meaning of New York's Taylor Act. The library was chartered as a private corporation pursuant to enabling legislation providing for the establishment and maintenance of a system of free circulating libraries. In 1901 the library and the city entered into a contract under which the city agreed to furnish sites and provide for the maintenance of branch libraries to be built by the library corporation. The library, however, maintained control over the persons it employed. It was found that the library was virtually entirely dependent upon the city for its operations, that the library submitted its proposed budgets to the city for approval, and that the library had voluntarily come under the city's career and salary plan. The court declined to pass on the question of whether a private employer and a public employer might together constitute a "joint public employer" as that term is used in the Taylor Act. On the facts, however, the court found that since the library retained general control over the direction and management of its own affairs and specifically retained the power to hire, fire, and supervise its employees, the library was the employer and not the city.[10] 10

10[10] In the New York Public Library case, the court noted in support of its conclusion that employees of the library could not be placed under civil service since the Civil Service Law applies only to officers and employees of the state. The district makes a similar argument here. The district notes that under Education Code section 45103 (formerly 13581), which applies to non-merit system districts, and 45241 (formerly 13703), which applies to merit (con't)

In the present case, there is far less reason to conclude that there is a joint or single employer relationship than in the New York Public Library case. Abbey does not submit its operating budget to the district for approval and Abbey's bus drivers have no employment rights with the district. The district does not in any way subsidize Abbey's operation in the way New York City supports the library. The record indicates simply that the district and Abbey deal with each other on an independent contractor basis.

The union argues that the EERB should assert jurisdiction over Abbey because under Roesch Lines, Inc., 224 NLRB No. 16, 92 LRRM 1313 (1976), the NLRB has declined jurisdiction over bus companies under contract to California school districts. The NLRB has found that the function of providing transportation services to school districts is so intimately related to the school districts' function as to warrant the conclusion that those services are a municipal function, and on this basis the bus companies share the school districts' exemption from coverage of the NLRA.

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lO(con't) system districts, the governing board of a school district must take action to effect the employment of classified employees by the district, and since no such action has been taken with respect to these bus drivers they cannot be considered "public school employees" as defined in the EERA. However, in Pittsburg Unified School District, EERB Decision No. 3, (October 14, 1976), it was determined that noon-duty supervisors, who are specifically excluded from the classified service under Education Code section 45103, may be considered "public school employees" within the meaning of the EERA, and they were included in a paraprofessional unit. In the present case, therefore, the fact that the governing board has not taken action to classify the bus drivers is not dispositive of the issue of whether those drivers have rights under the EERA.

(29 U.S.C sec. 152(2).) See also, Columbia Transit Co., 226 NLRB No. 115, 93 LRRM 1396 (1976); Camp Town Bus Lines, 226 NLRB No. 3, 93 LRRM 1140 (1976); Transit Systems, Inc., 221 NLRB No. 53, 90 LRRM 1471 (1975). In reaching this conclusion the NLRB has in part relied upon the fact that such contracts are subject to various provisions of the Education Code, the Motor Vehicle Code, and regulations of the State Board of Education.[11] 11

Reliance on the above cases is misplaced. Public school employers and employees are specifically defined in the EERA. The EERB lacks jurisdiction in cases not involving employers and employees meeting those definitions. The EERB cannot simply assert jurisdiction over employees not covered by the NLRB. There is nothing in the EERA which expresses a legislative intent that the jurisdiction of the EERB should extend up to the boundaries of NLRB jurisdiction.

Finally, the union argues that Abbey is a de facto branch of the school district under cases holding that

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[11] The union introduced in evidence a determination by the Acting Regional Director of the NLRB, Region 20, dismissing an unfair labor practice charge filed with respect to the same dismissals involved in the present case. This dismissal contains the same rationale expressed in the cases cited in the text.

[12] Compare Labor Code section 1140.4(b) which defines "agricultural employee" for purposes of the Agricultural Labor Relations Act as one who is excluded from coverage of the National Labor Relations Act under that act's agricultural employee exemption.

Fourteenth Amendment applies to businesses whose operations are dependent upon governmental involvement to an extent sufficient to constitute state action. See Ginn v. Matthews, 533 F.2d 477 (9th Cir., 1976). Such an argument is irrelevant to the issue in this case, which involves purely and simply statutory interpretation in light of the facts, rather than the abridgement of constitutional rights. See SEIU, Local No. 22 v. Roseville Community Hospital, supra, 24 Cal. App.3d at 406, 407.

For the foregoing reasons, it is concluded that the EERB lacks jurisdiction to proceed in this matter.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, it is hereby ordered that the unfair practice charge filed by the Service Employees International Union, Local 110, AFL-CIO, against the Fresno Unified School District and Abbey Transportation System, Inc. is dismissed.

Pursuant to EERB Regulation 35029, this recommended decision shall become final on January 4, 1978, unless a party files a timely statement of exceptions. See Cal. Admin. Code, Tit. 8, §§ 35029, 35030.

Dated: December 21, 1977

Franklin Silver
Hearing Officer