

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION AND ITS LINCOLN)
CHAPTER #282,)
)
Charging Party,) Case No. S-CE-610
)
v.) PERB Decision No. 465
)
LINCOLN UNIFIED SCHOOL DISTRICT,) December 18, 1984
)
Respondent.)
)

Appearances: Sally Talbot for Lincoln Unified School District;
Burton E. Gray for California School Employees Association and
its Lincoln Chapter #282.

Before Hesse, Chairperson; Tovar and Morgenstern, Members.

DECISION

HESSE, Chairperson: This case is before the Public
Employment Relations Board (PERB or Board) on exceptions filed
by the Lincoln Unified School District (District) to the
proposed decision, attached hereto, of a PERB hearing officer.
The hearing officer found that the District had violated
section 3543.5(c) and, derivatively, section 3543.5(a) and (b)
of the Educational Employment Relations Act (EERA)¹ by

¹EERA is codified at Government Code section 3540 et
seq. All statutory references herein are to the Government
Code.

Section 3543.5 reads, in pertinent part, as follows:

It shall be unlawful for a public school
employer to:

(a) Impose or threaten to impose reprisals on

unilaterally transferring bargaining unit work outside the unit. Specifically, bus drivers lost the opportunity to earn overtime by driving school band members on weekend trips when volunteer drivers, drawn from the ranks of the Band Boosters club, were substituted for District drivers.

The Board has reviewed the hearing officer's proposed decision in light of the District's exceptions and the entire record in this matter. Finding it free from prejudicial error, we adopt the hearing officer's findings of fact and conclusion of law in toto, consistent with the discussion below.

DISCUSSION

The District would have the Board overturn the hearing officer's decision primarily on the grounds that the weekend band trips were not a "District-supported" program but rather were financed by the Band Boosters, a group of parents, relatives, and friends of band members.

We do not believe that the source of funds for these field trips is relevant to the hearing officer's conclusions. Since

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.

the funds were paid not to the drivers but to the District for reimbursement, the funding was analagous to state tax revenues allocated to the District. Such state funding does not make the state the employer. The District paid the drivers time-and-a-half and made the schedules for overtime. Since the drivers were without question employees of the District, the program was a District-supported one, regardless of the source of funds that paid the bus drivers.

We recognize that the District might well have discontinued the field trips entirely because of the costs, and the Band Boosters might have independently arranged for volunteer drivers without violating the law. But here, the District decided to continue to provide bus service, and merely transferred the work from paid workers to volunteers.

The exceptions filed by the District concerning the proposed remedy present no grounds for reversal, but rather are matters for a compliance hearing.

ORDER

The Board hereby AFFIRMS the proposed decision in Case No. S-CE-610 and ADOPTS its remedy and order as that of the Board itself.

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Lincoln Unified School District violated section 3543.5(a), (b) and (c)

of the Educational Employment Relations Act. Pursuant to section 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) Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Lincoln Chapter No. 282 as the exclusive representative of its employees by unilaterally transferring bus driver work out of the unit and thereby reducing the opportunity for overtime pay, a matter within the scope of representation.

(b) By the same conduct, denying to the California School Employees Association and its Lincoln Chapter No. 282 rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

(c) By the same conduct, interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

(a) Upon request of CSEA, meet and negotiate with CSEA over the decision and the effects thereof of transferring bus driver work out of the classified employee unit.

(b) Pay to all bus drivers in the unit lost income plus interest caused by the transfer of bus driver work to volunteers. The amount of income due each driver shall be calculated as follows:

The District shall total the number of hours worked by all bus drivers for band trips in 1979-80, 1980-81 and 1981-82 and then divide by three. This calculation will produce the average number of extra hours worked in the three years. The District then shall divide the average number of hours evenly among all unit members employed as bus drivers in 1982-83. The drivers are to be paid whatever amount of money they would have received in 1982-83 had they driven the calculated number of hours. Insofar as the 1982-83 band trips were taken during hours for which unit drivers receive overtime, the amount of money paid to each driver should be computed at the overtime rate. The amount due to each driver shall be augmented by interest at the rate of 7 percent with the interest due only from the period between the last bus driver workday of the 1982-83 school year to the date paid. Back wages for 1983-84 and any subsequent years which may elapse until the date this proposed decision becomes final shall be calculated in the same manner as for 1982-83.

