STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS PONDERADO CHAPTER NO. 267,	)	
Charging Party,	)	Case No. S-CE-775
V.	)	PERB Decision No. 564
EL DORADO UNION HIGH SCHOOL DISTRICT,	)	April 4, 1986
Respondent.	)	

Appearances; Minnie Franklin, Field Representative for the California School Employees Association and its Ponderado Chapter No. 267; Girard and Griffin by Thomas M. Griffin for El Dorado Union High School District.

Before Morgenstern, Porter and Craib, Members.

DECISION

PORTER, Member: El Dorado Union High School District (District) excepts to the proposed decision, attached hereto, by a Public Employment Relations Board (PERB or Board) administrative law judge (ALJ) finding that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act).[1] Specifically, the ALJ found the District violated the Act by cancelling the assignment of an overnight field trip to three district bus

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

drivers in retaliation for the exercise of rights protected by the Act and by interfering with the right of the drivers to seek the representation of their employee organization and with the right of the employee organization to provide representation.

We have reviewed the ALJ's findings of fact, conclusions of law and proposed decision and, finding them free from prejudicial error, adopt them as those of the Board itself, save and except those portions of the decision interpreting the collective bargaining agreement. We find this interpretation was unnecessary to resolution of the charges, and therefore do not adopt the ALJ's discussion or conclusion in that regard. Inasmuch as neither party excepted to the ALJ's remedy, however, we adopt it as that of the Board, notwithstanding that the ALJ's interpretation of the contract was the basis upon which such remedy was granted.

ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is hereby ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Retaliating against employees because of their exercise of the protected right to seek representation by an employee organization in their employer-employee relations by cancelling work assignments which had been given to them and thereby causing them to lose extra pay.

(b) Interfering with the right of employees to seek representation by an employee organization in their employer-employee relations by warning them that the filing of grievances will result in the loss of work assignments and by cancelling such assignments.

(c) Interfering with the right of an employee organization to represent its members in their employer-employee relations by warning employees that the filing of grievances will result in the loss of work assignments and by cancelling such assignments.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Compensate bus drivers Dianne Woodson, Victoria Tilley and Claudia Larson for wages lost because of the District cancellation of their assignment to drive students to San Mateo on May 12 and 13, 1984. Each driver shall be paid for four hours of work on May 12 and a full day on May 13, with the workday concluding at 8:30 p.m. unless either party can demonstrate that the trip as actually made by the charter bus company required either a greater or lesser amount of time. Insofar as any portion of the trip normally would have been paid at the overtime rate under the contract between the parties, the back pay award shall be calculated accordingly. The amount due each driver shall be augmented by interest at the rate of 10 percent with the interest due from the date

District drivers received paychecks covering the period of May 12 and 13, 1984.

(b) Within 35 days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

(c) Make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions.

It is further ORDERED that the portion of the complaint and charge which alleges that the District subcontracted unit work is hereby DISMISSED.

Members Morgenstern and Craib joined in this Decision.

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. S-CE-775, California School Employees Association and its Ponderado Chapter No. 267 v. El Dorado Union High School District, in which all parties had the right to participate, it has been found that the El Dorado Union High School District violated section 3543.5(a) of the Educational Employment Relations Act by imposing reprisals against employees because of their exercise of the protected right to seek the assistance of an employee organization in their employer-employee relations. The reprisal took the form of a cancellation of an assignment to drive students on a weekend field trip to San Mateo. The District also violated subsection (a) when it interfered with the right of employees to seek the assistance of an employee organization in their employer-employee relations. The interference took the form of a supervisor's warning to employees that the filing of grievances would lead to the cancellation of the trip to San Mateo. It also has been found that by this same conduct the District violated section 3543.5(b) when it denied CSEA its right to represent its members.

As a result of this conduct, we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Retaliating against employees because of their exercise of the protected right to seek representation by an employee organization in their employer-employee relations by cancelling work assignments which had been given to them and thereby causing them to lose extra pay.

(b) Interfering with the right of employees to seek representation by an employee organization in their employer-employee relations by warning them that the filing of grievances will result in the loss of work assignments and by cancelling such assignments.

(c) Interfering with the right of an employee organization to represent its members in their employer-employee relations by warning employees that the filing of grievances will result in the loss of work assignments and by cancelling such assignments.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

Compensate bus drivers Dianne Woodson, Victoria Tilley and Claudia Larson for wages lost because of the District cancellation of their assignment to drive students to San Mateo on May 12 and 13, 1984. Each driver shall be paid for four hours of work on May 12 and a full day on May 13, with the workday concluding at 8:30 p.m. unless either party can demonstrate that the trip as actually made by the charter bus company required either a greater or lesser amount of time. Insofar as any portion of the trip normally would have been paid at the overtime rate under the contract between the parties, the back pay award shall be calculated accordingly. The amount due each driver shall be augmented by interest at the rate of 10 percent with the interest due from the date District drivers received paychecks covering the period of May 12 and 13, 1984.

