STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS ANGELES CITY AND COUNTY SCHOOL EMPLOYEES UNION, LOCAL 99, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL/CIO,	
Charging Party,	Case No. LA-CE-1126
v.	PERB Decision No. 218
LOS ANGELES UNIFIED SCHOOL DISTRICT,	June 30, 1982
Respondent.	

Appearances: Jeff Paule, Attorney (Geffner & Satzman) for Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL/CIO; Steven C. Babb and Joel M. Grossman, Attorneys (O'Melveny & Myers) for Los Angeles Unified School District.

Before Gluck, Chairperson; Tovar and Morgenstern, Members.

DECISION

This case comes before the Public Employment Relations Board (PERB) pursuant to its rule 32654(h), (i) and (j)[1] and the Educational Employment Relations Act (EERA)

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[1]PERB rules are codified at California Administrative Code, title 8, section 31000 et seq.

Rule 32654(h), (i) and (j) provide:

(h) The Board shall conduct a hearing on the repugnancy claim. After the close of the hearing, a Board agency shall issue a recommendation to the Board itself regarding the repugnancy claim. The recommendation shall be concurrently served on all parties. Each party may file with the Board

subsection 3541.5(a).[2] The hearing officer recommended that PERB defer to the arbitration award which ruled that the Los Angeles Unified School District (District) had not violated the

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> itself a response to the recommendation of the Board agent within 20 days following the date of service of the recommendation. The response shall be filed with the Executive Assistant to the Board. Service and proof of service of the response pursuant to Section 32140 are required. The recommendation of the Board agent together with any responses filed pursuant to this Section and the case record shall be submitted to the Board itself for a decision.
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> (i) If the grievance award is found to be repugnant, the Board itself shall remand the case, ordering the issuance of a complaint and the processing of the charge accordingly.
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> (j) If the award is found not to be repugnant, the Board itself shall refuse to issue a complaint and dismiss the charge.

[2]EERA is codified at Government Code section 3540, et seq. All references are to the Government Code unless otherwise noted.

Section 3541.5(a) provides in pertinent part:

> . . . The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance marchinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge.

contract when it unilaterally changed the reporting locations of certain bus drivers. For the reasons which follow, we affirm the hearing officer's recommendation.

FACTS

Local 99 of the Service Employees International Union, AFL/CIO, (SEIU), the exclusive representative of the District's bus drivers, concluded a collective bargaining agreement with the District in August 1979. Article XI of the agreement provides for a detailed system of bidding for bus routes to be assigned the drivers, but contains this caveat:

> 1.10 Notwithstanding the foregoing, [bidding procedures] adjustments or assignment changes may be made when necessary for the best interests of the District.

Shortly after the agreement was signed and the bidding concluded, the District unilaterally altered two parking locations of buses which, in turn, altered the reporting locations of the grievant and required him to drive further to work. A grievance was filed over this alleged contract violation on November 19, 1979. Three months later, SEIU filed an unfair practice charge alleging that the District had violated EERA subsections 3543.5(a), (b) & (c)[3] by

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[3]Subsections 3543.5 (a), (b) and (c) state:

> 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

unilaterally changing the "hours, wages, and other terms and conditions of employment . . . when it changed the parking locations of the buses." This charge was held in abeyance pending the outcome of the binding arbitration.

The arbitration occurred in April 1980, and the award issued the following August, exonerating the District by finding that the contract permitted the change. The stipulated issue presented to the arbitrator was, "Did the District violate Article I of the collective bargaining agreement when it changed the parking location of the grievant after he had received his 1979-80 route assignments?"

The arbitrator found, based on credibility determinations, that 1) a major factor in route selection is parking location; 2) the District warned drivers after bidding that changes in their route may occur; 3) changes in parking locations had occurred in the past; and 4) although the union had expressed some concern at the bargaining table over the breadth of

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

discretion reposed in the District by the language, "when necessary for the best interest of the District," it nevertheless agreed to this language. Finally, the arbitrator found that, because the District needed to find more parking spaces for its expanding bus fleet, the change was necessary for the best interest of the District.

Dissatisfied with this award, SEIU reactivated its unfair practice charge claiming that the award was repugnant to EERA because the arbitrator failed to consider and resolve the underlying unfair and because the award is contrary to PERB law on unilateral change and waiver. A repugnancy hearing was held by a PERB hearing officer who concluded that the issues which the arbitrator considered and resolved were substantially parallel to the statutory issues and that award was not inconsistent with the law on waiver and therefore not repugnant to EERA.