(c) Within 35 days following the date the 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.

(d) Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board, in accordance with her instructions.

Members Tovar and Morgenstern 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-610 California School Employees Association and its Lincoln Chapter No. 282 v. Lincoln Unified School District in which all parties had the right to participate, it has been found that the Lincoln Unified School District violated subsection 3543.5(c) of the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Chapter No. 282 with respect to the transfer of work outside the negotiating unit. The transfer of work affected both wages and hours, matters within the scope of representation. It was further found that this same conduct violated subsection 3543.5(b) since it denied CSEA the right to represent its members, and interfered with employees' rights to be represented by their chosen representative in violation of subsection 3543.5(a) of the Educational Employment Relations Act.

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) Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Lincoln Chapter No. 282 as the exclusive representative of its employees by unilaterally transferring bus driver work out of the unit and thereby reducing the opportunity for overtime pay, a matter within the scope of representation.

(b) By the same conduct, denying to the California School Employees Association and its Lincoln Chapter No. 282 rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

(c) By the same conduct, interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

(a) Upon request of CSEA, meet and negotiate with CSEA over the decision and the effects thereof of transferring bus driver work out of the classified employee unit.

(b) Pay to all bus drivers in the unit lost income plus interest caused by the transfer of bus driver work to volunteers. The amount of income due each driver shall be calculated as follows:

The District shall total the number of hours worked by all bus drivers for band trips in 1979-80, 1980-81 and 1981-82 and then divide by three. This calculation will produce the average number of extra hours worked in the three years. The District then shall divide the average number of hours evenly among all unit members employed as bus drivers in 1982-83. The drivers are to be paid whatever amount of money they would have received in 1982-83 had they driven the calculated number of hours. Insofar as the 1982-83 band trips were taken during hours for which unit drivers receive overtime, the amount of money paid to each driver should be computed at the overtime rate. The amount due to each driver shall be augmented by interest at the rate of 7 percent with the interest due only from the period between the last bus driver workday of the 1982-83 school year to the date paid. Back wages for 1983-84 and any subsequent years which may elapse until the date this proposed decision becomes final shall be calculated in the same manner as for 1982-83.

Dated: _____

LINCOLN UNIFIED SCHOOL DISTRICT

Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)	
ASSOCIATION and its LINCOLN)	
CHAPTER NO. 282,)	
)	Unfair Practice
Charging Party,)	Case No. S-CE-610
)	
v.)	PROPOSED DECISION
)	(3/2/84)
LINCOLN UNIFIED SCHOOL DISTRICT,)	
)	
Respondent.)	
<hr/>		

Appearances: Burton E. Gray, Field Representative, for the California School Employees Association and its Lincoln Chapter No. 282; Sally Talbot, Director of Personnel, for the Lincoln Unified School District.

Proposed Decision by Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

An exclusive representative contends here that a public school employer unilaterally secured volunteer bus drivers to take students on field trips, thereby eliminating work for unit members. The employer responds that the use of volunteer drivers, most of them parents, is in accord with past practice.

The California School Employees Association and its Lincoln Chapter No. 282 (hereafter CSEA) commenced this action on April 21, 1983, by filing an unfair practice charge against the Lincoln Unified School District (hereafter District). The charge accused the District of violating Educational Employment

Relations Act subsections 3543.5(a), (b) and (c)¹ by unilaterally instituting a parent volunteer bus driver program to perform work which had normally been performed by bargaining unit employees.

A complaint against the District was issued on June 14, 1983, by the office of the General Counsel of the Public Employment Relations Board (hereafter PERB), alleging that the employer had acted in violation of the EERA. The District answered the complaint on July 1, 1983, admitting that it had started a volunteer bus driver program in October of 1982, but asserting that the action was consistent with a practice in operation since 1979.

¹Unless 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.

A settlement conference was unsuccessful in resolving the dispute. A hearing was conducted on January 4, 1984, by Gary Gallery of the PERB staff. Prior to the submission of briefs, the case was reassigned to the undersigned hearing officer under California Administrative Code, title 8, part III, section 32168(b). The final brief from the parties was received on February 23, 1984, on which date the case was submitted for decision.

FINDINGS OF FACT

The Lincoln District, an employer under EERA, is a suburban Stockton school system with 11 schools. The District on May 13, 1976, recognized CSEA as the exclusive representative of a comprehensive unit of classified employees, including bus drivers.² CSEA remained as exclusive representative at all times relevant to this case.

The use of volunteer parents as bus drivers arose from a suggestion by District band director Art Holton. In 1982, sometime prior to the commencement of summer, Mr. Holton told Allan Patterson, District director of maintenance and operations, that he wanted to reduce the cost of band trips. The band director proposed that parents assume some of the responsibility for driving band members on trips.

²The unit description is contained in representation case file S-R-127 which is maintained in the Sacramento Regional Office of the PERB.

Mr. Patterson discouraged the plan but Mr. Holton took his idea to the District superintendent, Tod Anton.

On June 11, 1982, the superintendent instructed Helen Alston, the District's transportation dispatcher, to set up a training program for parents and others who had volunteered to become band bus drivers. In his memo to Ms. Alston, the superintendent cited the District's "great shortage of funds" as the reason for seeking volunteer drivers. Under the volunteer program, the drivers were not to be paid for their time, thus providing the District considerable salary savings.

In fact, for some period prior, band field trips had been financed by the band boosters club, a parent organization which supports the band. The boosters paid for both the use of the buses and the salaries of the drivers who received overtime rates for trips in the evening and on weekends. During the 1981-82 school year, the boosters incurred a \$3,000 debt to the District for band trips. Although the boosters did not have the funds to pay for the trips at the time they were taken, the group conducted subsequent fund raisers and paid off the debt. Reducing the costs to the boosters was one of the goals of the volunteer driver program.

The use of volunteer bus drivers was not unprecedented in the District. Will Pool, the principal of the District's

Colonial Heights Elementary School, commenced a volunteer driver program during the 1978-79 school year. Mr. Pool himself and at least one parent went through the District's bus driver training program and qualified as drivers. The parent(s) drove on some field trips during 1978-79. Mr. Pool drove that year and has continued driving on student field trips through the date of the hearing. Mr. Pool drives only during school-hour field trips. He does not drive on after-school or weekend trips. Prior to Mr. Pool's qualification as a bus driver, regular District bus drivers had taken students on field trips from his school only if they were available. Mr. Pool's driving has not had a significant effect on the regular drivers because they drive their assigned routes during the school day and are not generally available for the types of trips he makes. CSEA did not challenge Mr. Pool's performance of unit work when it commenced in 1978-79, although at least one driver individually complained about it.

In accord with the superintendent's instructions, Ms. Alston set up a training program for the volunteer drivers. The superintendent told her to disregard the objections of Dennis Chuning, the assistant superintendent for business, and Mr. Patterson, the director of maintenance and operations. She conducted 20 hours of classroom instruction for five volunteers, four parents and a brother of band members. After the five completed their classroom instruction,

they were given behind-the-wheel training by two of the District's veteran drivers. The behind-the-wheel training was given during the summer of 1982 and, once school resumed in the fall, during the evenings and on Saturdays. The driving instructors were paid overtime during the training period.

The first band bus trip with a volunteer driver was taken on October 23, 1982. All told, the volunteer drivers took the band on approximately 10 trips during the 1982-83 school year. By comparison, the band took an average of five trips during each of the three previous years when unit members drove the buses. Unit members who drove the buses in previous years were paid at the overtime rate because band trips are on weekends and after school hours. During the 1982-83 school year, regular drivers did not take the band on any trips.