Dated: _____ EL DORADO UNION HIGH SCHOOL DISTRICT

By: _____
Authorized Representative

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 BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its PONDERADO CHAPTER NO. 267,	)	
Charging Party,	)	Case No. S-CE-775
V.	)	PROPOSED DECISION (1/31/85)
EL DORADO UNION HIGH SCHOOL DISTRICT,	)	
Respondent.	)	

Appearances: Brian H. Caldeira, Field Director for the California School Employees Association and its Ponderado Chapter No. 267; Thomas M. Griffin, Attorney (Girard and Griffin) for the El Dorado Union High School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

This case involves the cancellation of an assignment for three school bus drivers to take students on an overnight trip from Placerville to San Mateo. After cancelling the trip for its own drivers, the school district employed Greyhound to transport the students. The exclusive representative contends that the district's action was the unilateral contracting out of unit work. Moreover, the union continues, the action was taken as a reprisal because the union had challenged the employer's intended method for paying the drivers. The district denies that it committed any unfair practice, arguing that its action was consistent with prior practice on the use of commercial carriers to transport students. The district

also denies that it acted with retaliatory intent.

The charge which commenced this action was filed on June 4, 1984, by the California School Employees Association and its Ponderado Chapter No. 267 (hereafter CSEA or Association) against the El Dorado Union High School District (hereafter District). The charge alleges that the District's action in cancelling the bus trip and employing Greyhound was the unilateral contracting out of unit work, the imposition of a reprisal because of the exercise of protected rights, the denial to CSEA of the right to represent its members and an interference with employee exercise of protected rights. Such conduct was alleged by CSEA to be in violation of subsections 3543.5 (a), (b) and (c) of the Educational Employment Relations Act.[1]

---

[1]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> 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 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.

On July 11, 1984, the Sacramento Regional Attorney of the Public Employment Relations Board (hereafter PERB) issued a complaint against the District which incorporated the allegations in the charge. The District filed an answer to the complaint on July 26, 1984, denying that it had committed any unfair practice and asserting affirmatively that its action was consistent with past practice in the use of private carriers. In addition, the District asserted, CSEA waived its right to negotiate over the subject of contracting out by the withdrawal of a negotiating proposal which had addressed the issue. Moreover, the District continued, the transportation of students on field trips is not bargaining unit work and, finally, the PERB lacks jurisdiction to hear and decide the matter.[2]

A hearing was conducted on October 9, 1984. The parties filed simultaneous briefs which were received on December 17, 1984, at which time the matter was submitted for decision.

---

[2]In support of this contention, the District cited EERA subsections 3541.5 (a) and (b). Subsection (a) prohibits the PERB from issuing a complaint where the contract covers the matter at issue and the contractual grievance machinery has not been exhausted by settlement or binding arbitration. Subsection (b) prohibits the PERB from enforcing agreements between the parties and provides that a complaint shall not be issued on a contractual violation unless it also constitutes an unfair practice.

The District provided no explanation in its answer for how it believed that the complaint in the case had been issued in violation of either subsection. In its post-hearing brief, the District did not address the contention. The District has not made a motion to dismiss based on its contention and the

FINDINGS OF FACT

The El Dorado Union High School District is a public school employer with schools in five El Dorado County communities. The District has an enrollment of approximately 4,200 high school students.[3] At all times relevant, CSEA has been the exclusive representative of the classified employee unit which includes transportation department employees.

The Assignment.

On May 7, 1984, three District bus drivers, all members of the unit represented by CSEA, were offered the opportunity to drive the Ponderosa High School band and chorale, their teachers and chaperons on a weekend trip to San Mateo. The trip was to commence at 7:30 a.m. on May 12 and conclude about 8:30 p.m. on May 13. Approximately 115 students, 3 teachers and 19 to 21 chaperons were scheduled to make the trip on 3 District buses. In accord with established District practice, the three drivers — Dianne Woodson, Victoria Tilley and Claudia Larson — all marked the assignment slip to indicated acceptance of the trip.

The assignment of special trips is a common event in the

---

rationale for the affirmative defense set out in the answer is not apparent from an examination of the pleadings. It is concluded that the District, by its failure to address the contention in its brief or to make a motion to dismiss, has abandoned the jurisdictional argument. It therefore is not considered in this proposed decision.

[3]The District enrollment figures are drawn from the California Public School Directory, 1984, published by the California State Department of Education.

District and drivers are offered the opportunity for them on a rotational basis. Some drivers make as many as 50 to 100 special trips per year. The trips allow drivers to earn additional income and it is the District's practice to offer all drivers the same number of trips each year. The least-frequently assigned type of special trip is one that requires an overnight stay.

The day after she agreed to the San Mateo assignment, Claudia Larson questioned the driver coordinator, Phyllis Riley, and the transportation manager, Glen Hunter, about how the hours would be calculated for pay purposes. The assignments were made by Ms. Riley at the direction of Mr. Hunter who supervises the transportation department. The two supervisors were together when Ms. Larson asked the question. Mr. Hunter responded that on the first day, the drivers would be paid for the amount of time it took to drive to San Mateo and check into their hotel rooms. This was estimated at about four hours. He told her that on Sunday, the drivers would be paid for the entire day, until their return to the District. Ms. Larson did not challenge this method of payment and made no complaints to CSEA.

The other two drivers, Victoria Tilley and Dianne Woodson, both CSEA members, did discuss the matter with a CSEA representative. Shortly after she accepted the assignment, Ms. Tilley, the CSEA chapter vice president, asked Ms. Riley how the hours would be calculated. Ms. Riley responded that

the drivers would be paid for driving time on Saturday and for the full day on Sunday. Ms. Tilley challenged that plan as contrary to past practice and stated that drivers should be paid for 16 hours on Saturday. Ms. Tilley told Ms. Riley she "would get back to her" about the method of payment.

