

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SANTA CLARA COUNTY OFFICE OF)
EDUCATION,)
) Case No. SF-UM-442
Employer,)
) PERB Decision No. 839
and)
) September 17, 1990
SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 715, AFL-CIO/CLC,)
)
Exclusive Representative.)
_____)

Appearances: Littler, Mendelson, Fastiff & Tichy by Patricia P. White and Deanna Mouser, Attorneys, for Santa Clara County Office of Education; Van Bourg, Weinberg, Roger and Rosenfeld by Vincent A. Harrington, Jr., Attorney, for Service Employees International Union, Local 715, AFL-CIO/CLC.

Before Hesse, Chairperson; Craib and Cunningham, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Santa Clara County Office of Education (SCCOE) to the attached proposed decision of a PERB Administrative Law Judge (ALJ). The ALJ granted the unit modification petition filed by Service Employees International Union, Local 715, AFL-CIO/CLC (Local 715), which sought to add substitute bus drivers to an existing bargaining unit containing full-time bus drivers.

The Board has reviewed the entire record in this case, including the proposed decision, SCCOE's exceptions, and Local 715's response thereto and, finding the ALJ's findings of fact and conclusions of law to be free of prejudicial error, adopts

the proposed decision as the decision of the Board itself. Below is a brief discussion of SCCOE's exceptions.

DISCUSSION

While SCCOE has filed numerous exceptions, its main argument is that the two groups of bus drivers do not share a community of interest, but instead have serious conflicts of interest which make it inappropriate to place them in the same unit. The conflicts involve sub-differential pay¹ and contract provisions which establish a minimum number of float drivers² and reflect SCCOE's intent to avoid using substitutes. A recent grievance protesting the assignment of a substitute instead of a regular driver willing to work on a holiday is offered as an example of the conflicting interests.

SCCOE made the same arguments before the ALJ. We find that he correctly analyzed and rejected those arguments; therefore, it is unnecessary to reiterate that analysis here. We agree with the ALJ that the existing differences between substitute and regular drivers are insufficient to negate other factors demonstrating a community of interest and that such differences are amenable to resolution through the process of negotiations. However, we believe the issue of sub-differential pay requires one further comment.

¹Sub-differential pay refers to the practice of paying employees, when their sick leave is exhausted, the difference between their regular pay and the rate received by the substitute taking their place.

²Float drivers are guaranteed full-time employment, but do not have regularly assigned routes.

Though not noted by the ALJ, sub-differential pay is mandated by Education Code section 45196.³ Moreover, as noted by the Board with regard to a similar provision applying to certificated employees,⁴ the Education Code merely provides a minimum salary in such circumstances and the parties are free to negotiate a different formula. Therefore, a pay raise for substitutes does not necessarily require a lowering of sub-differential pay for the regular drivers.

SCCOE also urges that the Board take guidance from three cases from other jurisdictions which, it asserts, supports the exclusion of substitute drivers. The ALJ simply noted the

³Education Code section 45196 states, in pertinent part:

When a person employed in the classified service is absent from his duties on account of illness or accident for a period of five months or less, whether or not the absence arises out of or in the course of employment of the employee, the amount deducted from the salary due him for any month in which the absence occurs shall not exceed the sum which is actually paid a substitute employee employed to fill his position during his absence.

.....

Entitlement to sick leave provisions under this section, if any, shall be considered "entitlement to other sick leave" for the purposes of computing benefits under the provisions of Section 45192 if the absence is for industrial accident or illness and shall be used after entitlement to all regular sick leave, accumulated compensating time, vacation or other available paid leave has been exhausted.

⁴Palo Alto Unified School District (1983) PERB Decision No. 352, pp. 10-11.

existence of these cases and stated that they apparently differ from PERB precedent. In fact, all three cases are inapposite because the issue presented was whether substitutes were within existing unit descriptions. None of these cases addressed the appropriateness of placing substitutes in a unit consisting of regular full-time bus drivers.

