STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TEACHERS ASSOCIATION OF LONG BEACH,

Charging Party,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-1151

PERB Decision No. 721

March 3, 1989

Appearances: A. Eugene Huguenin, Jr., Attorney, and Jerry B. Allen, Law Clerk, for Teachers Association of Long Beach; McLaughlin and Irvin by Lawrence J. McLaughlin for Long Beach Unified School District.

Before Hesse, Chairperson; Craib, Shank, and Camilli, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Long Beach Unified School District (District) to the attached proposed decision of an administrative law judge (ALJ) finding that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by adopting and

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 reads, 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

enforcing unreasonable regulations governing the use of the District's -internal mail system by employee organizations. We have reviewed the entire record, including the ALJ's proposed decision, the District's exceptions and the responses thereto. As we find the ALJ's findings of fact free from prejudicial error, we adopt them as our own. The following is a brief summary of the pertinent facts.

FACTUAL SUMMARY

The District operates an internal mail system serving administrative offices in the Board of Education building, 77 school sites and 30 child development centers. The mail employees also process the United States (U.S.) mail between the District and outside entities. The District employs three full-time drivers and two full-time mail clerks who work exclusively in the mail room. These employees sort approximately 8,500 to 9,000 pieces of mail per day. The estimated cost to the District for processing each piece of mail is five to six cents.[2]

From 1976 to 1980, the District had regulations prohibiting the use of the internal mail system by employee organizations. However, during this period of time, employees did utilize the mail system to communicate with the exclusive representative,

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guaranteed to them by this chapter.

[2]As the internal mail system processes both internal mail and United States mail and the testimony indicates that each school site is on a U.S. postal route (T.R. Vol. II, p. 154), it would appear that the District's internal mail system overlaps with U.S. postal routes.

Teachers Association of Long Beach (TALB). In December 1979, the District intercepted a TALB communication which instructed individual employees to report to TALB through the internal mail system. Assistant Superintendent William Marmion then notified TALB and the District's employees that they were not to use the internal mail system for TALB communications.

In February 1980, in response to PERB's decision in Richmond Unified School District and Simi Valley Unified School District (1979) PERB Decision No. 99, the District promulgated new regulations entitled "Administrative Regulations for Exclusive Representative Association Use of the District Mail Delivery Service." The regulations were amended in August 1980 to include other employee organizations and other associations. The amended regulations are at issue here.

Since the regulations were adopted, TALB, pursuant to those regulations, has restricted its mailings to a single newsletter per week, consisting of one or two pages. These newsletters are bundled and addressed to either the TALB representative at each school site, or, if the name of the site representative is unknown, the name of the school site. Thus, each mailing includes 107 pieces of bundled mail, which is delivered to the TALB site representatives who, in turn, distribute the newsletters to individuals via their site mail boxes. There is no evidence that the District permitted any other mailings besides the weekly newsletter, or that TALB requested any additional mailings, nor was there evidence that any other

association sought to use the mail system. Since December 1979 and the District's adoption of its regulations, employees have generally not used the mail service to respond to TALB's mailings or inquiries.

Pursuant to the provisions of the regulations which allegedly require District approval based on content, the District has refused to approve the distribution of certain TALB newsletters through its internal mail system. On two occasions, the District refused to permit TALB to send its newsletter which, along with its regular TALB reports, also contained materials relating to local political campaigns and school board elections. On at least one other occasion, the District refused to permit TALB to send its newsletter, which also contained a paid advertisement. Finally, on another occasion, the District refused to permit TALB to send a pamphlet containing League of Women Voters' information.[3]

DISCUSSION

The District's principal defense is its assertion that the Federal Private Express Statutes[4] prohibit the carrying of

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[3]Although there is testimony that the District refused to permit TALB to distribute a League of Women Voters' information pamphlet, there is no testimony regarding the reasons why the District refused to distribute the information or how the information was to be distributed to the employees. Thus, there is insufficient evidence for the Board to determine whether this information constitutes a letter under the postal regulations.

[4]18 U.S.C, sections 1693-1699, 1724; 39 U.S.C, sections 601-606. These statutes establish the postal monopoly of the United States Postal Service and generally prohibit the private carriage of letters over postal routes without paying postage.

letters to or from TALB through the District's internal mail system. This is the same issue which was recently decided by the U.S. Supreme Court in Regents of the University of California v. Public Employment Relations Board (1988) 485 U.S. ____ [99 L.Ed.2d 664] (UC Regents). In UC Regents, the Supreme Court held that the Letters of the Carrier and Private Hands exceptions to the Federal Private Express Statutes did not permit the university to carry the union's letters in its internal mail system.[5]

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[5]While UC Regents dealt only with whether access rights under the Higher Education Employer-Employee Relations Act (HEERA) conflict with the Federal Private Express Statutes, the analysis is equally applicable to access rights under EERA. Access rights under HEERA are governed by section 3568, while access rights under EERA are governed by section 3543.1(b). Section 3568 of HEERA states:

> Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

Section 3543.1(b) of EERA states:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

In the underlying decision, Regents of the University of California (1984) PERB Decision No. 420-H (Regents) , the Board held that an employee organization's use of the university's internal mail system was permitted by two exceptions to the Private Express Statutes, commonly known as "Letters of the Carrier" and "Private Hands Without Compensation."[6] The Letters of the Carrier exception is set out at Title 18 U.S.C. section 1694, which provides:

> Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than $50.

Title 18 U.S.C, section 1696(c) provides, in relevant part, that the Private Express Statutes "shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation . . . ." The regulation governing the

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As the wording of the two provisions is nearly identical, we find that UC Regents is applicable to EERA.

[6]The Board also found that the employee organization's use of the university's internal mail system was allowed by one suspension of the Private Express Statutes, entitled, "Suspension for certain letters of college and university organizations." As this type of suspension expressly applies only to college and university organizations, it is not relevant to the present case involving a school district.

Private Hands Without Compensation exception is codified at 39 C.F.R. section 310.3(c). It provides, as follows:

> The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception; or, when a person is engaged in the transportation of goods or persons for hire, his carrying of letters "free of charge" for customers whom he does charge for the carriage of goods or persons does not fall under this exception.

In affirming Regents, the Court of Appeal relied solely upon the Letters of the Carrier exception and found it unnecessary to consider any other exception to the Federal Private Express Statutes. The court found, as had the Board, that provisions of HEERA describing its purpose reflect the intent of the Legislature that collective bargaining be part of the "current business" of the university. Thus, an employee organization's mail would relate to the "current business" of the university.

The Court of Appeal found further support for its position in United States v. Erie Railroad Company (1914) 235 U.S. 513 [59 L.Ed. 335], where the U.S. Supreme Court applied the Letters of the Carrier exception to the carriage of letters by a railroad for a telegraph company. In exchange for a percentage of receipts and joint supervision, the railroad company granted the telegraph company the right to operate telegraph lines previously

operated by the railroad. Relying on the interdependence of the two companies, the Supreme Court concluded that the carriage of the telegraph company's letters constituted the "current business" of the railroad. In reviewing Regents, the Court of Appeal found the relationship between the university and employee organization analogous to the relationship between the railroad company and telegraph company.

However, in UC Regents, the U.S. Supreme Court reversed the Court of Appeal and PERB. In its opinion, the Supreme Court held that neither the Letters of the Carrier nor Private Hands exceptions, properly construed, permit a state university to carry unstamped letters from a labor union for delivery to certain university employees in the university's internal mail system. In its discussion of the Letters of the Carrier exception, the court reasoned that the ordinary meaning of the term "current business" does not encompass the union's internal letters. The court stated that such letters relate to the union's efforts to organize the employees, and cannot accurately be described as the "current business" of the employer. The court also distinguished its only previous decision concerning the Letters of the Carrier exception, United States v. Erie Railroad Company, supra, 235 U.S. 513, which concerned a joint venture between a railroad company and telegraph company. In that case, the court held that the "business of the carrier" included the business of the joint enterprise. The Supreme Court concluded that the lack of factual similarities between Erie

Railroad Company and UC Regents rendered Erie Railroad Company inapplicable to the proper construction of the Letters of the Carrier exception.

With regard to the Private Hands exception, the Supreme Court concluded that this narrow exception was developed by Congress to permit only the gratuitous carriage of mail undertaken out of friendship, not pursuant to a business relationship. The court found that a business relationship existed between the university and union. Specifically, by delivering the union's letters, the university was performing a service for its employees that they would otherwise pay for themselves through their union dues. This service would then become part of the employer's package of monetary and non-mandatory benefits provided to its employees in exchange for the employees' services. As the carriage of the union's letters pursuant to such an exchange of benefits necessarily means that the carriage is not "without compensation," the court held that the Private Hands exception did not apply.

To determine whether the bundles of the newsletters sent by TALB through the District's internal mail system are covered by the Federal Private Express Statutes, the Board must determine whether these materials fall under the definition of "letter," codified at 39 C.F.R. section 310.1(a), which provides, in pertinent part:

> (a) "Letter" is a message directed to a specific person or address and recorded in or on a tangible object, subject to the following:

> (1) Tangible objects used for letters include, but are not limited to, paper (including paper in sheet or card form), recording disks, and magnetic tapes. Tangible objects used for letters do not include (i) objects the material or shape and design of which make them valuable or useful for purposes other than as media for long-distance communications, unless actually used as media for personal and business correspondence, and (ii) outsized, rigid objects not capable of enclosure in envelopes, sacks, boxes or other containers commonly used to transmit letters or packets of letters.
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> (2) "Message" means any information or intelligence that can be recorded as described in paragraph (a)(4) of this section.
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> (3) A message is directed to a "specific person or address" when, for example, it, or the container in which it is carried, singly or with other messages, identical or different, is marked for delivery to a specific person or place, or is delivered to a specific person or place in accordance with a selective delivery plan. Selective delivery plans include delivery to particular persons or addresses by use of detached address labels or cards; address lists; memorized groups of addresses; or "piggy-backed" delivery with addressed articles of merchandise publications, or other items. Selective delivery plans do not include distributions of materials without written addresses to passersby on a particular street corner, or to all residents or randomly selected residents of an area. A message bearing the name or address of a specific person or place is a letter even if it is intended by the sender to be read or otherwise used by some person or persons other than or in addition to the addressee.

Consistent with the Federal Private Express Statutes, the District's regulations prohibit TALB's use of the internal mail

system for "items/letters directed to specific persons or persons by title" and "notices to building representatives for posting or follow-up action." Under the District's regulations, the only material that TALB is authorized to send through the internal mail system is the official association newsletter issued on a regular basis, i.e., "At A Glance." There is testimony that TALB wanted to use the internal mail system for other materials (TR Vol. I, pp. 42-47; see charging party's Exhs. 10 and 11), but also that anything that TALB would put into the internal mail system would "bear an addressee." (TR Vol. IV, p. 4.) However, as the TALB materials addressed to a specific person, including the notices addressed to the business representatives for follow-up (TR Vol. II, p. 151), would fall under the postal regulations' definition of "letter," TALB would be prohibited from sending these materials through the District's internal mail system under the U.S. Supreme Court decision in UC Regents. Similarly, if the newsletters also fall under the postal regulations' definition of "letter," then TALB would be prohibited from sending the newsletter through the District's internal mail system.

