STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. LUCIA MAR UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4194-E PERB Decision No. 1440 May 24, 2001

Appearances: Arnie R. Braafladt, Attorney, for California School Employees Association; Girard & Vinson by Christian M. Keiner, Attorney, for Lucia Mar Unified School District.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties to an administrative law judge's (ALJ) proposed decision (attached). The California School Employees Association's (CSEA) unfair practice charge alleged that the Lucia Mar Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally contracting out the District's transportation services. The ALJ found a violation and ordered the District to restore all bargaining unit transportation services positions and to make all affected employees whole for any loss of wages or benefits due to the District's violation of the EERA, including interest at 7 percent.

[1] EERA is codified at Government Code section 3540 et seq.

After reviewing the entire record, the Board hereby affirms the proposed decision and adopts it as the decision of the Board itself, consistent with the following discussion.

DISCUSSION

Both CSEA and the District filed exceptions to the proposed decision. The District takes numerous exceptions to the ALJ's key findings. It repeats most of the arguments it raised earlier, and essentially urges the Board to reverse the proposed decision.

CSEA also filed exceptions that pertain to the remedy ordered by the ALJ. It specifically requests the Board to order rescission of the contract between the District and the contractor, Student Transportation of America (STA).

Unilateral Change Issue

With regard to the merits of this case, the ALJ's finding of a violation is amply supported by the record. There is little dispute as to the key facts, and the ALJ correctly found that these facts fall squarely within the clear guidelines established by Redwoods Community College District (1997) PERB Decision No. 1242 and other long-standing precedent. The Board has considered the District's arguments and is not persuaded by them. Accordingly, the Board affirms the ALJ's conclusions.

Remedy

CSEA filed exceptions to the remedy ordered by the ALJ, and requests that the Board order rescission of the District's contract with STA. Having considered the particular factors in the case at bar, the Board finds that the ALJ's remedy is appropriate as written and declines to modify it.

In making this finding, the Board is mindful of the goals to be achieved when ordering a remedy in a unilateral change case and finds that the current remedy is well tailored to achieve these goals. An important goal is to make the affected bargaining unit employees

whole for any losses they may have suffered due to the District's unilateral action until such time as they are restored to their former positions. The ALJ's order of lost wages and benefits, including interest, will achieve that goal.

Another important goal is to compel the District to restore the status quo ante as soon as reasonably possible. That does not necessarily mean that the Board must order rescission of the STA contract, however. In a case involving transportation of public school students, to order abrupt rescission of the District's contract with a third party is almost certain to result in some disruption in services. Furthermore, there is no reason to presume that the District will unreasonably delay terminating the STA contract, since, after issuance of this Decision, there will be a strong financial incentive for the District to take prompt steps to terminate its contractual relationship with STA. Under the ALJ's remedy, the affected bargaining unit members will not suffer further financial harm in the interim; additionally, those persons are guaranteed the right to be restored to their former unit positions. In light of all these factors, the Board finds that the ALJ's remedy is appropriate as written.

ORDER

Based upon the entire record at this case, and pursuant to the Educational Employment Relations Act (EERA), Government Code section 3541.5(c), it is hereby ordered that the Lucia Mar Unified School District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the California School Employees Association (CSEA) about the decision and effects of contracting out the District's transportation services.

2. Denying CSEA its right to represent bargaining unit members in their employment relations with the District.

3. Denying bargaining unit members their right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Upon demand from CSEA, restore all bargaining unit transportation services positions at the earliest opportunity it can terminate the existing contract with the contractor.

2. Make all affected employees whole for any loss of wages or benefits due to the District's violation of the EERA, including interest at 7 percent per annum.

3. Within ten (10) days of service of this decision, post at all work locations where notices to employees customarily are placed, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the notice is not reduced in size, altered, defaced or covered by any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with this order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Member Whitehead joined in this Decision.

Member Baker's concurrence begins on page 5.

BAKER, Member, concurring: Although I join the majority opinion, I write separately because I believe the remedy is inadequate in its goal of restoring the status quo. I would modify the order to provide a portion of the "make whole" monetary relief granted to affected employees be directed to the California School Employees Association (CSEA) in an effort to more effectively restore the status quo.

The Public Employment Relations Board's (Board) decision found that CSEA was denied its right to represent bargaining unit members in their employment relations with the Lucia Mar Unified School District (District). I do not find the Board's cease and desist order with regard to CSEA sufficient to restore the status quo. The Board's order should return all parties, including CSEA, to the status quo ante as it existed prior to imposition of the unilateral change. If for example, the Board's order in this case required reinstatement of affected employees, CSEA's entitlement to dues or fees would be addressed in compliance as part of the award of back pay.

In this case the employer's violation of the Educational Employment Relations Act (EERA) removed dues and/or fee paying members from the bargaining unit. This harms CSEA's ability to represent these employees and the remaining employees in the unit. With the inadequate remedy provided by the Board, what is to stop an employer from unilaterally removing <u>every</u> employee from a particular bargaining unit to destroy the union? The employer could then hope that with virtually no revenue, the employee organization (or at least its staff and lawyers) would fold up shop and go away, leaving no one to contest the employers' unlawful action. I therefore would modify the Board's order to effectuate the policies of the EERA and right the employers' wrong with respect to CSEA.

In addition to the individual employees affected, CSEA was affected by the District's unlawful action and suffered financial losses for which it should be made whole. CSEA is entitled to the difference in membership dues and/or agency fees between that which they received from the affected employees and that which they would have received in the absence of the District's unilateral action. This amount should include interest at 7 percent per annum. The amount should be deducted from the amount provided by the Board's order to affected employees to make them whole for loss of wages or benefits.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-4194-E, California School Employees Association v. Lucia Mar Unified School District, in which all parties had the right to participate, it has been found that the Lucia Mar Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543(a), (b) and (c), when it unilaterally contracted out the operation of transportation services within the District.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the California School Employees Association (CSEA) about the decision and effects of contracting out the District's transportation services.

2. Denying CSEA its right to represent bargaining unit members in their employment relations with the District.

3. Denying bargaining unit members their right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Upon demand from CSEA, restore all bargaining unit transportation services positions at the earliest opportunity it can terminate the existing contract with the contractor.

2. Make all affected employees whole for any loss of wages or benefits due to the District's violation of the EERA, including interest at 7 percent per annum.

Dated: _____ LUCIA MAR UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. LUCIA MAR UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-4194 PROPOSED DECISION (1/19/2001)

Appearances: Arnie Braafladt and Mary Ellen Maldonado, Labor Relations Representatives, for California School Employees Association; Girard & Vinson by Christian Keiner and Michelle Cannon, Attorneys, for Lucia Mar Unified School District.

Before James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On May 25, 2000, the California School Employees Association (CSEA) filed this unfair practice charge against the Lucia Mar Unified School District (District). After an investigation, a complaint was issued by the general counsel's office of the Public Employment Relations Board (PERB or Board) on June 22, 2000. The complaint alleged that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by unilaterally contracting out the

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[1]EERA is codified at Government Code section 3540 et seq. EERA section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to:
>
> (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

District's transportation services.[2] On June 15, 2000, CSEA filed a request for injunctive relief (California School Employees Association v. Lucia Mar Unified School District, Injunctive Relief Request No. 415). On July 7, 2000, the Board denied that request without prejudice.

The parties participated in two informal settlement conferences, but were unable to resolve their dispute. A formal hearing was held July 18 through 20, 2000. Transcripts were prepared and briefs were filed. The case was submitted for decision on October 30, 2000.

FINDINGS OF FACT

The District is an employer and charging party is an employee organization within the meaning of the Act. Charging party is the exclusive representative of the District's classified employees. The parties have entered into a collective bargaining agreement running from July 1, 1998 through June 30, 2001. The collective bargaining agreement contains a grievance process culminating in binding arbitration; however, the contract does not arguably prohibit the contracting out of bargaining unit work. Deferral of this complaint to the arbitration process

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guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]CSEA withdrew allegations included in the original charge which involved the effects of layoff of the transportation employees.

contained in the collective bargaining agreement is therefore not appropriate.

The District is located in southern San Luis Obispo County and covers approximately 550 square miles. It operates a comprehensive high school, a continuation high school, three middle schools and ten elementary schools. A proposed high school and two new elementary schools are expected to be completed during in the 2002-03 school year.

The District provides regular home to school transportation services, transportation services to students with special needs and co-curricular transportation services. At the time this dispute arose, the District was operating 33 regular home to school routes, 9 special education routes, and transportation for approximately 5 to 10 co-curricular field trips each day.

