* * * PUC TRANSIT CASE. PERB DECISION NUMBER CONTAINS INCORRECT LETTERING, AS CASE DID NOT ARISE UNDER MMBA * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO METROPOLITAN TRANSIT SYSTEM, Employer, and INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL & TRANSPORTATION WORKERS, Petitioner, and PUBLIC TRANSIT EMPLOYEES ASSOCIATION, Exclusive Representative.	Case No. LA-DP-436-M Administrative Appeal PERB Order No. Ad-465-M June 12, 2018

Appearances: Jeffrey Stumbo, Human Resources and Labor Relations Director, San Diego Metropolitan Transit System; Charly Fraley, International Representative, SMART Union; Aguirre & Severson by Michael Aguirre and Maria Severson, Attorneys, for Public Transit Employee Association.

Before Gregersen, Chair; Winslow and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from the attached administrative determination by the State Mediation and Conciliation Service (SMCS). SMCS determined to proceed with a petition for certification filed by International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART). The current exclusive representative, Public Transit Employees Association (PTEA), filed a timely appeal pursuant to PERB Regulations 32350-32380 and

93025, subdivision (d).[1] PTEA also asks that we stay the administrative determination pursuant to PERB Regulation 32370.[2]

PTEA asserts that the contract bar doctrine prohibits SMART from pursuing its petition. The employer, San Diego Metropolitan Transit System (System), joined PTEA in making this argument to SMCS, but the System has not taken any position regarding PTEA's appeal.

Having reviewed the record in its entirety, we find no error in the administrative determination, and we adopt it as the decision of the Board itself, as supplemented by the following discussion. We also deny PTEA's request for a stay. Lastly, in order to minimize delay, we correct an error in a different SMCS administrative determination pertinent to this representation matter.

BACKGROUND

In 2016, PTEA replaced International Brotherhood of Electrical Workers, Local Union 465 (IBEW) as the recognized exclusive bargaining representative for more than 350 System employees who maintain and operate the San Diego Trolley. (See *San Diego Metropolitan Transit System* (2016) PERB Order No. Ad-441-M [adopting administrative decision dismissing IBEW's objections to an SMCS representation election].) Thereafter, PTEA and the System negotiated a short initial collective bargaining agreement (CBA), effective from January 19, 2017 through December 31, 2017.

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[1] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[2] SMART's petition seeks both to decertify PTEA and to certify SMART as the new exclusive representative. While such a petition can logically be referred to as a "decertification petition," in transit district representation matters arising under PERB Regulation 93005, such a petition is technically a "petition for certification." (See *San Diego Metropolitan Transit System* (2018) PERB Order No. Ad-464-M. pp. 4-6.)

On December 31, 2017, PTEA and the System extended their CBA through January 31, 2018. On January 8, 2018, PTEA and the System tentatively agreed to a successor CBA to be in effect from February 1, 2018 through December 31, 2020. PTEA ratified the new CBA on January 16, 2018, and the System ratified it on January 18, 2018.

On January 22, 2018, SMART filed its petition to decertify PTEA. On January 30, 2018, SMCS informed representatives for SMART and the System that it was withdrawing as Election Supervisor due to the parties' failure to reach a consent election agreement. According to subsequent correspondence from SMCS, the System refused to agree to an election because it believed that SMART's petition was untimely. SMCS then commenced to investigate this assertion, and on February 23, 2018, issued an Order to Show Cause (OSC) as to why the petition should not proceed. After reviewing the parties' responses to the OSC, SMCS issued the attached administrative determination on March 19, 2018.

DISCUSSION

Public Utilities Code section 120505 provides that in deciding representation matters involving System employees, SMCS "shall be guided by" relevant federal law and administrative practice applicable to private sector labor relations.[3] While a number of the transit district acts feature identical language requiring that SMCS "shall be guided" by relevant federal law,[4] there are other transit district acts requiring that SMCS "shall apply"

[3] Public Utilities Code section 120505 is part of the enabling statute for the System. As noted in PERB Regulation 93000, subdivision (b), there are more than a dozen such statutes (hereinafter "transit district acts") that vest SMCS with jurisdiction to resolve representation disputes involving certain transit district employees. These transit districts are not subject to the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), which applies to most local public agencies. (See *San Diego Metropolitan Transportation System, supra,* PERB Order No. Ad-464-M, p. 2.)