Following her conversation with Ms. Riley, Ms. Tilley went to the CSEA shop steward, Georgia Ybright, and told her about the District's planned method of compensating drivers for the San Mateo trip. Ms. Ybright told Ms. Riley that she would find out about the past practice but that in the meantime the drivers should go ahead with the trip. If it became necessary, Ms. Ybright said, CSEA could file a grievance later. Ms. Woodson overheard the conversation and separately discussed the matter with Ms. Ybright who gave her the same advice she gave Ms. Tilley.

Georgia Ybright then went to Mr. Hunter. She told him that under the contract the only time drivers should not be paid on overnight trips was for the eight hours of sleep required by law.[4] Mr. Hunter responded that under the contract, drivers

---

[4]The relevant provision of the contract in existence at the time provides in Article VII, section 6, as follows:

> 6. Salary
>
> a. Bus drivers who must chain up on snow days will receive one (1) hour additional pay for each day they chain up.
>
> b. Bus drivers will receive compensation for hours driven only

who work overnight trips are not entitled to pay after they are released for the evening. At that point, Ms. Ybright told Mr. Hunter that the drivers would take the trip and the parties

---

plus one-half hour bus preparation time and standby time for trips outside regularly assigned bus routes.

c. Each driver must safety inspect each different bus they drive during the day, prior to transporting students. Payment for additional inspection(s) shall be fifteen (15) minutes for each bus, or twenty-five (25) minutes for buses equipped with dual air brake systems.

d. Bus drivers on special trips, including but not limited to athletic events, field trips, and curricular trips who are required to remain on standby, will be paid at the appropriate rate of pay for the duration of the event for which the special trip is made.

e. Notwithstanding any other provisions of this Agreement, if a special trip requires an overnight stay, the District shall be relieved of the obligation of payment for any hours between the time a bus driver is relieved of duties for the evening and the time duties resume the following morning.

f. Trip drivers may be taken off their regular route assignment to take a special trip. In such cases drivers will be paid for their trip time pursuant to the provisions of the agreement and not their missed route time.

could "settle it when they come back." She testified that Mr. Hunter warned "that by pursuing grievances and continuing to pursue this line, that we were going to end up doing ourselves harm by the District taking away our field trips." When he was called as a witness, Mr. Hunter was not asked if he warned Ms. Ybright that the drivers would harm themselves by pursuing grievances.

After her conversation with Mr. Hunter, Ms. Ybright called Minnie Franklin, a CSEA field representative and explained the growing dispute over the hours calculation. Ms. Franklin in turn contacted Arthur Cate, the assistant superintendent who is responsible for personnel and employer-employee relations. Ms. Franklin testified that she explained the problem to Mr. Cate. However, the matter was not resolved.

After he spoke with Ms. Franklin, Mr. Cate contacted Mr. Hunter and asked for an explanation of the problem. Mr. Hunter described the planned trip and told Mr. Cate how he interpreted the contract provision on hours. Mr. Cate said he then urged Hunter to speak to the District superintendent because he believed the superintendent previously had instructed Hunter to obtain the superintendent's approval before scheduling overnight trips.

Mr. Hunter testified that he had not believed the superintendent's instruction to be quite so strict. However, following the conversation with Mr. Cate, Mr. Hunter did visit

the superintendent and described the disagreement with CSEA over hours. The superintendent instructed Mr. Hunter to develop cost estimates for the trip, comparing the method of hours calculation favored by the District to that favored by CSEA and comparing the cost of both to the cost of an outside carrier. Mr. Hunter did make the comparison. He determined that the least expensive method of transportation would have been the use of District drivers and buses paid in accord with the District's interpretation of the contract. The most expensive method of transportation would have been the use of District drivers and buses paid in accord with CSEA's interpretation of the contract. The cost of Greyhound was between the other two.

The Cancellation.

Mr. Hunter presented his cost calculations to the superintendent who shared them with the principal of Ponderosa High School. The superintendent thereafter directed Mr. Hunter to cancel the trip for the District drivers and contract with Greyhound for the transportation of the students. On cross-examination Mr. Hunter was asked why the District did not go ahead with the trip as scheduled, pay the drivers per its reading of the contract and take its chances on winning the grievance. Mr. Hunter responded, "I don't know. I suppose. I didn't make that decision." The superintendent, who did make the decision, was not called as a witness.

On May 9, 1984, the three drivers scheduled to make the San Mateo trip were given cancellation notices by the driver coordinator. No explanation accompanied the notices which simply were placed into the boxes where drivers routinely receive instructions and communications from their supervisors. Claudia Larson was the only driver who testified that she was given any explanation for the cancellation. She said that Mr. Hunter followed her out to her bus just as she was preparing to leave on her afternoon run. She testified that she asked him, "What's going on, here?" She said he responded that, "Minnie and Georgia were causing trouble again and if it didn't stop that we weren't going to have any more weekend trips at all." Ms. Larson said she did not know what "trouble" was being caused by Minnie and Georgia.

Mr. Hunter testified that he did not recall following Ms. Larson out to her bus on May 9 but that, "it's not unusual for me to go out to a bus to talk to a driver." Asked if he made the "Minnie and Georgia" comment attributed to him by Ms. Larson, Mr. Hunter replied, "No, that's not accurate." He then denied that he had made any reference to "Minnie and Georgia causing trouble."

