

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



AMALGAMATED TRANSIT UNION,
LOCAL 1704,

Charging Party,

v.

OMNITRANS,

Respondent.

Case No. LA-CE-323-M

PERB Decision No. 2030-M

May 29, 2009

Appearances: Neyhart, Anderson, Flynn & Grosboll by William J. Flynn, Attorney, for Amalgamated Transit Union, Local 1704; County of San Bernardino by Carol A. Greene, Deputy County Counsel, for Omnitrans.

Before Rystrom, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

RYSTROM, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Omnitrans and Amalgamated Transit Union, Local 1704 (ATU) to the proposed decision of an administrative law judge (ALJ). The ALJ concluded that Omnitrans violated the Meyers-Milias-Brown Act (MMBA)¹ by: (1) denying union representatives access to employees in the drivers' assembly rooms at its facilities; and (2) adopting a new union access policy without providing ATU with notice and an opportunity to meet and confer over the change. In addition to the usual cease and desist and notice posting remedies, the ALJ ordered Omnitrans to: (1) reimburse ATU for the legal expenses it incurred defending a criminal trespass charge filed by Omnitrans against one of ATU's officers

¹ MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

who refused to leave the drivers' assembly room; (2) notify the court and district attorney that Omnitrans' action was unlawful; and (3) seek expungement of all records of the ATU officer's arrest and prosecution.

The Board has reviewed the entire record in this case, including but not limited to, the complaint and answer, the hearing transcripts and exhibits, the parties' post-hearing briefs, the ALJ's proposed decision, Omnitrans' exceptions and ATU's response thereto, and ATU's exception. Based on this review, we affirm the violations found by the ALJ for the reasons discussed below.

BACKGROUND

Omnitrans is a joint powers agency that provides scheduled public transportation service in western San Bernardino County. ATU is the recognized employee organization representing coach operators (bus drivers) employed by Omnitrans.

Local Rules and Contract Provisions Governing Union Access to Omnitrans Facilities

Pursuant to MMBA section 3507, subdivision (a),² the Omnitrans Board of Directors adopted Employer-Employee Relations Resolution 59-81 (EERR) on October 14, 1981.

Section 16 of the EERR provides:

Access to OMNITRANS work location, and the use of OMNITRANS paid time, facilities, equipment and other resources by employees' organizations, and those representing them, shall be authorized only to the extent provided for in Memoranda of Understanding and/or administrative procedures, shall be limited to activities pertaining directly to the employer-employee relationships, and not such internal employee

² MMBA section 3507, subdivision (a), authorizes a local public employer to "adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations." Such local rules may include provisions for "[a]ccess of employee organization officers and representatives to work locations." (Gov. Code, § 3507, subd. (a)(6).)

organization business as soliciting membership, campaigning for office, and organization meetings and elections, and shall not interfere with the efficiency, safety and security of OMNITRANS operations.

Omnitrans Personnel Policy Manual, Policy 1004 "Visitors," approved by the Board of Directors on May 5, 2004, states in relevant part that "[v]isits to the Agency by friends, family, or acquaintances of employees and off-duty employees are not encouraged, and are not permitted in work areas."

Article 18 of the memorandum of understanding (MOU) between ATU and Omnitrans addresses union access to employees. Prior to the 2004-2007 MOU, Article 18, entitled "Access to Work Locations," stated:

Reasonable access to employee work locations shall be granted officers of the ATU and their officially designated representatives for the purposes of processing grievances or contacting members of the bargaining unit concerning business within the scope of representation. Such officers or representatives shall not enter any work location without first advising the Department Head. Access may be restricted by the Department Head so as not to interfere with the normal operations or with established safety or security requirements. Should such access be denied, a mutually agreeable meeting shall be arranged.

Article 18 of the 2004-2007 MOU, which was in effect at all times relevant to this case, is entitled "Access to On Duty Employees" and states in full:

Reasonable time and access to on duty employees shall be granted officers of the ATU and their officially designated representatives for the purpose of processing grievances or appeals only.

Such officers or representatives shall not access any on duty employee without first advising the Department Head or designee. Access may be restricted or denied so as not to interfere with the normal operations or with established safety or security requirements. Should such access be denied, a mutually agreeable meeting shall be arranged.

ATU President Dale Moore (Moore) and ATU International Vice President William Gilbert McLean (McLean), who were both members of ATU's bargaining team for the 2004-2007 MOU, testified that the change to Article 18 occurred in response to Omnitrans' concerns about union officers contacting drivers on their routes. According to Moore and McLean, ATU agreed to the new language with the understanding that it prohibited union access while an employee was working. Both also testified that access to the drivers' assembly rooms was not discussed during the negotiations over Article 18. Omnitrans presented no evidence of the bargaining history of Article 18.

The Drivers' Assembly Rooms

Omnitrans has two operations facilities: the West Valley Division in Montclair and the East Valley Division in San Bernardino. Employees access the facilities by use of an electronic key card. Drivers' access to areas inside the facility are restricted by their key cards. Each of the facilities has a drivers' assembly room. In both locations, the assembly room contains lockers and long tables. On one wall of the assembly room is the dispatch window where drivers sign in and out for their routes; the dispatcher is located in a separate room on the other side of the window. In both facilities, drivers have access to adjacent rooms where they can exercise, watch television, eat or just sit quietly.

Though drivers must come into the drivers' assembly room to sign in and out at the dispatch window, drivers are not required to perform work duties in the assembly room. If an incident occurs on a driver's route, the driver is required to fill out a report at the end of the shift. Some drivers fill out their reports in the assembly room while others use the adjacent quiet room. Occasionally, standby drivers, who are paid to be on the premises in case a substitute driver is needed, are assigned light clerical tasks by the dispatcher. Those duties are usually performed in the assembly room.

There are many occasions when off-duty drivers are in the assembly room. Drivers may come in early before their shift or stay after their shift to socialize with other drivers. Drivers who work a split shift are required to clock out in between the “pieces” of their shift. Some drivers choose to spend that off-duty time in the assembly room rather than leave the premises and return later. Off-duty employees also come to the assembly room to collect their paychecks or paystubs from the dispatch window, to check the schedule of routes for the following day and to bid on scheduled routes.