In Quick-Lahmann Express, Inc. (1982) 262 NLRB 220 [110 LRRM 1327], the National Labor Relations Board concluded that an on-call extra roster driver who had worked a total of 30 hours over his first four weeks of employment was not eligible to vote because the stipulated bargaining unit description included only full-time and regular part-time drivers, and expressly excluded casual employees. In Patzwald v. PERB (1981) 306 N.W.2d 118 [110 LRRM 3376], the Minnesota Supreme Court granted a joint petition to clarify an existing unit to expressly exclude substitute bus drivers. The court found that the original unit certification was never intended by the parties to include substitutes. Though the court found it unnecessary to decide the issue, there was also a serious question of whether the substitute drivers fell within the scope of the relevant collective bargaining law.⁵ In Clay County School District (1986) 12 FPER par. 17279, the Florida Public Employees Relations Commission excluded substitute bus drivers in a unit clarification proceeding, finding that

⁵The statute excludes from its coverage part-time employees who work less than 14 hours per week or 35 percent of the normal work week, and temporary or seasonal employees who work less than 100 days a year. (Minn. Stat. sec. 179.63, subd. 7.)

there was no substantial change in job duties since the original certification which excluded such drivers. It is unclear on what basis they were excluded originally.

ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, Local 715's unit modification petition is hereby GRANTED. It is therefore ORDERED that substitute drivers be placed in the existing operations-support services unit.

Chairperson Hesse and Member Cunningham joined in this Decision.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA CLARA COUNTY OFFICE OF)	
EDUCATION,)	
)	Representation Case
Employer,)	No. SF-UM-442 (R-24B)
)	
-and-)	
)	
LOCAL 715, SEIU, AFL-CIO/CLC,)	PROPOSED DECISION
)	(2/9/90)
Exclusive Representative.)	

Appearances: Littler, Mendelson, Fastiff & Tichy by Patricia White, Attorney, for Santa Clara County Office of Education; Van Bourg, Weinberg, Roger and Rosenfeld by Vincent Harrington, Attorney, for Local 715, SEIU, AFL-CIO/CLC.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

On May 17, 1989, Local 715, SEIU, AFL-CIO/CLC (hereafter Union or Local 715) filed a unit modification petition under Public Employment Relations Board (hereafter PERB or Board) regulation 32781(a)(1).¹ The petition seeks to add substitute bus drivers to an operations-support services unit represented by

¹PERB regulations are codified at California Administrative Code, Title 8, section 31001, et. seq. Section 32781(a) provides in part:

(a) A recognized or certified employee organization may file with the regional office a petition for modification of its unit(s):

(1) To add to the unit unrepresented classifications or positions;

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

the Union at the Santa Clara County Office of Education (hereafter Employer or COE). On June 5, 1989, the Employer filed its opposition to the petition.

The informal conference on August 15, 1989 did not resolve the dispute. A formal hearing was conducted by the undersigned on December 4, 1989, in San Jose, California. The final brief was received on January 29, 1990.

FINDINGS OF FACT

Local 715 is the exclusive representative of an operations-support services unit (OSS unit) within the County Office of Education. There are three categories of bus drivers in the OSS unit. Category "A" drivers are permanent drivers with fixed routes. They start and end each day at home, where they keep their vans. There are approximately 147 "A" drivers in the OSS unit. Category "B" drivers are also permanent drivers with fixed routes. Their days start and end at the transportation yard. Their vans are kept at the yard. There are approximately 10 "B" drivers in the OSS unit. "A" and "B" drivers are generally referred to as permanent drivers. Category "C" drivers are known as "float" drivers. They act as replacements for permanent drivers and have no permanently assigned routes of their own. Like "A" and "B" drivers, float drivers are full-time employees. The number of float drivers is set by the collective bargaining agreement. There are approximately 22 float drivers now in the OSS unit.

Local 715 seeks to add approximately 11 substitute drivers to the OSS unit. Substitute drivers are called to drive only after all float drivers have been assigned and open routes remain. The substitute drivers are currently in no unit and are thus unrepresented.

The qualifications for substitute drivers are the same as those for permanent drivers. All drivers must possess a valid California driver's license. They must maintain a California bus driver's certificate, a medical certificate, and a Red Cross certificate.

Bargaining unit drivers transport handicapped students in minivans. The vans carry between six and twenty passengers. Substitute drivers drive the same vans and transport the same students over the same routes as unit drivers.

The COE maintains a list of approximately 10-12 substitute drivers. The list is updated on a weekly basis. In the event a substitute is needed, the transportation supervisor calls him/her from the list. (The same procedure is used to assign float drivers who replace permanent drivers.) These calls typically come at approximately 4:30 a.m., so the substitute driver must remain available at that hour. The substitute is not obligated to accept every assignment. However, to remain on the list, the substitute cannot consistently reject assignments. Gary Slade, director of transportation, testified that substitutes who are repeatedly unavailable are dropped from the list, but substitutes who are consistently available remain on the list. Assignments

from the substitute list are not made in any particular order. The COE has complete discretion in this regard.