In determining whether TALB's weekly newsletters are letters within the postal regulations' definition, the Board must analyze whether any of the exceptions to the definition of "letter" apply to the newsletters. The only exception which arguably could apply to these newsletters is the exception for "newspapers and periodicals." Since the postal regulations do not include any definition of these terms, the Board must look to other sources.

The definition in Funk and Wagnalls Standard College Dictionary defines newspaper as follows:

> 1. A printed publication usually issued daily or weekly, containing news, editorials, advertisements, etc. 2. Newsprint. (Funk and Wagnalls Standard College Dictionary (5th ed. 1974), p. 911.)

Periodical is defined as:

> 1. Of or pertaining to publications, as magazines, etc., that appear at fixed intervals of more than one day; also, published at regular intervals. 2. Periodic. (Funk and Wagnalls Standard College Dictionary (5th ed. 1974), p. 1003.)

Similarly, the definition of newspaper at 66 C.J.S., Newspaper, section 1, page 22 states:

> In ordinary understanding a newspaper is a publication, usually in sheet form, intended for general circulation, and published at short intervals containing intelligence of current events and news of general interest.

Although TALB's newsletter appears to be distributed on a weekly basis, the language in the newsletters is directed to the bargaining unit employees. In fact, the newsletters regularly contain a message from the president of TALB, and other reports on TALB issues. The newsletters inform the bargaining unit members of upcoming events, including elections, meetings, and membership campaigns, and contain updates on negotiations, unfair practice charge hearings, and legislative bills. This type of information is more akin to a message directed to the bargaining unit employees, as opposed to general information not intended for a specific group. Unlike a newspaper, which is intended for

general circulation and contains current events and news of general interest, the newsletters are intended for a specific group, namely the bargaining unit employees, and contain information and messages directed to its bargaining unit employees.[7]

Consistent with the postal regulations' definition, Funk and Wagnalls Standard College Dictionary defines "letter" as follows:

> A written or printed message, usually of a personal nature or concerning a specific subject, directed to a specific person, group, or category of persons. (Funk and Wagnalls Standard College Dictionary (5th ed. 1974), p. 776.)

In the present case, the facts are uncontradicted and establish that the newsletters were bundled and the envelope for each bundle of newsletters was addressed to a specific site representative or specific school address. The newsletters were then delivered to individual mailboxes by the site representatives. Although the specificity of the addressee is one indicia of the common understanding of letter, the fact that the newsletters are not addressed, by name, to each bargaining unit employee, and do not include a salutation to its members, does not mean that the newsletters are not letters under the

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[7]It is also interesting that Funk and Wagnalls Standard College Dictionary's definition of newsletter as "a brief, specialized, periodical news report or set of reports sent by mail," and Webster's New World Dictionary's definition of newsletter as "containing recent news, often of interest to a special group" are consistent with the postal regulations' definition of "letter." (Funk and Wagnalls Standard College Dictionary (5th ed. 1974), p. 911; Webster's New World Dictionary (2d college ed. 1976), p. 958.)

[1]Private Express Statutes. The delivery of the newsletters to the individual mailboxes of the bargaining unit employees, and the content of the newsletters specifically directed to the bargaining unit employees are indicative that the newsletters constitute a letter. Even if these newsletters were not bundled in envelopes addressed to site representatives or school site addresses, the newsletters would still constitute letters due to their content and the fact that the delivery is directed to each of the bargaining unit employees.

This finding is consistent with a federal case involving advertising circulars. In Associated Third Class Mail Users v. United States Postal Service (D.C. Cir. 1979) 600 F.2d 824, the Court of Appeal found that advertising circulars were included in the postal regulations' definition of "letter." The court used Webster's Dictionary to define a letter as "a written or printed message intended for the perusal only of the person or organization to whom it is addressed." The court concluded that the advertising circulars were intended for the perusal of the addressees, and stated that the key fact was that the sender's goal was to reach the particular persons who had been identified as most likely to be interested in the advertised products. The court held that the advertising circulars were letters, despite the fact that others might also see the circulars.

In the present case, the same analysis applies. The newsletters are delivered to the individual mailbox of each of the bargaining unit employees, and are intended to be read by

TALB's bargaining unit employees. Based on the fact that the newsletters are delivered to the individual bargaining unit employees and contain messages directed to the bargaining unit employees, the Board finds that these newsletters do not constitute a newspaper or periodical, but fall within the postal regulations' definition of "letter."

As these TALB materials constitute a "letter" under the Federal Private Express Statutes, the Board holds that, pursuant to the U.S. Supreme Court decision in UC Regents, neither the Letters of the Carrier nor Private Hands exceptions of the Federal Private Express Statutes permit the District to carry the TALB materials through the District's internal mail system. Therefore, the Board hereby REVERSES the ALJ's conclusions of law, and hereby DISMISSES the complaint.[8]

Members Shank and Camilli joined in this Decision.

Member Craib's dissent begins on page 16.

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[8]As the Board finds that the TALB materials are letters under the Federal Private Express Statutes, and that the Letters of the Carrier and Private Hands exceptions do not permit the District's carriage of such TALB materials through its internal mail system, the Board finds it unnecessary to address the reasonableness of the District's amended regulations.

Member Craib, dissenting: I am compelled to dissent from the majority's "decision." In short, the majority has misidentified the issues in dispute, and has thus failed to decide the case that was brought before it. At issue is the lawfulness of regulations the District promulgated in 1980 to govern the use of its internal mail system. Some of the provisions of those regulations are based on the purported effect of the Postal Express Statutes, but many provisions are not. As the majority noted, the effect of the Postal Express Statutes has been settled by the U.S. Supreme Court in Regents of the University of California v. PERB (1988) 485 U.S.____[99 L.Ed.2d 664] (hereafter, U.C. Regents). The proper course for the Board to take now would be to apply the Court's decision to the related portions of the regulations and decide the propriety of the other portions in accordance with Board precedent and/or its view of the meaning of "reasonable regulation" as used in HEERA section 3568 (for text, see majority decision, p. 5, fn. 5).

The majority instead analyzes the case as if the matter in dispute was the carriage (through the District's internal mail system) of TALB's weekly newsletter. Finding that the newsletter does not fall within any of the exceptions to the definition of a "letter" in the postal regulations (itself a dubious proposition), the majority concludes that it is unnecessary to address the reasonableness of the District's regulations. The absurdity of that conclusion is apparent, given the fact that the effect of the Postal Express Statutes on the carriage of the

newsletter was never at issue in this case. The District, in fact, routinely allowed the carriage of the newsletter through its internal mail system! TALB's objection has always been to the regulations themselves and that is what heretofore has been litigated in this case.

TALB's amended unfair practice charge, which was incorporated by reference into the complaint, clearly alleges that the regulations are unreasonable on their face and asks that much of the regulations be stricken, including several portions which have no relation to the Postal Express Statutes. The ALJ's list of issues to be decided (see attached proposed decision, pp. 16-17) includes many unrelated to the Postal Express Statutes, including those concerning content and quantity restrictions. Moreover, nowhere in the record is there any indication that the sole issue in dispute is the lawful carriage under the Postal Express Statutes of any particular mailing. As noted above, the majority's focus on TALB's weekly newsletter is particularly strange because the regulations, as designed and applied, permitted the carriage of the newsletter. The carriage of the newsletter was placed in issue only to the extent that the District several times rejected a particular edition due to its content. That issue, of course, turns on the propriety of prepublication content regulation, not upon the applicability of the Private Express Statutes.

In sum, it is the reasonableness of the regulations, <u>on their face</u>, that is at issue in this case. This includes both

those provisions based on the Postal Express Statutes and those which are unrelated. Therefore, the application of the Postal Express Statutes to any particular mailing, especially TALB's weekly newsletter, is irrelevant to this case.[1] Addressing the "reasonableness" of the District's regulations on their face is a difficult task which I do not relish. Nevertheless, that is what this case requires. Simply avoiding these issues as the majority has done is simply not an intellectually honest option. Therefore, for the edification of all concerned, I will resolve the true issues presented by this case. After waiting six years for the Board's decision, the parties deserve no less.[2]

The District's regulations are summarized at pp. 9-13 of the attached proposed decision. I will address each section (in numerical order) that is in dispute (i.e., those where the District has excepted to the ALJ's finding of unreasonableness).

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[1]The majority's conclusion that the newsletter is not a "newspaper or periodical" within the meaning of the postal regulations is highly questionable. However, since that determination is irrelevant to this case, I need not address it further.

[2]During most of the six year period the Board held the case in abeyance pending a final decision in the U.C. Regents, supra, case, which was expected to dictate the propriety of some (but not all) of the provisions of the District's regulations.

Section 2 - Advance Notice

Relying on both PERB precedent[3] and constitutional principles, the ALJ concluded that the law does not allow the District to restrain TALB mailings prior to dissemination. I would affirm the ALJ on this point, as Richmond/Simi is controlling and I find no compelling reason to overrule it. However, as the Board did in Richmond/Simi, I would refrain from relying on constitutional law and decide the case on statutory grounds only. While the District may not screen the content of TALB mailings prior to dissemination, it is important to note that to the extent this section of the regulations merely requires advance notice that TALB wishes to use the mail system, it is unquestionably reasonable. Such notice would allow the District to adequately plan for the carriage of TALB's mailings, thereby lessening any effect upon the efficiency of the system.

Section 3 - Publication Requirements

The analysis of this section assumes post-publication application only, for prior screening of mailings, as discussed above, has been held to be unreasonable.

Subdivisions (a) and (b)

These subdivisions are based upon the Postal Express Statutes and postal regulations (see 39 CFR 310.1). Subdivision (a) expressly allows newsletters such as TALB's, citing the

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[3]Richmond Unified School District and Simi Valley Unified School District (1979) PERB Decision No. 99 (hereafter Richmond/Simi); Pittsburgh Unified School District, (1978) PERB Decision No. 47.

newspaper and periodical exception to the definition of a "letter" (39 CFR 310.1(a)(7)(iv)). This confirms that the carriage of TALB's newsletter is not at issue in this case. More importantly for this portion of the analysis, this subdivision appears to be consistent with the postal regulations and thus constitutes "reasonable regulation."

Subdivision (b) mirrors some of the language of the definition of a "letter" (39 CFR 310.1(3)0)), and thus would appear to be reasonable. However, the second sentence states that "Notices to building representatives for posting or for follow-up action may not be sent." I would find this to be reasonable only to the extent that it can be read to be consistent with the following exception to the definition of a "letter," at 39 CFR 310.1(a)(7)(viii):

> Tags, labels, stickers, signs or posters the type, size, layout or physical characteristics of which indicate they are primarily intended to be attached to other objects for reading.