Moore, ATU Vice President Jeff Caldwell (Caldwell), and ATU officers Michael Aguilar (Aguilar) and Lucius Tyson (Tyson), all Omnitrans employees at the time of the hearing, testified that on a regular basis over the past few years each had sat in the drivers’ assembly room at either West Valley or East Valley, while off-duty and out-of-uniform, and discussed union matters with drivers. They consistently testified that they did not approach drivers but that drivers would approach them individually or in small groups. They also testified that on each occasion the ATU officer had not sought prior permission from Omnitrans management to access employees in the assembly room and that Omnitrans management had never questioned why the officer was there or asked him to leave.

Doug Stanley (Stanley), the transportation manager at East Valley, testified that he passes through the drivers’ assembly room between five and fifteen times per day on the way to and from his office. Stanley testified that he routinely notices if someone is out-of-uniform in the assembly room. In such cases, Stanley would not ask the person why he or she was there but would instead check with the dispatcher. He also testified that he had never seen an out-of-uniform individual spend several hours in the assembly room. Kevin Copeland (Copeland), a field supervisor who reports directly to Stanley, testified that he would question an out-of-uniform, off-duty employee about being in the assembly room but had never seen

such an employee spend a long period of time in the assembly room. Operations Director Scott Graham (Graham) testified that he passes through the assembly room six to eight times per day and often notices out-of-uniform drivers there.

John Steffon (Steffon), transportation manager at West Valley, testified that over the prior three or four years he had seen Tyson set up his laptop and discuss union business with drivers in both the West Valley and East Valley drivers' assembly rooms on several occasions. Steffon said he had never been informed that ATU had advance permission to talk informally to drivers in the assembly room at West Valley and had never questioned Tyson about why he was there.

Events of October 23, 2006

On October 23, 2006, Moore arrived at the West Valley drivers' assembly room at approximately 8:00 a.m. He was off-duty that day and not in uniform. He had not requested permission or notified Omnitrans management that he would be doing union business there that day. Moore sat at a table, and spoke with and gave ATU flyers to drivers who approached him. The flyers announced a dues increase that was to take effect the following day.

Aguilar arrived at the East Valley drivers' assembly room at approximately 10:30 a.m. that same day. Like Moore, Aguilar was off-duty and not in uniform, and had not advised Omnitrans management that he would be conducting union business there that day. Aguilar sat at a table, set up his laptop computer and a folder containing the dues increase flyers, and spoke with drivers who approached him. Around 11:00 a.m., Copeland, who was filling in for the dispatcher, asked Aguilar if he had permission to be in the assembly room. Aguilar responded that he was an employee, he was just talking to drivers and that he had never needed permission before. Copeland testified that Aguilar responded with an "elevated tone" and upraised hands.

Copeland phoned Stanley and told him Aguilar had “set up in the drivers room without permission.” According to Stanley, Copeland also told him Aguilar was “stirring up the troops or riling up the troops.” Stanley then called Graham, told him Aguilar had “set up shop” in the assembly room and asked if Graham had given permission for him to do so. Graham responded that he had not given permission.

Stanley immediately went to the drivers’ assembly room. As he entered the room, Stanley saw five to ten drivers standing around Aguilar. Stanley testified there were elevated voices and he heard something about “rest and meal periods” before the drivers saw him and quieted down. Stanley asked Aguilar to come back to his office. Aguilar responded that they could have a discussion right there. Stanley sat down, showed Aguilar a copy of Article 18 and said that it required Aguilar to obtain permission from Graham to meet with drivers in the assembly room. Aguilar then said that he had a right to be there and if Graham wanted to talk to him, Graham could call him or come to the assembly room.

Aguilar then phoned Moore, who was still at West Valley, and asked him to explain Article 18 to Stanley. Aguilar handed the phone to Stanley. Neither Moore nor Stanley testified about the contents of their phone conversation. After speaking with Moore, Stanley returned the phone to Aguilar and told him he had five minutes to leave the premises. According to Stanley, Aguilar responded “well, then, you’re going to have to call the police.” Stanley then left the assembly room.

After Stanley left, standby driver David Patton (Patton) spoke with Aguilar for several minutes. About an hour earlier, Patton had been assigned by the dispatcher to deliver an interoffice mail bag to a particular bus when it stopped in front of the building. Patton testified that he forgot to make the delivery at the proper time and instead put the mailbag on another bus 15 minutes later. Patton later told Copeland that he missed the assigned delivery because

he was speaking to Aguilar. However, Patton testified that Aguilar did not in any way interfere with him delivering the mailbag and that he used Aguilar as an excuse when he spoke with Copeland “because [Aguilar] just happened to be the person in the room at the time.” Copeland testified that he counseled Patton either that day or the next morning about forgetting the mailbag delivery. Copeland also issued Patton an “information to file” memorandum that, per Omnitrans policy, Patton never saw.

Approximately ten to fifteen minutes after Stanley left, he returned to the drivers’ assembly room and told Aguilar he did not want to escalate the situation “to the next level.” Aguilar responded that “you may have to.” Stanley left the room and called Omnitrans security. Stanley also told Graham, the operations director, that Aguilar had refused to leave.

In the meantime, Steffon, the transportation manager at West Valley, approached Moore and asked if he had permission to conduct union business in the drivers’ assembly room. Moore responded that he had never needed permission to come and talk to drivers in the assembly room. Steffon then told him to leave. Moore said that he would leave when he was ready to leave. Moore then called Graham, said he was told he needed permission to speak with drivers about a dues increase at the West Valley assembly room, and asked if Graham had a problem with him doing so. Graham responded that he was informed Aguilar was discussing meal and rest periods with drivers, not a dues increase. Moore left West Valley soon after to attend a meeting at East Valley.

Not long after Stanley left for the second time, Omnitrans security officer Rhonda Rickmire approached Aguilar and asked him to come to Graham’s office. Aguilar responded he was not comfortable going to the office and asked that Graham come to the assembly room. Steve Okamura (Okamura), Omnitrans’ director of security, then asked Aguilar to come to

Graham's office. Aguilar again refused. Okamura then told another security guard to call 911. The security officers then left the room.

A few minutes later, ATU Vice President Caldwell arrived, sat down next to Aguilar, and spoke with him for a while. Caldwell testified that he went to the assembly room because Moore called and told him Stanley was speaking with Aguilar about being on the premises. When Moore arrived, he and Caldwell left the assembly room and went to a meeting with Omnitrans Employee Relations Officer Michael Lloyd. Aguilar then left the assembly room and went outside to eat lunch. On his way back in, Aguilar observed a police car in front of the building. Fearing that he would be taken to jail, Aguilar put his laptop in his truck before returning to the assembly room. Aguilar then called Moore and asked him to witness anything that happened.