[4] See, e.g., Public Utilities Code sections 40122, 70122, 101344, and 102403.

relevant federal law and administrative practice.[5] Regardless of this slight statutory difference, our Regulations mandate that relevant private sector law "shall apply" in deciding representation matters under any of these transit district acts. (PERB Regulation 93080.)

The Board takes into account that law and practice under the transit district acts must necessarily differ, at times, from federal law and practice. For instance, Public Utilities Code section 120505 contains a statutory certification bar and contract bar provision not found in federal law:

> Any certification of a labor organization to represent or act for the employees in any collective-bargaining unit shall not be subject to challenge on the grounds that a new substantial question of representation within such collective unit exists until the lapse of one year from the date of certification or the expiration of any collective-bargaining agreement, whichever is later, except that no collective-bargaining agreement shall be construed to be a bar to representation proceedings for a period of more than two years.

This statutory contract bar provides that a CBA governing System employees may bar decertification for up to two years, whereas current National Labor Relations Board (NLRB) precedent holds that a private sector collective bargaining agreement may bar decertification for up to three years. (*General Cable Corp.* (1962) 139 NLRB 1123.) Moreover, whereas NLRB precedent holds that there is no contract bar during an "open period" from 60 to 90 days before a CBA expires (*Leonard Wholesale Meats, Inc.* (1962) 136 NLRB 1000), under the transit district acts PERB has by regulation established a comparable open period from 90 to 120 days before a CBA expires. (PERB Regulation 93005, subd. (a).)

SMART did not file its petition during the open period established in PERB Regulation 93005, subdivision (a). Nor did SMART file its petition during the protected timeframe after the open period and before the CBA's final effective day; during that protected

[5] See, e.g., Public Utilities Code sections 98162.5, 125521, 103401, and 100301.

period, the contract bar was in effect and would have barred any petition. SMART instead filed its petition after both of these timeframes had passed. At issue is whether PTEA and the System had by that time created a new contract bar.

PTEA asserts that when it signed a one-month contract extension with the System on December 31, 2017, it extended the old contract bar, and/or created a new contract bar that was effective during the one-month extension. The NLRB, however, has found that because a contract or extension lasting fewer than 90 days is not long enough to create a new open period 60 to 90 days before CBA expiration, such a short contract or extension cannot serve as the basis for a contract bar. (*Crompton Company* (1982) 260 NLRB 417, 418 (*Crompton*).)[6]

PTEA asks us to depart from *Crompton*, *supra*, 260 NLRB 417, for three primary reasons. First, PTEA argues that the Board should not apply federal precedent related to the contract bar in this case, because the contract bar in Public Utilities Code section 120505 differs from the federal contract bar in the two respects enumerated *ante*, at p. 4. This argument misunderstands the Board's approach to resolving representation issues under the transit district acts. While a transit district act must take precedence over federal law when there is a conflict, the Board nonetheless follows relevant federal law to the extent it can be integrated with law and practice under the transit district acts. SMCS correctly did so when it applied federal precedent finding that a one-month CBA extension is not long enough to create a contract bar, because it is not long enough to create an open period.

[6] PERB has followed *Crompton*, *supra*, 260 NLRB 417, in interpreting the Educational Employment Relations Act (EERA), codified at Government Code section 3540 et seq. (*Apple Valley Unified School District* (1990) PERB Order No. Ad-209, p. 10 [because EERA, at section 3544.7, subd. (b)(1), includes an open period from 90 to 120 days before a CBA expires, contracts or extensions of fewer than 120 days do not create a contract bar].)

Second, PTEA notes that its extension agreement featured a definite duration, unlike the extension in *Crompton, supra*, 260 NLRB 417. However, *Crompton* instructs that either an indefinite duration or an insufficiently long duration forestalls any contract bar from taking effect. (*Id.* at p. 418.) We affirm SMCS' interpretation of federal law.

Third, PTEA relies on the fact that SMART failed to file its petition during the open period 90 to 120 days before the initial CBA expired.[7] This argument proves too much, as it would mean that the open period before a CBA expires is the exclusive opportunity for decertification, irrespective of what occurs following a CBA's final effective date. PTEA's point is inapposite to the question presented—the extent to which an employer and a union may create a new contract bar by entering into a one-month CBA extension. We affirm the administrative determination and find that because a one-month extension is insufficiently long to create an open period, it also cannot serve as a contract bar.