After she learned of the cancellation of the trip for District drivers, Minnie Franklin called Mr. Hunter to protest. She told him that the District should reassign the trip to the District drivers. Mr. Hunter declined to do so and

the students were taken to San Mateo by Greyhound. The District in the past has cancelled trips after drivers have accepted assignments. Previous cancellations, however, have been because of adverse weather or the combining of two bus loads into one. No witness could recall a previous occasion when a scheduled trip was cancelled to be replaced by a private carrier.

Past Practice on Payment for Trips.

The evidence does not conclusively establish what was the method of hours calculation for bus drivers taking overnight trips prior to a contractual change in the fall of 1983. It is clear that on some occasions drivers were paid from the time they left the District until their time of return, less eight hours for sleep. One driver, Patsy Estey, was paid for 36 hours of work after making an overnight trip to Modesto in December of 1981. She testified that when she accepted the assignment she was told that she would be paid from the time she left the District until the time of her return. Another driver, Dan Herrmann, testified that he was paid for 27 hours of work for an overnight trip to Modesto in October of 1982. He testified that on the first day his actual driving time was approximately 5 to 6 hours but he was paid for 16. On the second day, he testified, he was paid for 11 hours. Payroll records corroborated the testimony of both drivers.

Yet the District was able to produce evidence that on other occasions prior to the fall of 1983, drivers were paid for something less than portal-to-portal time minus eight hours for sleep. In August of 1982, for example, a driver was gone two nights on a trip to Aptos and was paid for only 24 hours. In June of 1982, another driver was gone for two nights and was paid for only 29 hours on a trip to Calaveras County.

In September of 1983 a District bus driver took a trip which brought into clear focus the issue of payment for overnight bus trips. The driver Jesse Martinez, took a concert choir to Nevada City on a trip that required a stay of two nights. When he returned, the District proposed to pay him only for driving time. CSEA filed a grievance which ultimately reached the superintendent. During a meeting with the superintendent, Mr. Martinez said he would be satisfied if the District would give him eight hours of pay for the Saturday portion of the trip, rather than the 16 hours sought by CSEA. The superintendent agreed and CSEA accepted the settlement with the stipulation that it was not intended to be precedential. The settlement was reached in mid-October.

The parties were in contract negotiations at the time of the Martinez grievance and the problem it presented soon became a consideration of the District. Mr. Cate and Mr. Hunter decided that the contract should be revised to preclude any

further misunderstanding about the method of calculating the hours of work for bus drivers taking overnight trips.

The prior contract contained only limited provisions dealing with bus driver compensation for field trips. The only relevant clause was in Article VII, section 6(b) which provided:

> Bus drivers will receive compensation for hours driven only plus one-half hour bus preparation time and standby time for trips outside regularly assigned bus routes.

CSEA had proposed an extensive revision of the sections pertaining to transportation employees. Of particular relevance was a proposal specifically requiring that drivers be compensated portal-to-portal. The CSEA proposal contained the following provision:

> Time leaving yard to time returning to yard will be compensated at the regular rate of pay plus overtime if applicable.

The District made no written counter to the CSEA proposals on transportation and there was very little discussion about the subject in the regular negotiating meetings. However, the settlement was worked out principally in side discussions between Mr. Cate and CSEA field representative Elizabeth Stephens. Mr. Cate testified that in those meetings,

> . . . one of the things we insisted upon was that we pull back on the drivers' time so that we would make that clear so, and we really both thought or I thought we had an understanding of what this article meant. That's maybe why the shock when suddenly we didn't get people interpreting it the same way we did because we thought the understanding was clear . . . .

As a result of the negotiations, four new provisions were added to Article VII, section 6, which deals with the salary of bus drivers. The two new sections which are relevant read as follows:

> d. Bus drivers on special trips, including but not limited to athletic events, field trips, and curricular trips who are required to remain on standby, will be paid at the appropriate rate of pay for the duration of the event for which the special trip is made.
>
> e. Notwithstanding any other provisions of this Agreement, if a special trip requires an overnight stay, the District shall be relieved of the obligation of payment for any hours between the time a bus driver is relieved of duties for the evening and the time duties resume the following morning.

Mr. Cate testified that the purpose of subsection (e) was to provide that when a driver was finished for the evening and not needed on standby, the District would no longer be obligated to compensate the driver. He said CSEA knew the District's position because of discussions that occurred during the processing of the Martinez grievance.

Georgia Ybright, a member of the CSEA negotiating team, testified that no such purpose was intended by subsection (e). She said it did not make a change and that it was an effort "to put in black and white a past practice that had already been set." Ms. Ybright testified that she could not remember if subsection (e) was a District or a CSEA proposal. The language

was not contained in CSEA's written proposal. Agreement was reached between the parties on November 1, 1983.

Past Practice on Use of Private Carriers.

The District has a long history of using private carriers to transport students on field trips. Mr. Cate testified that as long ago as 1971, the District sometimes used private carriers to transport students depending upon cost and distance. The practice has continued in recent years. The District presented evidence that in the 1980-81 school year students were taken on two trips to the bay area and one trip to Nevada by charter bus. In 1981-82, there was one trip to Nevada by charter bus. In 1982-83, there were three trips to the bay area and one to Nevada by charter bus. In 1983-84, there were four trips to the bay area, one to Nevada, one to Southern California and one to Mexico by charter bus.