In May 1994, the District began exploring the possibility of contracting out its transportation services. When CSEA learned of this, then CSEA President Mary Melton wrote to Juan Olivarria, assistant superintendent for personnel, stating in part:

> CSEA Chapter #275 would like to re-establish our long term practice of no surprises and open communications by requesting to negotiate both the decision and the effects of the proposed layoffs, using the Interest Based Model. We firmly believe that both parties have mutual interests that can be best met using this method. Please give us a written response as soon as is practicable.

On June 14, 1994, Mr. Olivarria wrote back stating, in part:

> [We] believe your formal request to negotiate both the decision and the effects of the proposed layoffs' is premature. All the Board of Education has authorized, and all

> the district administration has done, is to issue a request for proposals regarding transportation services. No decision has been made at this time regarding possible layoffs of classified employees.
>
> We will notify CSEA Chapter #275 of any potential district course of action regarding transportation services once bids are received and the preliminary evaluation process is concluded. I anticipate a complete formal response to your letter by June 24, 1994.

On June 27, 1994, Mr. Olivarria wrote CSEA:

> I am writing to notify you the district will negotiate the effects of any decision to utilize contract transportation services. Similarly, the district will negotiate the effects of any reductions in the classified bargaining unit resulting from such a contract. The district believes this response meets its bargaining obligations pursuant to Public Employment Relations Board precedent.
>
> I want to emphasize no decision has been made regarding contract transportation. As we informed CSEA Labor Representative Marcie Bayne, the decision, if any, will be made at the Board of Education July 19, 1994, meeting, after input from CSEA Chapter 275 on potential transportation cost-savings.

On July 14, 1994, CSEA Labor Relations Representative Marcie Bayne wrote to the school board stating in part:

> This letter is to place the District on prospective notice that California School Employees Association (CSEA) chapter #275 demands to bargain with respect to any District effort to contract out bargaining unit work in the Transportation Department.
>
> Specifically, in the event the District intends to contract out the work performed by unit members, CSEA demands to bargain over the decisions, as well as, "in-scope" effects of any decision to contract out bargaining unit work.

> This prospective demand letter is exclusively intended to insure that there is no misunderstanding between the parties in the event, at some point, the District moves to contract out bargaining unit work.
>
> This letter should not be read as an indication to the District that CSEA encourages or in any way supports the notion of subcontracting bargaining unit work. Rather, that CSEA expects the District to meet its legal responsibilities with respect to this matter, by providing this union with proper notice and a full opportunity to bargain.

Ms. Bayne's letter also outlined CSEA's arguments as to why it believed the decision to contract out was a negotiable decision.

The District decided that rather than contracting out the transportation services it would create a joint District/CSEA Transportation Advisory Committee (TAC) to explore ways of meeting transportation needs within the District. TAC had no independent decision-making authority. If suggestions for improvements were generated by TAC, they would be referred back to the negotiating team for negotiations.

The parties collective bargaining agreement states:

> [The parties] agree to continue the Transportation Advisory Committee on a permanent basis to research and implement the mutual interests of the District/Classified Negotiating Team. The committee will be comprised of four classified employees chosen by CSEA and two management employees. This committee will meet regularly as needed and make the record of its meetings available to the CSEA Executive Board and the members of the District and Classified Negotiating Teams.
>
> If there need [sic] to be any procedural and/or contractual changes to this agreement, they may be brought back into negotiations as

> a continuation of on-going negotiations, not a part of reopener negotiations. . . .

In 1995, the District again explored the possibility of contracting out its transportation services. CSEA Representative Ellen Maldonado wrote to the school board, the superintendent and the assistant superintendent for personnel stating CSEA's adamant opposition to contracting out and demanding to bargain both the decision to contract out and any resulting effects. Her letter stated in part:

> If in fact this is your intent, CSEA and its Lucia Mar Chapter #275 is putting the District on notice that we adamantly oppose <u>any</u> decision to contract out bargaining unit work and that we demand to bargain the decision and the effects of contracting out transportation services. [Emphasis in original.]

CSEA lobbied board members and administrators and made presentations at board meetings regarding ways to cut transportation costs and make the transportation department more effective. On November 7, 1995, the school board decided not to contract out transportation services. The school board minutes reflect the vote as follows:

> A motion was passed to rule out contract bussing until a financial crisis occurs in the future. Administration and CSEA will continue to work on cost savings.

Following the vote, then CSEA President Reina Diaz wrote to the board thanking it for retaining transportation services within the District. She also stated:

> CSEA feels now that we have a mandate from the school board to work with administration (and visa versa) to streamline

> the department and look for creative ways to control costs. . . .

The TAC continued to meet through 1998-99. It became ineffective and fraught with conflicts, however, and played no material role in the events at issue in this hearing.[3]

In July 1999, CSEA learned that the District was again considering contracting out transportation services. CSEA representative Maldonado wrote to then school board President Erik Howell expressing alarm that the contracting issue was resurfacing. She included the following demand to bargain:

> On July 21, 1999, I was informed that the Lucia Mar Unified School District is **again** investigating the possibility of contracting out student transportation. This information, if correct, is very alarming and disheartening to CSEA and its Lucia Mar Chapter #275. . . .
>
> The CSEA expects that if this is the case, that the District will provide the union with proper notice and a full opportunity to bargain the decision and effects of this matter. [Emphasis in original.]

Mr. Howell contacted CSEA President Diaz and spoke for about an hour. Ms. Diaz mentioned she had heard a rumor that the District might issue a request for proposal (RFP) for transportation services. Mr. Howell testified that he replied as follows:

> . . . I told her that I didn't think that they were just rumors, that I thought there

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[3]The TAC was given an opportunity to address the school board in closed session prior to the most current contracting out dispute. That meeting, which is discussed later in this decision, was not a negotiating session.

> was a good chance that the board would consider looking at going out for an RFP for transportation. And I told her that as a rule I'm not in favor of contracting out services in the school district, but that there's been a lot of problems out in transportation and that we tried, since the day I got on the board, we tried to resolve the problems and instead they seemed to have really gotten worse. And I also expressed to her my frustration that even after the last time we talked about the issue, and the board voted not to go out for contract transportation on the promises and representations by CSEA that they would work to resolve the problems out there, most notably the personnel problems, I didn't feel that they kept up their end of the bargain. And at the point we were at with the transportation department, even not knowing what kind of services we'd be receiving from a contractor, I was inclined to take the devil I didn't know.

Mr. Howell also contacted Ms. Maldonado by phone and explained that an RFP was a very real possibility.[4] He explained that the transportation department had a huge number of problems and that he was disappointed that CSEA had not lived up to its earlier promise to help fix the problem. When Ms. Maldonado raised her demand to bargain over the District's decision to contract out, Howell responded that he did not think the District was required to bargain over contracting out decisions. Ms. Maldonado disagreed with Mr. Howell and they agreed that they would be talking about it further if the District issued an RFP.[5]

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[4]Ms. Maldonado's recollection of this conversation was very vague. I credit Mr. Howell's testimony about the phone conversation where it conflicts with Ms. Maldonado's.

[5] Q [Mr. Keiner] Do you recall Ms. Maldonado raising a demand to bargain the decision to subcontract?

On August 17, 1999, Assistant Superintendent for Business Sandra Davis wrote a memo to Superintendent Nancy DePue which was included in the packet of information distributed to the school board and the public for the August 17 board meeting. The memo stated:

> A summary of the Transportation Department's revenues, expenses, and the cost per mile as reported on the J-141 is attached. It is not possible to determine what, if any, cost savings could be achieved by contracting current transportation services whereby the contractor is responsible for providing all of the capital equipment.
>
> In order to provide the information requested by the Board of Education, it would be necessary to send a request for proposal for transportation services to determine if any savings can be achieved.

The minutes of the board meeting that night reflect the following action by the school board:

A [Mr. Howell] Yes, I do.

Q And what was your response?

A I want to say it was pretty cursory. I said I don't think we have to.

Q And what was her response?

A It was sort of well, you now, I think we do.

Q Okay. How did the conversation close?

A That we would probably talk about this further if the board did go out for RFP, and it looked as though the board would be considering it some time in the next month or two.

> Approval, Authorization, Request for Proposals, Transportation Services
>
> A motion was passed to authorize the staff to prepare an RFP for transportation services at a reduced cost. (Harvey/Howell)
>
> The Board has asked for a committee to be formed to study the pros and cons of contract bussing. The committee will be formed and chaired by Margie Godfrey with board members Curtze, Soto and Senna on the committee.