Although the volunteer driver program started as a project of the band boosters, it expanded beyond the confines of the band during its first year of operation. During April of 1983, students on a course trip were driven by a volunteer parent. On June 4, a volunteer parent drove the bus to Yosemite for a weekend trip by the German and Spanish Clubs. Previously, bus drivers in the unit had taken the foreign language students on field trips. Weekend trips had been assigned to unit members on a rotating basis.

In 1983-84, District transportation employment dropped to six full-time bus drivers and two part-time drivers from eight

full-time drivers in 1982-83. The record does not establish the relationship, if any, between the volunteer driver program and the decrease in the number of full-time drivers.

Jackie Marquez, CSEA job steward for the transportation department, complained to Ms. Alston and Mr. Patterson about the volunteer driver program as soon as she became aware of it. Aloma Sorling, one of the unit members who trained the volunteers, also complained to Ms. Alston. Ultimately, Ms. Alston told Ms. Sorling to take her complaint to the superintendent. Ms. Sorling and another driver did complain to Superintendent Anton who rejected their complaint, advising them that he was satisfied that he had made the correct decision by starting the volunteer program.

Following the meeting between Ms. Sorling and the superintendent, CSEA chapter President Diana Criddle joined Ms. Sorling and another driver in a meeting with Assistant Superintendent Chuning. At that meeting, Mr. Chuning complained that the bus drivers had not progressed through the chain of command before visiting the superintendent. On February 28, 1982, shortly after the meeting with Mr. Chuning, CSEA filed a formal grievance about the commencement of the volunteer driver program. On March 3, 1983, CSEA asserted that the use of the volunteer drivers constituted the contracting out of duties normally performed by unit members and is in

violation of past practice. CSEA also raised concerns about the safety implications of the practice.

The grievance reached the superintendent's office on March 14, 1983. He delegated the matter to John McCandless, assistant superintendent of personnel. Mr. McCandless met with CSEA representatives on March 22, 1983. On March 29, 1983, Mr. McCandless rejected the grievance, asserting that the District had the authority to initiate the volunteer program under the management rights clause of the contract between the parties.³

At no time prior to institution of the volunteer driver program did the District ever advise CSEA of its plans or offer to negotiate about the matter. At some point during the grievance discussions, CSEA requested to negotiate about the

³In relevant part, the management rights article in the contract between the parties reads as follows:

It is understood and agreed that the District retains all of its rights, powers, privileges, functions and authority to discharge its obligations to the full extent provided by law. Any of the rights, powers, privileges, functions or authority which the District had prior to the execution of this Agreement are retained except as those rights, powers, privileges, functions or authority are limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with law. The District retains all of its rights, powers, privileges, functions and authority to take action on any matter in the event of an emergency.

volunteer driver program but the District declined. CSEA President Criddle testified without contradiction that "Dr. Anton felt that it wasn't a negotiable item." The parties were in negotiations during the fall of 1982 but the subject of volunteer drivers was not raised at the table. They reached agreement in January of 1983 on a new contract extending into 1985.

LEGAL ISSUE

Did the District unilaterally transfer bus driver work out of the unit and thereby violate EERA subsection 3543.5(c) and/or (a) and (b)?

CONCLUSIONS OF LAW

CSEA argues that commencement of the volunteer bus driver program for band trips was a unilateral transfer of work out of the bargaining unit. Citing various PERB decisions, CSEA argues that the transfer of unit work is a negotiable subject under EERA and the unilateral transfer of work was per se a failure to negotiate in good faith.

The District contends that the use of volunteer drivers for band trips was not the implementation of a new program but the continuation of a practice that commenced in 1978. The District argues, moreover, that the band trips affected only overtime which was irregular and was never promised to unit members. The drivers suffered no loss of regular, full-time

work. Finally, the District concludes, it has been willing to negotiate the subject and has, in fact, done so.

It is well established that the decision to transfer work out of the bargaining unit is negotiable if it impacts upon a subject within the scope of representation.⁴ Solano County Community College District (6/30/82) PERB Decision No. 219. See also, Rialto Unified School District (4/30/82) PERB Decision No. 209 and Mt. San Antonio Community College District (3/24/83) PERB Decision No. 297. It is undisputed that the use of volunteer drivers for band trips reduced the amount of overtime pay for which unit members were eligible. The opportunity for overtime pay relates directly to wages and hours and is a subject expressly held negotiable by the PERB. State of California (Department of Transportation) (8/18/83)

⁴The scope of representation under the EERA is set forth at section 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 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. . . .

PERB Decision No. 333-S and State of California (Department of Transportation) (11/28/83) PERB Decision No. 361-S. See also, Willamette Industries, Inc. (1975) 220 NLRB 707 [90 LRRM 1478] and Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services District (1975) 45 Cal.App.3d 116 [119 Cal.Rptr. 182]. The argument made by the District here that employees were not promised overtime and thus cannot complain about its loss was considered and rejected in Department of Transportation, supra, PERB Decision No. 361-S.

An employer that makes a pre-impasse unilateral change about a matter 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 (10/12/79) PERB Decision No. 105 and San Mateo Community College District (6/8/79) PERB Decision No. 94.

Nevertheless, the District argues that the use of volunteers to drive on band trips was consistent with a continuous practice since 1978. An employer's acts that are consistent with established practices cannot be considered unlawful unilateral changes. Placer Hills Union School District (11/30/83) PERB Decision No. 262. But where the

employer changes "the quantity and kind" of its past practice without negotiation, it will be found guilty of failing to negotiate in good faith. Oakland Unified School District (12/16/83) PERB Decision No. 367. See also, Clevenger Logging, Inc. (1975) 220 NLRB 768 [90 LRRM 1726] and Shell Oil Co. (1967) 166 NLRB 1064 [65 LRRM 1713].

The practice in effect since 1978 was for an elementary school principal to drive his students on field trips during the regular school hours. At first, he was assisted by a parent but later only the principal himself drove. The driving by the principal did not affect unit members because they are assigned regular routes during school hours and are seldom available for additional field trips. In the past, substitute drivers have been employed to drive on field trips if unit members were occupied. Band trips, by contrast, are taken after school and on weekends when regular drivers are available. In the past, regular drivers took the band on all of its trips. The use of volunteers for band trips thus encroached directly upon work which formerly had been performed exclusively by members of the unit. The use of volunteers to drive buses substantially expanded and changed the very nature of the prior practice.

In its answer, the District in effect argues that even if the subject of volunteer drivers is negotiable CSEA waived its right to negotiate by agreeing to the contractual management

rights and zipper clauses. The argument is unpersuasive. The management rights clause is a general retention of powers and contains no reservation of a right to transfer work outside the bargaining unit. In order to show that a union waived its right to negotiate, the employer must demonstrate either "clear and unmistakable language or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made." See, Los Angeles Community College District (10/18/82) PERB Decision No. 252 and cases cited therein. No language in the management rights clause constitutes a "clear and unmistakable" waiver of CSEA's right to negotiate about the transfer of unit work. Likewise, no waiver can be found in the zipper clause. A zipper clause does not "cede to the employer the power to make unilateral changes in the status quo." Los Angeles Community College District, supra.

Before an employer can make a lawful unilateral change affecting a matter within scope, the employer must give notice of the change and an opportunity to negotiate to the exclusive representative. See, Delano Union Elementary School District (4/30/82) PERB Decision No. 213 and cases cited therein. Here, the District decided upon a course of action and took it. There was no prior notice to the exclusive representative and no offer to negotiate. When CSEA first contested the action in a grievance meeting, the District initially took the position that the subject of volunteer bus drivers was not even

negotiable. That the District eventually agreed to negotiate did not cure the inherently destructive impact of its unilateral change.

Upon these facts and based on the record as a whole, it is held that the District unilaterally transferred work out of the unit, an action affecting wages and hours, matters within the scope of representation. The change was a failure per se to negotiate in good faith and a violation of subsection 3643.5(c). An employer's failure to meet and negotiate in good faith with an exclusive representative, when obligated to do so, violates the rights of both the exclusive representative and the employees it represents. The District's action therefore concurrently violates subsections 3543.5(a) and (b). North Sacramento School District (12/31/81) PERB Decision No. 193.

REMEDY

CSEA seeks an order that the District be required to return to the status quo ante and that the affected unit members be made whole for any loss of wages and benefits with interest. 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 unilateral change cases is to

restore the status quo ante. In this case, that means that unit members would be given the opportunity to serve as drivers for such band and other trips as the District may choose to provide. Where work has been transferred out of the unit, it is appropriate that the employer be required to compensate employees for work they lost because of the unilateral change. Solano County Community College District, supra, PERB Decision No. 219 and Rialto Unified School District, supra, PERB Decision No. 209.

In the calculation of the amount of back pay, the District should not be obligated to pay employees more than they would have received had the District not unilaterally transferred work out of the unit. It is apparent from the record that the institution of the volunteer driver program brought about more trips in 1982-83 than in previous school years. In the three years prior to the institution of the volunteer program, the band members went on an average of 5 trips per year compared to the 10 trips they took in 1982-83. The reason for the doubling of trips after the start of the volunteer program is that with free drivers the available funds went further. It requires no speculation to observe that had there been no volunteer driver program the number of trips in 1982-83 would have been similar to the previous years.

Therefore, the amount of back pay due affected employees shall be based on the number of hours employees would have

worked had there been no volunteer program. To determine the proper number of hours, the District shall use the three years prior to the institution of the volunteer program as a guide. The District shall total the number of hours worked by all bus drivers for band trips in 1979-80, 1980-81 and 1981-82 and then divide by three. This calculation will produce the average number of extra hours worked in the three years. The District then shall divide the average number of hours evenly among all unit members employed as bus drivers in 1982-83. The drivers are to be paid whatever amount of money they would have received in 1982-83 had they driven the calculated number of hours. Insofar as the 1982-83 band trips were taken during hours for which unit drivers receive overtime, the amount of money paid to each driver should be computed at the overtime rate. The amount due to each driver shall be augmented by interest at the rate of 7 percent with the interest due only from the period between the last bus driver workday of the 1982-83 school year to the date paid. Back wages for 1983-84 and any subsequent years which may elapse until the date this proposed decision becomes final shall be calculated in the same manner as for 1982-83.

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 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 Lincoln Unified School District violated subsection 3543.5(a), (b) and (c) 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) Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Lincoln Chapter No. 282 as the exclusive representative of its employees by unilaterally transferring bus driver work out of the unit and thereby reducing the opportunity for overtime pay, a matter within the scope of representation.

(b) By the same conduct, denying to the California School Employees Association and its Lincoln Chapter No. 282

rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

(c) By the same conduct, interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

(a) Upon request of CSEA, meet and negotiate with CSEA over the decision and the effects thereof of transferring bus driver work out of the classified employee unit.

(b) Pay to all bus drivers in the unit lost income plus interest caused by the transfer of bus driver work to volunteers. The amount of income due each driver shall be calculated as follows:

The District shall total the number of hours worked by all bus drivers for band trips in 1979-80, 1980-81 and 1981-82 and then divide by three. This calculation will produce the average number of extra hours worked in the three years. The District then shall divide the average number of hours evenly among all unit members employed as bus drivers in 1982-83. The drivers are to be paid whatever amount of money they would have received in 1982-83 had they driven the calculated number of hours. Insofar as the 1982-83 band trips were taken during hours for which unit drivers receive overtime, the amount of

money paid to each driver should be computed at the overtime rate. The amount due to each driver shall be augmented by interest at the rate of 7 percent with the interest due only from the period between the last bus driver workday of the 1982-83 school year to the date paid. Back wages for 1983-84 and any subsequent years which may elapse until the date this proposed decision becomes final shall be calculated in the same manner as for 1982-83.

(c) Within seven (7) 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.

(d) Within thirty (30) workdays from service of a final decision in this matter, notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to

the regional director shall be served concurrently on the charging party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on March 22, 1984, 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 March 22, 1984, 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: March 2, 1984

Ronald E. Blubaugh
Hearing Officer