Two police officers approached Aguilar in the drivers' assembly room. Officer Shaun Jarvis (Jarvis) asked Aguilar to speak to him in the hallway. Aguilar asked if he could take Moore with him but the officers said, "it doesn't work like that." According to Jarvis, Aguilar twice refused to go with the officers. The officers then turned Aguilar around and handcuffed him. As the officers escorted Aguilar from the room, he stated in a loud voice "this is what Omnitrans does to you."

The officers led Aguilar to a bus stop in front of the Omnitrans building. Moore and Caldwell arrived soon after. After speaking to the officers, Caldwell left while Moore remained and talked with Aguilar. Officer Roberg (Roberg) then spoke with Stanley and Graham. Upon returning, Roberg told Aguilar that Omnitrans did not want to press charges but just wanted him to leave the premises.³ Aguilar responded that he had "every right" to be

³ Roberg's statements are taken from the police report contained in the record. Because he did not testify, these statements are hearsay.

on the premises. Jarvis testified that Aguilar said “if you take these handcuffs [off] me I’m going back inside.” Aguilar denied making that statement.

The officers informed Stanley and Graham that Aguilar refused to leave the premises. Stanley and Graham said they wanted Aguilar arrested. Okamura placed Aguilar under citizen’s arrest and signed an “Arrest by Private Person” form. The officers took Aguilar to West Valley Detention Center, where he was booked for violating Penal Code section 602.1, subdivision (b),⁴ and held until the following morning.

Aguilar retained an attorney, Donald Jordan (Jordan), to represent him regarding the criminal trespass allegation. ATU paid Jordan’s \$3000 fee. According to Aguilar, the district attorney sent him a letter stating that the trespassing “charges” would be dropped in October if he stayed out of trouble. Neither that letter nor any other documentation of the district attorney’s filing or dismissal of charges against Aguilar is in the record.

ALJ’s Proposed Decision

The ALJ concluded that Omnitrans unlawfully interfered with employees’ and ATU’s rights under the MMBA by prohibiting ATU officers from speaking with employees in the drivers’ assembly rooms unless they first obtained permission from Omnitrans management.

⁴ Penal Code section 602.1, subdivision (b), states in full:

Any person who intentionally interferes with any lawful business carried on by the employees of a public agency open to the public, by obstructing or intimidating those attempting to carry on business, or those persons there to transact business with the public agency, and who refuses to leave the premises of the public agency after being requested to leave by the office manager or a supervisor of the public agency, or by a peace officer acting at the request of the office manager or a supervisor of the public agency, is guilty of a misdemeanor, punishable by imprisonment in a county jail for up to 90 days, or by a fine of up to four hundred dollars (\$400), or by both that imprisonment and fine.

The ALJ first observed that even though the MMBA is silent regarding union access rights, such rights are inherent in the statutory right of employees to participate in the activities of an employee organization. The ALJ found that the drivers' assembly rooms were "mixed use" areas where work was occasionally performed and that drivers were "predominantly on non-working time" while in the assembly rooms. The ALJ noted Omnitrans' policy was presumptively invalid because it restricted union communication in non-work areas during non-working time and found Omnitrans failed to establish a legitimate business reason to rebut the presumption.

The ALJ also concluded that Omnitrans' application of this policy to Moore and Aguilar on October 23, 2006, constituted an unlawful unilateral change. The ALJ found the parties' past practice was for ATU officers who were also Omnitrans employees to regularly speak with drivers about union matters in the drivers' assembly room without obtaining prior permission from Omnitrans management. The ALJ rejected Omnitrans' arguments that Article 18 applied to the drivers' assembly room and that, by agreeing to the article, ATU had waived its right to bargain over union access to employees.

As a remedy, the ALJ ordered Omnitrans to cease and desist from applying its unlawful access policy and post a notice of the violation. The ALJ also ordered Omnitrans to: (1) pay the \$3000 attorneys' fee ATU incurred to defend Aguilar against the criminal trespass charge; (2) notify the court and district attorney of its unlawful conduct; and (3) seek expungement of all records of Aguilar's arrest and prosecution. The ALJ reasoned that these additional remedies were necessary to make ATU whole because Aguilar's arrest and charge would not have occurred but for Omnitrans' enforcement of its unlawful access policy.

Omnitrans' Exceptions

Omnitrans excepts to the ALJ's rulings on both issues and to the proposed remedy. Omnitrans argues that its access policy is lawful because the drivers' assembly rooms are work areas and Aguilar accessed on duty employees in the assembly room on October 23, 2006. Regarding the unilateral change allegation, Omnitrans asserts that it was merely enforcing existing access policies on October 23, 2006. Omnitrans also asserts this allegation was untimely because ATU knew more than six months before the charge was filed that Omnitrans had a policy requiring employees to obtain prior permission to access Omnitrans property while off-duty. Finally, Omnitrans contends the proposed remedy is improper because: (1) PERB has no authority to order payment of attorneys' fees in a criminal matter; (2) Aguilar had it within his control to avoid arrest; and (3) it was the district attorney, not Omnitrans, that decided to file the criminal trespass charge against Aguilar.

ATU's Response and Exception

In response to Omnitrans' exceptions, ATU argues that: (1) standby drivers are not on working time for purposes of union access; and (2) the drivers' assembly rooms are "mixed use" areas because most of the drivers there at any give time are off-duty. ATU also excepts to the proposed decision to the extent the decision finds that Aguilar was the cause of Patton's failure to deliver the mailbag at the proper time.

DISCUSSION

1. Interference

To establish a prima facie case of interference with the rights of employees, the charging party need not show that the respondent acted with an unlawful motive but only that the respondent's conduct tends to or does result in harm to employee rights. (*Sacramento City*

Unified School District (1982) PERB Decision No. 214.) The courts have described the interference standard under the MMBA as follows:

All [a charging party] must prove to establish an interference violation of [MMBA] section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that [the] employer's conduct was not justified by legitimate business reasons.

(Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County (1985) 167 Cal.App.3d 797, 807.)⁵

a. Protected Activity

To determine whether Aguilar engaged in protected activity when he spoke with drivers about union matters in the East Valley drivers' assembly room on October 23, 2006, it is necessary to first determine the scope of ATU's access rights to Omnitrans employees. Only if Aguilar was acting within the bounds of those rights can his conduct be protected by the MMBA.