A new Ad Hoc Transportation Committee (Ad Hoc Committee) was formed and consisted of 12 individuals, only 2 of whom represented CSEA. It also included parent representatives, school board members, district managers, transportation employees and representatives of elementary and secondary schools in the District. The Ad Hoc Committee had no relationship to the old TAC committee.

The charge of the Ad Hoc Committee was to review the current and future transportation needs of the District and concerns about the transportation department. The Ad Hoc Committee met several times between October 1999 and May 2000 and played a role in the development of the RFP. Once the RFP was drafted by District officials, the Ad Hoc Committee reviewed it line by line, making several changes.[6]

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[6]The Ad Hoc Committee was also surveyed to prioritize the transportation issues/concerns from a list of 16 items. Only 5 of the 12 members responded and one of those 5 gave a number one priority to each of the items. Because so few members completed the survey and they were not identified, I draw no conclusions from the results of this survey.

On April 26, 2000, Ms. Maldonado wrote to the Board of Education with another demand to bargain. Her letter stated, in part:

> This letter is to put the District on notice that the California School Employees Association (CSEA) and its Lucia Mar Chapter #275 respectfully demand to meet and negotiate the decision and the effects with respect to any District effort to contract out bargaining unit work in the Transportation Department.
>
> This demand letter is intended to insure that there is no misunderstanding between the parties. The CSEA expects that the District will provide the union with proper notice and a full opportunity to bargain the decision and effects of this matter prior to any decision by the Board with respect to subcontracting bargaining unit work.

Ms. Maldonado learned that the school board was placing the issue of contracting out transportation services on the agenda as an action item for the May 15, 2000, board meeting. She left a phone message for Margie Godfrey, assistant superintendent for personnel, asking if the item could be taken off the board's agenda as an action item. Ms. Godfrey responded that it would not be possible. Ms. Maldonado then wrote a letter to then board President GeeGee Soto which states in part:

> On April 26, 2000, the California School Employees Association (CSEA) and its Lucia Mar Chapter #275 submitted a formal notice to meet and negotiate the <u>decision</u> and the effects of any intent by the school board to contract out bargaining unit work. The union's right to negotiate the decision and the effects prior to any action by the school board is clearly set forth in case law.
>
> The CSEA demand[s] that the school board "cease and desist" any decision to contract

> out bargaining unit [sic] until it meets its legal obligation to meet and negotiate with the CSEA. Failing to do so will compel the union to immediately file a grievance and the unfair labor practices. [Emphasis in original.]

At the May 15 board meeting, prior to consideration of the subcontracting issue, the board received a memo from Anthony Bridges, interim assistant superintendent of business. In the memo, Mr. Bridges discussed the RFP and safety issues, cost issues, District control of contracted services and bus replacement. The memo stated in part:

> In evaluating the issue of outsourcing student transportation, School Districts face the constant financial dilemma of balancing limited state resources and increasing community demands for a higher quality of education. Due to this demand to review operational efficiencies, an increasing number of school districts nationwide are outsourcing home-to-school transportation in an effort to control cost but maintain the highest level of safety and control. Nearly one-third of school districts nationwide are contracting student transportation services.
>
> Supporters of privatization or contracting out student transportation services claim it will save money, improve efficiency, provide specialized expertise, reduce perceived labor issues, avoid managing areas that school administrators are unqualified to supervise and relieve school districts of functions unrelated to their main goal-educating students. Contracting out also has its naysayers, and there are many in the educational field who maintain that it is not feasible for contracting out to save money and further espouse that government does not have to save money.
>
> Regardless of the viewpoint, the District's decision regarding contracting student transportation should be dependent upon a

host of factors. The following information is provided for review and consideration.

Mr. Bridges' memo then reviewed safety issues and concluded that contractors had a "superb safety record that may lead to lower accident and insurance rates." Mr. Bridges then went on to review other factors as follows:

> COST
>
> Many educators have questioned the logic that contracted services can provide the same level of service at a lower cost. The direct answer is that they are more cost efficient. This is the industry standard for any company that succeeds in our market driven economy. Student transportation contractors tend to more closely track and manage their costs, resulting in a greater utilization of resources in all aspects of their operation. Significant cost savings have been achieved by many districts using contracted services for student transportation.
>
> **Based on current year projected expenditures, the district could achieve a cost savings of $634,116 should the Board elect to utilize contracted services**. (Based on low bid from Student Transportation of America 5.5 hours.)
>
> CONTROL:
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> Many districts have found that the level of control when converting to contracted student transportation is actually increased. Issues such as reducing the budget, personnel problems, route design, regulatory compliance or increases in year end field trips can simply be delegated by the proper authority without surrendering accountability. One of the issues currently affecting the district, is the lack of demonstrated leadership and operational deficiencies in the routing system. Contractors have become increasingly efficient in the routing and scheduling of school buses with extremely sophisticated software.

> BUS REPLACEMENT PROGRAM:
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> One critical factor in the Board's decision should be the evaluation of a bus replacement program and the ability to sustain a safe and reliable fleet. In 1997, staff presented a Five-Year School Bus Replacement Program that estimated the need to purchase 14 school buses at an approximate cost of $1,260,000. During that time frame, the district successfully secured grant funds from the State of California for the replacement of four buses. The District participated in the grant program, which required matching funds and reduced the requirements for an additional 10 buses through FY 2001-02.
>
> Similar data was requested regarding the evaluation of the district's fleet from each vendor, and with no exception, each respondent stated that a minimum of one bus and a maximum of four buses would be required to be purchased in the first year.
>
> RECOMMENDATION:
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> In the event the Board of Trustees recommends contracted transportation services for FY 2000-01, a percentage of the funds generated from the cost savings be reserved in a Special Reserve Fund for the purposes of establishing a bus replacement program. [Underlining and bold emphasis included in original.]

At the May 15 meeting, Ms. Maldonado addressed the board and made another demand to negotiate any decision to contract out work. The board, however, voted to contract out the transportation services. Prior to the vote, the motion was amended by Mr. Howell to require the contractor to hire laid off District employees and to pay employees at their current rate of pay up to the number of hours they were employed during the May pay period. The increased costs due to the amendment would be paid to the contractor by the District.

While the amendment increased the cost of the contract considerably, it did not guarantee that employees would earn the same salary. For example, if an employee worked for the District four hours a day during the May pay period, that employee would receive the same rate of pay for up to four hours per day working for the contractor. If, however, the employee worked seven hours per day, the employee would receive a lower rate of pay for the additional three hours working for the contractor. Overtime would also be paid at a lower "blended" rate (i.e., a rate that was a blend between the District's overtime rate and the contractor's lower overtime rate). Furthermore, the amendment made no guarantee of any benefits, nor did it change the "at will" employment status of former District drivers employed by the contractor.

At the same meeting, the board also passed a resolution to lay off transportation employees. The justification for the reduction in force was stated in the board's motion as follows:

> WHEREAS, the Governing Board is exploring alternate methods to maximize available resources for completing ongoing school construction; increase available funds when necessary for the purchase of school buses; and minimize transportation overruns into the general fund, which may lead to restructuring or elimination of the Transportation Department;
>
> WHEREAS, such alternate methods, including, but not limited to, the contracting of transportation services with private carriers pursuant to Education Code section 39830 et seq. may require cutbacks in the Transportation Department. . . .

According to Mr. Howell, the only board member to testify, a desire to save money played no role whatsoever in his decision to vote for contracting out. He did it to eliminate all the problems in the transportation department.[7] Mr. Howell felt that the District should bring in a contractor that specialized in transportation issues to address the problem.

Mike Milton, the current CSEA chapter president, testified that CSEA lobbied five of the seven board members in their attempt to avoid contracting out. According to Mr. Milton, the old TAC was allowed to meet with the board once. They were told they needed to address three issues; personnel, costs, and the efficiency of the department. Originally, the TAC had been told they would be given two hours to address the board in closed session. However, the board began late, so the TAC presentation was cut short by the board after about 30 minutes.

In every written or verbal correspondence CSEA had with the District, CSEA took the position that it was adamantly opposed to contracting out. CSEA also argued repeatedly that contracting out the work would not, in fact, save the District any money. CSEA provided the District with a survey it had taken of transportation employees, indicating that most employees believed

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[7] Q [Mr. Keiner] Okay. So, what part did cost play in your decision that evening?

A [Mr. Howell] Cost played absolutely no part of my decision. Given the problems we've had in transportation, I would have gone out for -- I would have accepted the bid with [the contractor] if it didn't save us a dime.

the District was contracting out due to personnel issues rather than cost savings. The survey, however, also generated at least a dozen ideas for saving money or generating revenue within the department.[8]

Mr. Milton also testified that at the May 15 board meeting when the board decided to contract out the transportation services, at least one board member mentioned the $600,000 in savings and other members referred to "savings" in general as a way the District could purchase new buses. Mr. Milton's testimony was supported by testimony of Ms. Maldonado, who testified that the board discussed a possible $600,000 savings at the meeting.