PTEA also submits an alternative argument: even if PTEA and the System did not create a contract bar when they entered into a one-month CBA extension on December 31, 2017, they created a contract bar by ratifying a new CBA on January 18, 2018. Federal law on this point is clear. The contract bars applies if ratification *and* the contract's effective date both precede a subsequent decertification petition. (*Deluxe Metal Furniture Co.* (1958) 121 NLRB 995, 999, fn 6). SMCS correctly applied federal law, finding that the new CBA did not take effect until February 1, 2018, which was after SMART filed its petition.

[7] There is no dispute that SMART had an opportunity to seek decertification during the open period, but did not avail itself of that opportunity. The facts of this case thus differ significantly from those in which an employer and union extend their contract prior to the open period and a competing union raises arguments based on the "premature extension doctrine." (See, e.g., *Kern High School District* (1999) PERB Decision No. 1319, p. 6.)

Accordingly, we will remand the matter to SMCS for further processing of SMART's petition, including an election, as appropriate, pursuant to PERB Regulation 93070.[8]

ORDER

We affirm the attached administrative determination and remand the matter to SMCS for further processing consistent with this decision.

Chair Gregersen and Member Winslow joined in this Decision.

[8] Before proceeding to investigate the contract bar issue in this case, SMCS stated that it was withdrawing as election supervisor due to the parties' failure to reach a consent election agreement, citing PERB Regulation 32999. That regulation, however, applies to elections conducted "pursuant to the local rules of an MMBA, Trial Court Act or Court Interpreter Act employer." (PERB Reg. 32999, subd. (a).) For representation matters arising under the transit district acts, SMCS is required to conduct appropriate elections, regardless of whether the parties enter into a consent election agreement. (PERB Regs. 93070, subd. (a) ["All elections *shall* be conducted by SMCS" (emphasis added)]; 93020 [the parties "*may*, with the approval of SMCS, enter into a consent election agreement" (emphasis added)].)

STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

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March 19, 2018

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Re: **Administrative Determination**
SMCS Case #17-3-324
Decertification Petition by SMART
San Diego Metropolitan Transit System

Dear Mr. Fraley, Mr. Stumbo and Ms. Severson:

The Public Transit Employees Association (PTEA) is the recognized exclusive bargaining representative of a bargaining unit of employees of the San Diego Metropolitan Transit System, also known as the San Diego Trolley, Inc. (MTS/SDTI). On January 22, 2018, the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) filed with the State Mediation and Conciliation Service (SMCS) a petition to decertify PTEA as the exclusive representative.

On February 23, 2018, the SMCS issued an Order to Show Cause (OSC) as to why the petition for decertification should not proceed. Based upon the information provided, SMCS had determined that, for the purposes of the contract bar doctrine, there was no contract in effect at the time the decertification petition was filed.

On February 28, 2018, the MTS/SDTI submitted a response to the OSC. On March 2, 2018, PTEA submitted a response to the OSC. On March 5, 2018, SMART submitted a response to the OSC. MTS/SDTI contends that the Public Utilities Code provides for a two-year contract bar. PTEA

also contends that there is a two-year contract bar, and, in addition, argues that State law pre-empts federal NLRB law concerning this issue. SMART disagrees as to both issues.

Pursuant to Transit Regulation 93025,[1] the SMCS Chief has investigated the petition and considered the positions and information submitted by all parties. Based on the discussion below, the SMCS Chief finds that the decertification petition is timely filed and there is no contract bar to the petition.