Subdivisions (c), (d) and (e)

These subdivisions were found by the ALJ to be reasonable if applied only after dissemination. The District excepts to this limitation, but I would affirm based on the discussion above with regard to Section 2.

Subdivisions (f), (g), (h) and (i)

I disagree with the ALJ's conclusion that subdivisions (f) through (i) are unreasonable. Subdivisions (f), (g), and (h) prohibit the mailing of any material that sanctions, induces,

aids, encourages, abets or assists work stoppages, disruption of regular school operations by acts of violence and destruction, alteration or obliteration of District property or records. Paragraph (i) prohibits the sending of material violative of law.

The ALJ analyzed subdivisions (f), (g), and (h) together, rather inexplicably, as his analysis appears relevant only to subdivision (f). The ALJ pointed to the no-strike clause in the parties' contract, along with the contractual grievance procedure, as sufficient means to regulate work stoppages. He concluded that regulation of work stoppages through mail system restrictions would give the District an unfair contract enforcement advantage and discriminate in favor of nonexclusive employee organizations or those not party to a no-strike clause. I find the ALJ's reasoning unconvincing. I see no unfair contract enforcement advantage stemming from the mere regulation of mailings concerning work stoppages. Such regulation does not directly influence the propriety of a work stoppage and would be of little effect in causing such conduct to cease. Similarly, a prohibition of strike-related mailings creates no significant additional burden on an employee organization that has already made a contractual pledge not to strike. Therefore, I do not find such a provision in any way discriminatory.

My rejection of the ALJ's reasoning is based on my conclusion that restriction of materials which advocate or encourage unlawful, disruptive conduct is unquestionably reasonable. Such conduct is not consistent with employee

organizations' statutory purpose and therefore should not enjoy the benefit of statutory access rights. Nor can public school employers fairly be required to carry mailings which are not only unrelated to legitimate employee organizations' activities, but threaten to unlawfully destroy school property and disrupt the educational process. For these reasons, I find that subdivisions (f)y (g), and (h) constitute reasonable regulation to the extent they seek to avoid use of the mail system in the aid of illegal activities. The ALJ apparently viewed subdivisions (g) and (h) as relating to work stoppage situations, hence he analyzed them in that context. However, on their face, subdivisions (g) and (h) do not apply solely to work stoppage situations.

Unlike subdivisions (g) and (h), subdivision (f) does not seek to restrict only unlawful conduct. By its own terms, subdivision (f) would prohibit mailings in support of all work stoppages.[4] While both legal and illegal work stoppages have the potential of seriously disrupting the educational process, work stoppages do not necessarily present the substantial threat to peaceful school operations[5] that violent or destructive conduct clearly does. As discussed above, it is the unlawful character of the conduct that justifies the restriction as to illegal work

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[4]I would consider "illegal" work stoppages to be both those unlawful as a matter of law and those made unlawful by contract.

[5]In Richmond/Simi, supra, the Board concluded that "school employer regulations under EERA section 3543.1(b) should be narrowly drawn to cover the time, place and manner of the activity, without impinging on the content unless it presents a substantial threat to peaceful school operations."

stoppages. Further, a public school employer may find many lawful employee organization activities distasteful or potentially burdensome, but such activities are given the protection of the law. I therefore conclude that it is unreasonable to restrict mailings which advocate or support lawful activities, including work stoppages.

Subdivision (i), which merely prohibits the sending of materials violative of law, was found by the ALJ to be unreasonably vague and overbroad. I disagree. This provision is certainly broad, but its meaning is clear--the District will not allow its mail system to be used to carry illegal material. Consistent with my approval above of restrictions on the sending of materials in support of illegal activities, I find it reasonable to prohibit the sending of mailings which are themselves illegal. As there are a number of laws which might make material illegal, it would be difficult, if not impractical, to provide an exhaustive list of all applicable statutes and legal principles.

Section 4 - Frequency

This section limits mailings to one per week, not to exceed three 8-1/2 x 11 inch pages. The ALJ found this to be an arbitrary limit that was not supported by evidence concerning the operation of the mail system. While it is true that the limits appear to be arbitrary and the District failed to provide evidence that would justify them, I do not read this provision to create a hard and fast rule. This regulation further provides

that, if the association wishes to send mailings of greater frequency or length, it must give the employee relations office 24 hours notice. Assuming that this means that additional mailings would be allowed as long as the District has sufficient notice to allow it to plan for the additional carriage, this provision is not unreasonable.

In addition, while a once-a-week, three-page limit is not supported on this record, I must emphasize that the statute does not provide for unlimited access to the mail system. Limitations on the frequency and size of mailings must necessarily be judged on the circumstances existing in each school district. Logically, a central factor will be the burden varying volumes of mailings place on the internal mail system. Regulations designed to both protect access, yet minimize its impact, should be looked upon favorably by this Board. Examples are the District's present requirement that mailings be reviewed in advance as to volume, bulkiness, or other hazards they might pose, and TALB's present practice of bundling mailings by school site.

Section 7 - Responses

This section prohibits employees from sending responses to association mailings. The ALJ found this restriction to be unreasonable, relying on passages from Richmond/Simi which speak of the right of access in terms of two-way communications between employees and employee organizations. He also found it incongruous that the Legislature would provide for means of

communication to employees but not provide for responsive communication to their employee organizations.

Given the U.S. Supreme Court's decision in U.C. Regents, supra, the only employee organization mailings that may be carried without postage are those which are not "letters" within the meaning of the postal regulations (39 CFR 310.1(a)(7)). My review of those regulations has revealed no listed exceptions which would encompass responses from employees. Consequently, it appears that all such responses would be "letters," and thus prohibited by the Private Express Statutes. With that understanding, I would find that section 7 constitutes "reasonable regulation."

Section 9 - Reserved Right

The portion of this provision that is in dispute is that which provides that the District may charge associations for their share of the costs of maintaining the mail system. The ALJ found this unreasonable, relying primarily on the rationale of Regents of The University of California (Lawrence Livermore National Laboratory) (1982) PERB Decision No. 212-H, where the Board held (in a situation not involving a mail system) that statutory access rights cannot be subjected to the taxation of costs. In the Board's underlying decision in U.C. Regents, PERB Decision No. 420-H,[6] this principle was expressly extended to the

[6]The only issue on appeal in U.C. Regents was the effect of the Private Express Statutes on access rights arising under state law. Consequently, the remainder of the Board's decision continues to be precedential.

use of internal mail systems. While precedent on this issue arose under HEERA, the relevant provisions of the EERA are nearly identical and should be interpreted in the same fashion. Consequently, I would affirm the ALJ's holding that this provision of the regulations is unreasonable.

Section 10 - Summary Provisions

This section simply states that the use of the District's mail system is governed by the Private Express Statutes. The ALJ found this unreasonable due to his conclusion that several exceptions to the Private Express Statutes made them inapplicable to an employee organization's use of the employer's internal system. That view, of course, was not shared by a majority of the U.S. Supreme Court in U.C. Regents. Since it is now established that the Private Express Statutes do apply, this section is unquestionably reasonable.

CONCLUSION

Unlike the majority, I would address the reasonableness of the District's mail system regulations, for that is the issue this case squarely presents. The majority has instead chosen to focus on a matter not even at issue in this case, i.e., whether TALB's weekly newsletter is a "letter" within the meaning of the postal regulations. As discussed above, I would affirm in part and reverse in part the ALJ's proposed decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TEACHERS ASSOCIATION OF LONG BEACH, Charging Party, v. LONG BEACH UNIFIED SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-1151 PROPOSED DECISION (10/19/82)

Appearances; A. Eugene Huguenin, Jr., Esq., attorney for Teachers Association of Long Beach; McLaughlin & Irvin by Joseph M. McLaughlin, Esq. and Lawrence J. McLaughlin, Esq., attorneys for Long Beach Unified School District.

Before Stephen H. Naiman, Administrative Law Judge.

I. STATEMENT OF THE CASE

On March 8, 1980, charging party, Teachers Association of Long Beach (hereafter TALB or Association) filed an Unfair Practice Charge against respondent, Long Beach Unified School District (hereafter District). The Charge alleges that the District violated sections 3543.1(b) and 3543.5(a)(b)(c) of the Educational Employment Relations Act[1] (hereafter EERA or Act) by adopting unreasonable regulations governing the use of the District mail service; by notifying the Association that previously allowed Association communications would no longer be carried by the District mail service and by denying the

[1]The Educational Employment Relations Act is codified at Government Code section 3540, et seq.

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

requests by TALB to alter the regulations and make them reasonable.

The District filed its Answer on May 27, 1980 denying the allegations of the Charge. The District affirmatively alleged that its mail regulations were mandated by and consistent with the federal Private Express Statutes and the regulations of the United States Postal Service. An informal conference was held on June 3, 1980. The parties could not agree upon a settlement proposal. A complaint was issued by the Public Employment Relations Board.

A formal hearing was scheduled for August 13, 1980. On the day the formal hearing was to commence, respondent distributed an amended set of mail access regulations and the parties discussed certain issues raised by the Charge as well as the possibility of informally resolving the dispute. The parties were still unable to reach agreement or viable settlement. However, it was understood that charging party would amend the Unfair Practice Charge to more squarely confront the reasonableness of the District's amended mail service regulations in relation to the federal Private Express Statutes. The date of the formal hearing was rescheduled to permit charging party an opportunity to amend its Charge. On October 3, 1980, charging party filed an Amendment to the Unfair Practice Charge and on October 21, 1980 respondent filed and Amended Answer to Unfair Practice Charge.

The formal hearing commenced pursuant to notice on March 27, 1981 and continued on May 28 and 29, 1981. During the course of these proceedings, a disagreement developed between the parties as to the scope of the Amended Charge and the understandings reached between the parties on August 13, 1980. Respondent made an oral motion that the Administrative Law Judge who had assisted the parties at that earlier date disqualify himself from further participation in the case. The Administrative Law Judge denied the motion. Counsel for respondent requested and was granted the right to appeal the matter to the Chief Administrative Law Judge pursuant to California Code of Civil Procedure, section 170. After both parties had been given full opportunity to brief the matter, the Chief Administrative Law Judge sustained the ruling of the Administrative Law Judge on December 11, 1981.

The formal hearing in this matter resumed on March 25, 1982 and concluded on March 26, 1982. Pursuant to an agreed-upon briefing schedule, final briefs were received on July 12, 1982 and the matter was submitted.

II. FINDINGS OF FACT

A. Background

Long Beach Unified School District encompasses an area in excess of 128 square miles. Within the District there are 77 school sites covering grades kindergarten through 12 as well as certain special schools, continuation high schools and adult education schools. In addition there are 30 Child Development

Centers contiguous to the school sites. As of 1981, the total enrollment of students in grades kindergarten through 12 was 56,125. Additionally, the District had 3,244 adult students. The District employs approximately 2,883 certificated employees and approximately 2,200 classified employees.