There was a great deal of testimony about problems the District had in its transportation department. The department had had three different directors in the previous five years along with high turnover in numerous bargaining unit and management positions. Costs had steadily increased over the previous several years. District management believed the department had become increasingly ineffective, absorbing scarce

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[8]The parties place more credence in this survey than I do. It does not appear to me to be unbiased or independent in any way. For example, questions were posed as follows: Do you feel betrayed that the board did not use the money our department saved over the years to purchase new buses they promised us? Do you feel betrayed knowing the board is using the excuse of lack of buses as a main reason to look into contracting? Knowing the school board has not held up their financial responsibility concerning our department, has this caused you unnecessary stress in your job and family life?

managerial resources with limited benefits. Absenteeism was reported as high as 20 percent.

Ms. Godfrey supervised the transportation department from November 1999 to the date of the layoff. According to Ms. Godfrey, "the department was running amok, employees were challenging management, they were challenging each other, all kinds of strange and counterproductive activities were going on, and the efficiency of the department was severely impaired." Ms. Godfrey also testified that as a result of the chaos in the department, she received numerous complaints from teachers about buses being late, kids being missed, field trip buses not showing up on time and similar issues. Ms. Godfrey estimated that over the past three years she spent between 30 and 50 percent of her time on transportation issues.

Ms. Godfrey also testified that from what she observed and heard at the May 15 board meeting, the board's decision was based partially on the analysis and recommendation of Mr. Bridges. According to Ms. Godfrey, CSEA never sent her a demand to bargain the decision to subcontract transportation services, but she was aware CSEA wanted to negotiate the decision because she had seen copies of letters sent to other individuals.

Superintendent DePue testified that she has been involved one way or another with the transportation department during her 30 years of employment within the District. She testified about receiving numerous complaints about problems in the department. She was aware that board members had also received complaints.

According to Ms. DePue, the department has a current need for new buses because the District has not replaced any over the past several years. The average bus costs about $82,000 and the District needs between 15 to 20 of them. Ms. DePue testified about her budget frustration:

> . . . when it comes down to budget time and you're looking at how you spend your money, that once we did everything that we thought we needed to do for students, as far as academically, we had a hard time coming up with the money to replace buses.

When Ms. DePue was asked about potential savings from the decision to contract out transportation services, she testified as follows:

> Q [Mr. Kiener] Okay. Is there going to be a cost savings to the District under that contract with STA?
>
> A [Ms. DePue] I believe there will be some. We won't know until the end of the first year whether there actually are cost savings or not. I believe that there will be some.
>
> Q Does the District have plans for any cost savings?
>
> A If we have cost savings, our plan is to -- the first thing I believe that we will do is to get those 15 to 20 school busses that we need.

Ms. DePue also testified that she had never seen any letters from CSEA asking to negotiate the decision to subcontract until the day the board was meeting to decide the issue. Ms. DePue recalled talking to board President Soto about CSEA's letter. Ms. DePue testified:

> . . . I talked to Mrs. Soto, my recollection was that she talked to Mary Ellen Maldonado that afternoon and felt that it was a little late to be asking for this now, and that they were not ready to negotiate the decision to contract.

The day following the board vote to subcontract, Christian Kiener, attorney for the District, wrote to Ms. Maldonado. This was the first written response CSEA had received from the District regarding the demand to negotiate the decision to subcontract. In his letter, Mr. Kiener acknowledged receipt of CSEA's April 26, 2000, demand to negotiate and stated that the District was under no obligation to negotiate the decision to contract out work. Mr. Kiener made several arguments in his letter. First, he stated that the Education Code provided explicit authority for contracting out transportation services. He also claimed that PERB precedent and private sector labor law did not require such negotiations because the decision was not based primarily upon labor costs. Mr. Keiner found this particularly true in light of the board's mandate that "the hourly wage [paid by the contractor] not be less than current compensation, all at District expense." Furthermore, according to Mr. Kiener, "Because these parties have, for several years, already exhausted all opportunities for meaningful restructuring through advisory committee, the basic decision would also not be amenable to collective bargaining." Mr. Kiener's last justification was, "Finally, as a practical matter, CSEA routinely demands to bargain the decision, but instead begins

[sic] effects, in the transportation area. There is no reason to change that approach in this District."

The letter concluded with an invitation to negotiate the negotiable effects of the District's decision to subcontract. Although the parties did meet and reach agreement about the layoff procedures to be used, CSEA maintained its position that it would not negotiate about effects until the District was willing to negotiate the decision itself.

CSEA filed this unfair practice charge on May 25, 2000. On June 8, 2000, the District signed a contract with the Student Transportation of America (STA) for transportation services, and laid off its transportation employees. The contract is for a term of 5 years. As part of the agreement, the District also agreed to lease the District's maintenance and refueling facilities to the contractor for one dollar per year.

The collective bargaining agreement includes a management rights clause which states:

> <u>District Rights</u>
>
> It is understood and agreed that the District retains all of its powers and authority to direct, manage, and control to the full extent of the law. Included in, but not limited to, those duties and powers are the exclusive rights to: determine the times and hours of operation; determine the type and level of service to be provided and the method and means of providing them; establish is educational policies, goals, and objectives; insure the rights and educational opportunities of students; determine staffing patterns; determine the number and types of personnel required; maintain the efficiency of District operation; determine the curriculum; build, move or modify facilities;

> establish budget procedures and determine budgetary allocations; determine the methods of raising revenue; and take action on any matter in the event of an emergency. In addition, the District retains the right to hire, assign, classify, evaluate, promote, terminate, and discipline employees.
>
> A. The exercise of foregoing powers, rights, authority, duties and responsibilities by the District, the adoption of policies, rules, regulations and practices in furtherance thereof, shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with the law.

ISSUE

Did the District violate section 3543.5(a), (b) and (c) of the EERA by taking unilateral action to contract out the District's transportation services?

DISCUSSION

Jurisdiction Issues

The District argues that PERB has no jurisdiction to hear this matter because the charge is barred by the statute of limitations. Section 3541.5(a)(1) states:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

In California State University (San Diego) (1989) PERB Decision No. 718-H, the Board determined that the six-month statute of limitations is jurisdictional. Thus, if this charge

is untimely, the Board is without jurisdiction to decide the merits of the complaint.

The District's argument regarding the statute of limitations is rather novel. It argues that because the District was unwilling to negotiate the decision to contract out work in 1994-95, CSEA was on notice since that time regarding the District's position on the subject. Therefore, according to the District, CSEA had knowledge that the District would continue to refuse to negotiate its decision, thus the statute of limitations ran several years earlier.

The District also argues that at the very least the statute of limitations began to run in August 1999, when Mr. Howell "once again informed Ms. Maldonado and Ms. Ruiz that the District would not bargain the decision."

PERB has dealt with statute of limitations issues on numerous occasions and the law is very clear. In Regents of the University of California (1990) PERB Decision No. 826-H, the Board stated the following rule:

> . . . The statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent. . . .

"Actual knowledge" must clearly inform the charging party of the allegedly unlawful act. (Victor Valley Union High School District (1986) PERB Decision No. 565.) In Riverside Unified

School District (1985) PERB Decision No. 522, the Board adopted the following view of constructive notice:

> . . . Absent actual notice, the limitations period begins to run when the persons affected have constructive notice of the violation. They are aware of the events which manifest change and should reasonably be aware of the significance of the events. . . .

Events in 1994-95 offer no actual or constructive knowledge about the May 2000 decision by the board. If anything, they do exactly the opposite. In 1994-95, the District changed its position and decided not to contract out after lobbying from CSEA. In 1999-2000, CSEA continued to lobby the board to convince it that the District would not save money and that contracting out was not an appropriate action. Up until the May 15 board meeting, CSEA had hopes that the District would not contract out transportation services.

Thus, it is not even a slightly plausible argument that the statute of limitations for the May 15, 2000, board decision began running five years prior to consideration of that decision by the school board.

The District also places great weight on Mr. Howell's statement to Ms. Maldonado and Ms. Ruiz about the District's position in August 1999. However, even discounting Ms. Maldonado's account of the conversation, and crediting Mr. Howell's testimony in the strongest light possible for the District, it falls far short of providing actual or constructive notice to CSEA of a clear intent to subcontract. At most, Mr. Howell's testimony reflects that he told Ms. Ruiz that he

"thought" there was a "good chance" the board would "consider" an RFP and he was "inclined to take the devil" he didn't know. When asked about his response to Ms. Maldonado's request to negotiate the decision to contract out the work, Mr. Howell gave a cursory response, saying that he didn't think they had to. According to Mr. Howell, Ms. Maldonado said that she thought they did have to negotiate, and then they agreed that they "would probably talk about this further if the Board did go out for an RFP, and that it looked as though the Board would be considering it sometime within the next month or so."

