STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, Charging Party, v. HARTNELL COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. SF-CE-98 PERB Decision No. 54 June 5, 1978
STATIONARY ENGINEERS LOCAL 39, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER NO. 470, Respondent.	)	Case No. SF-CO-21

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Stationary Engineers Local 39; Arnold B. Myers, Attorney (Abramson, Church and Stave) for Hartnell Community College District; California School Employees Association, Chapter No. 470 did not make an appearance.

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

OPINION

Stationary Engineers Local 39 appeals the dismissals by the General Counsel of the unfair practice charge it filed against Hartnell Community College and the amended unfair practice charge it filed against California School Employees Association, Chapter No. 470. The general counsel dismissed each charge on the ground it did not state a prima facie case. The cases are consolidated for decision because they are based on identical facts.

FACTS

The following facts alleged by Local 39 are assumed true for the purpose of deciding in these appeals whether or not the unfair practice charges were properly dismissed for failure to state a prima facie case.1/[1]

On April 5, 1976, California School Employees Association, Chapter No. 470 (hereafter CSEA) filed a request for recognition with Hartnell Community College District (hereafter District) seeking to represent all the classified employees of the District, excluding management, supervisory and confidential employees. Stationary Engineers Local 39 (hereafter Local 39) did not file a competing claim of representation with the District as prescribed by the Educational Employment Relations Act (hereafter EERA) section 3544.1 2/ and rule 30017 et seq.3/ The District filed a petition pursuant to section 3544.5(a)[4] with the Public Employment Relations

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1/ San Juan Unified School District (3/10/77) EERB Decision No. 12; Mount Diablo Unified School District (12/30/77) EERB Decision No. 44.

2/Government Code section 3544.1, which provides in pertinent part:

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

All statutory references hereafter are to the Government Code.

At the time in question, rule 30017 et seq. were codified at California Administrative Code, title 8, section 30017 et seq. These rules governed the filing of a competing claim of representation, also termed an "intervention." They have since been amended and are now codified at California Administrative Code, title 8, section 33070 et seq.

4/ Government Code section 3544.5 provides in pertinent part:

> A petition may be filed with the board, in accordance with its rules and regulations, requesting it to investigate and decide the question of whether employees have selected or wish to select an exclusive representative or to determine the appropriateness of a unit, by:
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> (a) A public school employer alleging that it doubts the appropriateness of the claimed unit....

Board[5] on May 6, 1976, stating that no competing claim of representation had been filed, that the District doubted the appropriateness of the unit requested by CSEA, and that the District desired PERB to conduct a representation election subsequent to the resolution of the appropriate unit question at a hearing. On July 8, 1976, CSEA filed a petition with PERB requesting a unit hearing on the proper management, supervisory and confidential exclusions from its requested wall-to-wall unit.

In late April 1977, a representative of Local 39 was contacted by certain custodial, maintenance and craft employees of the District who desired Local 39 to represent them in an operations unit. Local 39 commenced organizing these employees. Between May 17 and 24, 1977, 34 of the 41 operations employees signed authorization cards for Local 39.

The District, CSEA and PERB were aware of Local 39's organizing efforts. They were also aware that Local 39 intended to intervene at the formal PERB unit determination hearing by means of the one-card rule[6] for the purpose of

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[5] At the time in question, the Public Employment Relations Board was named the Educational Employment Relations Board. The Board was renamed effective January 1, 1978 by Government Code section 3541, as amended (Chapter 1159, Statutes of 1977). Hereafter it is referred to as PERB.

[6] Rule 33340, codified at California Administrative Code, title 8, section section 33340, provides:

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

arguing that an operations unit was appropriate and should be carved out from the wall-to-wall unit requested by CSEA. On May 12, 1977, the District, CSEA and PERB participated in an informal conference, from which Local 39 was excluded, wherein they explored the possibility of the District extending voluntary recognition to CSEA. On May 24, 1977, the District granted voluntary recognition to CSEA in a wall-to-wall unit substantially the same as that originally petitioned for by CSEA. This voluntary recognition precluded the holding of a formal hearing and Local 39's participation therein via the one-card rule.