During the times relevant to this proceeding, there were four separate collective bargaining units, two classified and two certificated. The majority of the classified employees are represented by California School Employees Association. The certificated employees are in units covering teachers who teach grades kindergarten through 12 and teachers who teach in the Child Development Centers. Both units are represented by the charging party, Teachers Association of Long Beach.

At all times during these proceedings, TALB and the District were parties to a collective bargaining agreement which had as its term May 21, 1979 through June 30, 1982. During negotiations for this agreement, certain proposals were made relating to use of the school mail service. These proposals were eventually dropped and the contract is silent on the question of use of the school mail service. In addition, the agreement contains a no strike clause.

B. The District Mail Service

The District maintains an internal mail distribution system. The District mail service transports communications between the Administrative offices in the Board of Education Building and the 77 school sites plus 30 Child Development Centers. In addition, the service picks up mail from each of the sites and returns it to the mail room either for distribution within the Board of Education Building or for distribution to one of the other school sites of the District. The mail service transports mail between 51 different offices within the Board of Education Building twice a day. The mail room is located on the first floor of the Board of Education Building and occupies a concrete enclosure approximately 20 by 40 feet. In addition, there is a dock area with space for the three vans used to carry the mail.

The District employs five employees; three who drive the vans and two who work full-time in the mail room. All employees work an eight-hour day, however, the three messengers who drive the vans begin slightly earlier than the two permanently assigned mail room employees. The procedures on a daily basis involve picking up messages first thing in the morning. Thereafter the messengers begin the mail routes. Each of the three vans stops at an assigned school site. The schedule allows approximately 10 to 15 minutes between each stop. During these stops, the messenger will drop off mail for

a school site and pick up mail from a school site. Mail which is picked up and dropped off is carried to and from the school site in a single container or "bin." After the mail is delivered to a school site it is then sorted by a clerical employee and placed in the appropriate employee's mail box. Mail received from a school site is returned to the mail room for sorting at the end of the route.

The employees driving the van usually return to the mail room some time in the afternoon following their lunch break. Upon return to the mailroom, the bins from each of the school sites are carried into the mail room for sorting. The messengers assist in sorting the mail upon completion of their routes. At the conclusion of the day, the bins containing mail for delivery the following day are loaded into the trucks. Uncontradicted testimony indicates that it takes a mailroom employee approximately one minute to sort 17 to 20 pieces of mail. The District mail employees sort approximately 8,500 to 9,000 pieces of mail each day. In addition to this amount, the District mail room employees are required to process mail from the District to be sent through the U.S. mails to points outside of the District. The annual budget for the mail room is approximately $123,000, and it is estimated that it costs the District five to six cents to process each item of mail. The District mail service carries communications

relating to the business of the District such as payroll records instructional materials, student records, and accounting records.

C. The District's Regulations Covering Use of the Mail Service

The District has had regulations governing the use of the mail service since 1960. In 1976, following the passage of the EERA, the District had regulations which prohibited use of the school mail system by any employee organization. In the years 1976 through December of 1979, the record reveals that unbeknownst to the District, employees were utilizing the school mail service to communicate with charging party, TALB. While the amount of communication which took place is not expressly revealed by the record, it is clear that employees utilized the mail system for communications including responses to Association surveys concerning negotiations. The record further reveals that employees would usually give their communications to a site representative who would then forward them in an envelope to TALB which had and still has a receptacle at the Board of Education Building. Thereafter the Association would pick up these materials and take them down to the TALB offices in Long Beach.

In December of 1979, the District intercepted a TALB communication which instructed individual employees to communicate to TALB through the school mail system. By

communications of December 21, 1979, Assistant Superintendent William Marmion instructed TALB and the District's employees not to use the mail system for communications to the Association.

In approximately late February 1980, the District promulgated a new set of regulations entitled "ADMINISTRATIVE REGULATIONS FOR EXCLUSIVE REPRESENTATIVE ASSOCIATION USE OF THE DISTRICT MAIL DELIVERY SERVICE." These regulations are ostensibly based on PERB's decision concerning access to school mail systems in Richmond Unified School District and Simi Valley Unified School District (8/1/79) PERB Decision No. 99. TALB expressed its concern about the legality of these regulations but the District held firm. In August 1980 the District amended these regulations and to date they remain unchanged.

The regulations amended in August 13, 1980 permit employee organizations and other associations to utilize the school mail distribution system. Prior to February 1980, associations were not permitted to use the District mail service. Thus, these regulations grant a broader right than previously had existed. However, the regulations only permit an association to use the District's mail distribution system to send one regular newsletter once a week. In summary, the regulations provide:

1. Eligibility

Associations and organizations, other than an exclusive representative, are required to file certain identifying information prior to being permitted to use the mail system.

2. Advance Notice

Any association or employee organization desiring to use the mail system is required to file two copies of any mailing by 9:00 a.m. of the day prior to the date when distribution is requested. No mailings may be given to the mail room until the District Employee Relations Office notifies the sender that the mailing has been "approved." The Employee Relations Office will notify the mail room and any sending association if materials are not approved and such materials will be returned to the sender.

3. Publication Requirements

Materials distributed through the District mail system, "must be official association materials such as newsletters issued by a local association." (Emphasis supplied.) These publications must meet the District's interpretation of the Private Express Statutes, the Education Code and the District's Regulations. The following criteria are set forth as a basis for determining whether the District will approve a mailing:

a. Newsletters issued on a <u>regular</u> basis (weekly, monthly, quarterly) may be sent through the District mail service. Irregular or special flyers may not. Commercial announcements will not be approved. [Per <u>Private Express Statutes</u> 39 CFR, 310.l(a)(7)(iv)]

b. Items/letters directed to specific persons or persons by title may <u>not</u> be sent. Notices to building representatives for posting or for follow-up action may <u>not</u> be sent. [Per <u>Private Express Statutes</u> 39 CFR, 310.l(a)]

c. Per PERB Decision No. 99, any material which "inspires immediate violent conduct by readers or substantially impairs any school function" shall <u>not</u> be sent through the District mail service.

d. Per PERB Decision No. 99, any material that is critical of public school officials with "actual malice or reckless disregard for truth" shall <u>not</u> be sent through the District mail service.

e. That which urges the passage or defeat of any school measure of the District including, but not limited to, the candidacy of any person for election for the governing board of the District may <u>not</u> be sent.

f. That which calls for, sanctions, induces, aids, encourages, abets or assists in any manner a strike, sympathetic or otherwise, walkout, slowdown or work stoppage of any nature by employees of the District may <u>not</u> be sent.

g. That which calls for, sanctions, induces, aids, encourages, abets or assists in any manner a disruption of the regular school operations by acts of violence by employees of the District may <u>not</u> be sent.

h. That which calls for, sanctions, induces, aids, encourages, abets or assists in any manner the destruction, alteration or obliteration of any District property or record, including student records or the removal of such property or records from the District premises by employees of the District may not be sent.

i. No publication shall contain material violative of law.

4. Frequency

Mailings to an association's membership are normally limited to one (1) communication per week per association. Each mailing shall not exceed three (3) 8 1/2 x 11 inch pages. If the association wishes to send a second publication or one of more than (2) two pages, it must notify the Employee Relations Office 24 hours prior to the mailing.

5. Handling

a. Any materials sent through the District mail service must be accompanied by a completed request form: "Request to Use District Mail Service." This request form requires the sender to list certain information, and must have a signature to indicate that the person requesting the use of the mail service has "read and understood" certain civil and criminal statutes relating to libel and slander which appear on the reverse side of the form.[2]

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[2]The reverse side of the request form quotes from sections of the California Penal Code section 248 and section 249 involving the definition of libel and the penalties

b. Any materials sent through the District mail service must not create an "undue impact" on the service. Those using the mail service must count, package and label materials and address them in bulk fashion for receipt at a given site. The materials must be delivered to the mail room at least 24 hours prior to the requested delivery date. No bulk mailings may be originated at a school site. All mailings are subject to a determination by District personnel that they may be feasibly handled on a given date.

6. Site Distribution

Association representatives at each site are to be responsible for distributing materials to the individual mail boxes during non-duty time. The District's only responsibility is to inform an association's site representative that the materials have arrived at the site for distribution or to otherwise place these in the association site representative's mail box.

7. Responses Through The District Mail Not Permitted

Individual employees may not return responses to association mailings or otherwise address mail to the

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for anyone who publishes libellous material. The reverse side also summarizes California Civil Code, sections 44, 45 and 46, which define defamation, libel and slander. Also summarized are certain sections from the treatise on California Jurisprudence, sections 139 and 140, relating to republication, multiple publication and the extent of publication of defamatory material.

association for delivery through the District mail service. United States mail is to be used for these purposes. The exchange of personal mail by individuals is prohibited. [Per Private Express Statutes, 39 CFR, 310.2(a)(b).]

8. Hold Harmless Clause

The District disavows responsibility for any claims or legal actions against an association arising out of the use of the District mail service. Further the District informs users of the mail service that they are responsible for the content of their communications and are to be aware of the Civil and Penal Code provisions on the reverse side of the request form.

9. Reserved Right

The District reserves the right to amend or modify its regulations and to withdraw mail service privileges from associations who fail to comply with the regulations. Further, upon notice, the District reserves the right to charge associations for their respective share of the costs of maintaining the mail service.

10. Summary Provisions

Finally, the regulations state that the use of the mail service is governed by the Private Express Statutes of the United States Postal Service. These regulations, as revised, are presently in effect in the District and are the subject of the instant dispute.

D. The Use Of The Mail Service In Practice

The record reveals that since the promulgation of the above regulations, charging party and any other association have been permitted to utilize the District's mail delivery service to send one regular newsletter per week. In practice, TALB has restricted its mailings to a single, one or two page newsletter per week. There is no evidence that TALB desires to send more than one regular, local, weekly newsletter to its constituents. Except for a regular newsletter, the District has not permitted any other mailings to TALB members or any other association members. Thus TALB has not sought permission to mail surveys concerning contract negotiations nor has TALB been able to mail election materials to its members or other newsletters from the National Education Association with which it is affiliated. TALB has not sought to recruit new members through the District mail service, nor has it sent insurance information or other membership materials to employees of the District through the District mail service. There is no evidence that any other associations in the District have sought to use the mail service for any purpose whatsoever. There is no evidence that TALB has requested permission to send more than one mailing per week or a mailing of greater volume than three (3) 8 1/2 X 11 inch pages.

Moreover, since December 1979, employees have not generally used the mail service to respond to any of TALB's inquiries

concerning contract negotiations, membership elections, insurance information, grievances or other matters concerning which TALB may desire to hear from its constituents.