Applicability of Federal Law

Public Utilities Code (PUC) section 120505 provides, in part, as follows:

> If there is a question of whether a labor organization represents a majority of employees or whether the proposed unit is the appropriate unit for collective bargaining, the question shall be submitted to the State [Mediation and] Conciliation Service for disposition. The service shall promptly hold a public hearing, after due notice to all interested parties, and shall thereupon determine the unit appropriate for the purposes of collective bargaining. **In making such determination and in establishing rules and regulations governing petitions and the conduct of hearings and elections, the service shall be guided by relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended.**

Under this statute, "the Public Utilities Code expressly requires SMCS to resolve questions concerning representation in accordance with federal administrative and judicial precedent." (*San Diego Metropolitan Transit System* (2016) PERB Order No. Ad-441-M.) It is immaterial that the contract bar rule developed by the NLRB is a judicially-created set of rules, and is not established by statute. (*Pacific Coast Ass'n of Pulp and Paper Manufacturers* (1958) 121 NLRB 990; *General Cable Corp.* (1962) 139 NLRB 1123.) Under the plain meaning of PUC Section 120505, SMCS shall be guided by federal law developed by the NLRB, whether the NLRB's law is written in a statute or developed as administrative practice. Accordingly, SMCS properly is guided by the NLRB's judicially-developed contract bar doctrine.

The Contract Bar Rule

PUC section 120505 provides further, in part, as follows:

> The service shall provide for an election to determine the question of representation and shall certify the results to the parties. Any certification of a labor organization to represent or act for the employees in any collective-bargaining unit shall not be subject to challenge on the grounds that a new substantial question of representation within such collective unit exists until the lapse of one

[1] The Transit Regulations are codified at Cal. Code Regs., tit. 8, §§ 93000 et seq.

> year from the date of certification or the expiration of any collective-bargaining agreement, whichever is later, **except that no collective-bargaining agreement shall be construed to be a bar to representation proceedings for a period of more than two years.**

MTS/SDTI and PTEA both contend that this provision creates a statutory contract bar of two years. This is not a correct reading of the statute. This section provides that a contract will bar representation proceedings *for a period not to exceed* two years. Thus, for example, a three-year contract would bar representation proceedings only for the first two years of the contract. (See, e.g., *General Cable Corp.*, *supra*, 139 NLRB 1123.) This two-year limitation is entirely consistent with the NLRB's judicially-developed rule that places a three-year limit on contracts for purposes of a bar.[2] As such, it can be readily harmonized with the other aspects of the contract bar rule as developed by NLRB decisions.

The Collective Bargaining Agreement (CBA) between PTEA and MTS/SDTI was in effect for just under one year, from January 19, 2017 through December 31, 2017. Accordingly, the CBA barred representation proceedings during its term; the CBA was effective as a bar because it was less than two years in duration. On December 31, 2017, the parties signed an extension agreement with a term of one month. Because the extension agreement was for a short duration, it was not sufficient to constitute a contract bar. (*Crompton Company* (1982) 260 NLRB 417.)

As discussed in the OSC, the case of *Crompton Company*, *supra*, 260 NLRB 417 presented a very similar situation. The parties in *Crompton Company* were signatories to a CBA with a term just under two years, and executed an extension agreement for two months. The NLRB treated the extension agreement as a new, separate agreement; it did not treat the CBA as now having a term of two years and two months. Likewise, here, the extension agreement is a new agreement with a new term, and does not operate to rewrite the term of the existing CBA.

PTEA cites *Alum Rock Union Elementary School District* (1986) PERB Order No. Ad-158, as support for its position that a short term contract will not operate as a bar. This decision by PERB is not applicable here. PUC section 120505 specifies that SMCS must be guided by NLRB law, not by California state law. Moreover, the *Alum Rock* case was subsequently overturned. (*Apple Valley Unified School District* (1990) PERB Order No. Ad-209.)

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[2] Until 1962 the NLRB had a two-year limitation. (*Pacific Coast Ass'n of Pulp and Paper Manufacturers* (1958) 121 NLRB 990.) In 1962 the NLRB expanded it to three years. (*General Cable Corp.* (1962) 139 NLRB 1123.) However, all other aspects of the contract bar rule remained the same.

In light of the foregoing discussion, the petition filed by SMART is timely filed. The PERB Board itself has jurisdiction to review decisions by SMCS regarding transit district issues. (Transit Regulations 93025, 93060 and 93065.) A determination made pursuant to Transit Regulation 93025 may be appealed to the Board in accordance with PERB Regulations[3] 32350 through 32380 or, if applicable, in accordance with and subject to the limitations provided in PERB Regulation 32200. Once the time period for an appeal has expired, SMCS will contact the parties regarding a consent election agreement.

Sincerely,

Loretta van der Pol
Chief, SMCS

[3] PERB Regulations are codified at Cal. Code Regs., tit. 8, §§ 31001 et seq.