The District simply overstates Mr. Howell's testimony. It appears to be the speculative opinion of one board member at best, and did not put CSEA on notice about a definite course of action by the District.

Even CSEA's knowledge of the RFP does not start the statute of limitations running. The August 17, 1999, administrative memo asked the board to authorize an RFP to determine what, if any, cost savings would be achieved by contracting out transportation services. At the same time, the board approved the RFP, it also created the new Ad Hoc Committee "to study the pros and cons of contract busing."

This was merely the start of the fact-finding process, not an indication of a final decision made by the board.[9] Thus, the

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[9]This was identical to 1994 when the District issued an RFP. At that time, Assistant Superintendent Olivarria informed CSEA that all the District had done was issue a request for proposals for transportation services, and no decision had been made.

statute of limitations in this case began running on May 15, 2000, when the board voted to contract out transportation services and lay off all employees. Therefore, the charge was timely filed and PERB has jurisdiction to consider the merits of the complaint.

Negotiability Issue

It is well settled that an employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and a violation of EERA section 3543.5(c). (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

To prevail on a complaint of unilateral change, a charging party must establish a preponderance of the evidence that (1) the District breached or altered a written agreement or an established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., having a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; see also Pajaro Valley Unified School District, supra, PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

Here there is no question that the District changed the terms and conditions of employment of its transportation services bargaining unit employees. It is also clear that it did so without first giving CSEA proper notice and an opportunity to negotiate over its decision to implement those changes. The District, however, argues that the decision to contract out the District's transportation services is not within the scope of representation.

The scope of representation under the EERA is set forth in section 3543.2, which states, in pertinent part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22316 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code.

In Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim), the Board determined that a subject which was not enumerated in EERA section 3542.2 is negotiable if: (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is

of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiation is an appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission.

This test was approved by the California Supreme Court in its decision in San Mateo City School District v. PERB (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800] (San Mateo), and was subsequently applied by the Board in its decision in Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375 (Healdsburg).

Using this test, the Board found that the decision to subcontract was within the scope of representation under the EERA, and that the employer must therefore negotiate over proposals concerning that decision. (See Arcohe Union School District (1983) PERB Decision No. 360 (Arcohe); Oakland Unified School District (1983) PERB Decision No. 367; Healdsburg at pp. 85-87.)

In Arcohe, the Board stated:

> Subcontracting custodial work formerly performed by unit employees is a subject logically and reasonably related to wages, hours, and transfer and promotional opportunities for incumbent employees in existing custodial classifications. Actual or potential work is withdrawn from unit employees, and wages and hours associated

with the contracted-out work are similarly withdrawn. Further, such diminution of unit work weakens the collective strength of employees in the unit and their ability to deal effectively with the employer. Such impact affects work hours and conditions, and thus is logically and reasonably related to specifically enumerated subjects within the scope of representation. [Citations.]

. . . . . .

Management considerations are also raised by subcontracting decisions. The public school employer may determine that an outside firm can perform a particular task at a lower labor cost than can unit personnel.

It is apparent that subcontracting the work of unit employees is of great concern to employees and management, and their interests will naturally be opposed on the subject so as to make it likely that conflict will occur. Such conflict might well be ameliorated by the mediatory influence of collective negotiating.

The decision to subcontract the work of unit custodians did not involve the exercise of any essential managerial prerogative. The District, by such conduct, did not determine that custodial services would no longer be provided. Rather, it sought to transfer existing functions and duties from unit employees to persons who are not employees of the District. No decision as to what functions were essential to management's mission was involved. The same functions were still being performed, albeit by persons not employed by the District. While sound fiscal management is a significant concern, such concern is properly addressed at the bargaining table and is not "an excuse to avoid the negotiating obligation entirely." San Mateo County Community College District (6/8/79) PERB Decision No. 94, p. 13. The requirement that the District negotiate prior to subcontracting unit work does not abridge the District's freedom to exercise any essential managerial prerogative.

The Board revisited the issue of subcontracting in State of California (Department of Personnel Administration) (1986) PERB Decision No. 574-S (DPA-574-S) and State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S (DPA 648-S).

Both of these Department of Personnel Administration (DPA) cases relied heavily upon federal precedent, beginning with the U.S. Supreme Court's decision in Fibreboard Paper Products Corporation v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609] (Fibreboard). The facts in Fibreboard are remarkably similar to both Arcohe and Lucia Mar. In Fibreboard, the employer had performed maintenance work at its business by utilizing its own employees. Estimating that it could save $225,000 per year by using an outside contractor, the employer unilaterally decided to contract out the maintenance work. The maintenance work continued to be performed within the plant using the contractor's employees. The nature of the work did not change. The anticipated savings in cost came primarily from the reduction in fringe benefits, adjustments in work scheduling, employment of stricter work quotas, more effective supervision of scheduling and more effective supervision of the contractor's employees.

In Fibreboard, the court stated:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company

merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests. Yet, it is contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.

. . . . . .

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case--the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment--is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy. [Fn. omitted.]

The court then affirmed the National Labor Relations Board's (NLRB) remedy which included an order to resume the employer's own maintenance operation along with making employees whole for all their losses.

A second case relied upon by PERB is First National Maintenance Corporation v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705] (First National). In that case, the employer was in the business of supplying customers with housekeeping and maintenance services at the customer's location using contract employees. The employer determined that operations with one particular customer were not profitable and decided to terminate the contract, close down the operation at that location and lay off all the employees.

In its decision, the court noted three types of issues against which the obligation to negotiate must be measured.

> Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. [Citation.] Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. [Citation.] The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, . . .

The first category of issues would not be subject to mandatory negotiations. The second category would be subject to mandatory negotiations. Regarding the third category, the court stated:

> . . . in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

The court in First National referred to the application of the same analysis in the Fibreboard decision:

> The Court in Fibreboard implicitly engaged in this analysis with regard to a decision to subcontract for maintenance work previously done by unit employees. Holding the employer's decision a subject of mandatory bargaining, the Court relied not only on the "literal meaning" of the statutory words, but also reasoned:
>
> > The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The court then distinguished Fibreboard from First National, which involved an employer's decision to shut down part of its business.

> In order to illustrate the limits of our holding, we turn again to the specific facts of this case. First, we note that when petitioner decided to terminate its Greenpark contract, it had no intention to replace the discharged employees or to move that operation elsewhere. Petitioner's sole purpose was to reduce its economic loss, and the union made no claim of anti-union animus. In addition, petitioner's dispute with Greenpark was solely over the size of the management fee Greenpark was willing to pay. The union had no control or authority over that fee. The most that the union could have offered would have been advice and concessions that Greenpark, the third party upon whom rested the success or failure of the contract, had no duty even to consider. These facts in particular distinguish this case from the subcontracting issue presented in Fibreboard. . . .

(See also Otis Elevator Company, a Wholly Owned Subsidiary Of United Technologies (1984) 269 NLRB 891 [116 LRRM 1075], where the NLRB determined that the employer did not need to negotiate a decision to terminate part of its research operation, thus distinguishing the facts from Fibreboard.)

It is based upon this background of federal cases that PERB analyzed the DPA cases mentioned earlier (DPA 574-S and DPA 648-S). The DPA cases analyze contract language proposed at the bargaining table rather than unilateral changes.

In DPA-574-S, the Board analyzed the proposed contract language using the scope test adopted in Anaheim, which recognizes that essential management prerogatives are outside the scope of representation. In applying the test, the Board found the subcontracting proposal to be directly related to terms and conditions of employment and that likely conflict over the

subject would benefit from the mediatory influence of collective bargaining. The Board acknowledged that some managerial decisions are so fundamental to the direction of the enterprise that they would not need to be negotiated. However, the Board still found a violation because the employer flatly refused to discuss proposals concerning the decision to subcontract, never acknowledging in negotiations that some decisions might be within scope or that union proposals might contain some negotiable elements. The Board decision cited Fibreboard for support:

> This conclusion is the same as that reached by the National Labor Relations Board (NLRB) in private sector cases, finding that subcontracting is a mandatory subject of bargaining. See Fibreboard Paper Products Corporation v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]. In Fibreboard, the NLRB and the U.S. Supreme Court found that the employer was required to negotiate over the decision to contract out maintenance work which had previously been done by the employer's own employees. . . .