Dave Soper, assistant principal at El Dorado High School, testified that the decision on whether to use District or charter buses is left primarily to the teacher who organizes the trip and the school administrators. Traditionally, he said, the basis for the decision has been the length of the trip. He testified that because charter buses are more comfortable, have air-conditioning and restrooms, they frequently have been selected for longer trips. He said that if a charter bus is to be used, the arrangements for it usually are made by the participating high school.

Mr. Soper testified that the manner of payment for the transportation was the same whether District or charter buses were used for the trip. He said that all District funds for field trips except athletics were eliminated in about the 1977-78 school year. Since that time, funds for field trips have been obtained from the student group taking the trip. The students conduct fund-raisers to collect the money and deposit it in student body accounts. The cost of both District-supplied and private charter transportation is paid from the student body accounts. If District buses are used, the transportation department bills the high school which pays the bill from the student account.

Credibility Determination.

There is one significant conflict in testimony. It involves a statement allegedly made by a District administrator to a CSEA witness. Claudia Larson testified that Mr. Hunter told her, "Minnie and George were causing trouble again and if it didn't stop that we weren't going to have any more weekend trips at all." Mr. Hunter denied making the statement.

It is significant that the disputed statement is similar to another remark attributed to Mr. Hunter that stands without contradiction in the record. Georgia Ybright testified that Mr. Hunter warned her "that by pursuing grievances and continuing to pursue this line, that we were going to end up doing ourselves harm by the District taking away our field

trips." The comment is quite similar to Ms. Larson's testimony that Mr. Hunter told her, "Minnie and Georgia were causing trouble again and if it didn't stop that we weren't going to have any more weekend trips at all." It is entirely believable that a person who made the first statement would also make the second.

Ms. Larson, moreover, was a highly credible witness. She was not one of the persons who contested the proposed method of pay in the first instance and she did not know even what the dispute was about when the trips were cancelled. She struck the administrative law judge as a person who felt herself caught in the middle between contesting parties in a dispute she did not desire. Her demeanor on the stand was that of a bystander simply describing what happened. Mr. Hunter, in contrast, gave a somewhat less convincing description of the conversation he had with Ms. Larson. He could not remember whether or not he followed her to the bus. When first asked if he made the disputed statement, he responded, "No, that's not accurate." It was only when pressed with further questions that his denial became more direct and even then he felt constrained to offer an explanation for why it is not likely that he would have made such a statement. A straightforward denial would have been more believable.

For these reasons, the testimony of Ms. Larson on this point is credited and that of Mr. Hunter is not.

LEGAL ISSUES

1. Did the District by hiring a private carrier to take students on a field trip make a unilateral change in past practice and thereby fail to negotiate in good faith in violation of subsection 3543.5 (c)?

2. Did the District by cancelling the assignment of its drivers to take students on a field trip thereby retaliate against employees for the exercise of protected rights in violation of subsection 3543.5 (a)?

3. Did the District by cancelling the assignment of its drivers to take students on a field trip thereby interfere with the right of employees to engage in protected activities in violation of subsection 3543.5 (a)?

4. Did the District by cancelling the assignment of its drivers to take students on a field trip thereby interfere with the right of CSEA to represent its members in violation of subsection 3543.5 (b)?

CONCLUSIONS OF LAW

Unilateral Change.

It is well-settled that the decision to subcontract unit work is within the scope of representation.[5] Archoe Union

---

[5]The scope of representation under the EERA is set forth at sections 3543.2 which, in relevant part, provides as follows:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and

School District (11/23/83) PERB Decision No. 360. It is equally well-settled that an employer that makes a pre-impasse unilateral change affecting an established policy within the scope of representation violates its duty to meet and negotiate in good faith. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. See generally, Davis Unified School District (2/22/80) PERB Decision No. 116, San Francisco Community College District (6/8/79) PERB Decision No. 94.

The District argues that its use of a private carrier to take students on a field trip was not a unilateral change but was the consistent application of a practice in continuous effect since 1971. An employer's acts that are consistent with an established practice cannot be considered unlawful unilateral changes. Placer Hills Union School District (11/30/83) PERB Decision No. 262.

> 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, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code . . . .

CSEA argues that the District's action here was different from the previous practice because never in the past had the District cancelled a trip assigned to its own drivers and then hired a private carrier. CSEA argues that this difference of itself constitutes an unlawful change in practice.

As will be seen, infra, the District's action in scheduling and then rescinding the assignment for its own drivers is substantial evidence of unlawful motivation. However, the use of a private carrier to take students on a trip to San Mateo in May of 1984 was consistent with past actions by the District. The District correctly argues that there is a continuous practice since 1971 of its use of private carriers to take students on field trips. In 1982-83, the District used private carriers three times to take students on trips to the bay area. In 1983-84, the District used private carriers four times to take students to the bay area. Except for the case at issue, there is no evidence of any CSEA protest about those trips. There would, of course, have been no grounds for such a protest because the status quo between the parties permits the use of private carriers.

Because CSEA has failed to demonstrate that the District changed the past practice by its use of a private carrier on the San Mateo trip, the allegation that the District violated subsection 3543.5 (c) must be dismissed.