DISCUSSION

Local 39 first argues that the recognition agreement between the District and CSEA was unlawful because it occurred at a time when a question of representation existed under the Educational Employment Relations Act[7] concerning the classified employees of the District. Local 39 cites Labor [8]Management Relations Act, as amended, (hereafter LMRA) precedent for the proposition that a question concerning representation arises when two rival employee organizations file conflicting petitions with the National Labor Relations Board seeking representation in an appropriate unit. Shea Chemical Corporation (1958) 121 NLRB 1027 [42 LRRM 1486]. Local 39 also cites section 3544.7(a) which provides in relevant part:

> Upon receipt of a petition filed pursuant to Section 3544.3 or 3544.5, the board shall conduct such inquiries and investigations or hold such hearings as it shall deem necessary in order to decide the questions raised by the petition....

In this case, the District and CSEA filed petitions pursuant to section 3544.5 on May 6, 1976 and July 8, 1976, respectively. It is argued that PERB thereby

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[7]Section 3540 et seq., hereafter referred to as the EERA.

[8]29 U.S.C. section 151 et seq. The Labor Management Relations Act amended the National Labor Relations Act.

gained jurisdiction of the unit dispute, and upon gaining knowledge of Local 39's interest in the unit, PERB could not relinquish its duty to determine the appropriate unit at a formal hearing by accepting a voluntary recognition agreement from the District and CSEA. Therefore, the voluntary recognition agreement was unlawful.

The core of this argument is the assertion that an employee organization can raise a question of representation if it simply obtains the interest of a majority of employees in an alleged appropriate unit overlapping that originally petitioned for, and brings such interest to the knowledge of the district, original petitioning employee organization and PERB. Therefore Shea Chemical Corporation is not on point since in that case the rival organization filed a petition. In the present case, Local 39 never filed any petition or proof of support of any kind with the District, much less the competing claim of representation required by section 3544.1 and rule 30017 et seq.[9]

While PERB gained jurisdiction of the unit dispute upon the filing of the District's May 6, 1976 petition, it has been and is the policy of PERB to encourage the voluntary resolution of representation disputes by the parties in an effort, among other purposes, to speed the resolution of disputes and avoid time-consuming and costly hearings.[10] Therefore, Local 39's argument that the PERB cannot accept a voluntary recognition agreement following an employer's section 3544.5(a) petition is not persuasive.

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[9] See footnote 3, supra.

[10] Rule 33000, codified at California Administrative Code, title 8, section 33000 provides:

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

The general counsel dismissed the charges on the ground that under the EERA and the Board's rules, a question of representation can be raised only during the 15 workday period provided by section 3544.1 or at a formal unit determination hearing pursuant to the one-card rule. The Board agrees with this analysis. The language of the EERA and the Board's rules is clear in providing that a competing claim of representation must be filed within 15 workdays following the posting of the original request for recognition. There are no provisions allowing a competing claim of representation to be filed after the specified 15 workdays. While the present case did not proceed directly to a hearing because of delay caused by the EERA being newly implemented, the filing of a request for recognition will normally prompt a timely hearing and election if they are necessary. In this normal context the 15 workday intervention period is reasonable. If a hearing is held, the one-card rule allows an employee organization to participate in the hearing and thereby raise a question of representation only if it shows a substantial interest in the case at the time of the hearing so it is likely the employee organization will participate on the ballot at a subsequent election.

While the Board rejects Local 39's first argument, it does not agree that the present unfair practice charges should be dismissed. Local 39 raises a significant question in its second argument, that the District and CSEA may have been motivated to enter the voluntary recognition agreement by an intent to preclude Local 39 from participating in a formal hearing and election, so that but for Local 39's activity in the district the voluntary recognition would never have occurred. It is alleged that on April 5, 1976, CSEA filed a request for recognition in a wall-to-wall unit. On May 6, 1976, the District informed PERB that it doubted the appropriateness of the requested unit. Then, approximately one year later, after Local 39 became active in the District and indicated its intent to intervene in the formal

unit determination hearing to be conducted by PERB, the District extended voluntary recognition to CSEA in essentially the same wall-to-wall unit originally requested and previously found unsatisfactory by the District. On these facts, Local 39 claims the District gave and CSEA accepted unlawful assistance and support, to the detriment of Local 39. Also, based on these facts, Local 39 claims the employees who are members of or who have engaged in activities on behalf of Local 39 have been discriminated against by the District and CSEA.