Any communications to TALB from employees at a school site, are generally directed to the site representative and then the site representative takes the responsibility of carrying the communications back to the association office. Similarly when the Association desires to communicate with its members in a manner not permitted by the regulations these communications are delivered to each site by TALB board members or by site representatives. The mailings permitted by the regulations are bundled for each site and then the site representative receives the mail and distributes it to the individuals through their site mailboxes. Thus mailings by TALB to its members through the District mail service generally involve approximately one package of mail per site. The District clerical employee at each site is only required to place the packet of association mail in the hands of a site representative. A TALB mailing will thus involve only 107 pieces of bundled mail, one for each of the 77 schools and the 30 Child Development Centers.

Based upon these facts the Association contends that the District has unreasonably restricted rights to utilize the district mail service. In response the District contends that its regulations are reasonable, are mandated by the federal Private Express Statutes, the California Education Code, PERB

case law, and the need to maintain an efficient and cost effective mail service in the District.

In practice the District has refused at least three newsletters of the Association pursuant to the provisions of the regulations which purport to require District approval based on content. On two occasions the District refused to permit a newsletter which contained certain material relating to local political campaigns and school board elections. On at least one other occasion the District has refused to permit the Association to send a newsletter containing a paid advertisement. And still on another occasion the District refused to permit a pamphlet containing League of Women Voters information.

ISSUES

A. Whether on the facts of this case charging party has established that the District denied employee organizations and employees their statutory rights.

1. Whether the Association has a right to utilize the District mail service.

2. Whether an Association's right to utilize a District mail service includes the right to receive mail from employees.

B. Whether the District has justified that it reasonably restricted use of its mail service based upon the federal Private Express Statutes and federal regulations.

C. Whether the District has justified that it is reasonable to bill employee associations for their share of the cost of the use of mail service.

D. Whether the District has justified that it is reasonable to limit use of the mail service based upon the quantitative and economic burden.

E. Whether the District has justified that it is reasonable to review in advance the content of communications sent by associations through the District mail service.

F. Whether the District's content requirements for advance approval of communications sent through the District mail service are reasonable:

1. Pursuant to the Private Express Statutes;
2. Pursuant to the decision of PERB in Richmond/Simi, supra;
3. Pursuant to the contract between the parties;
4. Pursuant to the Education Code.

G. Whether the District's regulations are justified by alternatives to use of the mail service.

H. Whether charging party has established a violation of 3543.5(a) and (b) of the EERA.

I. Whether charging party has established a violation of 3543.5(c) of the EERA.

J. What remedy, if any, is appropriate.

CONCLUSIONS OF LAW

A. The Association's Claim that the District Unlawfully Denied it the Right to Use Other Means of Communication.

1. The Association's Right to Use the District Mail Service.

The Educational Employment Relations Act, section 3543.1(b) provides that employee organizations "shall have . . . the right to use institutional bulletin boards, mailboxes and other means of communication, subject to reasonable regulation. . .." Section 3543 provides that for purposes of representation on all matters of employer-employee relations "[p]ublic school employees shall have the right to form, join, and participate in activities of employee organizations of their own choosing . . " or to refrain from doing so.

Section 3543.5(a) makes it an unfair practice for a public school employer "to 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 [the EERA]." Section 3543.5(b) makes it unlawful for an employer to "[d]eny to employee organizations rights guaranteed to them by [the EERA]."

The Public Employment Relations Board has determined that the California Legislature intended that the internal mail systems of school districts are "other means of communication" which employee organizations have a right to use pursuant to

section 3543.1(b) of the EERA. This right is qualified solely by a District's need to reasonably regulate the use of such facilities. Richmond/Simi, supra at 12-14.

In the case of Richmond/Simi, supra the Board examined mail systems in two other school districts which were substantially similar to the one at issue here. PERB said:

> As a threshold matter, PERB finds the Legislature intended to include the use of internal school mail systems as one of the employee organization access rights authorized by section 3543.1(b) of EERA. (Id. at 9.)

As a concomitant issue, PERB, later in its decision, went on to confront the question of whether denial of access to the school mail systems denied any employee rights protected by the EERA. The PERB stated:

> A different question is raised by the organizational claims that the districts interfered with, restrained or coerced employees in the exercise of their rights guaranteed by EERA, in violation of section 3543.5(a). (Id. at 29.)

PERB went on to find that the denial of use of the school mail system constituted "some" harm to employees' rights to receive communications from employee organizations. PERB then shifted the burden to the District to show that the harm was justified by operational necessity. (Id. at 29-31; see also Carlsbad Unified Unified School District (1/30/79) PERB Decision No. 89; Wilson v. University of California at Berkeley (11/25/81) PERB Decision No. 183-H at 5.)

2. The Association's Right to Receive Mail from Employees.

The facts in Richmond/Simi, supra, did not directly posit the question of whether the right to utilize a school mail system encompassed use by employees responding to or communicating with their selected representative. However, the language of that case is instructive. The Board observed that school districts had historically made their mail systems available for two reasons:

> Effective communication between employee organizations and their members is essential for productive employer-employee relations; and mail systems are perhaps the most efficient and non-disruptive means of communication available to employees and their representatives. (Richmond/Simi, supra, at 10.) (Emphasis supplied.)

The Board went on to observe that in determining what constitutes reasonable regulation:

> [D]istrict limits on access rights granted to employee organizations . . . are to be consistent with statutory labor law principles set forth in EERA. Within this labor policy design, effective and non-disruptive organizational communications are an important aspect of employee rights 'to form, join, and participate' in employee groups . . . by serving as necessary links between employees and their representatives. Without adequate communications, these employee rights at their work place would be largely empty or subject to employer whim and domination. In turn, employees and their representatives might be forced to pursue unscheduled, disruptive and even secretive means of communication hardly benefiting schools in this state. (Id. at 15.)

Thus PERB observed that EERA section 3543.1(b) was a "legislative step to . . . insure that employee organizational communications would be relatively unhampered." (Ibid.)

In further analyzing section 3543.1(b) of the EERA, PERB noted that since it was the section's design to "protect employee organizations' ability to communicate freely with employees, it is appropriate to consider cases dealing with employees' ability to communicate among themselves." (Id. at 16.)

PERB then went on to analyze certain private sector and constitutional law cases relating to the underlying principles which justify the need for an adequate means of employee expression.[3] (See Richmond/Simi, supra, 16-18 and cases cited therein.)

The Board did not expressly find that the right to use other means of communication extended to employee responses and communications to their selected representatives. However, the rationale and analysis in the Board's decision leads to the conclusion that PERB recognized the Legislature was aware of employees' need to be able to express themselves. Indeed the

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3PERB may use federal labor law precedent where applicable to public sector labor issues. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 603 [116 Cal.Reptr. 507]; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; Sweetwater Union High School District (12/6/76) EERB No. 4 (PERB was previously known as the Educational Employment Relations Board or EERB).

right to utilize other means of communication given expressly to employee organizations is, in part, derived from the language of private sector cases which guarantee to employees the right to communicate among themselves and with employee organizations.

The structure of the EERA premised upon the right of full and free communication among employees, employers and employee organizations must of necessity envision that employee organizations will need to solicit information and communications from the affected employees. It is incongruous that the Legislature would establish a unilateral statutory right of communication to employees, thus creating a vacuum in the vital area of employee response. Such a statutory interpretation would deprive employee organizations of any means of discovering the employees' opinions as to contract provisions, contract negotiations, contract violations, grievances and general matters affecting the day-to-day operations of the employee organizations seeking to represent those individuals. It cannot logically be concluded that the Legislature wanted to silence this vital source of input necessary for employee organizations to fulfill their duty to fairly represent their members. (See EERA section 3544.9.) Finally the record itself shows that the District on occasion has permitted TALB to use the mail service to solicit employee input concerning employee-paid income protection plans which

bear a reasonable relationship to the employment concerns of the employer, the employee organizations and their members.

It is concluded that the right to use other means of communication, more specifically District mail systems, includes the right to receive communications from employees.

The regulations of the District summarized above prohibit use of the District mail system by employee organizations, except for mailing of one regular weekly newsletter of the local organization, limited in size to a three-page document 8 1/2 x 11 inches. Moreover, the regulations when read in their entirety and specifically paragraph 7 prohibit individual employees from mailing to their representatives any communications or responses to communications via the District mail system. These provisions of the District's regulations appear to unduly limit the right to use the District mail system. The record thus supports a conclusion that charging party has made out a prima facie case. The burden is thus shifted to the District to justify the reasonableness of the regulations at issue here. (Richmond/Simi, *supra*, at 20-21 and cases cited therein.)

B. The District's Justification that it Has Reasonably Restricted Use of its Mail Service Based Upon the Federal Private Express Statutes and the Accompanying Federal Regulations.

The District urges that certain limitations embodied in its regulations are required by the federal Private Express

Statutes and the attendant regulations interpreting them. (See 18 U.S.C, secs. 1693-1699; 18 U.S.C, sec. 1724; 39 U.S.C, secs. 601-606).

The Private Express Statutes derive their authority from Article I, section 8, clause 7 of the U.S. Constitution which directs Congress to establish "post offices and post roads." (United States Postal Service v. Brennan (2d Gir. 1978) 574 F.2d 712, 714.) Pursuant to 39 U.S.C, sec. 401(2) the Postal Service adopted substantive regulations relating to the Private Express Statutes, codified in 39 C.F.R, secs. 310, 320. These federal regulations have been held to have the same preemptive effect on state laws as do the Private Express Statutes themselves. (Grover City v. U.S. Postal Service (CD. Cal. 1975) 391 F.Supp. 982, 986.)

In ex parte Jackson (1877) 96 U.S. 727, 734, the Court held that "the power of Congress over the mail is an exclusive power and embraces the entire postal system of the country." Several non-binding authorities including Advisory Opinions of the United States Postal Service have indicated that the Private Express Statutes and regulations specifically apply to school district mail systems.

The District contends that the Private Express Statutes which grant a monopoly to the mail service limit its ability to carry any letters and other materials on behalf of an employee organization or on behalf of employees seeking to communicate

with an employee organization.[4] The District takes the position that unless the carriage of materials by the District mail service can fall within an express exception to the Private Express Statutes that such conduct on the part of the District would be violative of federal law.[5]

Pursuant to the second exception found in 39 C.F.R, sec. 310.2(d), the District may carry its own mail via its mail service as "letters of the carrier." The District has

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4The Private Express Statutes place responsibility on entities carrying mail to insure that there is no violation of federal law. Thus the legal impetus for the District's regulations appears to come from 39 C.F.R, sec. 310.4 entitled "Responsibility of Carriers." This section cautions private carriers that they should take reasonable measures to inform their customers that only proper mailable materials should be given to them for carriage. It also states that carriers should desist from carrying certain items when reasonably accessible information indicates to them that the items tendered are not proper under the Private Express Statutes.