In DPA 648-S, the Board came to a different conclusion. The decision, however, in no way signalled a departure from the reasoning set forth in Fibreboard:

> The decision of the NLRB in Otis Elevator, relying upon the decision of the Supreme Court in First National Maintenance Corporation, does not disturb the Fibreboard ruling. Indeed, it reinforces it. But the later two decisions reemphasize that Fibreboard is dependent upon certain factors, specifically, a savings in labor costs being the motivating factor for the decision to subcontract. . . .

In DPA 648-S, the Board based its decision upon the specific contract language before the Board:

> . . . a blanket proposal that prohibits subcontracting, and severely limits the number of reasons why an employer may subcontract, such as the one we have here, is outside the scope of negotiation because it of necessity impinges upon management's right to manage, and does not present a concomitant ability of the union to influence a decision that is not based upon labor costs.

Two more recent cases also give clear guidance about the negotiability of the decision to contract out work previously done by District employees. In San Diego Community College District (1988) PERB Decision No. 662 (San Diego), rev. in part sub. nom. San Diego Adult Educators v. PERB (1990) 223 Cal.App.3d 1124 [273 Cal.Rptr. 53], the district offered non-credit classes in several languages. In March 1983, the district decided to discontinue non-credit classes in German, French and Spanish for economic reasons. After pressure from the public to reinstate the classes, in May 1983 the trustees directed the staff to restore the language classes. The result was that the San Diego Community College District Foundation, Inc., was asked to offer the language classes. In June 1983 a contract was entered into between the foundation and the district providing for the class offerings by the foundation. In August 1983, the district discontinued the remaining non-credit language classes and subcontracted those to the foundation.

The Board found that because the district contracted with the foundation, it tacitly admitted that it wished to offer classes despite its earlier position that it was discontinuing those services. Thus, it was not trying to halt the work but

rather simply transferring the work to a subcontractor in violation of its obligation to first negotiate such a decision.

The Court of Appeal determined that because the district had clearly discontinued the German, French, and Spanish language courses at an earlier date, the subsequent arrangement with the foundation was not a matter within the scope of bargaining as subcontracting. However, the court upheld PERB's determination that there had been illegal unilateral subcontracting of the remaining classes in August 1983. There was no interest to discontinue the service altogether. Rather, there was a contemporaneous determination to terminate the jobs of district employees and transfer the work to an outside contractor; a situation identical to Fibreboard.

The final case not only is the most recent, but also the case most directly on point. In Redwoods Community College District (1997) PERB Decision No. 1242 (Redwoods), the charging party claimed that the District had unilaterally contracted out the operation of its campus dormitories. The district denied that it contracted out the operation of the dormitory services and contended that it had abandoned the operation of its dormitories and transferred that activity to an auxiliary foundation.

In adopting the decision of the administrative law judge (ALJ), the Board held:

> . . . PERB, following the United States Supreme Court's rulings in Fibreboard Paper Products Corporation v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609] (Fibreboard); First

> National Maintenance Corporation v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705]; and the National Labor Relations Board's (NLRB) decision in Otis Elevator Company, a Wholly Owned Subsidiary of United Technologies (1984) 269 NLRB 891 [116 LRRM 1075], has held that subcontracting decisions which are based, at least in part, on labor costs are negotiable providing that the decision is otherwise amenable to collective bargaining. (Fn. omitted; citation.)

Redwoods also cites as authority Mid-State Ready-Mix, a Division of Torrington Industries, Inc. (1992) 307 NLRB 809 [140 LRRM 1137] (Mid-State) where the NLRB considered a fact pattern in which an employer replaced bargaining unit employees with those of an independent contractor to do the same work under similar conditions. In its decision the NLRB stated:

> . . . Such decisions, as the Court in First National Maintenance agreed, do not involve "a change in the scope and direction of the enterprise" and thus are not core entrepreneurial decisions which are beyond the scope of the bargaining obligation defined in the Act. 452 U.S. at 667, citing Fibreboard, 379 U.S. at 223 (Stewart, J., concurring). Thus, when the record shows that essentially that kind of subcontracting is involved, there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is. . . .

Redwoods held that the dormitories were still being operated for the benefit of the students and the district, and that the work had not been eliminated. The decision to contract out the work therefore did not turn upon a change in the nature and direction of the district's operation. Rather, it was a contemporaneous decision by the employer to terminate bargaining

unit employees and contract out their work to a subcontractor which continued to perform the work in a similar manner under similar circumstances. The district's failure to negotiate its decision to contract out the operation of the dormitory services was a violation of the Act.

The facts at hand in Lucia Mar are almost identical to a long list of precedential cases spanning almost 35 years from Fibreboard up to Redwoods. The District did not, as it argues in its briefs, make a "core restructuring" decision to no longer provide student transportation services. The District continued to offer transportation services to students that were almost identical to those offered prior to the subcontracting. The same drivers were driving the same District buses over the same routes, picking up the same students and then taking them to the same District's schools. The buses were even maintained in the same District facilities, rented to the contractor for a token $1 per year. What was different was that under the subcontracting provision the drivers were working with significantly reduced fringe benefits, lower salaries and without any job security, subject to termination at the will of the contractor.

Under these circumstances, where the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances, there is no need to apply any further test about labor costs in order to determine whether the decision is subject to the statutory duty to bargain.

The Supreme Court, the NLRB, and PERB have all concluded that it is.

Even though it is unnecessary in order to find a violation in this case, I note that the record also clearly supports a finding that the District was motivated substantially by potential savings in labor costs. When contracting out was first raised in 1994-95, the motivation was cost. Ms. Maldonado's November 1995 letter made clear references to the District's motivation of efficiency and cost savings. The school board minutes even reflect that the board "ruled out contract bussing until a financial crisis occurred in the future" and states that the District and CSEA would continue to work on cost savings. The CSEA letter in response to the District's decision also spoke about the mandate to "control costs."

When the District again considered contracting out the work in 1999, much of the key communication on the issue made clear references to controlling costs. For example, the District memo which initiated the RFP stated:

> In order to provide the information <u>requested by the Board of Education</u>, it would be necessary to send the request for proposal for transportation services <u>to determine if any savings can be achieved</u>. [Emphasis added.]

The board minutes reflecting the vote to authorize the RFP state:

> A motion was passed to authorize the staff to prepare an RFP <u>for transportation services at a reduced cost</u>. (Harvey/Howell) [Emphasis added.]

The supporting documentation provided by the administration to the Board of Education the night they voted to contract out the work clearly contemplated a savings of $634,000 and recommended that a portion of the cost savings be reserved to buy new school buses which would be operated by the contractor's employees.

The Board of Education's motion to lay off all the transportation employees clearly states its motivation to:

> . . . increase available funds where necessary for the purchase of school buses; and minimize transportation overruns into the general fund. . . .

The board's motion stated unequivocally that one method of maximizing resources and increasing available funds was:

> . . . the contracting of transportation services with private carriers

Before its vote, the board had a discussion of the $600,000 potential savings. District administrators also acknowledged that the District had failed to budget money for buses and that savings were needed for the purchase of those buses.

The District argues that cost savings was not its motivation and that CSEA understood that and also believed there would be no cost savings. The District claims that:

> CSEA has always taken the position that there will be no cost savings at all from subcontracting transportation.

The District also refers to the survey of transportation employees conducted by CSEA, and claims that:

> Not even transportation employees believe the school district RFP decision turned upon or was solely motivated by labor costs.

Of course, CSEA's argument that the District would not save money is a natural and logical response to a District motivated by exactly that. If CSEA had not believed the District was motivated by savings in labor costs, it is unlikely it would have spent so much energy trying to convince the District that potential savings were illusory.[10]

Mr. Howell's claim that cost savings had absolutely nothing to do with his decision is unpersuasive in light of all the evidence to the contrary. His credibility is compromised by the fact that he was one of the sponsors of the motion authorizing an RFP "for transportation services at a reduced cost." Even taking Mr. Howell's testimony that he was not personally motivated by cost savings at face value, I cannot impute that same motivation to the board as a whole, in light of all the evidence from the District itself that costs were a principal motivating factor. The argument that the District's decision to subcontract transportation services did not turn upon labor costs is simply not supported by the record in this case. The District's interest in reducing labor costs by contracting out services is evident throughout its unilateral process.