Union Access Rights Under the MMBA

PERB has not explicitly addressed the extent of union access rights under the MMBA. The California Supreme Court has instructed that each California public sector labor relations statute must be interpreted with reference to the others in order to maintain "a coherent and harmonious system of public employment relations laws." (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1089-1090.) Further, when interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA). (*Fire Fighters Union v. City of Vallejo*

⁵ In cases arising under the MMBA, PERB "shall apply and interpret unfair labor practices consistent with existing judicial interpretations of [the MMBA]." (Gov. Code, § 3509, subd. (b).)

(1974) 12 Cal.3d 608.) Accordingly, an examination of the right of access under other PERB-administered statutes, as well as under the NLRA, is instructive in deciding the issue before us.

Both the Educational Employment Relations Act (EERA)⁶ and the Higher Education Employer-Employee Relations Act (HEERA)⁷ explicitly grant recognized employee organizations a right of access to the employer's facilities. EERA section 3543.1, subdivision (b), states:

Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.^[8]

Under both Acts, the right of access is presumptive. (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1700-H.) However, as the statutory language indicates, access is subject to reasonable regulation by the employer. (*Regents of the University of California (Lawrence Livermore National Laboratory)* (1982) PERB Decision No. 212-H.)

Unlike EERA and HEERA (but like the MMBA), the Ralph C. Dills Act (Dills Act)⁹ does not contain an express grant of union access rights. Nonetheless, in *State of California (Department of Corrections)* (1980) PERB Decision No. 127-S, PERB found that "a right of access is implicit in the purpose and intent" of the Dills Act. In *State of California (Department of Transportation)* (1983) PERB Decision No. 304-S, PERB firmly grounded the

⁶ EERA is codified at Government Code section 3540 et seq.

⁷ HEERA is codified at Government Code section 3560 et seq.

⁸ HEERA section 3568 is identical in substance, though phrased somewhat differently.

⁹ The Dills Act is codified at Government Code section 3512 et seq.

right of access in Dills Act section 3519, subdivision (a). There, the Board stated that, “in addition to the right of employees to join and participate in an employee organization of their choice,” section 3519, subdivision (a), protects employee organizations’ “right to communicate with employees and members at their work site, where they are generally most accessible.”

(*Ibid.*)

PERB’s recognition of an implied right of access under the Dills Act is consistent with interpretations of the NLRA by the National Labor Relations Board (NLRB) and the federal courts. Like the Dills Act (and the MMBA), the NLRA does not expressly grant unions a right of access to employers’ facilities. Nonetheless, like all of California’s public sector labor relations statutes, the NLRA makes it an unfair labor practice for an employer to interfere with, or discriminate based on, an employee’s exercise of rights guaranteed under the Act.¹⁰ As early as 1943, the NLRB held that an employer’s rule unreasonably limiting union solicitation on its property constituted discrimination in violation of the Act. (*Peyton Packing Company Inc.* (1943) 49 NLRB 828, 843-844.) Not long after, the United States Supreme Court approved the NLRB’s recognition of an implied right of access arising from the Act’s non-interference and non-discrimination provisions. (*Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 801-803.) The Supreme Court has reaffirmed that right in subsequent cases. (*NLRB v. Magnavox Co. of Tenn.* (1974) 415 U.S. 322, 324; *Eastex Inc. v. NLRB* (1978) 437 U.S. 556, 570-573.)

¹⁰ NLRA section 7 provides in relevant part: “Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection.” Section 8, subdivision (a), states that “[i]t shall be an unfair labor practice for an employer: (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”

Like the other PERB-administered statutes and the NLRA, the MMBA prohibits interference with, or discrimination based on, a public employee's exercise of rights under the Act. (Gov. Code, § 3506; Cal. Code Regs., tit. 8, § 32603, subd. (a).) Thus, the above authority weighs strongly in favor of recognizing an implied right of access under the MMBA. Additionally, a provision of the MMBA that has no parallel in either the Dills Act or the NLRA provides further support for recognizing a right of access. Section 3507, subdivision (a), of the MMBA provides in relevant part that:

A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter. The rules and regulations may include provisions for all of the following:

(6) Access of employee organization officers and representatives to work locations.

The above language contemplates a right of access that is subject to reasonable regulation much like the statutory access right under EERA and HEERA. Considering the language of the MMBA in light of the well-established implied right of access grounded in the non-interference and non-discrimination provisions of other labor relations statutes, we hold that the MMBA grants a recognized employee organization a right of access to a public agency's facilities for the purpose of communicating with employees subject to reasonable regulation by the public agency.

Omnitrans contends that recognizing a right of access under the MMBA is contrary to the Board's decision in *City of Porterville* (2007) PERB Decision No. 1905-M. In that case, the city argued that because the MMBA does not contain an express grant of access rights and allows public agencies to adopt reasonable rules and regulations governing union access, no general access right exists. The Board acknowledged the city's argument but did not rule on it.

Instead, the Board's analysis focused solely on whether the city had a legitimate business reason for denying access. Thus, *City of Porterville, supra*, provides no authority on the issue of whether the MMBA grants union access rights. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.'"].) Accordingly, because *City of Porterville, supra*, left the question of access rights unanswered, our holding that the MMBA grants union access rights is not contrary to the Board's prior decision.

Reasonable Regulation of ATU's Access to Omnitrans Employees

An employer may reasonably regulate the place and time of union activity in its facilities. An employer has much more leeway to regulate union activity by non-employee union representatives than it does to regulate union activity by its own employees. (*NLRB v. Babcock & Wilcox Co.* (1956) 351 U.S. 105, 113; *Hudgens v. NLRB* (1976) 424 U.S. 507, 521-522, fn. 10 ["A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property rights were there involved."]; see *City of Porterville, supra* [upholding local access rule requiring non-employee union representative to obtain permission to access city property for union business].) Here, because Aguilar was an Omnitrans employee, we apply the legal standards for employer regulation of union activity by employees.¹¹

Employees have a protected right to engage in union activity in non-work areas during non-working time. (*State of California (Employment Development Department)* (1999) PERB Decision No. 1365-S; *Republic Aviation, supra*, 324 U.S. at pp. 798-799.) An employer may

¹¹ Accordingly, we need not and do not rule on whether Omnitrans' access rules are reasonable as applied to non-employee union representatives.

regulate union activity in non-work areas during non-working time only if the regulation is “necessary to maintain order, production or discipline.” (*State of California (Employment Development Department)*, *supra*; *Republic Aviation*, *supra*, 324 U.S. at p. 803, fn. 10.)