539 C.F.R, secs. 310.2(d) and 310.3 contain five exceptions which permit private carriage of letters:

> (1) [letters which] relate to some part of the cargo of, or to some article carried at the same time by, the conveyance carrying it;
>
> (2) [letters which] are sent by or addressed to the carrier;
>
> (3) [letters which] are conveyed or transmitted without compensation;
>
> (4) [letters which] are conveyed or transmitted by special messenger employed for the particular occasion only . . . ;
>
> (5) [letters which] are carried prior or subsequent to mailing.

additionally provided in its regulations that it will carry regular newsletters of an organization. The District's position is based on the fact that the Private Express Statutes cover the private carriage of letters. As codified in the regulations, a "letter" has been given a broad definition: "a message directed to a specific person or address and recorded in or on a tangible object." (39 C.F.R, sec. 310.l(a).)

Accordingly, matters that do not constitute "letters" are outside the prohibitions of the Private Express Statutes. Several items specifically excluded include photographic materials, tags, labels, stickers, signs and posters, books, catalogues, telephone directories and printed letters disseminated to the public. (See generally 39 C.F.R, sec. 310.l(a) (7) (i)-(xi).)

The District permits the mailing of one regular newsletter by employee organizations pursuant to the definitional exclusion of "newspapers and periodicals" found at 39 C.F.R. 310.1(a)(7)(iv). The phrase "newspapers and periodicals" is not defined in the Private Express Statute regulations. However, according to one of the United States Postal Service Advisory Opinions dated July, 1976, "a newspaper or periodical must be issued at regular and stated frequencies." (Opinion No. PES 76-17, p. 6.) This definition of newspaper or periodical requiring regular issuance at stated frequencies appears to

have been derived from Webster's New International Dictionary. Thus, except for regular newsletters issued by an employee organization, the District's regulations prohibit all other mailings by an employee association through the mail system in reliance upon the Private Express Statutes and the interpretative regulations. Similarly, these regulations and statutes are relied upon to preclude use of the District mail service by employees when attempting to communicate with a representative organization and to preclude any newspaper mailings which contain "commercial announcements."[6]

PERB has concluded that it is constitutionally impermissible for this Agency to determine that the statutes it administers are unenforceable or unconstitutional.[7] (Richmond/Simi supra, at 14 fn. 6; see also, William H. Wilson

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[6]Compare the District's regulation paragraph 3(a) and 39 C.F.R. 310.1(a)(7)(iv). The reason for the prohibition against commercial announcements is not at all clear.

[7]Cal. Const., Art. III, sec. 3.5 (1978):

> An administrative agency, including an administrative agency created by the constitution or an initiative statute, has no power:
>
> . . . .
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal regulations prohibit the enforcement of such a statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or regulations.

v. University of California at Berkeley, supra.) Specifically PERB has declined to hold that the access afforded to a District's mail system under EERA conflicts with or is preempted by the provisions of the Private Express Statutes. Any such finding must be made by another tribunal. (Richmond/Simi, supra, at 14 fn. 6.)

While the Board need not reach the question of whether the EERA has been preempted by federal law, it is possible to read the Private Express Statutes to be consistent with the provisions of the EERA.

The language of the Private Express Statutes expressly excepts from the statutory prohibitions " . . . the conveyance or transmission of letters or packets by private hands without compensation . . . .". (See 18 U.S.C, sec. 1696(c).)[8] To

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[8]The regulations explain this statutory exception:

> (c) Private hands without compensation. The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered, Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception; or, when a person is engaged in the transportation of goods or persons for hire, his carrying of letters "free of charge" for customers whom he does charge for the carriage of goods or persons does not fall under this exception. (39 C.F.R, sec. 310.3(c).)

fall within the exception, a carrier may neither be monetarily nor non-monetarily compensated for mail services rendered. In situations similar to the instant case, certain advisory opinions of the United States Postal Service posit that the very nature of the economic relationship between a union and an employer gives rise to a quid pro quo for the carrying of mail and therefore amounts to "non-monetary compensation" despite the fact that no charge is made for the services. Moreover, these opinions argue that whether or not use of the mail system is part of the collective bargaining agreement between the parties, the services of the employees coupled with the speculative failure of an association to press other demands from the employer gives rise to compensation within the meaning of the Private Express Statute. The District makes a similar argument in the instant case.

None of the advisory opinions upon which the District relies was issued pursuant to a statutory scheme such as exists under the EERA. The advisory opinions assume that the use of the mail systems in question is discretionary. In the instant case, under EERA, the law mandates that the District make available to employees and employee organizations other means of communication including a District mail system. The obligation to make the the mail system available derives from statute and not from contract or the employment relationship. Therefore, there is no consideration running to the District

for the use of its mail system. Rather, school districts in the State of California are required to make their mail systems available to employee organizations without compensation or charge. Thus the use of the mail system is without compensation and arguably falls within one of the exceptions of the Private Express Statutes. (See discussion and cases cited at pp. 32-34, infra.)

The position of the District and the opinions on which it relies are further found to be untenable when analyzed in light of the relationships of all the parties affected by the statutory provision in question. The EERA clearly affords all employee organizations a right to use school mail systems. Thus, even if there were non-monetary consideration flowing from the exclusive representative by virtue of a contract with an employer or by virtue of the compensation given to the employees it represents, there is no basis for finding consideration between the employer and those organizations who are not the exclusive representative of employees. It cannot be argued that the Legislature of California intended to give a greater right of communication to non-exclusive representatives than it did to the exclusive representatives who have a contract with the employer.

It is found that those provisions of the District's regulation which limit the use of the mail service only to employee organizations sending regular newsletters and which

otherwise restrict certain content of such newsletters or communications, cannot be justified by reliance upon the Private Express Statutes. Since this is the sole basis upon which the District relies to justify the exclusion of such communications through the District mail system, these exclusions must be found to be unreasonable and therefore constitute an unlawful restriction of the right of access to school mail systems.

C. The District's Justification of its Right to Charge for Use of the Mail Service.

Paragraph 9 of the District's regulations provides: "[a]lthough associations are not currently charged for costs, upon advance notice, the District reserves the right to bill associations for their share of the costs of maintaining the mail service." This provision of the District's regulations relates to the discussion immediately above. The Association contends that the provision just quoted was inserted into the regulations to avoid the exception of "private hands without compensation." The District contends that this provision is merely inserted in the regulations to permit it to recoup its reasonable costs of administering the mail service should expenses become excessive.

PERB has held that statutory access rights cannot be subjected to the taxation of costs. (Regents of the University of California, Lawrence Livermore National Laboratory (4/30/82)

PERB Decision 212-H at 16.) In the instant case the regulations which reserve the right to assess a pro rata share of the costs would be inconsistent with the rationale adopted by the Board in Lawrence Livermore National Laboratory, supra. In addition, the regulations entitled "Administrative Regulations for Exclusive Representative Association Use of the District Mail Delivery Service" are directed to exclusive representatives and other District associations. The District has offered no evidence that other users of the mail system may also be required to pay a pro rata share of the costs. (See Lawrence Livermore National Laboratory, supra at 16 and Regents of the University of California, Lawrence Livermore National Laboratory (8/24/82) PERB Decision No. 212a-H, Request for Reconsideration at 5.) It is incumbent upon the District to establish that its regulations are reasonable. The District must demonstrate that the provisions of the regulations are nondiscriminatory and equally applicable to other users of the services to which access is sought. (Ibid.)

The additional following considerations would support the finding that paragraph 9 is unreasonable, should the District attempt to enforce its provisions against an employee organization and tax costs for the use of the mail system. First, the regulation is vague in that it is not clear what portions of the costs may be billed. The regulation fails to explain whether a portion of the fixed cost will be billed or

whether only the added costs of mailing are to be billed and what factors will be utilized to determine these costs. Second, it is arguable, that the taxation of costs for the use of the District mail system would constitute a prohibition in toto. Many organizations, if not the charging party, would be deterred from utilizing the mail system based upon an unpredictable assessment added on to the other costs of producing and distributing information to their members. Third, to allow the District to charge for the use of the mail service would open the door to charges for the use of mailboxes, bulletin boards and other facilities. The Legislature could not have intended without express provision to impose such an unreasonable burden on the access rights clearly granted to employee organizations by statute.

It is therefore concluded that, any attempt by the District to assess costs for use of the mail service would be an unreasonable restriction on an express employee organizational right granted by the EERA.

D. The District's Justification that it Is Reasonable to Limit the Use of the Mail Service Based Upon Quantitative and Economic Burdens.

The District justifies certain limitations in quantity and frequency of mailings based upon the alleged impact they will have on the cost and efficiency of the operation of the District mail service. Inferentially the District justifies its limitation on individual responses to the Association and

mailings by the Association to individual employees on the basis of an increased burden upon the mail system.

The record reveals that the District's proffered justification is not factually supported. The District has offered no evidence to show that its mail room cannot manage to handle more than one mailing per week on behalf of an employee organization. While there is evidence in the record that the mail room is operating at "peak efficiency," it is clear that the regulations, when promulgated, envisioned that exclusive representatives "plus associations which are not exclusive representatives" are each permitted to utilize the mail system for one regular, weekly newsletter. To date only one employee organization has chosen to do so. The District's mail room has handled TALB'S use of the mail service without any increased effort, cost, or inefficiency on the part of the mail room employees.

The record further reveals that the utilization of the mail service by employee organizations has never reached the level of use anticipated by the regulations. In this regard the record reflects that the District anticipates there are some 12 organizations which could utilize the mail service pursuant to these regulations. Thus, utilization could increase by twelvefold beyond current levels and still fall within the permissible limits of the regulations.

The record further shows that each TALB mailing involves, at most, 107 pieces of mail. The Association has been able to

accomplish this result by sending a package of mail to site representatives for distribution at the 77 school sites and 30 Child Development Centers. The 107 pieces of mail, when compared with the daily average of almost 9,000 pieces of mail processed by the mail room, discloses that organizational mailings comprise an infinitesimal percentage of the materials handled by the mail room.

Thus, it is found that the District has not established that the general limitation of one mailing per week is justified by any business necessity or other economic or physical burden upon its mail room and mail service.

Similarly, the District has not factually established that the limitation of three, 8 1/2 x 11 inch pages is a reasonable limitation on the size and volume of each piece of mail sent by an employee organization. The record does reveal that the Association has not sought to send mailings of more than one or two pages. However, since the regulations limit organizational mailing to regular weekly newsletters, a number of other documents which the Association or any other employee organization might seek to send have been excluded by the terms of the regulations.

Thus, on occasion an association may seek to send out contract proposals, contract proposal surveys and other mailings to its membership to inform them of the progress of negotiations and also to solicit employee input. On those

occasions, mailings might be greater in frequency, size and volume than the District regulations permit. However, it is unlikely that associations would frequently send mailings in a volume which would justify the general size and page limitation imposed by the District.

First, it must be remembered that each additional page increases the Association's cost of a mailing. Thus mailings of large size are not likely to occur on a regular basis. Second, the only record evidence of frequent communications relates to those from an exclusive representative during contract negotiations, which generally occur every one to three years. It is unlikely that even exclusive representatives will turn out voluminous materials relating to contracts and negotiations. There is a need during negotiations to communicate rapidly with employees. Large voluminous communications would be cumbersome for the employee organization and it is unlikely that they would become a pattern. It is more likely that an association would utilize short informational communications to its membership.