Clearly, the District was also frustrated with personnel problems and inefficiency within the transportation department. No doubt these frustrations contributed to the District's

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[10]As stated earlier, the survey of transportation employees has little evidentiary value. However, even though the employees may not have believed what the District was telling them, the survey clearly reflects that the District was telling employees they were cutting jobs to save money to buy buses.

willingness to replace the entire department with a contractor. However, frustration about personnel issues and inefficiency do not establish an employer's right to unilaterally replace employees with those of a contractor. Employers have unfettered decision-making rights over entrepreneurial and policy matters because unions lack the ability to impact entrepreneurial issues. Under the cases discussed above, entrepreneurial issues are therefore not amenable to resolution through the collective bargaining process. Personnel problems, however, such as absenteeism, low efficiency and high turnover are among the issues that are most suitable for negotiations between an employer and a union. This was demonstrated in 1994-95 when CSEA had more input into the process and impact over the results at the time.

The District now clearly believes that its efforts to resolve these problems collaboratively with CSEA have failed. As Mr. Keiner stated in his May 16 letter, the District believed it had exhausted all opportunities for meaningful restructuring through the advisory committee process. The District may, in fact, be entirely correct. It may not have been able to gain any concessions improving the underlying problem. The bargaining obligation, however, is not eliminated by speculation about the failure of future negotiations. A union need not demonstrate that it is able to solve every problem raised by the employer before it has the opportunity to negotiate. As the Supreme Court stated in Fibreboard:

> . . . although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.

In this regard, it is very difficult to predict what concessions might have been generated by the very realistic potential that employees might lose their livelihood, including health benefits and pension rights. Here, the issue of wages and fringe benefits were obvious places to search for cost savings. Similarly, absenteeism is another area where CSEA may have been able to influence creative solutions.

No doubt, the District was also frustrated by its own managerial failures in the transportation department. High managerial turnover and ineffective supervision was crippling the department. The District was forthright in its assessment that it did not know how to run an efficient transportation department. To the extent that it was seeking to remedy only its managerial failure, it was free to act, even if that meant contracting out the management structure of the transportation system. The District actions went beyond management, however, and started impacting bargaining unit employees, it should have negotiated its decision and the effects of its decision before proceeding.

The District argues that its subcontracting decision was not amenable to collective bargaining because CSEA was unalterably opposed to contracting out any work. Therefore, according to the

District, "what CSEA wants to do is create alternatives to subcontracting, thereby blocking it." It is very important to note that if negotiations had not given the District what it believed it needed, it was still free to contract out the work at the completion of the impasse procedures. The law does not mandate success, but only requires a "good faith" effort by the parties to reach agreement. A willingness to negotiate will, by itself, never guarantee success. A refusal to negotiate, however, will almost always guarantee failure, and circumvent what legally and rightfully should be a mutual effort to find solutions to mutual problems.

The District believes that the decision to contract out work is not amenable to collective bargaining because it could not be accomplished within practical time lines. The District argues:

> As the record established, transportation RFPs typically must be responded to within 30 days, and the School District then has a window period to accept a RFP for only approximately 30 to 60 days. This legal timeline does not fit within the practical framework of collective bargaining, and CSEA never argues in its brief that it does. Maldonado herself admitted that EERA impasse and factfinding procedures take approximately 6 months to one year to complete. It is impossible as a practical matter for any School District to issue a RFP for transportation services and complete negotiations, mediation, and factfinding within 30 to 60 days after the bids are closed and potential bidders become known.

A compelling operational necessity can sometimes justify an employer's unilateral action prior to completion of bargaining. In San Francisco Community College District (1979) PERB Decision

No. 105, the Board first dealt with this type of defense regarding the district's unilateral change in response to Proposition 13 tax cuts. The Board held:

> Even when a District is in fact confronted by an economic reversal of unknown proportions, it may not take unilateral action on matters within the scope of representation, but must bring its concerns about these matters to the negotiating table. . . .

Under Calexico Unified School District (1983) PERB Decision No. 357, an employer adopting an operational necessity defense must show "an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action." (Oakland Unified School District (1994) PERB Decision No. 1045.)

In Compton Community College District (1989) PERB Decision No. 720, PERB held that severe financial difficulties of the district did not prevent the possibility of formulation of a budget without unilateral cuts, therefore, the district had not established a necessity defense. In Regents of the University of California (1998) PERB Decision No. 1255-H, the Board adopted a decision that a devastating earthquake in West Los Angeles did not create an emergency sufficient to justify bypassing bargaining obligations.

These cases establish that an employer must demonstrate that the necessity is the unavoidable result of a sudden change in circumstances beyond the employer's control in order to justify unilateral action. The timing of the emergency must preclude the

opportunity for negotiation, and there must be no alternative course of action available to the employer.

Lucia Mar meets none of these standards. The District's action was not the unavoidable result of sudden changes in circumstances. This issue had been brewing within the District for at least six years. Any difficult time deadlines were created by the District itself. It chose when to issue the RFP, to include a 30-day response time, and dictated the deadline for making a final decision. Even assuming, arguendo, that the situation was created by a sudden change and that the deadlines were imposed externally (which is not true) the timing would still have allowed 30 to 90 days for negotiations. Clearly, there were ample opportunities for notice and negotiations prior to any unilateral action by the District, and there were other alternatives available to the District besides the unilateral action that it chose.

Waiver Defenses

The District argues that Article II, section 3, District Rights, in the parties collective bargaining agreement sets forth a complete, albeit general, management rights clause. Within that article, according to the District, it has retained all rights to manage the work place, except as limited by the express terms of the collective bargaining agreement, so long as those provisions conform to the law. Because there is nothing in the agreement that restricts the right of the District to contract work to outside vendors and because Education Code section 39800

et seq. allows districts to contract out work, the District believes that CSEA has waived bargaining rights over the decision to contract out transportation services.

The Board has dealt with management rights clauses on many occasions. A union may waive its right to negotiate a matter within the scope of representation by consciously yielding that right in a management rights clause. (Mammoth Unified School District (1983) PERB Decision No. 371). A waiver of a right to bargain will not, however, be lightly inferred. Absent clear and unequivocal language waiving a bargaining right, PERB will not infer that a party has waived a statutory right. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; San Mateo City School District (1980) PERB Decision No. 129). The evidence must demonstrate the intentional relinquishment of a statutory right. (San Francisco Community College District, supra, PERB Decision No. 105). The waiver must specifically reserve for management the right to take certain action or implement unilateral changes regarding issues in dispute. (Barstow Unified School District (1997) PERB Decision No. 1138(b) (Barstow).)

In Barstow, the parties included language in the management rights clause that specifically reserved to the district the "exclusive right" to "contract out work, which may be lawfully contracted for. . . ." The Board held that language clearly and unmistakably waived the union's right to negotiate over any district decision to contract out transportation services.

In Lucia Mar, however, there was no evidence that the parties negotiated regarding the District's right to contract out work. There is no evidence that CSEA explored the issue and then consciously yielded its right to negotiate over the District's decision to contract out work. There was no clear and unmistakable waiver of that right included in the management rights clause of the collective bargaining agreement. Therefore, the management rights clause of the agreement does not provide the District with a defense.

It is also possible for a union to waive its right through inaction or acquiescence. Here, the District argues that CSEA should be estopped from asserting any bargaining rights because it fully participated in the TAC in 1994-95 and the Ad Hoc Committee in 1999-2000 and because it failed to challenge the District's bargaining position. In 1994, according to the District:

> CSEA chose to proceed solely by working with the school district's governing board, and repeatedly thanked the governing board for the RFP consultative processes, instead of simultaneously pursuing unfair labor practice charges to enforce its multiple demands to bargain.

This defense is based on incorrect assertions of fact and law and has no merit. First, the record does not reflect that CSEA chose to proceed solely by working through the RFP consultative process. It simultaneously and repeatedly demanded to bargain the decision. On July 22, 1999, Ms. Maldonado wrote to Mr. Howell stating that if the District was going to contract

out work, CSEA expected, "that the District will provide the union with proper notice and a full opportunity to bargain the decision and the effects of this matter." A short time thereafter, Ms. Maldonado again put the District on notice when she raised a demand to bargain verbally with Mr. Howell.

On April 26, 2000, Ms. Maldonado gave the District a third demand to bargain. It stated in part:

> This demand letter is intended to ensure that there is no misunderstanding between the parties. The CSEA expects that the District will provide the union with proper notice and a full opportunity to bargain the decision and effects of this matter prior to any decision by the Board with respect to subcontracting bargaining unit work.

On May 15, 2000, Ms. Maldonado made another verbal demand to bargain when she contacted Ms. Godfrey about taking the contracting issue off the board's agenda as an action item. When that request was denied, Ms. Maldonado wrote a fifth demand to bargain which she delivered to board President Soto prior to the board meeting. In it, CSEA demanded:

> The school board cease and desist any decision to contract out bargaining unit [work] until it meets its legal obligation to meet and negotiate with CSEA.