Reprisals.

CSEA next argues that the District's decision to cancel the San Mateo trip for the three drivers was motivated solely by CSEA's challenge to the planned method of payment. Such motivation, CSEA concludes, was unlawful and constituted a violation of subsection 3543.5(a). The District does not specifically respond to the discrimination argument other than to argue that by contracting with Greyhound it did only what, under the Education Code, it has a legal right to do. The District argues that the action was consistent with past practice and motivated by comfort and cost.

In a discrimination or retaliation case, the key issue is the motivation of the respondent. An action that is otherwise legal can become unlawful under the EERA if it is motivated by improper considerations. Thus, if the District acted with unlawful motivation it cannot escape the consequence of its action by arguing that the Education Code empowers school districts to employ private carriers. Nor is it significant that the District has a past practice of employing private carriers. The question is whether in this instance the District cancelled the assignment of the trip to its own drivers as a retaliatory response to employee exercise of protected conduct.

Public school employees have the protected right,

> . . . to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of

representation on all matters of employer-employee relations.[6]

It is an unfair practice under subsection 3543.5 (a) for a public school employer to "impose . . . reprisals on employees, [or] to discriminate . . . against employees . . . because of their exercise of [protected] rights." In an unfair practice case involving reprisals or discrimination, the charging party must make a prima facie showing that the employer's action against the employee was motivated by the employee's participation in protected conduct. Novato Unified School District (4/30/82) PERB Decision No. 210. This can be done by either direct or circumstantial evidence.

In a case involving proof by circumstantial evidence, the charging party must show initially that the employer had actual or imputed knowledge of the employee's participation in protected activity. Moreland Elementary School District (7/27/82) PERB Decision 227. An employer cannot retaliate against an employee for engaging in protected conduct if the employer does not even know of the existence of that conduct.

The charging party then must produce evidence of unlawful motivation to link the employer's knowledge to the harm which befell the employee. Indications of unlawful motivation have been found in an employer's general animus toward unions, San Joaquin Delta Community College District (11/30/82) PERB

[6]Section 3543.

Decision No. 261, in an inadequate explanation to employees of the action, Clovis Unified School District (7/2/84) PERB Decision No. 389, in the timing of the employer's action, North Sacramento School District (12/20/82) PERB Decision No. 264, and in the failure to follow usual procedures, Santa Clara Unified School District (9/26/79) PERB Decision No. 104.

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the employer to prove that its action would have been the same in the absence of protected activity. Novato Unified School District, supra, PERB Decision No. 210.

It is clear that employees in the present action participated in protected activity. Two of the drivers sought CSEA assistance to determine whether or not the District proposed to pay them at the proper rate for the San Mateo trip. Employees have a protected right to seek employee organization assistance "for the purpose of representation on all matters of employer-employee relations." Seeking advice from an employee organization is a protected activity, even outside the grievance process. Santa Clara USD, supra, PERB Decision No. 104. Here, the contact with the employee organization was prefatory to the filing of a grievance, which likewise is a protected activity. North Sacramento, supra, PERB Decision No. 264.

It also is clear that the District knew of the employee participation in the protected conduct. Victoria Tilley raised the issue of the amount of pay with Phyllis Riley, the person who assigned the trip, and then challenged Ms. Riley's explanation of the proposed method of payment. Shortly thereafter, CSEA representatives contacted two District administrators to question the proposed method of payment. From this sequence of events, knowledge that one or more of the bus drivers had requested CSEA's assistance can be imputed to the District.

Finally, there is substantial evidence of unlawful motivation by the District. Most persuasive is the virtual admission of Mr. Hunter that the cancellation was due to the CSEA challenge. One of the drivers, Claudia Larson, testified that Mr. Hunter told her, "Minnie and Georgia were causing trouble again and if it didn't stop that weren't going to have any more weekend trips at all." Minnie and Georgia are the CSEA field representative and shop steward who questioned District administrators about the proposed method of payment. Presumably, the "trouble" they were causing was their challenge to the District's plan to pay employees only for time worked on Saturday. Mr. Hunter made a similar comment to Georgia Ybright when he told her that "by pursuing grievances . . . we were going to end up doing ourselves harm by the District taking away our field trips." The statements of Mr. Hunter plainly reveal a retaliatory intent.

Retaliatory intent is obvious also in the timing of the District's action. The trip was assigned on Monday. On Tuesday and Wednesday CSEA representatives challenged the proposed method of payment for the trip. On Thursday, the trip was cancelled. The record establishes that the cancellation was the first ever made so that a trip then could be subcontracted to a private carrier. In the past, trips subcontracted to private carriers were assigned to them from the beginning. Here, the trip was subcontracted after CSEA challenged the District's proposed method of payment. The proximity of the CSEA challenge to the decision to hire Greyhound strongly suggests a cause and effect relationship.

Against this prima facie showing by CSEA, the District argues that it cancelled the trip for its own drivers because charter buses were more comfortable and less expensive. Neither contention is persuasive. One would expect that if comfort were a key consideration the District would have opted for charter buses in the first instance. Apparently, comfort became an important consideration only after CSEA challenged the proposed method of payment. The comfort argument is at best an afterthought designed to put the District's action in a better light.