The District has also failed to show that its arbitrary limitation of three, 8 1/2 x 11 inch pages is justified by an actual burden on its mail service. There is evidence that the containers provided to carry the mail to various sites and to hold the mail at the mailroom are somewhat limited in size. However, there is no evidence to show that an additional page

or pages would significantly affect the utilization of the existing containers for handling mail or otherwise burden mailroom employees and staff. Nor is there evidence on the record to show that larger containers have not been used in the past or could not be acquired for future use if the need arises. Thus, there is no justification for the size and quantity limitations imposed by the mail service regulations.

The District suggests that if employees were entitled to utilize the mail service, approximately 4800 additional pieces of mail might be generated on a daily basis. This would require that every employee utilize the mail service on a daily basis. The District argues that such an additional utilization of the mail system would increase the cost of operation of the District mail service by as much as 50 percent or $62,000 per year. This argument in fact disproves the District's contention.

There is no record evidence that there has been anything close to 4800 additional pieces of mail per day flooding the District's mail system. Indeed, prior to 1979, when employees freely utilized the mail service, the District was unaware of this use, let alone was it aware of any additional burden created by such mailings. Moreover, it defies logic to assume that either individual employees or employee organizations would regularly utilize the mail system on a daily basis. Even were communications to be sent daily, evidence in the record

reveals that employees could return mail through site representatives and the number of pieces of mail on a daily or weekly basis would be, at most, 107 pieces per day.

Thus, the burden on the District mail service will never likely reach the volume which it argues will impact upon efficient operations. It seems impossible that utilization of the mail service by individual employees or employee organizations could ever reach a volume of 4800 pieces of mail per day. This is so, even if employees were permitted to send individual communications to associations and not use the convenient site representatives at their school. The amount of actual and potential use of the mail service by employees and employee organizations justified by the evidence is so small that the cost and impact upon the District's operations is almost non-existent. The District's speculations to the contrary are unpersuasive.

Finally, for all the reasons stated above, the limitation upon the ability of site representatives to return packaged mail to the association mail box at the Board of Education Building is equally unreasonable. There is no evidence that the site representatives at the 107 sites throughout the District would flood the mail room with mail in such a fashion to impact upon the mail service. Indeed all site representatives would be sending their envelopes to a single mail receptacle at the headquarters building. Their

utilization of the mail service would have an insignificant impact upon the system.

Thus the District's limitation on the size and number of communications per week which an organization may send through the District mail system and the District's limitation upon the use of that mail system by individual employees and site representatives has not been shown to be justified by any legitimate business considerations and is, at best, speculative. On the facts of this case, the restrictions based upon the alleged burden to the District's mail service are unreasonable and thereby constitute an unlawful limitation upon associations' rights to use the District's mail service.

E. The District's Requirement that it Be Given Advance Notice and the Right to Examine Materials Before They Are Sent Through the District Mail Service.

Paragraph 2 of the District's regulations is entitled: "Advance Notice." This paragraph requires that the District be furnished two "file copies" of any communication to be sent through the mail service, by 9:00 a.m. of the day prior to the date of distribution. Further, the regulation provides that any such mailings must be given the approval of the District ". . . as to volume, bulkiness, other hazards, and conditions specified below. . ."[9] One reason for the requirement that materials be given to the District prior to distribution is to

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[9]See discussion at 48-56, infra.

permit management personnel time to examine the material for certain content limitations which are expressly set forth in the regulations at Paragraph 3 (see pp. 9-11, supra). The regulations thus provide the District an opportunity to see organizational communications prior to the time that they are disseminated to the organization's membership or affected employees.

Advance scrutiny of Association communications to be sent through the mail service is an inappropriate restriction on TALB's access rights guaranteed by the EERA. In Richmond/Simi, supra, PERB construed as unreasonably restrictive a regulation which similarly required materials to be submitted to District management personnel prior to distribution.[10] (*Id.* at 5.) After reviewing a substantial body of case law relating to the rights of public employees to free expression, PERB stated:

> The employer's interest in regulating speech conduct on campus is fully protected, under section 3543.1(b), by narrow guidelines and by the deterrent threat posed by the possibility of subsequent punishment for unprotected behavior. (Id. at 20 [emphasis supplied].)

In reaching this conclusion, PERB relied upon Pittsburg Unified School District (2/10/78) PERB Decision No. 47 in which the Board sanctioned discipline of employees for distribution

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10The regulations in Richmond/Simi, supra, expressly provided: "[t]his submission is not to be used as a prior restraint or censorship." (*Id.* at 5 fn. 2.)

of material found not to be protected by free speech rights or the EERA.

The Board further stated:

> . . . to the extent that a document does breach requirements of school employee discipline or operations, punishment after distribution, constitutes an adequate deterrent to organizational misconduct . . . (Richmond/Simi, supra at 26.)

PERB has relied upon the Supreme Court case Bright v. Los Angeles Unified School District (1976) 18 Cal.3d 450. There the court was called upon to determine whether the right to exercise "free expression" in section 10611 of the Education Code also permitted school districts to require prior submission of materials to be distributed on school premises for prior approval. After analyzing numerous federal and state decisions the court concluded that the Education Code expressly afforded students certain rights of free expression and the ability to utilize institutional facilities not unlike those in the instant matter. The court also focused on the language of the Education Code which permitted schools to prohibit certain types of expression involving libel, slander, obscene communications, etc. The court concluded that the right given to a school district to prohibit these general forms of communications should be:

> . . . more reasonably construed as not authorizing prior restraint but rather as authorizing the stopping of such distribution once begun and the imposition

> of sanctions against those students responsible for such distribution. (Id. at 462.)

The court went on to conclude that the Education Code section in question did not grant schools "*carte blanche* to enact regulations embodying constitutionally suspect prior restraint systems." Rather, the Legislature intended to establish certain guidelines prohibiting distribution of "specified categories of objectionable material." The court stated under such system:

> . . . upon noncompliance with the regulation, school authorities would be authorized to stop distribution of the offensive material and discipline those responsible; *they would not, however, be authorized to prevent the distribution in the first place through prior administrative censorship or prior restraint of its content.* (*Id.* at 464 [emphasis supplied].)

In addition to the above analysis, there are ample reasons why the District should not be permitted to examine the content of organizational materials at all. The District has conditioned use of the school mail system upon its ability to scrutinize communications of employee organizations. By doing so, the District encroaches upon the confidentiality of certain employee organizational communications to affected employees and thereby gains an unfair advantage over the Association. The District, as an employer, has an interest in knowing what its employees are being told and can utilize information derived from Association communications a day before they are

disseminated to influence matters relating to representation which are of vital concern to the Association and District employees.

Thus, Association communications relating to negotiation positions, tactics, and progress could all be countered by District communications at or about the same time or even before the Association's communication was delivered. Moreover, were the District to scrutinize every association communication, it would have an unfair advantage during election campaigns for exclusive representatives or decertification of an exclusive representative. Finally, such scrutiny could impact on the unfettered use of the grievance procedures available to TALB and employees. Regardless of whether the District would act on the information, disclosure of confidential communications would chill communication.

The portion of the regulations which requires that the District be given advance copies of any materials to be distributed through the mail service is an unreasonable restriction on the right to use that other means of communication. The District may without advance scrutiny remedy inappropriate communications with due process after the fact. Pittsburg Unified School District, supra. In addition, the unfair advantage and prejudice to the confidentiality of such communication outweighs any burden placed upon the District's mail system by denying the right to scrutinize

copies of association communications. (Richmond/Simi, supra at 18-19.)

It is thus concluded that the District should not be permitted to scrutinize the content of publications sent through the District mail service as a condition for utilizing the service. This is so even if the communications are given to the District concurrent with their distribution to employees. While there would be no opportunity for prior scrutiny in this instance, it fails to take into account that certain communications sent to employees may not be meant for the District's eyes at all. Should they at some later time slip into District hands, that is different than requiring the association sending them to disgorge their contents to management.[11]

While the District should not be permitted to scrutinize mailings for content, the District should be able to see the material in packaged form prior to the time when they are to be distributed. PERB has indicated that districts may regulate

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[11]In Bright v. Los Angeles Unified School District, supra, the Court suggested that material to be distributed be submitted to school authorities "for informational purposes only." (Id. at 460.) However, in Bright, the document being distributed was a newspaper which would be available to both school authorities as well as the intended recipients, equally at the time of distribution. Moreover, the court in Bright assumed that informational copies of newspapers would be used to obtain a court injunction to remedy any problems with the publication, thus insuring due process as opposed to censorship by individuals.

the time, place and manner of an activity so long as it does not impinge upon content. (See Richmond/Simi, supra, at 19; Long Beach Unified School District, supra, at 22; Lawrence Livermore National Laboratory, supra, at 16.)

The record in this case reveals that the District requires that materials to be distributed on the following day be received in the mail room for sorting in the early afternoon. The requirement that the materials be given to the District representatives at 9:00 a.m. on the day prior to their dissemination does not appear to be unreasonable in terms of time. The three hours prior to the afternoon was to be utilized by administrative personnel to review the content of the material. The time is so close to that when the mail room would have to have any mailings for distribution that one cannot say that it is an unreasonable restriction on the use of the mail system. (Ibid.) The District is entitled to view any mailings for bulkiness, hazards and volume in advance of their presentation for distribution. The purpose of such advanced notice is to allow the mail room employees sufficient warning of any unexpected distributions which may require a different procedure than that normally followed.

It is found that the regulations to the extent that they require that mail be given to the District at 9:00 a.m. on the day before it is to be distributed are not an unreasonable restriction for the limited purposes of determining the volume,

bulkiness and any other hazards that might be involved in such a mailing. However, it has been found that the District is not entitled to review the content of this material and thus the regulations requiring "file copies" for the District of their receipt by their employees are unreasonable cannot be enforced.

F. The District's Justification for its Content Regulations.

Paragraph 3 of the regulation interfaces with the above-discussed claim of right to scrutinize materials before they are distributed through the mail system. This paragraph provides nine criteria, (a) through (i), which should be utilized by management "in determining approvals" for mailing.

The District's attempts to regulate the content of communication sent through its mail service are subject to attack on three general grounds. First, the approval of content is left to the unfettered discretion of District administrators. In addition to allowing individual managerial personnel to make determinations as to whether a communication fits within the prohibited category set forth in the District's regulation, there is no procedure afforded by the regulations for prompt review of an administrative determination prohibiting use of the mail service because of content. (See Richmond/Simi, supra at 25 and 22-23; and Bright v. Los Angeles Unified School District, supra, 18 Cal.3d at 460.)

Second, the content regulations on their face do not establish that they are designed to preclude speech which, if

not restricted, would result in immediate harm to the substantial interests of the District. Indeed, as PERB noted:

> It is nearly certain that communications distributed through the mail systems would not inspire immediate violent conduct by the readers or substantially impair any essential school function . . . . (Id. at 26 [footnote omitted].)