Based upon the foregoing facts and argument, the Board concludes that an unfair practice hearing may reveal violations of section 3543.5(a), (b) and (d) and section 3543.6(a) and (b),[11] and therefore overrules the dismissals and remands these unfair practice charges to the General Counsel for hearing.

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[11] Section 3543.5 provides in pertinent part:

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

and section 3543.6 provides in pertinent part:

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

ORDER

The general counsel's dismissal of the unfair practice charge filed by Stationary Engineers Local 39 against Hartnell Community College District is reversed and the charge is remanded to the general counsel for hearing.

The general counsel's dismissal of the amended unfair practice charge filed by Stationary Engineers Local 39 against California School Employees Association, Chapter No. 470 is reversed and the amended charge is remanded to the general counsel for hearing.

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

Jerilou Cossack Twohey, Member, concurring in part and dissenting in part:

I agree with my colleagues that these cases should not have been dismissed. I therefore join them in remanding the unfair practice charges to the General Counsel for a hearing. I completely disagree with the majority's conclusion that the only time a question of representation can be raised under the EERA is during the 15 workday posting period provided by section 3544.1 or at a formal unit hearing pursuant to the "one card" rule.

The EERA itself provides for two ways in which a question of representation may be raised, one of which is during the 15 workday posting period of section 3544.1 and the other of which is if the Board determines subsequent to the filing of a petition under sections 3544.3 or 3544.5

through "inquiries, investigations, or hearing" that a question of representation exists. Thus, section 3544.7(a) reads, in pertinent part,

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

The majority does not deny that a question of representation may be raised outside the 15 workday posting period. Intervention at a hearing pursuant to the "one card" rule can occur only after a case has been set for hearing, which in turn occurs after an employee organization has requested recognition and either the employer has declined to recognize it or another employee organization has filed a competing claim. This is the situation when a question of representation would be "deemed to exist pursuant to subdivision (a) or (b) of Section 3544.1...." (Emphasis added.) The majority completely ignores the fact that the statute itself provides for another way in which a question of representation may arise—if the Board determines through "inquiries, investigations or hearing" that one exists.

The fact that the Board's rules and regulations do not contain a specific procedure for implementing this portion of section 3544.7(a) in no way vitiates its mandate. The law clearly states that once a petition

is filed the Board "shall conduct such inquiries and investigations" necessary to resolve the questions raised by the petition. The mere fact that the Board does not have a rule specifying how this is to be accomplished in no way removes its obligation to fulfill the statutory requirements. It is well understood that rules and regulations must be consistent with the purposes of the statute.[1]

A question of representation is generally understood to mean that there is a real dispute as to whether employees wish to be represented, or by whom they wish to be represented, or in what unit it is appropriate for them to be represented. It arises when an employee organization requests recognition and the employer declines to recognize, or when there are two or more employee organizations seeking to represent the same employees[2].

The principle established by Shea Chemical Corporation[3] that upon presentation of a rival or conflicting claim of representation which raises a real question of representation an employer may not negotiate with another organization until the question of representation has been settled by the Board is applicable in this case. The majority's rejection of this principle because in the instant case Operating Engineers did not file a petition is

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[1] See Clean Air Constituency v. California State Air Resources Board (1974) 11 Cal.3d 801 in which the California Supreme Court stated, "...administrative agencies exceed the scope of their authority when they promulgate regulations which contravene the purposes and the effective implementation of the governing legislation." at page 813. See also Cooper v. Swoap (1974) 11 Cal.3d 856.

[2] See Thirteenth Annual Report of the National Labor Relations Board (1948) pages 26-29.