Omnitrans argues that the drivers’ assembly rooms are work areas and that Aguilar accessed drivers during their working time. Because separate legal rules apply to place and time regulations, we address each of these issues in turn.

Work Area

Often it is obvious whether a particular area of the employer’s facility is a work area. (E.g., *City of Porterville*, *supra*, [a shop area “with tools and equipment in it” was a work area]; *San Ramon Valley Unified School District* (1982) PERB Decision No. 230 [a teachers’ lounge is a non-work area].) However, when an area does not fall clearly into either category, the proper characterization turns on the extent of actual work duties performed in the area. In *State of California (Employment Development Department)*, *supra*, the Board found that an open area with 60 workstations was a work area even when some of the employees there were on break. Similarly, the NLRB has found that areas predominately used to perform work duties were work areas even though non-working employees sometimes happened to be there. (*UARCO Inc.* (1987) 286 NLRB 55, 68-69 [aisle where vehicle traveled on a regular basis]; *Vapor Corp.* (1979) 242 NLRB 776, 790 [room where forklifts entered regularly]; *Timken Co.* (1978) 236 NLRB 757, 764 [hallway with regular cart and tow-motor traffic].)

On the other hand, an area where employees occasionally perform work duties but which is used by most employees for non-work activities is not a work area for the purpose of regulating union activity. (*United Parcel Service, Inc. v. NLRB* (6th Cir. 2000) 228 F.3d 772, 776.) In *United Parcel Service*, *supra*, the Sixth Circuit upheld the NLRB’s conclusion that a drivers’ check-in area, where drivers were “free to talk, read newspapers and magazines, or

stand around until their assigned driving time,” was not a work area. (*Id.* at pp. 775-777.) The court then affirmed the NLRB’s holding that the employer violated the NLRA by prohibiting the distribution of union material in the check-in area. (*Id.* at p. 778.)

In light of the above authority, we find that the drivers’ assembly rooms are not work areas. Drivers sign in and out for their routes at the dispatch window located in the assembly room but this takes a minimal amount of time. Drivers may complete incident reports in the assembly room but the record does not show that this takes place on a regular basis. Standby drivers occasionally perform clerical duties in the assembly room. Nonetheless, most of the employees in the assembly room at any given time are free to engage in non-work activities, such as talking, reading, or otherwise passing the time. Thus, like the drivers’ check-in area in *United Parcel Service, supra*, the drivers’ assembly room is a non-work area where Omnitrans may restrict union activity only when “necessary to maintain order, production or discipline.”

Working Time

“Working time” refers to “periods when employees are performing actual job duties, periods which do not include the employees’ own time such as lunch and break periods.” (*Our Way, Inc.* (1983) 268 NLRB 394, 395.) On the other hand, “working hours” refers to “periods from the beginning to the end of workshifts, periods that include the employees’ own time.” (*Ibid.*) Thus, the fact that an employee is on paid status at a particular time does not mean the employee is on “working time.” Rather, the employee must be “performing actual job duties” to be considered on “working time” for purposes of regulating union activity.

Omnitrans does not dispute that drivers who have not yet signed in for a shift, who have signed out after a shift, or are on unpaid status between the “pieces” of a split shift are not on working time. Omnitrans’ sole argument on appeal is that it had the right to restrict Aguilar’s access to the assembly room because standby drivers were present at the time.

Standby drivers are required to be in the Omnitrans operations facility for a scheduled period of time on a particular day. As indicated by the word “standby,” such drivers are paid to be available in case a substitute driver is needed. Standby drivers are assigned various tasks during their shift, such as delivering mailbags to busses, checking equipment, and stocking route brochures on busses. All of these tasks are performed outside of the assembly room. The dispatcher may also assign a standby driver to perform light clerical duties, which are usually performed in the assembly room. However, during the other times the standby driver is in the assembly room, he or she is free to read, talk to other drivers, or pass the time in any other way. Thus, the majority of the time standby drivers spend in the assembly room is non-working time. Consequently, Omnitrans may not restrict union activity by standby drivers in the assembly room during periods when the drivers are not performing duties unless a restriction is “necessary to maintain order, production or discipline.”

MOU Article 18

Omnitrans contends that, even if standby drivers perform no duties while in the drivers’ assembly room, Omnitrans may nonetheless regulate their participation in union activity because standby drivers are “on duty employees” pursuant to Article 18 of the MOU. However, Omnitrans’ interpretation would render Article 18 an unreasonable regulation of union activity. Rules restricting union activity during the entire time the employee is being paid by the employer are presumed invalid because such rules regulate union activity during non-working time. (*North Hills Office Services* (2006) 346 NLRB 1099, 1113; *Our Way*, *supra*, 268 NLRB at pp. 394-395.) Omnitrans interprets “on duty” to mean all time for which an employee is paid by Omnitrans. Under this interpretation, Article 18 necessarily regulates union activity during paid, non-working times. As found above, the time a standby driver spends in the assembly room, while paid time, is not working time unless the driver is actually

performing duties. Thus, Article 18 is presumed invalid to the extent it applies to standby drivers who are not performing duties.

To rebut the presumption of invalidity, Omnitrans argues that ATU waived employees' statutory right to participate in union activity during paid, non-working time by agreeing to the new version of Article 18 in the 2004-2007 MOU. A union and employer may agree to restrict union activity during paid, non-working time, as long as the restriction does not seriously impair employees' right to communicate about union matters. (*Long Beach Unified School District* (1987) PERB Decision No. 608; *NLRB v. United Technologies Corp.* (2d Cir. 1983) 706 F.2d 1254, 1264.) The waiver of the employees' right to participate in union activity during the particular non-working time must be clear. (See *Long Beach Unified School District, supra* [collective bargaining agreement defined 20-minute periods before first class and after last class as "work time" even though teachers were not required to perform duties during those periods]; *United Technologies, supra*, 706 F.2d at p. 1257 [prohibition on union solicitation during working hours had been in collective bargaining agreement "for many years" and parties had "consistently interpreted" the restriction as applying to paid breaks but not to lunch periods].)