Additionally, the content regulations on their face do not "provide standards tied to imminent unlawful conduct." (Id. at 25.) Thus, the content regulations do not justify why materials cannot be sent through District mail service, yet those same materials can be placed in mailboxes or on bulletin boards or other District facilities regardless of. their content. This distinction without a difference appears to make the regulations artificial; raises question as to the need for the regulations at all; and casts doubt on their reasonableness. (16. at 22-23, 28.) In this regard, the District's argument is especially weak, in view of the fact that it argues the Association could use the United States mail to distribute the very same publications that would be arguably prohibited by the content regulations. Clearly, an association could address a document with material prohibited by Paragraph 3 of the regulations to the District for distribution in sealed envelopes with postage paid to the various school sites. The District would be assisting in carrying these materials, the only distinction would be that postage would have been paid on

them. It is impossible to discern how the payment of the United States postage would cure a defect which the District contends goes to the inherent lawfulness of the document's text.

Third, the record indicates that certain documents which the Association sought to send through the mail service were rejected by the District because in some small part they ostensibly violated the content regulations. No distinction is made between communications that are harmful in their entirety and those that contain a _de minimus_ statement which, when balanced against the entire communication, should not permit the District to deny its transmittal. The record shows that often the bulk of material may have nothing to do with the areas proscribed by the District's regulations. However, one small commercial advertisement contained in the newspaper has been sufficient for the District to reject the entire publication for transmittal through the mail service. The District's regulations thus provide no way to appropriately balance the injury to the right to utilize the system against the harm of a single commercial advertisement or a single derogatory sentence or line.

In addition to the general concerns which appear to make the content regulations unreasonable, there are certain specific problems with each of the District's regulations. The first two limitations on mailings have been previously

discussed. These involve the Private Express Statutes and the requirement that mailings may be limited to regular newsletters and may not be directed to specific persons. The above discussion concerning the Private Express Statutes as a defense is applicable here. These criteria cannot be a basis for denying the Association or affected employees access to the District mail service.

Criteria f, g and h indicate that the District will not approve any material that sanctions, induces, aids encourages, abets or assists in any manner a strike, a disruption of regular school operations; or destruction, alteration or obliteration of any District property records, etc. The District defends this criteria for approval because of the no-strike provisions in the contract between the parties. It is found that this is an unreasonable regulation of the right to use the mail service. The contract by its own terms and of its own nature has specific means of enforcement. The contract contains a grievance procedure, and additionally, the contract may be enforced in any state court. The District may not condition the statutory right to use the District mail system upon compliance with contractual provisions in a collective agreement between the parties. To permit the District to do so, places the exclusive representative, signatory to that contract, at a disadvantage as opposed to other organizations not signatory. If the District contends that the provisions

were applicable to all organizations, then the contractual bases for these provisions must fail. If the District only applies these provisions to the exclusive representative, then it is discriminatory. Moreover, the Legislature could not have intended that the District achieve a contract enforcement advantage by placing conditions upon statutory rights within the control of the District. Thus, the District's justification for these provisions must also fail.

Sections c and d of the content provisions of the regulations appear to be based upon "language" in _Richmond/Simi_, _supra_. Section c states that any material which "inspires immediate violent conduct by readers or substantially impairs any school function shall not be sent through the school mail service." Section d provides that any material critical of public school officials with "actual malice or reckless disregard for the truth" shall not be sent through the District mail service. While this language quoted in the regulations appears to be found in _Richmond/Simi_, _supra_, at 26, 27, clearly the Board did not adopt these general statements as a permissible precondition to use of a district's mail system. PERB was merely stating that certain types of communications might be prohibited when due process and explicit language provided for their prohibition. (See _Richmond and/Simi_, _supra_, at 20-28.)

Paragraph e of the content regulations provides that no approval shall be given to any communication:

> . . . which urges the passage or defeat of any school measure of the District including, but not limited to, the candidacy of any person for election for the governing board of the District . . .

The District states that this limitation on communications is sanctioned by section 7054 of the Education Code. That section provides as follows:

> Except as provided . . . no school district . . . funds, services, supplies, or equipment shall be used for the purpose of urging the passage or defeat of any school measure of the district, including, but not limited to, the candidacy of any person for election to the governing board of the district.

The District contends it would be in violation of this section of the Education Code if it permitted the use of its mail service for communications by the Association to its members concerning such issues and activities. Indeed the record reflects that such a communication was intercepted and returned to the Association by the District.

Section 3540 of the EERA provides in relevant part:

> Nothing contained herein shall be deemed to supersede other provisions of the Education Code and rules and regulations of public school employers which establish and regulate tenure or a merit civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

Section 3540 of the EERA must be presumed to have been passed by the Legislature with full knowledge of the provisions extant

in the Education Code to the extent that the provisions of the Education Code appear to be in conflict with the EERA. PERB has sought to, wherever possible, harmonize the two statutes. (Compare, Solano County Community College District (6/30/82) PERB Decision 219 at 12-16; Kaplan's Fruit and Produce Company v. Superior Court (1979) 26 Cal.3d 60, 75; Certificated Employees Counsel v. Monterey Peninsula Unified School District (1974) 42 Cal.App.3d 328.)

The Education Code section upon which the District relies, expressly prohibits the use of District facilities for urging passage of school measures, including the candidacy of school board members. The statutory language is clear. The District's reliance upon it to refuse to carry political communications of the nature expressly defined by the statute is reasonable. However, as discussed above, any express limitations placed upon communications must be based upon clear, objective standards, applied without discrimination, and accorded full due process.

Finally, Paragraph i of the regulations relating to content states that no "publication shall contain material violative of the law." This provision is ambiguous and vague. It is unclear what "the law" is: civil, criminal, administrative, contracts, etc. Moreover, because there are other remedies for violations of "the law" separate and apart from the regulations of the District, there is no reason to

justify this basis for prior restraint of communications by the association. The "sweeping" term law, without more, is indefinite and overbroad and can apply to matters concerning which the District has no legitimate interest. (Richmond/Simi, supra, at 21 and 24.)

For all of the above reasons, general and specific, the content regulations in paragraph 3 are an unreasonable restriction on the use of the mail service.

G. Alternatives to the Use of the District Mail Service.

The District repeatedly argues in its Brief and inferentially by its examination of witnesses during the hearing that the Association has available to it alternatives to use of the mail service. The District points to the availability of school bulletin boards, the accessibility of employee mail boxes and the use of the United States Mail as alternative sources to use of the mail service. PERB has already determined that the availability of alternatives is not a basis for reasonable restriction of access afforded by statutory right. (See Richmond/Simi, supra, at 28 fn. 11; Wilson v. The University of California at Berkeley, supra; contrast California Department of Transportation (7/7/81) PERB Decision No. 159b-S which involved different statutory provisions than those at issue here.) The record evidence also shows that the use of the United States Mail is not an effective alternative to the District mail system. The record

establishes that generally the mail service provides next day delivery. The United States Mail service does not enjoy a similar track record. Thus, the District's justification of its restrictions based upon alternatives available to the Association is rejected.

H. <u>The Alleged Violations of EERA Section 3543.5(a) and (b)</u>.

Pursuant to the discussion above, it is found that charging party, other employee organizations and employees enjoy a statutory right to utilize a District mail service pursuant to 3543.1(b). Having also shown that employees have a concomitant right to "form, join and participate in activities and employee organizations . . ." charging party has established a prima facie case that these rights were denied to TALB, other organizations and employees by the District. The regulations of the District restrict the right of employee organizations and employees to use the mail system and there is a nexus between the restriction in the District's regulations and the exercise of these rights by those protected pursuant to the EERA. The District has failed to establish that its restrictions on these employee rights are justified and reasonable on their face. Nor are they justified in any record evidence of legitimate concerns of the employer in operating the school district which outweigh the interests of TALB and employees of the District in using the mail service. Therefore, the District's regulations violate 3543.5(a) and (b)

of the EERA (see Carlsbad Unified School District, supra, at 10-11; Richmond/Simi, supra, at 29; Lawrence Livermore National Laboratory, supra, at 17; cf. San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230 at 13.)

I. The Alleged Violation of EERA Section 3543.5(c).

Charging party alleges that the District also violated section 3543.5 (c) of the EERA. However, nowhere in charging party's brief, nor during the course of the hearing has it shown the theory upon which it makes this allegation. Moreover, there is little or no evidence in the record to support a refusal to bargain. It is therefore found that the Association has not established a violation of section 3543.5(c) of the EERA and this portion of the Charge should be dismissed.[12]

THE REMEDY

It is appropriate to order the District to cease and desist from enforcing the regulations which unreasonably restrict the Association's and the employees' right to use the District mail service. Such an Order is consistent with section 3541.5(c) of the Educational Employment Relations Act which gives PERB:

> . . . the power to issue a decision and order directing an offending party to cease

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12As amended, the Charge appears to only allege a violation of 3543.5(a) and (b). However, since there is no indication that the Amendment superseded the original Charge, it is necessary to resolve the question of whether charging party has established a violation of 3543.5(c) as well.

> and desist from the unfair practice and take such affirmative action, including but not limited to the reinstatement of employees with or without backpay as will effectuate the policies of this chapter.

The Cease and Desist Order in this case is necessary to insure that employees and employee organizations will be guaranteed their statutory rights to utilize the District mail service. The Cease and Desist Order will insure that the District does not impose regulations which cannot be justified as reasonable and consistent with the operational necessity inherent in governing a school district.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. The notice effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (See Placerville Union School District (9/18/78) PERB Decision No. 69.) In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to Government Code section 3541.5(c) it is hereby ordered that Long Beach Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Unreasonably denying by written administrative regulations or other policies the right of an employee organization to send and receive communications to and from employees through the District mail service pursuant to section 3543.1(b), of the Educational Employment Relations Act for the purpose of communicating with the employees, and further;

(b) The District shall cease from interfering with the rights of the employees pursuant to section 3543 by the promulgation of such policies and regulations.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS DESIGNED TO EFFECTUATE THE PURPOSES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Rescind all regulations inconsistent with this Decision and Order;

(b) Within five (5) calendar days after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least 30 workdays at its headquarters office and in conspicuous places at the locations where notices to certificated employees are customarily posted. It must not be reduced in size and

reasonable steps should be taken to see that it is not defaced, altered or covered by any material;

(c) Within 20 consecutive workdays from service of the final decision herein, give written notification to the Los Angeles Regional Director of the Public Employment Relations Board of the actions taken to comply with this order. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the charging party herein.

IT IS FURTHER ORDERED THAT the charging party's allegation that the District violated Government Code section 3543.5(c) by its adoption of regulations concerning the use of the mail service IS HEREBY DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 8, 1982, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be either actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.)

on November 8____, 1982, or sent by telegraph or certified United States mail postmarked not later than the last day for filing in order to be timely filed. See, California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305 as amended.

Dated: October 19, 1982

Stephen H. Naiman
Administrative Law Judge