DISCUSSION

In Dry Creek Joint Elementary School District (7/21/80) PERB Order No. Ad-81a, this Board adopted the standard employed by the National Labor Relations Board (NLRB) in determining when deferral to an arbitration award is appropriate.[4] See Speilberg Mfg. Co. (1955) 112 NLRB 1080 [36 LRRM 1152]. These

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[4] Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d [31 LRRM 2548].

standards are: 1) The unfair practice issues must have been presented to and considered by the arbitrator; 2) the arbitral proceeding must have been fair and regular; 3) the parties must have agreed to be bound; and 4) the decision of the arbitrator must not have been "clearly repugnant to the purposes and policies of the Act."

SEIU contends that the first and fourth factors of the test have not been met.

A. The Arbitrator's Consideration of the Unfair Practice Issues

The NLRB has recently ruled that it will defer to arbitration awards where there is "parallelism" between the unfair practice issue and the contractual issue, provided the arbitrator has considered all of the evidence relevant to the unfair. Bay Shipbuilding Corp. (1980) 25 NLRB 809 [105 LRRM 1376]; Atlantic Steel Co. (1979) 245 NLRB 107 [102 LRRM 1247].

In Bay Shipbuilding, supra, the employer unilaterally changed insurance carriers during the term of the collective bargaining agreement. After considering the bargaining history and plain meaning of the contract, the arbitrator found that the contract permitted the employer to change insurance carriers. In deferring to this award, the NLRB observed that although the arbitrator specifically stated that he was not deciding whether the employer had violated the National Labor Relations Act, he nevertheless made factual findings in the

course of resolving the contractual issues which resolve the unfair practice issues. The board continued:

> The pivotal unfair labor practice issue herein is whether Respondent's change of insurance carriers constituted a modification of the contract or was simply an action permitted by the contract. Here the arbitrator found that the contract permitted the Company to change carriers, a determination he clearly had the authority to make. As the action was permitted by the contract, it does not constitute a modification of the contract and is not unilateral action in violation of the Act. Thus, the arbitrator's factual determination of the meaning of the contract has resolved the unfair labor practice issues herein.

In this case, the arbitral and statutory issues are clearly parallel; both turn on whether the District had the right to unilaterally change the bus parking locations. The arbitrator clearly found that the contract authorized the changes when necessary for the best interest of the District. Necessarily, the union had waived its right to negotiate over the change.[5]

It is also clear that the arbitrator was presented with and considered all of the evidence relevant to the unfair. The union relies on the bargaining history to argue that the implied waiver clause, Section 1.10, was intended by the

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[5]The award does not address itself to the alleged 3543.5(a) and (b) violations, but the charge does not state any facts which would support a finding of (a) and (b) violations independent of the (c). They are clearly being alleged as derivative violations, and are implicitly resolved by the determination of the unilateral change issue.

parties to operate more narrowly than it appeared on its face. The arbitrator heard witnesses from both the union and the District negotiators on this point and had the opportunity to weigh their testimony. It is appropriate therefore that the Board defer to his credibility determinations in this instance.

B. Clearly Repugnant to the Purposes and Policies of the Act:

The union also claims that the arbitrator's award is repugnant to EERA because his finding of waiver was contrary to the "clear and unmistakable" standard which this Board adopted in Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74. Without passing on whether we would have reached the same result as the arbitrator on the waiver issue,[6] we find that his award is not clearly repugnant to the purposes and policies of the Act. Dry Creek, supra.

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[6]The possibility that this Board may have reached a different conclusion in interpreting the parties' agreement and the evidence does not render the award unreasonable or repugnant. As the Court stated in Douglas Aircraft Co. v. NLRB (1979) 609 F.2d 352 [102 LRRM 2811]:

> ". . . If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was clearly repugnant to the Act . . . The reasoning if ambiguous, could have been interpreted in a non-repugnant way, and should have been in order to give arbitration the 'hospitable acceptance' necessary if 'complete effectuation of the Federal policy is to be achieved.'"

In finding the waiver, the arbitrator considered the plain meaning of the contract, looking not only to the zipper clauses and management rights section (which generally alone would not be a sufficiently clear and unmistakable waiver), but to evidence concerning the contractual bidding procedure itself, bargaining history and past practices of the employer.[7]

Consequently, we accept the hearing officer's recommendation and therefore direct that no complaint shall issue, and the charge shall be dismissed.

ORDER

The unfair practice charge is hereby DISMISSED.

By: Harry Gluck, Chairperson

Marty Morgenstern, Member

Irene Tovar, Member

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[7]Compare Aeronca, Inc. (1980) 253 NLRB 26 [105 LRRM 1541], where the NLRB refused to defer to an arbitrator's finding of waiver because he based it on the contract language only and failed to consider other factors such as bargaining history and past practices.