STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, SAN JUAN CHAPTER #127,	)	
Charging Party,	)	Case No. S-CE-426
v.	)	PERB Decision No. 204
SAN JUAN UNIFIED SCHOOL DISTRICT,	)	March 31, 1982
Respondent.	)	

Appearances: Christian M. Keiner, Attorney (Biddle, Walters & Bukey) for San Juan Unified School District.

Before Gluck, Chairperson; Jaeger, Moore and Tovar, Members.

DECISION

This matter is before the Public Employment Relations Board (hereafter Board or PERB) pursuant to an interlocutory appeal filed by the San Juan Unified School District (hereafter District). The District excepts to the proposed decision of the hearing officer denying the District's motion to defer the underlying dispute between the parties to arbitration pursuant to subsection 3541.5(a)(2) of the Educational Employment Relations Act.[1] The Board affirms the decision of the hearing officer.

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[1]The Educational Employment Relations Act is codified at

The sole issue before the Board is whether or not the underlying dispute in this case should be deferred to the binding arbitration mechanism contained in the parties' collective bargaining agreement. The Board finds this matter does not require deferral because it is not covered by the agreement. It therefore orders the parties to proceed to hearing pursuant to section 3541 et seq.

FACTS

The facts which give rise to the underlying unfair practice charge are central to the Board's determination of whether or not subsection 3541.5(a)(2) requires deferral to the

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Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise stated. Government Code subsection 3541.5(a)(2) reads:

> [The Board shall not]
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> . . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. . . .

binding arbitration provision encompassed in the contract between the parties.[2] A review of the record in this matter indicates that on or about June 30, 1981, the District directed certain painters assigned to the maintenance and operation division to change the location where they reported to work. The past practice had been for painters to report to

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[2]The collective bargaining agreement between the parties dated July 1, 1979 through June 30, 1982, at Article IV contains a lengthy grievance procedure. Section 4.8 details a five step procedure that culminates in the following:

Step V - Arbitration

(a) If the grievant is not satisfied with the Superintendent's response at Step IV, or if the response is not submitted within agreed time limits, the grievant may, within ten (10) workdays of receipt of the Superintendent's decision or his/her failure to respond within agreed time limits, request in writing that the Association submit the grievance to arbitration. The Association, by written notice to the Superintendent within ten (10) workdays after receipt of the request from the grievant, may submit the grievance to arbitration.

(b) The arbitrator shall have no power to add to, or delete, or amend the terms of this agreement.

(c) An arbitrator shall be selected by mutual agreement. If the parties are unable to agree on an arbitrator, the following procedure will be used: A representative of the grievant and the Board's representative shall select the arbitrator from the California State Conciliation Service's list of five (5) names by

the maintenance and operations yard at the beginning of their shifts. From there, they were then assigned to work at one or more of the schools in the District. The new directive required painters to begin their workday at the school site and not at the maintenance and operations yard.

In an apparent attempt to relieve itself of any possible contractual notice requirements, the District, through the director of maintenance and operations, issued a memorandum dated July 20, 1981, which explained its position that the transfer provisions of Article XI of the contract were not applicable to this action taken by the District.[3]

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eliminating names until one (1) name remains. The first option of elimination shall be determined by lot. The one remaining name shall be the arbitrator. The process of striking names shall occur within ten (10) workdays of receipt of the list by both parties.

(d) The decision of the arbitrator shall be submitted to the District and the Association and shall be final and binding upon the parties to this contract.

(e) The fees of the arbitrator and related costs shall be borne by the District and the Association equally.

[3]Article XI. Transfers reads in relevant part:

11.1 Employer-Initiated Job Site Transfers

A regular employee may be involuntarily transferred for reasons other than punitive, based upon the justifiable needs

On or about July 21, 1981, representatives of the parties met to discuss this matter. They failed to reach an agreement concerning the District's action. The California School Employees Association subsequently made a written demand to meet and negotiate the effects of this change. It submitted, under the same cover letter, a proposal to amend the collective bargaining agreement to include a new provision governing maintenance and operations members' work assignments/reporting locations. The District responded by refusing to modify the collective bargaining agreement, restating its position that the matter was not a transfer within the terms of the agreement.

> and best interests of the District and/or regular employee, provided that such transfer shall not result in the loss of pay or benefits to the regular employee. The regular employee shall be given a minimum of five (5) workdays notice prior to the effective transfer date.

The relevant portion of the District's July 20 memorandum reads:

> . . . questions have been raised whether or not such assignments constitute job site transfers in accordance with Article XI of the General Unit Contract. As stated above, maintenance crafts personnel may, within any given timee [sic] work at a number of sites throughout the district. The above referenced article cannot be interpreted to mean that it is necessary to provide an employee five days notice before moving to another work site.

DISCUSSION

Subsection 3541.5(a)(2) requires PERB to defer to the binding arbitration provisions of a collective agreement where the conduct at issue is encompassed by its terms. The Board has previously held that this subsection essentially codifies the policy developed by the National Labor Relations Board (hereafter NLRB) regarding deferral to arbitration proceedings and awards. Dry Creek Joint Elementary School District (7/21/80) PERB Order No. 81a; Spielberg Manufacturing Co. (1955) 112 NLRB 1080 [36 LRRM 1152]; Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931].[4]

Broadly stated, the NLRB ordinarily defers to arbitration if the underlying dispute between the parties is arguably encompassed by the agreement. But where there is no language in the contract which will resolve the underlying dispute, the NLRB will not defer to the arbitration machinery of the contract. Collyer Insulated Wire, supra; Bio Science Laboratories (1974) 209 NLRB 796 [85 LRRM 1568]; Keystone Steel & Wire (1975) 217 NLRB 995 [89 LRRM 1192].

When confronted with this issue in the past, the Board has reviewed the relevant provisions of the contract and the

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[4]It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Firefigters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Commission v. Superior Court (1978) 23 Cal.3d 65 [151 Cal.Rptr. 547].

negotiating history between the parties to assist in determining whether a dispute was encompassed by the the contract. Stockton Unified School District (11/3/80) PERB Decision No. 143.

The Association contends that at no time since the negotiation of the initial contract between the parties has a discussion ever touched on changes in the District's work assignment policy, and that neither Article XI, governing transfers, nor any other provision of the agreement covers this matter.

As expressed in its exceptions, the District contends that the contract does cover the matter at issue in this dispute but that Article XI does not prohibit this change in the employees' reporting site. We disagree with the first of the District's contentions.

As set forth supra, Article XI, entitled Employer-Initiated Job Site Transfers,[5] contains no reference to the place employees report to work. The District's own memorandum of June 20, 1981 confirms our conclusion that the contract, on its face, does not cover the matter at issue. Indeed, in response to the hearing officer's request, the District advised that the contractual language was inapplicable to the current dispute.

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[5]See footnote 3.

In light of the lack of any contractual provision referring to job reporting sites and the District's prior interpretations, we can find no basis to conclude that deferral to arbitration is appropriate. We affirm the hearing officer's determination.

ORDER

Based upon the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that the appeal of the hearing officer's decision not to defer the unfair practice charge to arbitration is DENIED. The chief administrative law judge is directed to proceed to resolution in accordance with PERB procedure.

By: John W. Jaeger, Member

Barbara D. Moore, Member

Harry Gluck, Chairperson, concurring:

The District's claim is not based on an express provision of the negotiated agreement. Both its memorandum of

July 20[1] and its October 5 response to the hearing officer's request that the District specifically identify the contract provision to be submitted to arbitration[2] deny the applicability of the employee transfer article. Nor does the District cite any other pertinent contract provision.

Rather, it seems that the District seeks from the arbitrator a determination that its inherent managerial rights, past practices and the parties' bargaining history allow it to take the action complained of or, at least, that the contract

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[1]See footnote 3 of majority opinion, supra.

[2]The October response states, in relevant part:

> . . . Although the grievant typically frames the issue under the allegations of the grievance; the district would submit Article 11, transfer, section 11.1 to the arbitrator and argue, in essence, that due to the inapplicability of this section to these facts, the district acted properly in taking the action it did under past practice, inherent management rights to direct the workforce, and bargaining history. It might read:
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> Considering past practice, bargaining history, and asserted management right to direct the workforce, did the district retain the authority to direct the district's employees (painters in maintenance and operations) in question to report directly to the worksite rather than the maintenance yard?
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> In other words, the district contends that it retains those rights which it has not bargained away and which are consistent with past practice . . .

does not prohibit such action. Possibly the District relies on the approach followed by some arbitrators who view the negotiated agreement as identifying those managerial rights which have been surrendered through bargaining and all other rights as being reserved to the employer.[3]

Whatever the merits of this residual rights theory, the District has failed to demonstrate to this Board that an arbitrator will or can assert jurisdiction where, as here, the parties agree that no provision in the contract is in dispute and have contracted to limit the use of arbitration to disputes involving "a violation or misapplication of specific provisions of . . . [the] agreement." Further, under the arbitration clause, the arbitrator is prohibited from adding to, subtracting from or otherwise modifying the agreement.[4]

Section 3541.5(a) prohibits PERB from issuing a complaint only where the aggrieved conduct is "prohibited by the provisions of the agreement of the parties" and where the

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[3]Other arbitrators limit their jurisdiction to determining whether the contract permits or prohibits the complained-of action and, therefore, consider such evidence as past practice and bargaining history only to aid in the interpretation of ambiguous or contested contract language. See Elkouri & Elkouri, How Arbitration Works (3rd Ed., 1973).

[4]Thus, deferral in this instance might well be futile. See section 3541.5(a)(2), supra.

arbitration clause "covers the matter at issue." Neither condition existing here,[5] I concur in the result reached by the majority.

Harry Gluck, Chairperson

Member Tovar's dissent begins on page 12.

[5]Aside from the parties' "agreement" to this effect, I agree with the majority's finding that the contract, on its face, contains no provision subject to the grievance.

Irene Tovar, Member, dissenting:

Contrary to the majority views, I would defer this case to arbitration.

I concur with the majority that subsection 3543.5(a)(2) is essentially a codification of the common law of voluntary deferral developed by the National Labor Relations Board (hereafter NLRB). As such PERB has previously determined that it is appropriate to look to the decisions of the NLRB for guidance in determining when it should defer to an arbitration procedure. Dry Creek, supra. However, I disagree with the majority as to the instances in which PERB must defer to arbitration when the underlying dispute is arguably covered by the contract.

I reject the majority's interpretation of the Board's holding in Stockton Unified School District, (11/3/80) PERB Decision No. 143. The majority would have Stockton stand for the proposition that PERB has the authority to review the relevant provisions of the contract and the negotiating history between the parties to assist in determining whether a dispute was encompassed by the contract. This is a misinterpretation of the occasions when the Board has looked to the negotiating history between parties. In Stockton the Board looked to the history of negotiations between parties trying to reach a successor agreement in order to understand the allegations involved. When looking to see if an issue was arbitrable, the

Board stated:

> Section 3541.5(a) prohibits the Board from issuing a complaint against conduct also prohibited by the provisions of the parties' agreement until the agreement's grievance machinery has been exhausted either by settlement or binding arbitration. Pursuant to section 3541.5(a), finding that the subject matter is covered by the contract and that the contract requires binding arbitration, the Board dismisses this portion of the charge. (Cite omitted.)

Nowhere does the Board state that it will look to the parties' past bargaining history in order to determine whether a dispute was encompassed by the contract. In fact, to do so would fly in the face of existing NLRB case law.

From its inception, the NLRB has held that its decision to assert or decline jurisdiction over disputes where the parties' collective agreement provides for arbitration will depend upon the facts in each particular case. When deciding whether or not to defer to arbitration the United States Supreme Court in United Steelworkers of America v. Warrior & Gulf Navigation Co., (1960) 363 U.S. 574, 582-583, [46 LRRM 2416] has stated:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

The NLRB has somewhat expanded this doctrine in Roy Robinson Chevrolet, (1977) 228 NLRB 828, [94 LRRM 1474],

where Chairperson Murphy, in casting the deciding vote, stated that the fact that there is no specific provision in the contract which expressly covers the dispute will not make deferral automatically inappropriate, as long as the pivotal issue hinges on interpretation of the contract.

The function of PERB in the present case is very limited. It is confined to ascertaining whether the party seeking arbitration is making a claim which is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the parties should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

In the present case, the District contends in its exceptions to the hearing officer's decision, that one or more provisions of the collective bargaining agreement would apply in resolving the dispute. I agree. Article XI allows for the employer to involuntarily transfer a regular employee, based on the employer's justifiable needs and best interest. Unlike the majority, I hold that, once it is found that a contract provision arguably covers the issue at hand, it is for the arbitrator to decide the merits of the grievance.

I also do not agree with Chairperson Gluck's contention that this is an instance where deferral might well be futile. Doubts that the issues are capable of full resolution under the

terms of the agreement should not prevent the Board from deferring to arbitration. The issue of arbitrability should itself be submitted to the arbitrator, as has become the near universal practice under collective bargaining. Patman, Urban N. Inc., (1972) 197 NLRB 1222, [80 LRRM 1481] enf'd sub nom Provision House Workers, Local 274 v.NLRB, (1974, 9th Cir.) 493 F.2d 1249, [85 LRRM 2863] cert. denied (1974) 419 U.S. 828; Norfolk Portsmouth Wholesale Beer Distributors Association, (1972) 196 NLRB 1150, [80 LRRM 1235].

For all the foregoing reasons, I would defer this dispute to the parties' contractual grievance and arbitration machinery. However, in accordance with NLRB policy, I would retain limited jurisdiction over this proceeding for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not been amicably settled or submitted promptly to arbitration, or (b) the grievance or arbitration procedure has not been fair and regular or has reached a result which is repugnant to the Act.

Irene Tovar, Member