Ms. Maldonado also put the District on notice that, "failing to do so will compel the union to immediately file a grievance and the unfair labor practices." Finally, at the board meeting, CSEA made a sixth demand to bargain prior to the board vote. This record hardly reflects a union proceeding solely through the RFP consultative process.

The fact that CSEA also took every opportunity to participate in the "consultative process" is no basis for a waiver argument. The law does not require a union to abandon all efforts of persuasion or possible settlement in favor of a single unfair practice path. To force a union to choose between an unfair practice proceeding, which could take years to resolve, or continuing settlement efforts by whatever other possibilities existed would be completely contrary to the purposes of the Act. If CSEA's goal was to stop the contracting out, fully participating in the RFP consultative process was at least as likely to produce results as filing an unfair practice charge, which could well have been dismissed as premature. As this case well demonstrates, an unfair practice charge can produce years of costly litigation before it has any impact. Furthermore, CSEA's informal efforts did work in 1994-95.

The fact that CSEA "repeatedly thanked the governing board for the RFP consultative process" is also no evidence of any intent to waive its negotiating rights. Attempts to persuade through cordial collaborative efforts, rather than hostile threats, should be encouraged by the law.

Thus, CSEA has not waived its right to negotiate the District's decision to contract out transportation services either through inaction or the management rights clause of the collective bargaining agreement.

Preemption by the Education Code

The District argues that California Education Code section 39800 et seq. supersedes any bargaining obligation of the District. EERA section 3540 provides in relevant part:

> This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or 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 agreement.

The test for resolving conflicts between the EERA and the Education Code is found in San Mateo:

> . . . "Unless the statutory language [of the Education Code] clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal should not be precluded." (San Mateo at pp. 864-865; see also Healdsburg at pp. 6-7.)

Thus, the Education Code will preempt collective bargaining only if mandatory provisions of the Code would be "replaced, set aside or annulled by the agreement." (San Mateo at pp. 864-866.)

In Mt. Diablo Unified School District (1983) PERB Decision No. 373, the Board reviewed a long list of precedential cases, then stated:

> . . . the Board has previously held that an Education Code provision will not limit the scope of representation so long as it merely "authorizes a certain policy but falls short of [creating an] absolute obligation." . . .

(See also Holtville Unified School District (1982) PERB Decision No. 250; San Bernardino City Unified School District (1982) PERB

Decision No. 255; Mt. San Antonio Community College District (1983) PERB Decision No. 297; Brawley Union High School District (1982) PERB Decision No. 266; and Calexico Unified School District (1982) PERB Decision No. 265, where the Board declined to find issues pre-empted by permissive or discretionary Education Code provisions which gave districts discretion and flexibility to act.)

In Fremont Unified School District (1997) PERB Decision No. 1240, in adopting the ALJ decision, the Board stated:

> In conclusion, it bears repeating that mandatory statutory language will remove a subject from EERA's bargaining obligation, while permissive or discretionary language will have the opposite result, provided the subject is otherwise negotiable. . . .

Education Code section 39800 et seq. permits but does not mandate a district to contract out transportation services. Rather, as noted below, it permits a district latitude and discretion in designing its transportation program:

> § 39800. Power of governing board to provide transportation of pupils
>
> (a) The governing board of any school district may provide for the transportation of pupils to and from school whenever in the judgment of the board the transportation is advisable and good reasons exist therefor. The governing board may purchase or rent and provide for the upkeep, care and operation of vehicles, or may contract and pay for the transportation of pupils to and from school by common carrier or municipally owned transit system, or may contract with and pay responsible private parties for the transportation. These contracts may be made with the parent or guardian of the pupil being transported. A governing board may allow the transportation of preschool or

> nursery school pupils in schoolbuses owned or operated by the district. A state reimbursement may not be received by a district for the transportation of preschool or nursery school pupils.

Being permissive rather than mandatory, Education Code section 39800 et seq. does not pre-empt the District's obligation to negotiate over its decision to subcontract its transportation services.

The District also argues regarding pre-emption that "CSEA was not demanding to negotiate just the overall decision to subcontract, but the specific selection of a carrier, e.g., the successful bidder STA." Therefore, according to the District, charging party sought to intrude on the District's obligation to make a decision based upon statutory criteria.[11]

This is not a persuasive argument because prior to the selection of STA by the District on May 15, CSEA never mentioned STA. Its repeated demands were simply to negotiate over the District's decision to contract out the work. It was not until the board selected the STA bid on May 15 that CSEA mentioned the particular STA contract, because it believed the contract violated the District's obligation to first negotiate the decision.

In summary, when the District replaced its transportation employees with those of a contractor, keeping the same basic

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[11]The District claims that it "is not in a position to avoid, ignore, bend or modify the statutory restrictions." However, the District never specified just how CSEA's demand to negotiate the contracting decision would have done that.

transportation system in place and offering the same basic transportation services to students of the District, it violated the law by failing to negotiate over that decision. There was no change in the scope and direction of the enterprise and thus entrepreneurial decisions were not at stake. Furthermore, the District's decision was based upon potential savings in labor costs so that it could fund the purchase of additional buses. CSEA did not waive its right to negotiate the District's decision either by the management rights clause or by failing to pursue collective bargaining rights while participating in a consultative committee process. Nor does the Education Code preempt the District's bargaining obligation in this case because its language is permissive, not mandatory.[12]

CONCLUSION

The District's unilateral action to contract out its transportation services violated EERA section 3543.5(c). This same conduct interfered with CSEA's right to represent employees in the bargaining unit in violation of section 3543.5(b). The District's failure to negotiate concurrently interfered with individual employees' rights to be represented by CSEA in violation of section 3543.5(a).

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[12]In correspondence with CSEA, and at the unfair practice hearing, the District raised as a defense the claim that throughout California CSEA always demands to bargain over the decision to subcontract, but then always settles for negotiating over the effects. Because the District did not brief this as a separate defense I consider the argument waived. Furthermore, the record does not support such a claim, and, that's not what happened this time.

REMEDY

Section 3541.5(c) empowers PERB to:

> . . . issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Here, the District has been found to have violated the EERA when it unilaterally contracted out the District's transportation services. The same conduct was found to interfere with CSEA's right to represent bargaining unit members and constituted interference with bargaining unit members' rights to be represented by CSEA. It is, therefore, appropriate to order the District to cease and desist from such activities in the future.

In cases of unilateral action, PERB generally orders employers to restore the status quo as it existed prior to the violation. (Santa Clara Unified School District (1979) PERB Decision No. 104.) By contracting out the transportation services, the District has not only harmed the employees who were terminated, but also weakened the collective strength of the unit by diminishing the unit work. (Arcohe.) It is, therefore, appropriate to order the District to restore, as soon as practical, the District's transportation services bargaining unit positions. Because the District has entered into a binding contract with STA, it will not be ordered to restore the terminated bargaining unit positions until the earliest

opportunity the District can lawfully terminate the contract with STA.

It is also appropriate, however, that the District be ordered to make bargaining unit employees whole for any losses they may have suffered due to the District's unilateral action, along with interest at the rate of 7 percent per annum until such time as they are restored to their former positions. (Mt. San Antonio Community College District (1988) PERB Decision No. 691.)

It is also 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 and reasonable effort will be taken to insure that it is not altered, covered by any material or defaced and will be replaced if necessary. Posting such a notice will inform employees that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (Davis Unified School District, et al., supra, PERB Decision No. 116; see Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to the Educational Employment Relations Act (Act), Government Code section 3541.5(c), it is hereby ordered that the Lucia Mar Unified School District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the California School Employees Association (CSEA) about the decision and effects of contracting out the District's transportation services.

2. Denying CSEA its rights to represent bargaining unit members in their employment relations with the District.

3. Denying bargaining unit members their right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Upon demand from CSEA, restore all bargaining unit transportation services positions at the earliest opportunity it can terminate the existing contract with the contractor.

2. Make all affected employees whole for any loss of wages or benefits due to the District's violation of the Act, including interest at 7 percent per annum.

3. Within ten (10) days of service of this proposed decision, post at all work locations where notices to employees customarily are placed copies of the notice attached as an Appendix hereto. Such posting shall be maintained for a period of

thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that said notices are not reduced in size, altered, defaced or covered by any material.

4. Upon issuance of a final decision, make written notification of the action taken to comply with the order to the San Francisco regional director of the Public Employment Relations Board, in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing.

(Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

James W. Tamm

James W. Tamm
Administrative Law Judge