The language of Article 18 does not clearly waive the employees' participation right, as did the collective bargaining agreements in *Long Beach Unified School District, supra*, and *United Technologies Corp., supra*. Further, ATU negotiators testified they understood Article 18 to restrict union access only when a driver was driving a bus, i.e., performing actual duties, and not during paid break time at the end of a route. Article 18 therefore does not clearly waive employees' right to engage in union activity during paid, non-working time. Accordingly, because Omnitrans has not rebutted the presumption of invalidity, we find that

Article 18 is an invalid regulation of union activity as applied to standby drivers who are not performing duties and thus are on paid, non-working time.

In summary, Omnitrans drivers, including those on standby duty, have a right under the MMBA to participate in union activity in the drivers' assembly rooms on non-working time. Thus, we find that Aguilar engaged in protected activity by speaking with non-working drivers in the East Valley drivers' assembly room on October 23, 2006. For the same reason, the drivers with whom Aguilar spoke that day were also engaged in protected activity.

b. Interference With Employee Rights

Because both Aguilar and the drivers to whom he spoke had a protected right to discuss union matters in the drivers' assembly room, Omnitrans' conduct in denying Aguilar further access to drivers in that room on October 23, 2006, interfered with, or tended to interfere with, both Aguilar's and the other drivers' rights under the MMBA.

c. Legitimate Business Reason

When an employer has produced a legitimate business reason for its conduct, the employer's interest will be weighed against the interference with employee rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89.) Only when the interference with employee rights outweighs the business justification for the respondent's conduct will a violation be found. (*Id.*; *Textile Workers Union of America v. Darlington Manufacturing Co.* (1965) 380 U.S. 263, 269 [interference standard under NLRA].) In cases involving regulation of employees' union activity, the interference with employee rights may be justified by the employer's need to "maintain order, production or discipline." (*State of California (Employment Development Department)*, *supra*; *Republic Aviation*, *supra*, 324 U.S. at p. 803, fn. 10.)

Omnitrans asserts it was necessary to deny Aguilar further access to the East Valley drivers' assembly room because his presence there was disruptive to Omnitrans operations. There is no evidence in the record that a union representative speaking with individual drivers or small groups of drivers in the assembly room had disrupted operations in the past. Omnitrans' argument therefore is based on two points specific to Aguilar himself. First, Omnitrans contends that standby driver Patton failed to deliver the mailbag on time because he was speaking with Aguilar about union business at the scheduled delivery time. However, Patton testified that he was not late because of Aguilar but because he simply forgot to make the delivery. He then used Aguilar as an excuse when speaking with the dispatcher about the missed delivery. On these facts, we find that Aguilar did not interfere with Patton's performance of his duties.

The perceived subject of Aguilar's discussions with drivers provides the second basis for Omnitrans' assertion that his presence was disruptive. In October 2006, there was an ongoing dispute between drivers and Omnitrans management over meal and rest periods. Stanley, the transportation manager, testified that when he entered the drivers' assembly room immediately after learning of Aguilar's presence there, he heard drivers around Aguilar speaking in elevated voices about "rest and meal periods." Graham, the operations director, testified that he was aware the drivers were discussing rest and meal periods with Aguilar and that "[t]here was concern" about ATU filing a grievance on that subject. This testimony strongly suggests that Aguilar was asked to leave the drivers' assembly room because he was discussing rest and meal periods with drivers, a subject Omnitrans considered to be controversial. However, the mere fact that a union communication addresses controversial subject matter does not justify a prohibition absent evidence that the communication actually impairs the employer's operations. (*Richmond Unified School District/Simi Valley Unified*

School District (1979) PERB Decision No. 99.) The facts here do not show that Omnitrans operations were actually disrupted in any way by Aguilar's presence in the drivers' assembly room on October 23, 2006. As a result, Omnitrans has failed to establish a legitimate business reason for denying Aguilar further access to the drivers' assembly room on that day.

In summary, we conclude that Omnitrans' conduct in denying Aguilar further access to the East Valley drivers' assembly room on October 23, 2006, constituted an interference with employee rights in violation of MMBA section 3506 and PERB Regulation 32603(a).¹² By the same conduct, Omnitrans denied ATU the right to represent its members in violation of MMBA section 3503 and PERB Regulation 32603(b).

2. Unilateral Change

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c) by failing to meet and confer in good faith, PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the respondent breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has 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. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District*

¹² PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

(1981) PERB Decision No. 160; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

The complaint alleged that Omnitrans made an unlawful unilateral change to its union access policy when it denied Aguilar access to the drivers' assembly room on October 23, 2006. Omnitrans does not dispute that employee organization access to an employer's facilities is within the scope of representation. (*Woodland Joint Unified School District* (1987) PERB Decision No. 628; *Davis Joint Unified School District* (1984) PERB Decision No. 474; see MMBA § 3507, subd. (a)(6) [allowing public agency to adopt "reasonable rules and regulations" for union access to work locations after good faith consultation with employee organizations].) Omnitrans does, however, except to the ALJ's conclusion that it made a unilateral change.

Breach of Written Agreement or Past Practice

Omnitrans asserts that it did not make a unilateral change but instead acted in accordance with the MOU and the parties' past practice.¹³ Omnitrans contends that Article 18 requires ATU to obtain permission from a department head to speak to drivers in the drivers'

¹³ Omnitrans also claims that section 7.23 of the Rules and Regulations and Codes of Performance for Operations and Maintenance Personnel, which states that an employee may be disciplined for unauthorized use of Omnitrans "equipment and/or facilities," requires ATU to obtain written authorization to use the drivers' assembly rooms for union business. The record contains several letters from ATU requesting to use the assembly room for votes on contract proposals. However, nothing in the record indicates that Omnitrans informed ATU that it needed to request written permission to speak to drivers individually in the assembly room or that any ATU officer had ever been disciplined for discussing union matters with drivers in the assembly room without prior permission.

Omnitrans further argues that Personnel Policy Manual, Policy 1004, which prohibits off-duty employees from visiting "work areas," applies in this case. However, because the drivers' assembly rooms are not work areas, that policy was not applicable to the events of October 23, 2006.

assembly rooms. As found above, the assembly rooms are not work areas and the majority of drivers in them at any given time are not on working time. Article 18 is silent on ATU access to employees in non-work areas during non-working time.

Where contract language is silent or ambiguous regarding a particular policy, the policy may be ascertained by examining bargaining history or the parties' past practice. (*Marysville Joint Unified School District* (1983) PERB Decision No. 314; *Rio Hondo Community College District* (1982) PERB Decision No. 279; *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.) ATU negotiators Moore and McLean testified there was no discussion of ATU's access to the drivers' assembly rooms during negotiations over the changes to Article 18 in the 2004-2007 MOU. Omnitrans presented no evidence that the topic was discussed in those negotiations. There is thus no bargaining history from which to ascertain Omnitrans' policy regarding ATU's access to employees in the drivers' assembly rooms.