[3] (1958) 121 NLRB 1027, 42 LRRM 1486.

unfounded. In Deluxe Metal Furniture Company,[4] decided the same year as Shea Chemical, pro forma reliance on the pendency of a petition in a rival-organization situation was firmly rejected. The test as to whether or not a question of representation exists does not hinge solely on the mechanical filing of a petition.[5] Rather, in the context of competing employee organizations, the test is whether there is a real or genuine dispute as to which organization employees desire to represent them. Where such a real dispute exists, an employer may not arrogate onto himself the authority to determine which employee organization in fact is the choice of a majority of his employees.[6] In fact, it is the Board's obligation to resolve questions of representation. Section 3544.7(a) states that the Board "...shall order that an election shall be conducted by secret ballot...." (Emphasis added.) once a question of representation has been determined to exist.

The purpose of the EERA, is clearly stated: to permit employees, if a majority of them in an appropriate unit so desire, to select one organization to represent them for the purpose of negotiating.

In the instant case a petition had been filed by the District pursuant to section 3544.5 on May 6, 1976 which, among other things, doubted the appropriateness of the unit requested by CSEA and desired PERB to conduct a representation election. CSEA also filed a petition pursuant to section 3544.5 on July 8, 1976 requesting PERB to conduct a representation hearing

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[4](1958) 121 NLRB 995, 42 LRRM 1470.

[5]See also Higgins Industries, Inc. (1964) 150 NLRB 106, 58 LRRM 1059; Air Master Corporation (1963) 14? NLRB 181, 53 LRRM 1004.

[6]Midwest Piping and Supply Co. (1945) 63 NLRB 1060, 17 LRRM 40.

on the appropriate unit. Both of these petitions languished unattended until May 1977 because of the delay caused by simultaneous representation activity in many districts following the enactment of the new law.

While these petitions were still pending and almost a year after the first one was filed, another employee organization, Operating Engineers, notified the Board's regional office that 35 out of 41 employees in a unit similar to ones the Board found appropriate had signed authorization cards seeking to have it, rather than CSEA, represent them. At the time Operating Engineers notified the Board of their substantial interest and support among employees in an apparently appropriate unit CSEA had not been granted voluntary recognition. Thus, at a time when a question of representation was clearly before the Board, Operating Engineers themselves raised an additional question of representation.

The Board's policy of encouraging voluntary recognition certainly was never intended to take precedence over the purposes of the EERA itself. In fact, the proviso to rule 33000 in which this policy is enunciated clearly so states.[7] The Board had and has an obligation to determine the questions raised once having taken jurisdiction of the original dispute between the District and CSEA. This obligation is imposed by the statute. The silence of the Board's rules in no way diminishes it.

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[7]Rule 33000, codified at Cal. Admin. Code, tit. 8, sec. 33000 proves:

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

Operating Engineers raised a real question of representation by notifying the employer[8], the Board and CSEA, that it possessed a substantial interest among employees in an apparently appropriate unit in conflict with the interest expressed by CSEA.. The pleadings in this case do not disclose whether Operating Engineers merely asserted a naked claim that it represented a substantial number of employees or whether it concretely demonstrated the extent of its interest to the employer. It is clear, however, that Operating Engineers did concretely demonstrate to the Board that its support among employees was substantial. In these circumstances the Board's obligation to foster harmonious relations between the employer and its employees cannot be suspended because the Board's own rules are silent.

Permitting the employer to impose a negotiating agent on employees is entirely contrary to the statute's specific grant to employees of the right to select an organization of their own choosing. An indispensable ingredient of successful collective negotiations is the confidence of individual employees that their exclusive representative will endeavor to wholeheartedly advocate their interests to the employer. In this case, 35 out of 41 employees in an apparently appropriate unit concretely demonstrated that they sought to have another organization than the one imposed upon them by their employer negotiate on their behalf. The majority, by its decision that a question of representation was not raised by the circumstances of this case is not only contrary

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[8]The Board assumes for purposes of ruling on the propriety of a dismissal of an unfair practice charge that the facts alleged in the charge are true. San Juan Unified School District (3/10/77) EERB Decision No. 12, 1 PERC 77.

to the specific language of section 3544.7(a) but is also contrary to the very purpose of the EERA itself. Accordingly, I dissent.

By Jerilou Cossack Twohey, Member