Once assigned, the substitute reports to the house of a permanent driver or the transportation yard, depending on where the van is kept. The substitute receives verbal or written instructions from the permanent driver. Typical instructions cover routes and care of particular students. Most of the time these instructions are written and left on the seat or in the overhead visor.

Like the permanent driver, the substitute driver is required to check the oil, gas, motor, lights, emergency buzzer, etc., before beginning the route. During the route, the substitute driver, like the permanent driver, is in contact with the dispatcher. After the assignment is over, the substitute returns the van to its original location. Both the substitute driver and the permanent driver are required to complete mileage and other forms during the course of an assignment.

Substitute and bargaining unit drivers receive the same in-service training. All drivers are required to complete ten hours of training for recertification each year. Substitute drivers are paid for the time they participate in the in-service training.

Substitute assignments vary in length. An assignment may be for a half day or a whole day. A substitute may also drive the same route for several consecutive days when the permanent driver is on extended leave.

Frank DelVillar and Sharlet Ramento are bargaining unit drivers who served previously as substitute drivers. As substitute drivers, they worked five days a week. Documents introduced by the COE as representative examples of substitute driver hours show substitute drivers work a substantial number of hours each week.² Substitute drivers are not guaranteed any work days per year. Unit drivers are guaranteed 193 days of work per year at eight hours per day.

Wages for bargaining unit drivers range from \$10.17 to \$12.08 per hour. Bargaining unit drivers also receive a variety of fringe benefits such as health and welfare, sick leave, vacation and holidays. They also earn PERS credit and seniority for purposes of layoff. They are covered by a comprehensive

²For example, records show that eight substitute drivers worked during the pay period September 26 to October 25, 1989. Gilbert Uresti worked 9 days during this period, averaging 6.6 hours per day. Virginia Olivo worked 19 days, averaging 7.5 hours per day. Larry Hansford worked 13 days, averaging 7.3 hours per day. Frances Munoz worked 5 days, averaging 8 hours per day. Sharlet Ramento worked 19 days, averaging 7.8 hours per day. Rachel Hernandez worked 14 days, averaging 7.6 hours per day. Elizabeth Villa worked 18 days, averaging 8.3 hours per day. Nancy Dove worked 12 days, averaging 7.3 hours per day. In addition, records for the periods February 6-10, 1989 and May 22-26, 1989 show that substitute drivers worked a substantial number of days. For the February 6-10 period, 10 of 18 substitute drivers worked 5 days, the remainder being largely unavailable. For the period May 22-26, 8 of 11 substitute drivers worked 4 or 5 days; the remaining 3 drivers worked 2 or 3 days.

collective bargaining agreement. Substitute drivers, on the other hand, receive \$8.85 per hour and no benefits.³

Bargaining unit drivers are evaluated under the collective bargaining agreement. Although substitute drivers receive no formal evaluation, they are evaluated on an informal level as to promptness, treatment of children, safety, etc. Deficiencies in these areas result in elimination from the substitute list. The COE has complete discretion in removing substitutes from the list in the event of unsatisfactory performance.

Substitute drivers who wish to become unit drivers must compete for such positions under COE procedures and win placement on an eligibility list. Once on the list, substitute drivers are selected as vacancies arise. Permanent driver vacancies must be filled from the list. Experience as a substitute driver is not required for placement on the list or for appointment from the list. Slade testified that 5 of the 11 permanent drivers hired for the 1989-90 school year came from outside the COE. In contrast, the list of bargaining unit drivers for the 1989-90 school year indicates that every driver had previously worked as a substitute driver.

³In addition, Slade described a sub-differential pay concept. Sub-differential wages are paid to a permanent driver when his/her sick leave is exhausted and a substitute is used. The permanent driver receives the difference between the contractual rate of pay and the rate received by the substitute driver. As the substitute driver's hourly rate increases, according to Slade, the permanent driver loses the equivalent amount in calculating the sub-differential.

Negotiations History

Substitute drivers have been excluded from the unit since Local 715 became the exclusive representative in 1977. Helen Kay King has been a union steward and negotiator since 1977. She testified that Local 715 repeatedly tried to negotiate benefits for substitute drivers, but COE refused. Eventually, COE agreed to the float driver concept. Slade testified that most of the negotiations on this topic centered on the number of float drivers needed.