Turning to past practice, the parties presented conflicting evidence of ATU's past use of the drivers' assembly rooms to communicate with drivers. Four ATU officers, Moore, Caldwell, Aguilar and Tyson, testified that on a regular basis over the past few years each had spent several hours at a time sitting in the assembly room speaking with drivers about union matters without obtaining prior permission and without being questioned by management or being asked to leave. Steffon, the transportation manager at West Valley, said he had seen Tyson speaking with drivers about union matters in the assembly room many times over the prior three or four years and never asked Tyson whether he had permission to be there or asked him to leave. Stanley, the East Valley transportation manager, and Graham, the operations director, both testified they passed through the assembly room numerous times each day and would notice if an out-of-uniform employee was in the room. Similarly, field supervisor Copeland testified that he would notice and question an out-of-uniform driver who was in the

assembly room. All three testified that they had never seen an out-of-uniform driver spend several hours at a time in the assembly room.

In light of the consistent testimony by ATU's officers and Steffon, and the fact that each of the Omnitrans witnesses admittedly passed through the assembly room several times per day and noticed out-of-uniform drivers there, we find the testimony of Stanley, Graham and Copeland regarding ATU officers' use of the assembly rooms lacks credibility. (See *United Parcel Service, supra*, 228 F.3d at p. 778 [upholding ALJ's reasonable inference that supervisors were aware of distribution of union materials in check-in area because "the supervisors routinely mingled with drivers while such distributions took place"].) We therefore credit the testimony of the ATU witnesses and find that during the three or four years prior to October 23, 2006, out-of-uniform, off-duty drivers who were ATU officers regularly spent several hours at a time in the assembly room speaking with drivers about union matters without obtaining prior permission from Omnitrans management, or being questioned or asked to leave.

To legally constitute a past practice, the practice "must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice." The practice must be "regular and consistent" or "historic and accepted." (*County of Placer* (2004) PERB Decision No. 1630-M.) The record establishes that ATU officers' use of the assembly rooms to discuss union matters with drivers without prior permission was a "regular and consistent" practice over several years and was accepted by Omnitrans management. This use therefore constituted a past practice under applicable Board precedent. Consequently, Omnitrans breached the parties' past practice on October 23, 2006, when it asked Aguilar to leave the East Valley assembly room because he had not obtained prior permission to speak with drivers there about union matters.

Lack of Notice and Opportunity to Bargain

Omnitrans contends ATU had notice of the alleged policy change in December 2005 when Moore was suspended for accessing Omnitrans property without prior permission while off-duty. We find no merit to this argument because Moore's suspension did not involve the drivers' assembly room. On December 19, 2005, Stanley issued Moore a one-day suspension in part because he "did not obtain proper authorization to be on Omnitrans property while [he was] off-duty" when he and two non-employee ATU representatives spoke with mechanics in the East Valley maintenance service area about ATU representation. The notice of suspension claimed this conduct violated MOU Article 18 as well as various Omnitrans personnel rules. Nonetheless, after December 2005 Omnitrans continued to allow off-duty drivers, including Moore, to discuss ATU matters with drivers in the drivers' assembly rooms without obtaining prior permission to do so. Thus, ATU did not have notice of Omnitrans' intent to apply the prior permission policy to the assembly rooms until October 23, 2006, when Omnitrans so informed Moore and Aguilar. Consequently, ATU had no opportunity to request to meet and confer before the change was implemented. Further, because ATU received notice of the change less than six months before the date the unfair practice charge was filed, the unilateral change allegation was timely. (*South Placer Fire Protection District* (2008) PERB Decision No. 1944-M ["In a unilateral change case, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's intent to implement a change in policy."].)

Change in Policy

A breach of the MOU constitutes a unilateral change in violation of the MMBA only if the breach has "a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." (*Grant Joint Union High School District, supra.*)

The Board has found a “continuing impact” when the breaching party asserts the change was authorized by the collective bargaining agreement because this indicates the party will continue to apply the new policy in the future. (*Fremont Unified School District* (1997) PERB Decision No. 1240; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.) Here, Omnitrans asserts that Article 18 and various agency policies allow Omnitrans to require that ATU seek prior permission before discussing union matters with employees in the drivers’ assembly rooms. Therefore, because Omnitrans has indicated it will continue to apply this policy in the future, the breach constitutes a change in policy.

In sum, we conclude that Omnitrans violated MMBA section 3505 and PERB Regulation 32603(c) when it adopted a policy requiring ATU to obtain prior permission to speak with employees about union matters in the drivers’ assembly rooms without providing ATU with notice or an opportunity to request to meet and confer over the change.

3. Remedy

In addition to the usual cease and desist and notice posting remedies, the ALJ ordered Omnitrans to: (1) reimburse ATU for the legal expenses it incurred defending Aguilar against the criminal trespass charge filed by Omnitrans, (2) notify the court and district attorney that Omnitrans’ action was unlawful and (3) seek expungement of all records of Aguilar’s arrest and prosecution. Omnitrans argues in its exceptions that PERB has no authority to order these additional remedies and, alternatively, that Omnitrans was not the actual cause of Aguilar’s arrest and prosecution. For the following reasons, we affirm some, but not all, of the additional remedies ordered by the ALJ.

PERB has broad authority to remedy violations of the MMBA. (Gov. Code, § 3509, subd. (a), & § 3541.3, subd. (i).) This includes the awarding of “make whole” relief to remedy an unfair practice. (*County of San Joaquin (Health Care Services)* (2003) PERB Decision

No. 1524-M; *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 1137; see Gov. Code, § 3541.5, subd. (c) [“The board shall have 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.”].)

Attorneys’ Fees

In *County of San Joaquin (Health Care Services)*, *supra*, the employer filed charges with the hospital’s Medical Evaluation Committee (MEC) against an employee doctor because the doctor had engaged in protected activity. To make the doctor whole for losses he suffered as a result of the employer’s unfair practice, the Board ordered the employer to reimburse the doctor for reasonable attorneys’ fees and expenses he incurred in defending against the charges before the MEC. The Board noted that such relief was appropriate “[b]ecause the charges would not have been brought against [the doctor] but for his protected activities.”