Equally unconvincing is the contention that the District contracted with Greyhound in order to cut cost. The District's own cost calculations established that use of District drivers

and buses under the District's interpretation of the contract was less expensive than Greyhound for transporting students on the San Mateo trip. The use of District buses would have been more expensive than Greyhound only under the CSEA interpretation of the contract.

The contract provides that "notwithstanding any other provisions of this agreement," the District has no obligation to pay drivers on overnight trips for the hours "between the time a bus driver is relieved of duties for the evening and the time the duties resume the following morning." As the District convincingly argues in its brief, the clause when read together with related provisions creates three categories of time. First is actual driving time, next is "standby time" and third is time after a driver is "relieved of duties for the evening." The District is obligated to pay drivers for the first two categories of time but not the third.

CSEA's claim that drivers are entitled to pay for the third category of time contradicts the clear meaning of the provision, not to mention its negotiating history. The record establishes that the provision was the product of District concerns about a 1983 grievance that had been filed over a similar dispute about hours. Although the past practice was ambiguous, the District wanted to ensure that there would be no future disputes about the payment to drivers on overnight

trips. As the District argues in its brief, the 1983 changes in the contract "clearly accomplished that result."

Thus, as its own brief makes apparent, the District's position on the meaning of the contract cause was by far the more convincing. The District almost certainly would have prevailed in any dispute that might have arisen out of its planned method for paying drivers on the San Mateo trip. Seen in this context, the District's argument that it used Greyhound in order to save money is hardly compelling. Greyhound was not the least expensive method of transporting the students to San Mateo. It is concluded that the District has failed to demonstrate that its action would have been the same in the absence of protected activity. CSEA's prima facie case that the District cancelled the San Mateo trip for its own drivers in retaliation for their exercise of protected activity is thus unrebutted. Accordingly, it is concluded that the District did violate EERA subsection 3543.5 (a).

Interference.

As a separate legal theory, the charge and complaint allege that the District's action in cancelling the trip for District drivers after the CSEA protest constituted an unlawful interference. Although neither party specifically discusses the question of interference in its briefs, the matter was raised in the complaint and was litigated.

It is an unfair practice under subsection 3543.5 (a) for a public school employer "to interfere with, restrain, or coerce employees because of their exercise of" protected rights. In a case involving interference, a violation will be found where the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity. Carlsbad Unified School District (1/30/79) PERB Decision No. 89.[7]

---

[7]The Carlsbad test for interference provides as follows:

. . . . . .

(2) Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

(3) Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;

(4) Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

(5) Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

See also, Novato Unified School District (4/30/82) PERB Decision No. 210 and Sacramento City Unified School District (4/30/82) PERB Decision No. 214. Interference has been found where an employee was warned against participation in protected activities, Ravenswood City School District (12/28/84) PERB Decision No. 469; Clovis Unified School District, supra, PERB Decision No. 389.

Here, the District transportation director warned two employees that the continued filing of grievances would have a negative effect on the assignment of weekend trips. Mr. Hunter told Claudia Larson that, "Minnie and Georgia were causing trouble again and if it didn't stop that we weren't going to have any more weekend trips at all." He told Georgia Ybright that "by pursuing grievances and continuing to pursue this line, that we were going to end up doing ourselves harm by the District taking away our field trips." Thus, two drivers were directly told that if employees continued to exercise their protected right to file grievances the District would eliminate their opportunity for weekend trips.

If those warnings were not sufficient to get the point across, the District in fact cancelled a weekend trip and subcontracted it to Greyhound. Employees thus had no need to speculate about whether or not the District actually would cancel trips if grievances continued. They were confronted with a demonstration of the District's resolve.

It seems indisputable that an employer's warnings coupled with an overt demonstration of resolve would interfere with employee exercise of protected rights. It was made explicitly clear to District bus drivers that if they continued to exercise protected rights they would lose the opportunity for weekend trips and the additional pay that accompanies them. Employees confronted with such evidence of District resolve would be encouraged to think again before seeking CSEA assistance to question a planned District action.

Against this prima facie case of interference the District offers as operational necessity the comfort and cost justifications. These arguments are rejected for the reasons discussed above.

Accordingly, it is concluded that by warning employees about the filing of grievances and by cancelling the San Mateo trip for its own drivers and subcontracting with Greyhound the District did interfere with the right of employees to engage in protected activity in violation of EERA subsection 3543.5(a).

Denial of Association Rights.

CSEA's final line of argument is that the District's actions here denied to CSEA its statutory right to represent its members. It is an unfair practice for a public school employer to "deny to employee organizations rights guaranteed to them" by the EERA.[8] Under section 3543.l(a),

[8]Subsection 3543.5(b), footnote no. 1, supra.

employee organizations "have the right to represent their members in their employment relations with public school employers." Thus, any denial of the Association's right to represent its members is a denial of the Association's protected rights.

It has been held that an employer's retaliation against an employee for the filing of grievances constituted a derivative violation of subsection 3543.5(b). North Sacramento, supra, PERB Decision No. 264. Under the evidence here, it also is held that the employer's action was an independent violation of subsection 3543.5(b).

It is self-evident that Mr. Hunter's warnings to Claudia Larson and Georgia Ybright constituted an interference with CSEA's right to represent its members. Mr. Hunter told Ms. Ybright, the transportation department shop steward, that "by pursing grievances" CSEA was going to do harm to employees because the District would take away field trips. A similar comment was made to Ms. Larson. Such statements by a management official gravely inhibit CSEA's ability to represent its members.