The agreement provides for a minimum of ten float drivers, plus one additional float driver for every permanent driver on a long-term leave of absence. At any given time, there are about 8-15 permanent drivers on leave. The contract also contains a statement of COE's "intent" to not use substitutes.

ISSUE

Should substitute drivers be placed in the operations-support services unit?

DISCUSSION

Local 715 argues that the community of interest between substitute drivers and bargaining unit drivers compels that the substitutes be placed in the OSS unit. COE, on the other hand, contends there is no community of interest and the bargaining history supports excluding substitute drivers from the OSS unit.

Community of Interest

The Educational Employment Relations Act (EERA), section 3545(a), sets out the following criteria to be used in establishing appropriate units:

. . . [T]he board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

These criteria have been applied in only one case dealing with substitute bus drivers. In circumstances strikingly similar to those presented here, the Board refused to establish a separate unit of substitute drivers. The Board concluded that the community of interest between unit drivers and substitute hourly, temporary hourly and even trainee drivers was indisputable. All drivers were paid the same rate, with the hourly drivers receiving a percentage of full-time pay. The substitute drivers received no fringe benefits, sick leave or vacations. Substitute drivers were not covered by the district's merit system for promotion or retention, although about one half of the unit drivers had been promoted from the ranks of the substitute drivers. Both groups of drivers worked at the same location, received the same training, were under the same supervision and,

most importantly, performed the same work. San Diego Unified School District (1981) PERB Decision No. 170.⁴

Nevertheless, COE argues that San Diego is not controlling, since that case, unlike the present case, contains no conflicts of interests between the two groups of drivers. In conclusory fashion, COE argues that the contractual provisions setting the number of float drivers, sub-differential pay, and the employer's "intent" to not use substitute workers are conflicts which preclude finding a community of interest.

The potential for conflict based on these subjects is somewhat exaggerated by COE. These matters more realistically represent legitimate negotiating topics, not conflicts which destroy community of interest. While such subjects may create difficult issues to be addressed as part of the collective bargaining process, such a burden cannot be avoided under the Act. As the Board indicated by its San Diego decision, it facilitates the negotiating process to address the interests of all bus drivers in a combined rather than a separate unit. Relying primarily on New Haven Unified School District (1977) EERB Decision No. 14, the COE next argues that differences in terms and conditions of employment preclude finding a community

⁴As COE points out in its brief, other jurisdictions have taken a different view. See Quick-Lahmann Express, Inc. (1982) 262 NLRB 220 [110 LRRM 1327]; Patzwald v. PERB (Minn. 1981) 306 N.W.2d 118 [110 LRRM 3376].

of interest.⁵ In New Haven the Board excluded home instructors from a unit of regular certificated teachers. Home instructors tutor ill students in the hospital or at home to keep them abreast of the work being performed in the classes the students would otherwise attend. The home instructors possessed the same credentials as regular teachers. Their contact with regular teachers consisted of coordinating the tutoring with the classroom instruction. They were assigned work on an as-needed basis, were not formally evaluated, had no written contract, received no fringe benefits, and were paid on an hourly basis. Home instructors were given no preference for vacancies in the certificated unit.

New Haven, an early PERB decision, is not controlling here. In a subsequent case, under facts almost identical to those in New Haven, the Board placed home instructors in a unit with regular teachers. El Monte Union High School District (1980) PERB Decision No. 142. Thus, the continuing validity of New Haven is questionable.

However, even if New Haven is good case law, it is easily distinguished. While there are many similarities between the home instructors in New Haven and the substitute drivers here, there are also significant differences. Unlike the home instructors, substitute drivers work at the same location as the unit drivers and they do precisely the same work. Because

⁵Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

tutoring ill students on a one-on-one level at home or in a hospital is very different from teaching consecutive classes of students, it follows that teachers in both groups have equally different interests. Community of interest is found only when employees "share a substantial mutual interest in matters subject to meeting and negotiating." Monterey Peninsula Community College District (1978) PERB Decision No. 76, p. 13.

If one compares substitute drivers with certificated employees, it is clear that the drivers are more like substitute classroom teachers than they are like home instructors.⁶ For example, in Dixie Elementary School District (1981) PERB Decision No. 171, the Board found a community of interest between regular teachers and substitute teachers who performed "basically the same job functions." Like substitute drivers, the substitute teacher's primary responsibility was to carry out the plans and goals of the absent unit employee. The Board rejected arguments that substitute teachers, like the substitute drivers here, were hired on an as-needed basis from an available pool, had no expectancy of continued employment, and worked widely differing numbers of days per year.