Here, Aguilar would not have been arrested but for Omnitrans’ enforcement of its unlawful union access policy. Stanley and Graham told the police officers that they wanted Aguilar arrested because he refused to leave the premises. Okamura, Omnitrans’ director of security, signed the citizen’s arrest form. Officer Jarvis testified that because the alleged trespass was a misdemeanor, he could not have arrested Aguilar without the citizen’s arrest being filed because the misdemeanor did not occur in Jarvis’ presence. Thus, Omnitrans was directly responsible for Aguilar’s arrest. Accordingly, we will order Omnitrans to reimburse ATU for the attorneys’ fees it incurred defending Aguilar against the trespassing allegation.

Petition to Expunge Criminal Record

When an employer imposes discipline for protected activity in violation of the MMBA, PERB has ordered the employer to rescind the discipline and remove all evidence of the

discipline from the employee's personnel file. (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *County of San Joaquin (Health Care Services)*, *supra*.) Further, in *County of San Joaquin (Health Care Services)*, *supra*, the Board ordered the employer to notify the National Practitioner's Data Bank that it had improperly imposed a plan of corrective action on the employee doctor. The purpose of such orders is to make the employee whole by removing any adverse records that could impair the employee's advancement in his or her current employment or negatively impact the employee's ability to obtain other employment. These same concerns arise when an employer has unlawfully initiated criminal charges against an employee for engaging in protected activity.

We recognize that expungement of Aguilar's criminal record is ultimately a decision to be made by the appropriate court and thus not within Omnitrans' exclusive control. Nonetheless, it is reasonable under the circumstances to require Omnitrans to take whatever steps are within its control to undo the effects of its unfair practice. Accordingly, we will order Omnitrans to join in a petition to expunge from Aguilar's record any charges that may have been filed as a result of the October 23, 2006 arrest.¹⁴ Further, to make Aguilar whole, it is also appropriate to order Omnitrans to pay reasonable attorneys' fees and costs incurred by Aguilar in petitioning the court for expungement of his record.¹⁵

¹⁴ It is not clear from the record whether the district attorney ever formally filed charges against Aguilar. Thus, there may in fact be nothing to expunge from his record. Nonetheless, because this issue can be fully resolved in compliance proceedings, the ambiguity in the record does not preclude the Board from ordering Omnitrans to join in an expungement petition.

¹⁵ In the proposed order, the ALJ ordered Omnitrans to notify the court and district attorney that PERB has found Omnitrans' actions of having Aguilar arrested and prosecuted to be unlawful. Because this notice will necessarily be part of the petition to expunge Aguilar's record, we see no reason to order Omnitrans to give such notice separately.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that Omnitrans violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506, and Public Employment Relations Board (PERB) Regulation 32603(a), (b) and (c) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), by prohibiting Omnitrans employee and Amalgamated Transit Union, Local 1704 (ATU) officer Michael Aguilar (Aguilar) from discussing union matters with drivers in the West Valley drivers' assembly room on October 23, 2006.

Pursuant to Government Code sections 3509(a) and 3541.5(c), it is hereby ORDERED that Omnitrans, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employee rights by preventing ATU representatives, by arrest or otherwise, from meeting with employees during non-working time in the drivers' assembly rooms of its West Valley facility in Montclair and its East Valley facility in San Bernardino without seeking prior permission of Omnitrans.

2. Denying ATU the right to represent its employees by preventing ATU representatives, by arrest or otherwise, from meeting with employees during non-working time in the drivers' assembly rooms of its West Valley facility in Montclair and its East Valley facility in San Bernardino without seeking prior permission of Omnitrans.

3. Implementing any change in policy concerning ATU's access to employees in the drivers' assembly rooms of its West Valley facility in Montclair and its East Valley facility in San Bernardino without giving ATU notice and an opportunity to request negotiations over any such change in policy.

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

1. Make ATU whole for monetary losses it suffered as a result of defending Aguilar in the criminal proceedings initiated by Omnitrans because of Aguilar's refusal to leave the drivers' assembly room on October 23, 2006, including reasonable attorneys' fees and costs. This award shall include interest at the rate of seven (7) percent per annum.

2. Join with Aguilar in petitioning the appropriate superior court to expunge all records related to the arrest or prosecution of Aguilar for the events of October 23, 2006. Omnitrans shall also reimburse Aguilar for reasonable attorneys' fees and costs incurred in petitioning the court for expungement of his record. This award shall include interest at the rate of seven (7) percent per annum.

3. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of Omnitrans, indicating Omnitrans 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. Omnitrans shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on ATU.

Members McKeag and Dowdin Calvillo joined in this Decision.

**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-323-M, *Amalgamated Transit Union, Local 1704 v. Omnitrans*, in which all parties had the right to participate, it has been found that Omnitrans violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505 and 3506, by prohibiting Omnitrans employee and Amalgamated Transit Union, Local 1704 (ATU) officer Michael Aguilar (Aguilar) from discussing union matters with drivers in the West Valley drivers' assembly room on October 23, 2006.

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

A. CEASE AND DESIST FROM:

1. Interfering with employee rights by preventing ATU representatives, by arrest or otherwise, from meeting with employees during non-working time in the drivers' assembly rooms of its West Valley facility in Montclair and its East Valley facility in San Bernardino without seeking prior permission of Omnitrans.
2. Denying ATU the right to represent its employees by preventing ATU representatives, by arrest or otherwise, from meeting with employees during non-working time in the drivers' assembly rooms of its West Valley facility in Montclair and its East Valley facility in San Bernardino without seeking prior permission of Omnitrans.
3. Implementing any change in policy concerning ATU's access to employees in the drivers' assembly rooms of its West Valley facility in Montclair and its East Valley facility in San Bernardino without giving ATU notice and an opportunity to request negotiations over any such change in policy.

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

1. Make ATU whole for monetary losses it suffered as a result of defending Aguilar in the criminal proceedings initiated by Omnitrans because of Aguilar's refusal to leave the drivers' assembly room on October 23, 2006, including reasonable attorneys' fees and costs. This award shall include interest at the rate of seven (7) percent per annum.
2. Join with Aguilar in petitioning the appropriate superior court to expunge all records related to the arrest or prosecution of Aguilar for the events of October 23, 2006. Omnitrans shall also reimburse Aguilar for reasonable attorneys' fees and costs incurred in petitioning the court for expungement of his record. This award shall include interest at the rate of seven (7) percent per annum.

Dated: _____

OMNITRANS

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