Moreover, the District here showed that its warnings were not mere idle talk. The District cancelled the San Mateo trip for its three drivers and subcontracted to a private carrier. CSEA's attempt to represent its members, Victoria Tilley and Dianne Woodson, led to their loss of income. The District's

action thus not only denied CSEA its rights here but created grave obstacles to future representation. Employees who observed the result of the Association's complaint about bus driver payments can make the easy observation that CSEA representation can lead to a loss of income. An employee organization confronted with such improper, District-imposed obstacles is essentially denied its right to represent its members.

Accordingly, it is concluded that by warning employees about the filing of grievances and by cancelling the San Mateo trip, the District did deny CSEA the right to represent its members in violation of subsection 3543.5(b).

REMEDY

CSEA seeks an order that the District be directed to compensate the three drivers for the May 12-13, 1984, trip in accord with the past practice. The PERB in subsection 3541.5(c) is given:

> . . . the power 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.

The ordinary remedy in cases involving discrimination because of protected conduct is restoration of the benefits or wages lost because of the discrimination. San Joaquin Delta Community College District, supra, PERB Decision No. 261. It

is appropriate, therefore, that the three drivers be compensated for wages lost because of the District's retaliatory cancellation of the May 1984 trip.

CSEA correctly argues that the amount of the compensation should be determined in accord with the past practice between the parties for the payment of drivers who take overnight trips. This means, according to CSEA, that drivers should be compensated for 16 hours of time on May 12 rather than the amount of actual driving time, estimated at four hours by the District. It has been concluded in this proposed decision that the past practice is not as CSEA claims it. Under the terms of the contract negotiated between the parties in the fall of 1983, drivers are entitled to compensation only for driving and standby time. On overnight trips, drivers are not entitled to compensation for the hours between the time they "are relieved of duties for the evening and the time the duties resume the following morning." Thus, the three drivers are entitled to compensation only for actual driving and standby time over the two days.

Prior to the trip, the drivers were told that they would be paid for approximately four hours on May 12 and for a full-day on May 13, beginning with the time they picked up the students in the morning until approximately 8:30 p.m. The District will be directed to pay the drivers in accord with what it estimated prior to the trip unless either party can demonstrate that the

trip as actually taken required a greater or lesser amount of time. Insofar as any portion of the trip normally would be paid at the overtime rate under the contract between the parties, the back pay award shall be calculated accordingly. The amount due to each driver shall be augmented by interest at the rate of 10 percent with the interest due from the date District drivers received paychecks covering the period of May 12-13, 1984.[9]

It also is appropriate that the District be directed to cease and desist from its unfair practices and to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from

---

[9]The District argues at length that when the Association threatened to file a grievance over the hours issue, the Association violated the agreement by seeking to avoid concessions it had made in bargaining. The District also argues that when the Association filed the present case it committed an unfair practice by refusing to bargain the issue in good faith. The District's legal theories in this regard are the subject of another action, El Dorado Union High School District v. California School Employees Association and its Ponderado Chapter No. 267, Case No. S-CO-116. The charge was dismissed on December 18, 1984, by the Sacramento Regional Attorney. Exceptions were filed to the dismissal and the matter is now before the Board itself. The District raised the matter in its brief in the present case as part of a request for reimbursement for its attorney's fees and other costs. Inasmuch as the Association has been partially sustained in its allegations against the District, the award of attorney's fees and costs to the District is obviously inappropriate and is denied.

this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. Davis Unified School District et al. (2/22/80) PERB Decision No. 116; see also Placerville Union School District (9/18/78) PERB Decision No. 69.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the El Dorado Union High School District violated subsections 3543.5(a) and (b) of the Educational Employment Relations Act. Pursuant to subsection 3541.5(d) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Retaliating against employees because of their exercise of the protected right to seek representation by an employee organization in their employer-employee relations by cancelling work assignments which had been given to them and thereby causing them to lose extra pay.

(b) Interfering with the right of employees to seek representation by an employee organization in their employer-employee relations by warning them that the filing of grievances will result in the loss of work assignments and by cancelling such assignments.

(c) Interfering with the right of an employee organization to represent its members in their employer-employee relations by warning employees that the filing of grievances will result in the loss of work assignments and by cancelling such assignments.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Compensate bus drivers Dianne Woodson, Victoria Tilley and Claudia Larson for wages lost because of the District cancellation of their assignment to drive students to San Mateo on May 12 and 13, 1984. Each driver shall be paid for four hours of work on May 12 and a full day on May 13 with the workday concluding at 8:30 p.m. unless either party can demonstrate that the trip as actually made by the charter bus company required either a greater or lesser amount of time. Insofar as any portion of the trip normally would have been paid at the overtime rate under the contract between the parties, the back pay award shall be calculated accordingly. The amount due each driver shall be augmented by interest at the rate of 10 percent with the interest due from the date District drivers received paychecks covering the period of May 12 and 13, 1984.

(b) Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix.

The notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(c) Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with her instructions.

It is further ordered that the portion of the complaint and charge which alleges that the District subcontracted unit work is hereby dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on February 20, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on February 20, 1985, or sent by telegraph or certified United

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

Dated: January 31, 1985

Ronald E. Blubaugh
Administrative Law Judge