⁶COE contends that Board decisions including substitute teachers in bargaining units with regular classroom teachers are not applicable here because the Act creates a presumption that all classroom teachers should be in the same unit. See Peralta Community College District (1978) PERB Decision No. 77. This contention is not persuasive. Although the presumption exists, it merely relates to the burden of proof in certificated cases. In the final analysis, the criteria used to determine community of interest are the same for certificated and classified employees.

The Board has also rejected the argument, advanced here by COE, that disparities in wages and fringe benefits point to a lack of community of interest. In certificated and noncertificated cases, the Board has held that these factors are not controlling. Wages, hours and other terms and conditions of employment are legitimate subjects for negotiations and disparities frequently exist largely because, absent exclusive representation, working conditions are unilaterally set by the employer. See Los Rios Community College District (1977) EERB Decision No. 18, p. 11; Long Beach Community College District, supra, p. 14; Unit Determination for Technical, Skilled Crafts, Service and Professional Employees of the University of California (1983) PERB Decision No. 290-H, p. 8.

COE next argues that a community of interest cannot exist because the substitute drivers are "casual" employees. Casual employees are those who, due to their sporadic or intermittent relationship with the employer, lack a sufficient community of interest with regular employees to be included in the regular unit. Unit Determination for Employees of the California State University and Colleges (1981) PERB Decision No. 173-H, citing Mission Pak Co. (1960) 127 NLRB 1097 [46 LRRM 1161]. The substitute drivers here do not fall under this definition. The testimony of DelVillar and Ramento indicates that at least some substitute drivers frequently work five days a week. And the representative examples of substitute driver work records confirm that the majority of substitute drivers have more than a mere

"sporadic or intermittent" relationship with COE. See page 5, footnote 2, supra.

In addition, the Board has refused to find casual status in situations similar to that presented here. For example, the Board found a community of interest between full time employees of the University of California and employees of "short or intermittent duration" in circumstances the Board described as "roughly analogous" to those of the substitute drivers in San Diego Unified School District, supra. Unit Determination for Technical, Skilled Crafts, Service and Professional Employees of the University of California, supra. PERB Decision No. 290-H, pp. 7-8. See also Unit Determination for Service Employees of the University of California (1983) PERB Decision No. 245c-H, p. 16 (part-time drivers who transport passengers or supplies and have no expectation of continued employment not excluded as casual).

Another argument offered by the COE is that substitute drivers do not have substantial interaction with bargaining unit drivers. This may be so, but neither do bargaining unit drivers have substantial interaction among themselves. Both groups of drivers transport students and interact with other drivers at the various schools, in the transportation yard or at in-service training sessions. The substitute drivers have the same interaction with unit drivers as unit drivers have among themselves. Under these circumstances, the lack of interaction argument is unconvincing. San Diego Unified School District, supra.

Bargaining History

COE's contention that the Union's practice of negotiating for additional float drivers runs counter to its current request to represent substitute drivers, even if true, is not a good reason to exclude substitute drivers from the OSS unit. There is nothing inconsistent in Local 715's negotiating efforts on behalf of float drivers and its current attempt to represent substitute drivers. Local 715 attempted to negotiate for substitute drivers, but the COE refused. Local 715 then concentrated on float drivers only because it represented float drivers and was precluded from representing substitute drivers. This scenario of events does not suggest that it is now inappropriate for Local 715 to represent substitute drivers and float drivers in the same unit.

The limited evidence of negotiating history does not support the conclusion that irreconcilable conflicts exist which would disrupt negotiations or the efficiency of the COE if substitute drivers are placed in the OSS unit. As mentioned earlier, the types of "conflicts" raised by COE are more akin to problems or issues which should be addressed at the bargaining table. Even if substitute drivers and permanent drivers have different interests, this does not necessarily argue in favor of excluding substitutes from the unit. While different interests among divergent groups within the bargaining unit may result in more complex negotiations, they do not automatically translate into

disruption. Oakland Unified School District (1983) PERB Decision No. 320; Palo Alto Unified School District (1983) PERB Decision No. 352.

CONCLUSION

Based on the findings of fact, conclusions of law and the entire record herein, Local 715's unit modification petition is granted. It is hereby ORDERED that substitute bus drivers be placed in the operations-support services unit.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing" . . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing. . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy

