

of the Educational Employment Relations Act (EERA)² and the PERB unit determination in Sweetwater Union High School District (1976) EERB Decision No. 4,³ (Sweetwater). the ALJ held that BAFU failed to demonstrate that its proposed unit of bus drivers is more appropriate than the existing operations-support unit, and denied the severance petition. The Board has reviewed the entire record in this case, including the severance petition, the hearing transcripts, the proposed decision and the parties

represented by an incumbent exclusive representative by filing a request for recognition in accordance with the provisions of Article 2 (commencing with Section 33050). All provisions of Article 2 and Article 4 of this Subchapter shall be applicable to a severance request except as provided in this Article 7.

(b) Whenever the conditions of Government Code Section 3544.1(c) exist, a severance request for recognition or intervention must be filed in accordance with Section 32135 with the employer during the "window period" as defined by Section 33020.

²EERA is codified at Government Code section 3540 et seq. Section 3545 provides, in pertinent part:

(a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

³Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

filings.⁴ We hereby sustain the ALJ's findings and adopt the proposed decision as the decision of the Board itself, consistent with the following discussion.

DISCUSSION

Throughout its appeal, BAFU argues that the ALJ's application of EERA has undermined the bus drivers' free choice of representation.⁵ BAFU points to federal law, the National Labor Relations Act (NLRA) and decisions of the National Labor Relations Board (NLRB) as authority for its assertion. We disagree with BAFU's argument.

Although the NLRA expressly references employee free choice,⁶ the provisions of EERA contain no such employee free

⁴The request for oral argument filed by BAFU is denied.

⁵As BAFU states in its exceptions:

BAFU's principal exception to PERB Judge Donn Ginoza's proposed decision concerns a fundamental misunderstanding [the applicability] of national labor law as it applies to state EERA criteria for severance.

⁶See 29 U.S.C, sec. 159(b):

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, that the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional

choice language. Further, while NLRB cases may be instructive, they certainly are not controlling in matters before PERB when interpreting dissimilar provisions of EERA and the NLRA.

(Regents of the University of California v. Public Employment Relations Bd. (1986) 41 Cal.3d 601, 615-617 [224 Cal.Rptr. 631] .)⁷

The Assembly Advisory Council on Public Employee Relations (Council) appointed by the Legislature to recommend provisions

employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

⁷See also, California Assembly Advisory Council on Public Employee Relations, Final Report, pp. 89-90, (March 15, 1973) which reads, in pertinent part:

One other observation is in order concerning the criteria to be followed by the Board in determining appropriate bargaining units. Although the decisions of the NLRB in the private sector, and of agencies similar to the Board in other States, may on occasion prove suggestive or even persuasive, they should not be treated as binding precedents upon the Board in California.

for the new collective bargaining statutory scheme for public sector employees concluded that: "the Board should be empowered and directed in the statute to find the largest reasonable unit to be the appropriate one for purposes of collective bargaining." (California Assembly Advisory Council, Final Report, p. 85 (March 15, 1973); "Aaron Report.")⁸

The Council expressly rejected the employee free choice procedures of the NLRA:

Although there are sound reasons to support . . . [a small group of employees within a larger group being able to vote for their own representative] in the private sector, we believe it is inappropriate for the public sector because of its tendency to result in a proliferation of bargaining units--the principal evil to be avoided. (Aaron Report, p. 86 (March 15, 1973). (Emphasis added.)

Due to the divergent sizes, organization and function of private sector businesses, a different practice of unit determination has evolved. As the ALJ correctly pointed out, EERA calls for more general uniformity and a more limited range

⁸In 1972, the Legislature established the Assembly Advisory Council on Public Employee Relations (Assem. Res. No. 51 (1972 reg. sess.)). The purpose of the Council was to provide recommendations "for establishing an appropriate framework within which disputes can be settled between public jurisdictions and their employees. . . ." (Id.) The Council's recommendations (The Aaron Report became the basis for the public sector labor relations legislation of the next succeeding years.

PERB looks to the Aaron Report to discern legislative history and the Legislature's intent regarding the statutes administered by PERB. (See, State of California (Department of Corrections) (1995) PERB Decision No. 1100-S, concurring opinion; Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 3 75.)

of units in the public school setting as intended by the Legislature.

Accordingly, we find that: (1) BAFU has failed to demonstrate that its proposed unit of bus drivers is more appropriate than the existing operations-support unit (Sweetwater): and (2) BAFU's "free choice" argument is not supported by PERB precedent and is contrary to the Legislative intent of EERA.

ORDER

The severance petition in Case No. LA-SV-123 is hereby DENIED.

Members Dyer and Amador joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



LOS ANGELES UNIFIED SCHOOL)
DISTRICT,) Representation
) Case No. LA-S-123
Employer,)
)
and) PROPOSED DECISION
) (7/17/97)
BUSDRIVERS ASSOCIATION FOR UNITY,)
)
Petitioner,)
)
and)
)
SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 99, AFL-CIO,)
)
Exclusive Representative.)
)
)

Appearances: O'Melveny & Myers by Pamela Samuels and Anne Garrett, Attorneys, for Los Angeles Unified School District; Victor Wightman, Antonio Jose Cooke, and Les Amponsah, Attorney, for Busdrivers Association for Unity; Geffner and Bush by Hope Singer and Rebecca Katz-White, Attorneys, for Service Employees International Union, Local 99, AFL-CIO.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Busdrivers Association for Unity (BAFU) initiated this case on September 19, 1994, by filing a severance request to represent bus driver classifications within the Los Angeles Unified School District (District). BAFU seeks to sever two classifications, light bus driver and heavy bus driver, from an established operations-support unit of classified employees exclusively represented by Service Employees International Union, Local 99, AFL-CIO (Local 99). The District and Local 99 both opposed the petition. The Public Employment Relations Board (PERB or Board)

found the petition to be timely filed and have sufficient proof of support. (PERB Regulation sec. 33700.)¹

On March 17, 1995, PERB denied motions to dismiss filed by the District and Local 99 and issued an order to show cause as to BAFU. The administrative decision denied the District's and Local 99's motions to dismiss, rejecting claims of lack of timely filing and lack of employee organization status by BAFU. Noting that a previous severance request filed by BAFU had been earlier dismissed by PERB on January 25, 1993 (and affirmed by the Board in Los Angeles Unified School District (1993) PERB Order No. Ad-250), PERB ordered BAFU to show cause for the existence of a "prima facie change in circumstances" from those serving as the basis for the previous severance request.²

¹PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Section 33700 provides in relevant part as follows:

33700. Severance Request.

(a) An employee organization may file a request to become the exclusive representative of an appropriate unit consisting of a group of employees who are already members of a larger established unit represented by an incumbent exclusive representative by filing a request for recognition

(b) Whenever the conditions of Government Code section 3544.1(c) exist, a severance request for recognition or intervention must be filed . . . with the employer during the "window period"

²In 1991, BAFU filed a request to sever a unit of bus drivers from the same operations-support unit. A Board agent's administrative determination to dismiss the request was upheld by PERB in the 1993 order. The Board found that BAFU failed to show

On July 24, 1995, PERB determined that BAFU had satisfied the requirements of the order to show cause and ordered a formal hearing on the matter. Two pre-hearing conferences were held on September 19, 1995 and November 17, 1995.³

The formal hearing commenced on February 26, 1996 in the PERB Los Angeles Regional Office and continued for 18 days, concluding on July 2, 1996. The hearing was ordered closed on August 19, 1996. With receipt of the final briefs on November 18, 1996, the case was submitted.

FINDINGS OF FACT

The District is a public school employer within the meaning of section 3540.1(h) of the Educational Employment Relations Act (EERA).⁴ BAFU is an employee organization within the meaning of section 3540.1(g). Local 99 is an employee organization within the meaning of section 3540.1(g) and the exclusive representative of a unit of District employees within the meaning of

that the proposed unit was more appropriate than the existing unit, and that no change in circumstances from those presented in a previous severance request had been alleged which would have justified a formal hearing. The previous severance request was one filed by the Drivers Association for Responsible Transportation (DART) in 1983. It sought to sever a unit of bus drivers and other transportation classifications. The DART request was denied after a formal hearing in which the hearing officer ruled that the proposed unit was not more appropriate than the established unit. (See Los Angeles Unified School District (1985) PERB Decision No. HO-R-105.)

³As a result of these pre-hearing conferences, the parties were limited to ten witnesses.

⁴EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

section 3540.1 (j). This bargaining unit is a traditional operations- support unit, known within the District as "Unit C." (See Sweetwater Union High School District (1976) EERB⁵ Decision No. 4.)

Community of Interest

A. Existing Unit Configuration within the District

The District, with its approximately 67,601 employees, is the largest public school employer in the state by a wide margin.⁶ Units other than operations-support include all certificated less other group, other certificated, certificated supervisors, instructional aides, office technical/business services, trades/crafts, security, teaching assistants, and classified supervisors.⁷

Classified employees are assigned among four operational divisions, including School Operations, Facilities Management, Business Services, and Information Technology. The bulk of classified employees are employed within the Facilities Management and Business Services Divisions. Business Services includes the Transportation Branch, Food Services Branch, and Purchasing Branch. Facilities Management includes the Maintenance and Operations Branch. Unit C employees are

⁵Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

⁶This is based on the PERB document Units in Place (May 1, 1996). (San Ysidro School District (1997) PERB Decision No. 1198 [judicial notice of PERB records].)

⁷See footnote 6, ante, for source.

distributed primarily among the Maintenance and Operations, Food Services, Purchasing, and Transportation Branches. Bus drivers are employed within the Transportation Branch.

According to District figures, there are currently 7,805 employees in the Unit C bargaining unit, distributed among 103 job classifications. Approximately 94 percent of all Unit C employees are employed in the Maintenance and Operations Branch (2,249), Food Services Branch (3,668), and Transportation Branch (1,428).⁸

Bus drivers, both light and heavy,⁹ and bus routing assistants comprise the principal classifications in the Transportation Branch. There are currently 1,050 light and heavy bus drivers in the District.¹⁰ The Transportation Branch also includes the mechanics who service the buses and other District vehicles such as trucks.

Building and grounds workers, gardeners, window washers, and office machine repair technicians comprise the principal job classifications under the Maintenance and Operations Branch. Cafeteria workers and food production workers comprise the

⁸The remainder are employed in the Purchasing Branch (includes truck drivers and warehouse employees), Information Technology Division (includes computer technicians), Schools and Children Centers (includes housekeepers and stock clerks), Reprographics Unit (includes offset machine operators), and miscellaneous other positions.

⁹Light buses carry less than 72 passengers. Heavy buses carry 78 to 84 passengers.

¹⁰This figure was based on the District's latest available data reviewed at the time of the hearing.

principal classifications under the Food Services Branch. Truck drivers (heavy, medium and light) and stockworkers are the principal classifications under the Purchasing Branch.¹¹ The majority of Unit C employees who drive District vehicles other than buses are truck drivers under the Purchasing Branch, and pest control technicians and other non-school-based employees under the Maintenance and Operations Branch.

The Transportation Branch is headed by Antonio Rodriguez. Enrique Boull't is the Deputy Director who has responsibility for the school bus operations. Reporting to him are student transportation supervisors who are regional managers. Twelve to thirteen area bus supervisors report to these regional managers. Area bus supervisors, of which there are approximately 63, have direct supervisory responsibility for the bus drivers. Assistant area bus supervisors and dispatchers report to the area bus supervisors and are responsible for managing the day-to-day bus operations.

B. Function, Purpose, and Job Duties of Bus Drivers

The District consists of approximately 900 schools located throughout Los Angeles County, with a total student enrollment exceeding 600,000. Approximately 650 schools are served by school buses. Prior to the 1970s, busing of students was designed to transport students to and from schools located where

¹¹Purchasing is a small branch with approximately 250 employees. Truck drivers were recently transferred from the Transportation Branch to the Purchasing Branch, signifying some distinction by the District between the functions of transporting students as opposed to supplies.

students did not live in close proximity to their schools. This type of busing, known as "non-programmatic" busing, no longer exists in the District.

In 1974, the level of busing increased dramatically as a result of a desegregation lawsuit that resulted in a consent decree, whereby the District agreed to transport students to ameliorate racial imbalance in the schools. Subsequently, the District created "magnet" schools, emphasizing special curricula, as an alternative means to ameliorating racial imbalance.¹² The District provides busing of students for the magnet schools. In addition, the District has traditionally provided busing for handicapped students and others with special needs. The District qualifies for, and receives, a substantial amount of state and federal funding to support busing of students for desegregation purposes and for transporting handicapped students. This type of busing is known as "programmatic" busing.¹³ State and federal funding for desegregation busing amounts to approximately \$20 million per year.

The basic function of bus drivers is to transport students in District buses to and from schools at the beginning and end of the school day and to transport students to and from other special events such as field trips and athletic events.¹⁴ Bus

¹²Twenty thousand students now attend magnet schools, and the number is increasing.

¹³This is apparently due to its categorical funding.

¹⁴Light truck drivers in the Purchasing Branch operate an employee shuttle service between certain District administrative

drivers also perform other functions ancillary to the transportation of students. These include inspecting buses for safety and mechanical problems, cleaning buses, and filling out records.

Three reports must be submitted on a daily basis. The vehicle condition report, required by law, is a checklist indicating the mechanical condition of the bus. The daily bus report indicates the hours of work, mileage, schools assigned, activities handled, and number of students transported. The tachograph is a graph indicating bus movements, including speed and stops, calibrated by time. It is produced automatically by a mechanism attached to the bus.

District trucks also carry tachographs. Truck drivers are required daily to submit the tachograph, a time record, proof of deliveries, and a vehicle condition report. The California Highway Patrol (CHP) reviews both truck and bus vehicle condition reports. Lack of compliance with CHP regulations on these reports can cause termination of operations. Pest control technicians and other Maintenance and Operations Branch workers who are required to travel from school to school also fill out reports indicating their day's activities.

Bus drivers begin their day by inspecting their buses, following a list containing approximately 20 items. The drivers then pick up and deliver students to schools. The first shift in

sites, although the scope of this operation is negligible in comparison to the student transportation operation.

the typical "split shift" day ends around 8:30 to 9:00 a.m. The drivers might then proceed directly to a special assignment, or if without one, report to their area bus supervisor to see if any assignment is available.

After returning students home in the afternoon, the drivers complete their paperwork for the day and engage in light cleaning. On a daily basis, as needed, they sweep out the bus and clean the seats and windows. On a periodic basis (weekly or bi-monthly), bus drivers have the outside of their buses washed at one of the three bus yards that maintain a bus washing facility. District trucks, too, are washed on a weekly basis.

When the occasion demands, bus drivers will have their buses serviced for mechanical problems at one of the bus yards. For non-critical items, the driver will fill out a work request form and take the bus to a service yard at the end of the day. Fueling of buses is done periodically at one of three locations.

Bus drivers exercise custody and control over students while the students are being transported.¹⁵ Bus drivers are responsible for maintaining discipline among the students who ride the bus. Maintaining discipline over students and safely driving the bus are tasks which involve added risks, such as

¹⁵Handicapped and developmentally disabled students who require special attention are typically accompanied on the bus by a District aide. The responsibility for safe transport of the students nonetheless rests with the driver.

threats of violence by passengers as well as non-passengers.¹⁶ Encountering gang violence or threats of violence by riders and non-riders along a bus route is not uncommon.¹⁷ Buses are equipped with a two-way radio linked to the District to ensure the safety of both drivers and passengers. Drivers are expected to act promptly and decisively in crises, to administer discipline rationally and firmly, yet with a positive and courteous approach.

When a student violates bus rules, the driver must initially make a determination as to the proper form of discipline to be imposed.¹⁸ The driver is required to write up a report on a disciplinary incident, a copy of which is delivered by the student to his parents for signature and return. Disciplining of students has the potential to provoke parent complaints. If the parent requests, a conference with the driver will be held. The District has a parent-complaint procedure dealing with complaints against bus drivers. In isolated instances, discipline of the student may even provoke threats of violence by the parent

¹⁶For example, one bus driver was physically attacked by a special education student, after the parent failed to receive the student at the drop-off point.

¹⁷Examples include rock throwing, egg throwing, finger signs, and name calling at certain bus stops. While driving his bus, one driver experienced gunfire with a bullet entering one of the windows. An explosive device was set off in another driver's bus. Drivers may carry students belonging to rival gangs. Other Unit C employees, such as building and grounds workers and pest control technicians who work during the night hours, are also exposed to threats of criminal violence.

¹⁸Certain infractions, such as fighting on the bus, require a three-day suspension from riding the bus.

against the driver.¹⁹ Some Unit C employees, such as cafeteria workers, have daily contact with students but do not exercise custody and control.

Apart from disciplinary matters, bus drivers occasionally interact with parents, resolving such issues as errors in bus assignments. They are expected to demonstrate multi-cultural sensitivity in dealing with students and parents.

C. Qualifications, Requirements, and Work Rules

Qualifications for employment as a bus driver include a high school education, valid California Class B commercial license with a passenger endorsement, a CHP certified first aid endorsement, a medical clearance, and completion of two written tests. The District test requires mapping and routing skills. The CHP test requires knowledge of state rules and regulations for bus drivers, as well as first aid. To obtain the Class B license, 20 hours of behind-the-wheel training and 20 hours of class time are required. To maintain the license, 10 hours of in-service training is required per year, except in the fourth year when 20 hours is required. The CHP conducts the testing and certification of drivers.²⁰

Auto mechanics and truck drivers are also required to maintain a Class B commercial license. Fifty-eight Unit C

¹⁹A parent threatened to kill one bus driver after he disciplined the parent's child.

²⁰By CHP regulation both bus drivers and truck drivers in the District must avoid driving violations. Violations on a driver's personal driving record can result in suspension of the commercial license.

classifications require a driver's license (non-commercial or commercial) including stock worker, copy machine operator, truck driver, mechanic, pest control technician, and power equipment operator. Truck drivers, pest control technicians, power equipment operators, and window washers are also required to provide a medical clearance.

Bus drivers are required to attend special training classes covering gang awareness, safe riding practices, and pupil management skills.²¹ They are trained to respond to emergency situations, such as accidents, by stabilizing the vehicle, assessing the situation, and administering first-aid. Truck drivers receive training in driving, safety, and completing the vehicle condition report. Food service workers receive training in sanitation, food preparation, machine use, basic skills, nutrition, supervision, and recordkeeping. Building and grounds workers receive 60 hours in general job training.

The District issues a bus driver manual consisting of approximately 160 pages. The manual sets forth numerous work rules, notably, those contained in the sections on "Professional Standards" and pupil management. It reminds bus drivers that they are "a moving billboard" representing the District and warns them that while in uniform and even when not transporting students, they are scrutinized by the public. Violations of these rules subject a driver to potential disciplinary action. Other classifications are not issued manuals of this kind.

²¹A 42-hour pupil management course is required.

The manual also requires maintenance of a well-kept personal appearance and courtesy to all citizens, parents, and the public even if those individuals are angry or discourteous. It prohibits fraternization with pupils, citizens, students, parents, and school staff while the drivers are on duty and advises them to refrain from entering liquor stores or even multi-purpose (liquor and food) stores, so as not to arouse suspicions about on-the-job alcohol consumption.

Bus drivers, and others required to maintain the Class B license, are subject to testing for drug and alcohol use. The testing is mandated by a federal law, which went into effect on January 1, 1995.²² The enabling statute and implementing regulations mandate testing procedures (pre-employment, post-accident, random, and reasonable suspicion), set an allowable level for blood-alcohol content, prohibit any use of controlled substances, and require removal of a positive-testing employee from driving duties until completion of a rehabilitation program.²³ The regulations do not require termination of employment based on a positive test, but in implementing the

²²The Federal Omnibus Transportation Employee Testing Act of 1991 is found at 49 United States Code section 2717 et seq. Its implementing regulations are found at 49 Code of Federal Regulations section 382.101 et seq. The District was required to have testing procedures in place as of January 1, 1995. (49 C.F.R. sec. 382.115.)

²³Code of Federal Regulations, sections 382.215, 382.301, 382.303, 382.305, 382.307, 382.501, 382.503, 382.605, 383.107, 383.201.

federal law, the District has chosen to adopt a "zero tolerance" policy that requires immediate employee termination.

Bus drivers are required to wear a uniform consisting of a shirt, pants, jacket, shoes, and a badge. Mechanics and truck drivers wear a similar uniform. Food service workers wear aprons, hairnets, and gloves. Power equipment operators and pest control technicians also wear uniforms.

D. Work Hours and Schedule

Bus drivers are employed for ten months each year, similar to food service employees and certain other employees.²⁴ Groundskeeper is one of the principal Unit C classifications assigned to a 12-month schedule.

The vast majority of bus drivers are employed part-time because transporting students to and from school does not require an eight-hour day. Their hours range from 4 to 6.9 hours, depending on the length of the routes they are assigned. Part-time drivers work a split-shift with idle, non-paid time during the middle of the day. Despite their being paid for only five hours per day on average, bus driver starting and ending times are 10 to 12 hours per day on average as a result of the split-shift assignment.

²⁴Eighty percent of the 3,200-3,600 food service workers (e.g., cafeteria helpers, cafeteria workers, and food production workers) are employed on a ten-month schedule. Bus drivers are permitted to bid for a limited number of summer routes.

A proportionally small number of drivers are employed on a full-time basis.²⁵ The eight-hour day consists of the typical split-shift, which typically includes multiple routes (i.e., high school followed by elementary route).²⁶ This time is supplemented on a daily basis with a shuttle route (non-student transportation), special events driving, or other tasks. In the past, the District had deemed it appropriate to maintain this full-time work force commensurate with a minimum amount of special events work projected over the entire year. Around 1991-92, the District, with Local 99's assent, decided to phase out the full-time positions through attrition as a cost-savings measure.

The majority of building and grounds workers work a full-time shift beginning at 1:00 p.m. and ending at 9:30 p.m. Part-time building and grounds workers work between four and six hours per day. Gardeners report at 7:00 a.m. and leave at 3:30 p.m. Pest control workers work between 3:00 a.m. and 11:30 a.m. The majority of food service employees work part-time.²⁷ The majority of Purchasing Branch employees work full-time.

²⁵Eighty-five out of approximately five hundred light bus drivers are full-time. Ninety to one hundred out of approximately five-hundred fifty heavy bus drivers are full-time.

²⁶Of the full-time positions, a small number are so because the routes themselves require an eight-hour day.

²⁷Cafeteria helpers and cafeteria workers work three to three and one-half hours. They prepare lunches at the school sites. Food production workers are employed full-time. They prepare food in bulk at the District's two central food production facilities.

Bus drivers typically begin their work day between 5:30 and 6:00 a.m. They report to one of seven bus parking locations, where the buses are parked when not in use. Some bus "yards" or "barns" house only buses; others house buses as well as other vehicles, such as delivery trucks and maintenance vehicles. The second shift typically begins between 1:00 and 2:30 p.m. and ends between 4:30 and 5:00 p.m.

Between the shifts or after the second shift, bus drivers may receive assignments for a special events or Kindergarten return trip. This work is assigned on a rotating basis among the drivers. The split-shift is unique to the bus driver classification.²⁸

Bus drivers are eligible for overtime assignments. Such opportunities arise from athletic events or weekend special events such as fundraisers or recreational trips.

E. Seniority Rights and Retention of Unit Work

Since at least 1979, the Transportation Branch has conducted a yearly bid for bus and bus route assignments. The heavy bus driver and light bus driver bids are conducted separately. Bidding is based on seniority within the respective classifications. The drivers convene at a central location at which the seniority and route lists are posted. The bid also

²⁸Cafeteria helpers and cafeteria workers have a break of approximately one to one-and-one-half hours between early preparation and service of the mid-day meal. Their work day, including the break for the majority of these workers, is at most five hours. In contrast, the work day for bus drivers, including the off-time between split shifts, is approximately 11 hours.

allows the driver to select the parking location of the bus and the supervisor.

A similar bid for vehicles and routes is conducted for truck drivers and mechanics.

The District has had a longstanding practice of contracting out some busing work to independent contractors. It currently has contracts with three independent operators. The District has utilized contract buses to provide a "buffer" for yearly contraction or expansion of services.²⁹ The District is limited in its ability to hire additional drivers because it must fund the purchase of new buses as well as the replacement of buses retired from service. Purchases are made out of the District's general fund or with state and federal monies.

Since at least 1991, District statistics show a steady rate of approximately 50 percent of the bus routes being contracted out. District testimony was that this rate dates back to the 1970s. This was contradicted by BAFU testimony that the level of contracting out increased during the 1980s from 25 percent to 50 percent. A Local 99 witness testified that there were 400 more

²⁹The District contracts out other services performed by Unit C employees, principally in the Food Services Branch where meals are prepared by outside vendors. Food service contracting out has increased as students have come to prefer name-brand fast foods. Contracting out in the Purchasing Branch is limited to specialized services not provided by District employees and for trash removal where the District has difficulty maintaining trash removal vehicles.

District drivers in the 1980s. Since this testimony corroborates the BAFU testimony, the BAFU testimony is credited.³⁰

F. Supervision

Most Unit C employees, including bus drivers, truck drivers, and food service employees are evaluated on a yearly basis.

Formal discipline is initiated by the supervisor's issuance of a notice of unsatisfactory service. Appeals of disciplinary actions (i.e., suspensions, demotions, and terminations) are pursued within a merit system hearing procedure, rather than through the grievance procedure of the collective bargaining agreement.³¹

³⁰There was no credible evidence suggesting any significant decline in the total number of routes since the 1980s. Therefore, assuming the current level of 1,100 District drivers, the number of District drivers in the 1980s would have been 1,500 and contract drivers would have been 700 (total of 2,200 routes and drivers). Darrell Anderson, a bus driver opposed to severance, corroborated the testimony of 1,500 District bus drivers at its peak. Enrique Boull't, Deputy Director of the Transportation Branch, testified that the District has never employed more than 1,200 drivers since the late 1970s. However, according to bid-lists for the years 1989 and 1990, entitled "Summer Bid List - Non-Driving Assignments Full and Part-time Heavy and Light Bus Drivers," there were a total of 1,297 drivers in 1989 and a total of 1,276 drivers in 1990. Thus, the accuracy of Boull't's recollection is questionable.

³¹The notice states particular causes, such as inefficiency, incompetence, neglect of duty, or absenteeism, as well as descriptions of the particular incidents underlying the alleged cause. This is followed by a "Skelly" hearing, where the employee exercises his right to upper management review of the charges. (See Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 539].) If the reviewer believes that the charges should stand, the charges are submitted to the Board of Education for approval. The board's approval triggers the employee's right to appeal and a hearing before a hearing officer appointed by the three-member Personnel Commission. The hearing officer's decision is subject to review (affirmance, modification, or reversal) by the commission itself. The

There was evidence introduced by BAFU indicating that bus drivers are scrutinized more closely than other classifications within Unit C³² and that there is no uniform policy incorporating principles of progressive discipline.³³ "Overcharging" in disciplinary actions (i.e., the alleging of additional but specious infractions to buttress the central charge so as to warrant the maximum penalty) has been shown in some cases. Testimony of drivers suggested that the burden to prove innocence in disciplinary matters is generally on the driver, who is often without corroborating witnesses and must rebut the assertions of supervisors, school administrators, students, and parents. Drivers who sought to defend themselves in disciplinary actions or to improve their working conditions are likely to suffer harassment or retaliation by certain supervisors and it appears that this is condoned at the highest levels of the Transportation

commission's decision is final and binding on the District. Appeal rights do exist by way of administrative mandamus proceedings in Superior Court.

³²For example, certain infractions, such as leaving a child on the bus, are considered extremely serious and subject a bus driver to possible termination. There is no evidence that failing to deliver a package of supplies on a truck route subjects a truck driver to immediate termination. In addition, the tachograph provides evidence to supervisors of the precise movements of the vehicle, its speeds, and the timing of its movements. Thus, suspicions may be raised by excessive speeds, or distances travelled by the bus during the "splits," the latter leading to the common charge of unauthorized personal use of the vehicle.

³³Local 99 negotiator Tom Newberry asserted that progressive discipline is addressed in the evaluation provisions of the contract. But nothing in the article suggests that it requires corrective action prior to proceeding with a dismissal.

Branch. Disciplinary action, which could lead to termination, commences for drivers having accumulated seven absences on a rolling basis. There is no similar policy of disciplinary action against building and grounds workers.³⁴

During the 1990s, BAFU claimed to have compiled statistics to document the numbers of bus driver terminations. These numbers were based on examining the bid lists ranking bus drivers by seniority from year to year. BAFU concluded that 400 to 500 bus drivers were terminated over a five-year period. A comparison of the 1989 and 1990 summer bid-lists reflects that approximately 85 drivers on the 1989 list do not appear on the 1990 list. This figure is close to the average yearly number of terminations claimed by BAFU. However, since BAFU was unable to provide clear and convincing evidence as to what proportion of those were terminated for disciplinary reasons as opposed to having left the District for other reasons, such as retirement, resignation, or promotion, the number of terminated is obviously less.

The District determined from its records that 474 drivers from the 1990 list do not appear on the 1996 summer bid list, a number nearly identical to that asserted by BAFU to constitute

³⁴Food Services Branch Personnel Representative Martha Palacios testified that the same absence policy applied to food service workers, but this testimony was not credible based on her demeanor and lack of specifics. She also testified that discipline of food service employees in general was greater than for Transportation Branch employees. But this was contradicted by District figures regarding Personnel Commission hearings in the Food Services Branch compared to the Transportation Branch.

terminations. Of these, it claimed, 40 were terminated for disciplinary reasons, 168 resigned, 137 retired, 57 were promoted, 48 exhausted their benefits while on leaves of absence, 11 abandoned their jobs, 7 died, and 6 were terminated for failure to maintain their bus driver certificates, as required by state law.³⁵ The District figures failed to account for drivers who may have chosen to resign or retire under threat of disciplinary charges. The District provided statistics showing that the average number of bus drivers charged with discipline warranting termination in the 1990s was approximately 16 per year. This conflicts with, and calls into question, its calculation of 40 terminations over the 1990-1996 period (i.e., average of six-to-seven per year). Because the District had access to the records but failed to present a clear, documented record, its figures cannot be fully credited either.³⁶

At best, the record supports only a very rough approximation of the number of bus drivers terminated or forced out by threatened disciplinary action. That figure is around 40 to 50 drivers per year.³⁷

³⁵Eighty appeared under a different name due to a variant spelling or change in marital status.

³⁶In 1990, bus drivers were successful in demanding a Local 99 general membership meeting specifically to address terminations. It defies credibility that drivers would take such action if terminations amounted to less than seven per year. (See section C, infra, in discussion of negotiations history.)

³⁷Of course, some terminations are justified. Local 99, however, claimed a 50 percent success rate in formal challenges to dismissals.

The fact that bus drivers perform safety sensitive jobs and subject the District to potentially great legal liability for malfeasance are factors corroborating the anecdotal and hearsay-based opinions of the bus drivers who testified that bus drivers are scrutinized, and hence disciplined, more severely than other Unit C classifications. The record also supports a finding that the Transportation Branch condones arbitrary discipline among some of its supervisors.

BAFU complained about a high proportion of African American bus driver terminations but failed to substantiate any racial animus behind this rate.³⁸

G. Compensation and Fringe Benefits

Compared to other major job classifications in Unit C, light and heavy bus drivers are among the highest paid. Truck drivers, mechanics, and skilled repair technicians have higher rates of compensation. A part-time, light bus driver with high seniority is capable of earning approximately \$38,000 per year.³⁹ A similar heavy bus driver may earn approximately \$40,000 per year. District bus drivers received considerably better compensation than drivers employed by private contractors.

³⁸It was undisputed that 60-75 percent of drivers currently are African American, suggesting that even if termination decisions were completely race-neutral, a higher proportion of African American drivers would be affected.

³⁹Truck drivers average between \$36,000 and \$40,000 or more per year. It would appear that bus drivers are capable of earning comparable wages with overtime and extra-duty assignments.

A majority of the terms and conditions governing the employment of bus drivers, as set forth in the collective bargaining agreement, are identical to those covering other Unit C classifications. The significant provisions include health and welfare, leave benefits, vacation, evaluation procedures, and the grievance procedure. The contract is notable for providing life-time coverage under the District's paid health plans for employees eligible to receive a Public Employees Retirement System/State Teachers Retirement System allowance for age or disability and who have met the years-of-service requirements of the contract.

A few provisions deal with specific classifications such as the seniority-based bidding procedures (for bus drivers, auto mechanics, and truck drivers), summertime cafeteria assignments, uniform differentials for cafeteria workers, and pay differentials for truck drivers with special duties.

H. Interchange with other Unit C Employees

As non-school based employees, bus drivers do not have any significant contact with the majority of school-based Unit C employees. After picking up their buses for the day, drivers are on the road in their individual vehicles for the majority of their duty time.⁴⁰ Work-related interchange with other classifications, such as truck drivers, mechanics, and building and grounds workers, is also limited. Though it is necessary for

⁴⁰A small proportion of drivers, who transport developmentally disabled students, are accompanied by an educational aide.

bus drivers to deliver their buses to mechanics, communication of the problem is customarily done in writing or by verbal report to a supervisor. Truck drivers may come into contact with bus drivers at some fueling stations. Rest facilities for mechanics and truck drivers are generally separate.

There is some opportunity for interchange in non-work situations with truck drivers and mechanics at bus barns where mechanics are assigned or at sites where the employees share parking lots for their personal vehicles. At most schools, bus drivers are permitted to use the school cafeterias for meals, but many drivers do not choose to eat in them.

At the same time, work-related interchange between classifications in Unit C generally is limited by the dispersed nature of schools, specialization of function (e.g., bulk food processing, pest control, and trucking operations), and differing shift times for the major classifications.⁴¹ Intra-classification interchange is more limited for the majority of Unit C employees because they are school-based.

Intra-classification interchange among light and heavy bus drivers, truck drivers, and mechanics is enhanced by the limited number of bus parking facilities as well as the opportunity for all in the classification to congregate once or twice a year at the route bids. Bus drivers also interact at the 75 area bus supervisor locations, where the drivers turn in their paperwork,

⁴¹Two of the largest school-based classifications, building and grounds workers and cafeteria helpers, have non-overlapping shifts.

receive their mid-day assignments, and spend their idle time between shifts.

Local 99 Negotiations History\Extent of Organization

A. Structure and Membership

Local 99 is the exclusive representative of three units of classified employees in the District, including units for school aides, operations-support, and non-certificated teacher assistants (Units B, C, and F, respectively). Local 99 is also the exclusive representative for classified units in the Los Angeles Community College District, Torrance Unified School District, and Lynwood Unified School District.

Approximately 4,938 out of 7,805 Unit C employees (63 percent) belong to Local 99. Approximately 66.4 percent of Transportation Branch employees are Local 99 members.⁴² Membership levels for Unit C employees is higher than for any other unit in the District. Presently, a majority of members exists within each of the major Unit C job classifications.⁴³ The Unit C contract provides for agency fees.

⁴²These figures understate somewhat the total membership since they are based on payroll deductions, which do not include members who pay dues directly to Local 99.

⁴³Membership is not necessarily inconsistent with opposition to Local 99. A majority of bus drivers supported the severance petition and yet a majority are also members of Local 99. Yudette Hayes, for example, is an ardent BAFU supporter but is also a member of Local 99. It is a common, if mistaken, belief, that non-membership may be a basis for a lesser quality of representation in individual employee disputes. There is also little financial disincentive to membership because of the existence of agency fees.

Local 99 operates under a formal constitution and bylaws. It is governed by an executive board of nine members elected to represent the members in the four school districts. The executive board elects officers, including a president, vice-president, secretary, and treasurer. The executive board hires an executive director.⁴⁴ Local 99 holds monthly division meetings and quarterly general membership meetings.

Walter Backstrom has been the executive director since 1992. Backstrom has the power to hire and fire the staff members of Local 99, subject to approval by the executive board. The current staff of Local 99 consists of 25 employees. Three staff members are assigned to work exclusively with Transportation Branch employees. This number is greater than for the other branches. Assistant Executive Director Paul Smith supervises these employees and handles individual cases as well.

The District and Local 99 have negotiated 13 Unit C collective bargaining agreements, dating back to 1978. Contract negotiations are currently coordinated by Tom Newberry, a staff member of Local 99 since 1990.⁴⁵ He was responsible for negotiating Unit C's last four contracts. Newberry is the spokesperson for a Unit C negotiating team. The team consists of members elected from a representative group of major job classifications in each of the various operational branches of

⁴⁴Appointment by the governing board rather than election by the membership is a common practice, particularly among Service Employees International Union (SEIU or International) locals.

⁴⁵Newberry also serves as chief negotiator for Units B and F.

the District, including Maintenance and Operations (three to four representatives), Purchasing, Food Services, Transportation (one to two representatives), and Information Technology.⁴⁶ Team members must be nominated from within one of the seven geographic divisions in the District. Currently, the driver with the highest number of petition signatures is elected. From 1992 through 1996, Michael Bird has been the bus driver representative on the team.

In the early 1990s, Local 99 implemented a written bargaining survey to obtain Unit C employee views in advance of negotiations. The written surveys have been replaced with a computerized telephone survey. The survey results are tabulated and presented to the negotiating team for review and discussion.

Labor/management committees were instituted by Local 99 through the 1992-94 agreement. The committees consist of representatives from the rank-and-file and District management. They are organized around the major job classifications and are intended to address issues in a more timely and informal manner than through the negotiations process.⁴⁷ The labor

⁴⁶The elected negotiating team receives input from the staff of Local 99, who typically have knowledge of technical matters, but it is the team that makes all final decisions on bargaining proposals.

⁴⁷Committees exist for food services, transportation, mechanics, purchasing, maintenance and operations, trucking, and information technology. Transportation is exceptional in that it has six rather than five labor representatives. According to the latest collective agreement, the committees are not to discuss matters within the scope of representation, although it appears that they do in practice.

representatives on the committees are appointed by the president of Local 99. Michael Bird and Howard Langey have been the bus driver representatives for the past several years. The committee has discussed such issues as lack of consistency in discipline, assignment of winter recess work, and bidding procedures.

B. Representation Activity

Local 99 provides representation to enforce the provisions of the collective bargaining agreement. The contract has a grievance procedure culminating in binding arbitration. From 1987 to 1995, the District processed 159 grievances for Transportation Branch employees, the majority of which involved bus drivers. Local 99 provided representation in all but four of these cases. In the others, the employee represented himself, or the record was unclear. The Transportation Branch had the most grievances per capita.⁴⁸

In its case, BAFU focused on bus driver complaints about Local 99's representation of bus drivers in appeals of disciplinary actions. Since the disciplinary appeals procedure is an extra-contractual forum, the duty of fair representation does not attach to such proceedings under the applicable PERB precedent. Nevertheless, Local 99 provides representation in the

⁴⁸The Transportation Branch accounts for 18 percent of Unit C employees. Over the same period, there were 51 grievances in the Food Services Branch, which accounts for 47 percent of Unit C employees, and 191 grievances in the Maintenance and Operations Branch, which accounts for 29 percent of Unit C employees. District records show extremely high rates of representation across the unit and extremely low rates of autonomous representation.

appeals process for bargaining unit employees on a case-by-case basis. Representation in disciplinary matters is supervised by Hope Singer, an attorney in the firm of Geffner and Bush, which provides a full range of legal services to Local 99. Paul Smith decides whether representation will be provided in individual cases. Attorneys from the firm of Geffner and Bush as well as Local 99 business representatives represent employees in disciplinary appeals. Non-attorney staff receive training from attorneys with respect to handling both Personnel Commission hearings and grievances.

In a survey conducted of bus driver termination cases handled by the firm of Geffner and Bush, close to one-half of those represented were reinstated. The same survey indicated that the length of suspensions imposed by the District were reduced in nearly one-half of the cases when the bus driver was represented.

District records establish that a relatively small number of Transportation Branch disciplinary cases reach the Personnel Commission level, approximately 3.5 per year. During the 17 year period from 1978 through 1995 there were 60 hearings for the Transportation Branch, compared with 102 for the Maintenance and Operations Branch, and 17 for the Food Services Branch. Transportation and Maintenance and Operations per capita rates for hearings are about the same; Food Services is much lower.

When random drug testing was imposed in the District, Local 99 sought an amnesty period. Backstrom, Smith, and Singer, representing Local 99, met with Alan Tomiyama, Director of the Transportation Branch, to propose the adoption of a grace period and the opportunity for employees to rehabilitate or transfer to another position. The District has refused to accommodate any of Local 99's requests. Local 99 has reluctantly acquiesced in the District's "zero tolerance" termination policy.⁴⁹ In a test case before the Personnel Commission, Local 99 engaged in discovery to ascertain whether the District was complying with the law's requirements. It has also pushed for mitigation of discipline in individual Personnel Commission cases.

The current contract for Unit C contains only one set of provisions relating specifically to bus drivers, namely, the bidding procedure.

Local 99 has implemented a computer-aided, tele-marketing system to increase participation of members and to assist in mobilizing them for organizational purposes. Local 99 successfully organized opposition to recent legislation proposing to cut state funding for desegregation busing. Local 99 also has lobbied the state and federal governments for increased funding for busing.

⁴⁹In Los Angeles Unified School District (1996) PERB Decision No. 1181, Local 99 filed a unilateral change charge challenging the District's right to terminate, but the charge was dismissed as being untimely.

C. Complaints About Representation

In approximately 1990, bus drivers banded together to demand a general membership meeting to address what was perceived to be a high level of bus driver terminations, many of which became final because Local 99 had allegedly failed to file employee Personnel Commission appeals in a timely manner. The meeting, held at Los Angeles High School, was the only general membership meeting held during the 1989-to-1992 trusteeship. (See section D, infra.) Local 99 offered no assurances in response and closed the meeting over the opposition of those attending.

Shiral Nelson and Theresa Oceguerra are part-time, light bus drivers, who were demoted from full-time to part-time along with 20 others as a result of reductions in hours in 1990-91. They complained that drivers with less seniority should have been demoted instead. With assistance from BAFU member Victor Wightman, Nelson filed a grievance over the matter. After the District denied the grievance⁵⁰, she then requested and received Local 99 assistance. On behalf of other drivers, Nelson requested that Local 99 seek an injunction based on the Education Code preventing the District from contracting out mid-day and

⁵⁰A District representative suggested at one point that the case could be resolved if Wightman were removed from the case. BAFU presented other testimony purporting to show that the District attempted to deter employees from electing BAFU representation. (But see Chaffey Joint Union High School District (1982) PERB Decision No. 202 [employer may refuse to process grievance where employee is represented by non-exclusive representative].)

overtime assignments, as a way to preserve full-time positions.⁵¹ Instead, Local 99 filed a grievance and companion PERB unfair practice charge challenging the reduction in hours that resulted in the demotions.⁵² Local 99 convinced her that the arbitration should be postponed pending the outcome of the PERB charge because the issues were parallel. After losing the PERB case, Local 99 declined to pursue the grievance to arbitration, but gave Nelson no explanation as to why the case lacked merit.

Through Local 99, Ocegüerra processed her own grievance over the same matter. Local 99 withdrew the grievance but she, too, was not provided with an explanation as to why the grievance lacked merit.⁵³

⁵¹See Barstow Unified School District (1997) PERB Decision No. 1138b (merit system districts have authority under Education Code to contract out pupil transportation).

⁵²Judicial notice is taken of the administrative law judge decision addressing this issue. (Los Angeles Unified School District (1993) PERB Decision No. HO-U-544.) There the administrative law judge found that language of Article IX concerning hours together with the past practice of reducing hours of bus drivers established that no unilateral change occurred as a result of the reduction in the number of full-time routes available for the 1992 bid. The administrative law judge noted that Paul Smith did not specifically demand to bargain over the reduction in hours.

⁵³A common denominator among the grievants who lost their full-time positions was that they all had time off due to industrial injury. Apparently a discrepancy existed in the District's seniority policy with respect to demotions, as opposed to other purposes, such as route bidding. However, the contract does not define seniority. Without a contractual basis for its claim, the grievance appears to have lacked merit since the grievance procedure requires the arbitrator to find only violations of express terms of the agreement.

Testimony from bus drivers Jay Grison and John Scates suggested inconsistencies in the manner in which Local 99 responded to requests for representation in disciplinary matters. In separate cases, Local 99 refused representation at the initial stage of a disciplinary appeal, in which Grison later prevailed, and after a District appeal to the commission of a hearing officer decision favorable to Scates. In other cases, Local 99 agreed to provide representation, including, in one of Scates's matters, attorney representation to pursue a Superior Court mandamus proceeding to reinstate employment following a favorable Personnel Commission decision. In the second of Grison's appeals, Local 99 failed to file a timely appeal, resulting in Grison's dismissal. Local 99 offered no explanation in rebuttal.

BAFU asserted that Local 99 did not adequately advise drivers of their options in disciplinary appeals, but there was no concrete evidence to support this claim. Grison testified that he complained to Local 99 about a high proportion of African American bus driver terminations but, as noted above, this allegation was not substantiated. There were a number of instances, including some noted above, where Local 99 apparently refused representation or abandoned a grievance or disciplinary appeal without providing the employee an explanation for its decision.

Local 99's 1995 bargaining survey showed that 66 percent of light and heavy bus drivers considered it to be doing a fair to

excellent job as opposed to 34 percent who considered its work to be poor or very poor.⁵⁴

D. Historical Background to SEIU Trusteeship

Beginning in 1978 and continuing through the late 1980s, Local 99's chief executive officer was the secretary-treasurer. This position was elected by the general membership by a vote taken at a general membership meeting. General membership meetings in the late 1970s and early 1980s were held on a regular monthly basis as prescribed by the constitution and bylaws. District bus drivers attended general membership meetings in large numbers -- between 100 and 200 -- often disproportionate to the size of the total membership (i.e., up to 90 percent of those in attendance). They were an active and militant group.

Howard Friedman was the secretary-treasurer in 1981. He was viewed by bus drivers as opposing their interests. As chair at the general membership meetings, he often resisted attempts by bus drivers to place their items on the agenda.⁵⁵

⁵⁴The results were based on a rather limited response of less than 90 light bus drivers and less than 80 heavy bus drivers.

⁵⁵For example, in the early part of 1981, Victor Wightman, who would subsequently become a leader in BAFU, complained to Local 99 about failing to make a list of stewards available to bus drivers and organized support among drivers over the issue. He complained to Friedman about the issue in a general membership meeting. Friedman failed to address the issue to Wightman's satisfaction. Wightman also organized support for Frank Loya, a Local 99 representative for the Transportation Branch popular among bus drivers, whom Friedman had sought to remove over allegations that Loya doctored minutes regarding a matter involving bus driver hirings.

In the summer of 1981, in an apparent attempt to seize control of the business agenda, the leadership of Local 99, headed by Friedman, cancelled several consecutive general membership meetings and simultaneously proposed to amend the constitution and bylaws so as to eliminate the monthly general membership meetings in favor of one annual general membership meeting.⁵⁶ Any amendment to the constitution and bylaws at that time required a two-thirds majority vote by the membership at a duly noticed general membership meeting.

Without any apparent textual authority for its action, Local 99 conducted the vote on the amendments by mail ballot rather than by in-person vote.⁵⁷ Wightman and Jules Kimmett, two current leaders of BAFU, went to the offices of Local 99, with

⁵⁶Wightman began leafleting in opposition to the cancellation of meetings. Wightman, Frank Loya, Jules Kimmett (a current BAFU member), and several others undertook to organize employees and also retained an attorney to demand reinstatement of the meetings. As a result of posting the leaflets, Wightman was reprimanded by his supervisor for posting unauthorized union material. Friedman initiated the call to Wightman's supervisor, requesting that the leaflets be removed. Wightman persisted in demanding his right to leaflet and as a result termination proceedings were instituted against him. He successfully challenged the dismissal and was reinstated. Wightman filed an unfair practice charge challenging the District's conduct, but the hearing officer in a final decision found that the removal was justified because Wightman was not officially a steward at the time he posted the leaflets.

⁵⁷Wightman alleged in PERB unfair practice charges that Friedman had based his authority solely on the assent of John Sweeney, President of the International. Wightman also alleged that the executive board ruled Loya ineligible to be seated on the board despite being elected by his division's membership and made similar rulings against the candidacies of Wightman and Kimmett (one of the constitution and bylaws changes adopted restricted board membership to active employees, and Loya had retired).

the intention of intervening in the ballot count. Wightman physically removed ballots in an apparent act of civil disobedience. Police responded to the scene and arrested Wightman.

The motion to amend the constitution and bylaws also included other changes, including a change in the article on amendments by allowing amendments to be originated by a majority vote of the executive board or by a petition of 25 percent of the membership. Ratification of amendments was to be by mail balloting or at a specially called meeting, rather than at general membership meetings. The structure of the union with functioning divisions was emphasized, reflecting a decentralization of the participatory aspects of the union. Division meetings were mandated to replace the regular general membership meetings. A provision permitting executive board action to be self-implementing on behalf of the union reflected a centralization of executive power. The amendments were approved.

In the mid-1980s, Friedman was replaced in the position of secretary-treasurer by Bill Price. Despite being a bus driver, Price was viewed by many bus drivers as continuing Local 99's opposition to bus driver interests.

In 1989, the International took control of Local 99 through its power of trusteeship, following a trial and findings of financial indiscretions and an inability of the leadership to govern. Membership was also found to be falling. During the trusteeship, governance through the constitution and bylaws was

suspended, as were general membership meetings. The International installed a board of trustees, including Walter Backstrom and several others. The trustees replaced the staff with their own selections. Price was removed from his position as secretary treasurer and Local 99 changed the existing constitution and bylaws, replacing the secretary-treasurer with the executive director, who was to be appointed by vote of the executive board.

These changes were the impetus for the formation of Local 99 Members for Union Democracy. Members of this organization were later instrumental in forming BAFU. The trusteeship was ended in November 1992, with the holding of elections. Since 1992, Local 99 has ceased the practice of electing negotiating team representatives at general membership meetings.

As a result of the trusteeship and an infusion of financial support from the International, membership in Local 99's units in the four school districts increased from approximately 6,000 to 18,000.⁵⁸ Resources from agency fee payers across Local 99's three units in the District were also added as a result of a negotiated agreement with the District and successful campaign in the late 1980s.⁵⁹ Membership in the bus driver classifications increased to a majority during the same period.

⁵⁸This includes members from the new teaching assistants unit in the District, which Local 99 organized in 1988.

⁵⁹A total of 28,000 employees within the four school districts are currently represented by Local 99.

E. Emergence From Trusteeship and Subsequent History

The emergence of Local 99 from trusteeship coincided with the District's \$400 million financial deficit in 1990-91. Due to the 1990-91 fiscal crisis, the District passed resolutions in that year adopting a 3 percent retroactive pay cut (later implemented through furloughs). The most powerful exclusive representative, United Teachers - Los Angeles (UTLA), chose to preserve its position by advocating the elimination of 4,000 classified positions. Local 99 adopted the strategy of opposing the layoffs in exchange for wage cuts implemented in a progressive fashion so as to impose the smallest cuts on the lowest paid unit employees. The District and Local 99 bargained to impasse in November 1991. They reached agreement in January 1992 for the 1991-92 year. In this agreement, Local 99 accepted the reductions in exchange for District assurances to forgo layoffs and graduate the pay cuts. The contract for 1991-92 was ratified by the entire membership of Local 99. Salary reductions were continued by agreement of the parties during the 1992-93 and 1993-94 years. Beginning in the 1994-95 year, the District restored the salary schedule to its pre-reduction rates.

At the present time, Local 99 views school decentralization and school reform as the principal threats to the unit. Decentralization of decisionmaking, with individual schools having greater control over matters which could affect classified

service, is seen as eroding the District-wide benefits and job security for which Local 99 has bargained.⁶⁰

School reform is fueled by the public perception that school districts in California are underfunded and must be required to perform more efficiently with fewer dollars. Local 99 desires to be "pro-active" in this movement by supporting initiatives that coincide with the goals of labor, such as mentoring programs for youth in job training programs.

BAFU Extent of Organization

A. Structure and Membership

As previously noted, BAFU was formed in 1989 out of a core of former members of Local 99 Members for Union Democracy.⁶¹ Local 99 Members for Union Democracy's principal purpose was to oppose the centralization of authority within Local 99 that occurred as a result of the trusteeship. Principal among these changes was the replacement of the elected secretary-treasurer with the appointed executive director. Bus drivers John Scates, Jose Cooke, and Victor Wightman formed the core group of BAFU and they continue to be active.⁶²

BAFU is a loosely organized entity. An informal list of members is kept but there are no formal requirements for

⁶⁰Local 99 has actively opposed recent efforts to divide the District into smaller districts.

⁶¹BAFU's previous severance request was originally filed in 1991 under the name of (Local 99) Members for Union Democracy, before BAFU substituted its name.

⁶²All have been terminated from the District. Scates and Cooke are still pursuing legal actions to be reinstated.

membership. There are no formal officers. A constitution and bylaws were prepared when the group formed but they do not strictly govern the affairs of the organization. No dues are required of members. BAFU receives income in the form of voluntary contributions from its members. Approximately five to six meetings are held each year on an irregular basis, typically at a member's home, at schools, or other public gathering places. BAFU is governed collectively through its core group of approximately 35 members. BAFU counts approximately 600 total members and supporters.⁶³ BAFU communicates with members through flyers and a telephone-banking system. It maintains a post-office box, but has no office or paid staff.

B. Representation Activity

BAFU has provided representation assistance to bus drivers in the disciplinary appeals process and an occasional grievance. No records were kept as to the number of drivers represented or the level of success achieved by such drivers as compared to that achieved by Local 99. Representation has mainly consisted of providing counsel and advice to drivers concerning strategy and

⁶³This figure is based on a minimal level of participation, in some cases as minor as making a contribution to the organization. It is also close to the bare majority required for proof of support of the severance request. On cross examination, BAFU witnesses claimed confidentiality with respect to the names of members, fearing retaliation by the District and Local 99 based on their participation in BAFU and the severance petition effort. The undersigned did not compel the witnesses to provide names because the record does contain some evidence of retaliation (e.g., Nelson, Scates, Cooke, and Ocegerra). Other means to test the credibility of the witnesses were available and so the right of cross-examination was not significantly compromised. BAFU's figures as to membership are credited.

options within the disciplinary appeals process, as opposed to formal representation. Kimmett, a former Local 99 steward, represented Scates, Cooke, and Wightman in disciplinary appeals. Wightman provided advice and counsel to approximately ten employees over the course of ten years. In some cases, he appeared at "Skelly" hearings and was successful in having some of the charges dropped.

Scates, Wightman, and Cooke were all stewards for Local 99 for brief periods of time. They were all associated with Frank Loya, who was removed by Howard Friedman.

Scates, together with other BAFU members, organized a group of approximately 14 bus drivers facing termination, who believed that Local 99 failed to provide adequate representation. A meeting with a local legislator, Assemblyman Curtis Tucker, was held in 1990 that included the superintendent and a member of the Board of Education. The drivers persuaded Tucker that the terminations were unjust, and through Tucker's appeals to certain Board of Education members, six of the drivers were reinstated.

Scates was hired by Backstrom as a consultant to work on issues related to bus drivers, shortly after Backstrom joined Local 99 in 1991. Scates observed the 1991-92 contract negotiations meetings.⁶⁴ Backstrom removed Scates from his

⁶⁴Scates was also a bus driver representative on the Local 99 bargaining team in the 1980s. He claimed that Price tabled items he had raised on behalf of bus drivers, although he provided no specifics.

position because Scates attended a meeting at PERB in 1992 involving BAFU's first severance petition.

Shiral Nelson supported the first BAFU severance petition beginning in 1992. She was elected to serve as the bus driver representative on the Local 99, 1991-92 negotiation team and was appointed to the first Transportation Branch labor/management committee. She is ranked seventh or eighth in terms of seniority among light bus drivers. During the 1991-92 negotiations, the bus drivers, through Nelson, presented a list of 25 desired items. Chief among them, in Nelson's view, was the demand for protections against further District contracting out of bus routes, especially the mid-day assignments which could ensure potentially more full-time positions.

There was conflicting testimony on how these matters were addressed. Nelson claimed that these items were tabled and never addressed during the negotiations. Newberry claimed that the team first referred the items to the Transportation Branch labor/management committee because he questioned whether they had broad-based support.⁶⁵ He claimed that the items returned and that he argued against some, particularly the proposal for the removal of the no-strike clause, which affected the entire unit. Newberry believed it was critical to be unified in the defensive two-point strategy for the 1991-92 negotiations and to avoid any cost-increasing proposals. Newberry's testimony is credited to

⁶⁵Nelson was elected to the team on the basis of 25 votes at a general membership meeting.

the extent that there was some discussion of the proposals. Nevertheless, the team, led by Newberry, did not simply defer them to a later time, but rejected them.

Nelson was removed from the negotiation team and the labor/management committee by Local 99 staff after it discovered that she attended a PERB meeting involving the 1991 BAFU severance petition.⁶⁶ Theresa Ocegerra was removed from the labor/management committee at the same time as Nelson.

C. Other Autonomous Representational Activity

Darrell Anderson has been a District bus driver since 1982. He became active in Local 99 beginning in 1988. He was elected a steward in 1989 and later an executive board member for a term beginning in October 1992, but abbreviated by his resignation in December 1994. He was elected a 1991-92 bargaining team member as an alternate representative to Nelson. Anderson, who opposes the severance petition, is dissatisfied with the level of commitment by the executive board and with the quality of Local 99 staff service to the employees. Bus drivers frequently complain to him about the lack of responsiveness by the staff to employee requests for assistance. Anderson believes that after bus driver Jonathan Newsome was removed as Local 99 Transportation Branch representative, the quality of Local 99 assistance during the bus route bidding sessions declined significantly. Anderson credits Local 99 with fighting for more

⁶⁶Nelson filed an unfair practice charge challenging her removal.

stewards to represent bus drivers and for obtaining agency fees. He finds fault with its passivity with respect to the District and its emphasis on fighting internal opposition.

Anderson was active in mobilizing opposition to Local 99's bargaining position that resulted in the 1991-1992 agreement. Anderson accused Backstrom of publicly misrepresenting rank-and-file support for the furloughs prior to the tentative agreement and of failing to inform the membership that the furlough agreement was for two years, not one.⁶⁷ The 1991-92 tentative agreement was approved and recommended to the membership by the negotiating team and subsequently ratified by the membership.

As the 1992-94 agreement was about to expire, Anderson mobilized bus drivers to attend a June 1994 general membership meeting at Monroe High School. He desired to implement a requirement for advance notice for discussion of tentative agreements and an in-person, general membership ratification vote, hoping to correct what he perceived as a procedural means for Local 99 leadership to press for approval of tentative agreements. Anderson was successful in having his motion put before the membership and carried. But after leaving the room, Newberry insisted that the motion lacked opportunity for debate and persuaded the meeting chair to entertain debate. The chair agreed, and as Anderson protested, order broke down. The chair

⁶⁷Anderson accused Backstrom of sending a letter to Sacramento announcing Local 99's willingness to accept the 1991-92 District furlough proposal prior to ratification. Backstrom gave a vague denial of the allegation. Anderson's testimony was more credible.

then closed the meeting and the motion was never implemented. Anderson subsequently ran for president in 1995, losing by approximately 400 votes out of 3,000.⁶⁸

Anderson worked with Jonathan Newsome, a confederate in Local 99 Members for Union Democracy. Newsome objected to the lack of member access in Local 99 during the trusteeship. As a Transportation Branch business representative, he was popular with the drivers. He was dismissed from his Local 99 position by Trustee Bob Muscat, apparently without explanation. Newsome ran for president of Local 99's executive board against Backstrom in 1992. Backstrom declared Newsome to be ineligible because he did not have two years job tenure in the classification he relied upon to qualify his candidacy.⁶⁹ In the past, the International had waived this requirement.

Efficiency of Operations

The creation of an additional bargaining unit would impose additional costs on the District in the form of an additional member on the personnel staff, administrative staff time associated with the administration of an additional contract, employee released time for the new exclusive representative, reproduction costs, and the imposition of additional

⁶⁸Only 3,000 out of 18,000 ballots were returned.

⁶⁹Backstrom testified that Newsome did not qualify to run for president because he collected invalid signatures. Anderson's testimony that Newsome was told he was ineligible is credited. Backstrom was unable to recall many seemingly relevant matters during his testimony, and thus it is unlikely that his memory as to these events was any more accurate.

responsibility on school principals and others to administer the additional contract.⁷⁰ Joanna Barnett, District Labor Relations Representative, currently has responsibility for administering the collective bargaining agreements for three classified units in the District, including Unit C, and for developing contract proposals in collaboration with administrators. Negotiations, which typically begin between January and March of each year, continue for approximately nine months. They require a bargaining session weekly.⁷¹

UTLA is currently the most powerful exclusive representative in the District. During the 1990-91 fiscal crisis, it created extreme divisiveness within the ranks of organized labor in the District by proposing layoffs in the classified units. In response, the classified bargaining units joined in a coalition to defend against UTLA's strategy.⁷² The coalition sought and obtained from the District "most favored nation" treatment, which guaranteed that whatever raises were granted to the certificated

⁷⁰Collective bargaining is a state-mandated service on local government and therefore its costs are subject to reimbursement pursuant to Article XIII B, section 6 of the California Constitution.

⁷¹Barnett is one of two District staff members who assume these duties in negotiations.

⁷²Judicial notice is taken of negotiations history described in Los Angeles Unified School District (1995) PERB Decision No. 1079.

unit would be replicated for the other units.⁷³ This provision continues in the latest agreement.

DISCUSSION

Section 3545(a) of the EERA sets forth the following criteria to be considered in determining the appropriate unit:

In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

Applying this statutory standard in Sweetwater Union High School District, supra, EERB Decision No. 4, PERB recognized three appropriate units of classified employees under the EERA: instructional aides, office-technical and business services, and operations-support services. PERB has deemed these units to be "presumptively appropriate." (Foothill-De Anza Community College District (1977) EERB Decision No. 10.) In severance cases, a fourth factor, the history of negotiations is examined in addition to the three factors set forth in the statute. (Livermore Valley Joint Unified School District (1981) PERB Decision No. 165.)

⁷³UTLA responded by seeking a raise so large as to prevent compliance with the "most favored nation" clauses in the other contracts. (Ibid.)

In Compton Unified School District (1979) PERB Decision No. 109, PERB held that a variant unit will not be granted unless it is more appropriate than the Sweetwater unit based upon a separate and distinct community of interest among employees in the variant unit. (See also Los Angeles Unified School District, supra, PERB Order No. Ad-250.)

In all of the cases where PERB previously has had the opportunity to consider a transportation or bus drivers unit, it has declined to approve of such a unit, favoring the Sweetwater operations-support configuration. (See Sweetwater Union High School District, supra, EERB Decision No. 4; Fremont Unified School District (1976) EERB Decision No. 6; Sacramento City Unified School District (1977) EERB Decision No. 30; Shasta Union High School District (1977) EERB Decision No. 34.) PERB records indicate that there are no bargaining units under EERA made up solely of bus drivers.

BAFU contends that the case law with respect to unit determination, in general, and severance, in particular, as developed both through PERB decisions and under the National Labor Relations Act (NLRA), support the proposition that, where a distinct community of interest has been shown to attach to particular job classifications, where the democratic initiatives of employees within those classifications to seek changes in working conditions through the incumbent exclusive representative have been unfairly stifled or ignored, and where the exclusive representative has systematically failed to defend the job tenure

of employees in the classifications, severance is appropriate. BAFU places singular importance on the right of employees to exercise free choice through the severance process. This theory must be examined in light of the noted unit factors and applicable precedent.

Community of Interest

Community of interest is based on such factors as job duties and the degree to which they are related to or integrated with the functions of other employees, the history of employee representation in public schools and in similar employment, the existence of skills, goals, and purposes common to other employees, educational and other special training qualifications, hours of work, salary and other compensation relationships, supervision, work-related interchange between employees, and other working conditions. No single factor is controlling.

(Marin Community College District (1978) PERB Decision No. 55; Hartnell Community College District (1979) PERB Decision No. 81; Grossmont Union High School District (1977) EERB Decision No. 11; Unit Determination for the State of California (1979) PERB Decision No. 110-S.) Community of interest is found only when employees "share a substantial mutual interest in matters subject to meeting and negotiating." (Monterey Peninsula Community College District (1978) PERB Decision No. 76.) Even potentially conflicting interests among these factors across differing job classifications do not destroy community of interest, unless it is concretely shown that collective negotiations are incapable of

simultaneously addressing competing bargaining interests. (See Santa Clara County Office of Education (1990) PERB Decision No. 839.) Nonetheless, differences in bargaining priorities can be a symptom of a lack of community of interest. (State of California (Department of Personnel Administration) (1990) PERB Decision No. 794-S, Hesse, Chairperson, dissenting.)

The function of bus drivers is to transport students between their homes and schools, and to off-site school events during the day. This function, like preparing mid-day meals, procuring supplies, maintaining the physical facilities, and other tasks performed by Unit C employees, is one which, in the general sense, "supports" the primary function of the District, which is to educate children. All of these functions are performed outside of the classroom.

Bus drivers operate District vehicles, as do truck drivers, mechanics, and a range of specialized maintenance employees who drive to sites within the District.

Bus drivers perform maintenance tasks which are similar to tasks performed by the majority of employees in the Maintenance and Operations Branch. These tasks include the daily light cleaning and mechanical inspection of the bus, the weekly washing of the exterior of the bus, and the periodic fueling of the vehicle. Truck drivers also perform these tasks. For both bus drivers and truck drivers, failure to report defects can cause the CHP to terminate or suspend District operations. Recordkeeping is associated with the daily operation of the bus,

similar to the recordkeeping performed by truck drivers and other Unit C employees who operate District vehicles. Tachographs accompany both buses and trucks. Bus drivers are required to possess mapping skills, as are bus routing assistants.

Bus drivers have job qualifications that are similar to other Unit C employees. The most significant of these is the requirement to maintain a California Class B commercial class driver's license. This requirement subjects the drivers to the recently mandated federal drug testing program, and under the District's "zero tolerance" policy, automatic termination for a positive test. Violations on the private driving record of a driver may cause suspension of the Class B license. Truck drivers and mechanics are other Unit C employees operating vehicles who are required to maintain a Class B license. Fifty-eight classifications require a valid driver's license of some kind. Like truck drivers and mechanics, bus drivers are required to participate in District sponsored in-service training related to vehicle operation. Bus drivers are required to wear a uniform nearly identical to those of truck drivers. Food service employees and others are also required to wear a uniform. The requirements for bus drivers versus truck drivers and mechanics are distinguishable only by the fact that bus drivers are required to maintain a first aid endorsement, possess mapping and routing skills, and receive training in gang awareness, safe riding practices, and pupil management.

Bus routing assistants and mechanics are two significant classifications which have common supervision within the Transportation Branch. The majority of Unit C employees are organized under two of the four divisions containing classified employees. The same evaluation procedure in the contract applies to all Unit C employees. BAFU, however, has demonstrated that bus drivers are more closely scrutinized than other Unit C employees and that this culture has led to some abuses by supervisors.

The hours of bus drivers have similarities to other Unit C employees. The majority of bus drivers are part-time. They have a strong concern in maintaining sufficient hours to qualify for health and welfare benefits. Cafeteria helpers and cafeteria workers are two major classifications also assigned part-time schedules.

The split-shift is a unique condition of employment for bus drivers. The effective length of their work day is much longer than for other Unit C part-time employees. The schedule does constrain bus drivers from obtaining other part-time employment to supplement their income. However, this is compensated by the fact that District bus drivers are among the highest paid Unit C employees.

Bus drivers are assigned to a ten-month schedule coinciding with the student calendar. Food service workers are assigned the same ten-month schedule.

Bus drivers bid for their work assignments and work location as do mechanics and truck drivers. Work location is significant in a district of this size. Seniority is significant to bus drivers because bidding rights are based on seniority. Mechanics and truck drivers are similarly concerned about seniority because they, too, bid for work assignments. Bidding seniority for bus drivers is only distinguishable by the fact that higher seniority has the potential to lead to full-time employment.

Contracting out is a concern for bus drivers because it threatens retention of unit work and because contracting out of mid-day assignments deprives drivers of potential full-time assignments.⁷⁴ A similar concern is shared by food service workers, though the concern for the loss of full-time opportunities is lacking.

Compensation rates for bus drivers are among the highest in the unit, but not exceptional. Truck drivers and other skilled technicians receive similar compensation. Bus drivers, though mostly part-time, receive the same generous fringe benefit package as all other Unit C employees.

Interaction between bus drivers and other Unit C employees is very limited. Yet this characteristic is unremarkable in view of this school district's great geographic dispersion of work sites and high degree of specialization of function. Even among

⁷⁴However, the ability to negotiate over allocating more work to the unit and less to contractors is lacking to the extent that proposals to purchase additional buses are outside the scope of representation. (See Anaheim Union High School District (1981) PERB Decision No. 177.)

the largest job classifications in Unit C assigned to school sites, unit employees have limited contact because of differing work schedules. Among Unit C employees in general -- both school-based and non-school-based employees -- bus drivers do have a relatively greater opportunity for intra-classification interaction because of the limited number of bus parking locations and the regular bidding sessions. This does appear to contribute to a certain degree of cohesiveness and group identity among bus drivers.

In sum, bus drivers share a community of interest with other Unit C employees based on the factors which PERB has examined in prior cases of this kind.

Notwithstanding this evidence, BAFU claims that bus drivers in this school district are, in effect, paraprofessional employees who are required to exercise substantial independent judgment in terms of pupil management skills, and by virtue of their responsibility for the safety of children, are evaluated by much stricter standards than other Unit C employees.⁷⁵

⁷⁵This theory finds support in PERB's finding that a unit composed of instructional aides is an appropriate unit because they perform paraprofessional duties. (Pittsburg Unified School District (1976) EERB Decision No. 3.) In Pittsburg, the EERB agreed with the contention that instructional aides "are distinguishable from other classified employees since their primary functions involve dealing directly with students either at the instructional or disciplinary level, whereas other classified employees are primarily charged with providing a physical environment for students." (Id., at p. 5; see also, Sweetwater Union High School District, supra, EERB Decision No. 4.)

However, it is axiomatic that every classification has attributes distinguishing it from all other classifications in an existing unit. (See Sacramento City Unified School District, supra, EERB Decision No. 30.) While bus drivers have a level of contact and responsibility for students qualitatively different from other Unit C employees, this unique characteristic does not predominate over the multitude of characteristics which bus drivers share with other Unit C employees. Bus driver supervision of students does not occur in the educational setting. Maintenance of authority is not interrelated with success in educating children; it is merely custodial in nature. Communication with students and the exercise of judgment are not ongoing, but episodic.⁷⁶

Negotiations History

Stability in negotiations and lack of dissension have been recognized by PERB as important factors supporting maintenance of the existing unit configuration. (State of California (Department of Personnel Administration) (1989) PERB Decision No. 773-S.) Conversely, a readily identifiable minority of unit members is not required to relinquish its issues regularly to the

⁷⁶The disciplinary function is analogous to that of campus aides and noon-duty supervisors, who enforce disciplinary and safety rules in buildings and on campus grounds. Unlike these paraprofessional employees, bus drivers do not receive additional compensation for educational experience, are not selected or supervised by school administrators, and are not assigned to work at schools. Further, although being paraprofessional employees, campus aides and noon-duty supervisors are included with other paraprofessional employees rather than afforded a separate unit. (Pittsburg Unified School District, supra, EERB Decision No. 3.)

more powerful majority. (State of California (Department of Personnel Administration)), supra, PERB Decision No. 794-S; accord State of California (Department of Personnel Administration), supra, PERB Decision No. 773-S.)

The District and Local 99 have negotiated 12 contracts dating back to 1978. These contracts have included generous wage rates for bus drivers, as well as the all-important seniority bidding process. The contracts have included generous health and welfare provisions for all employees in the unit, including bus drivers. The contracts have also provided for binding arbitration of grievances and agency fees.

Though there is no dispute that the District and Local 99 have a stable bargaining relationship, BAFU contends that the facility of negotiations has been at the expense of the vigilant defense of bus driver interests.

Over the same period of time that contracts have been successfully negotiated, bus drivers as a group have been vocal and militant in raising demands, typically in spontaneous fashion through general membership meetings of Local 99. Local 99 leadership responded with attempts to control what it apparently viewed as an anti-majoritarian faction. In some cases, the mechanisms employed by bus drivers to voice their demands (i.e., general membership meetings) or their leaders (Loya, Newsome, Scates, Nelson, and Ocegerra) were negated through the internal union political processes, perhaps in violation of principles of due process. When bus drivers did raise legitimate workplace

issues with Local 99, such as the issue of terminations at the Los Angeles High School meeting, the contracting out of routes in the 1991-92 negotiations, and the loss of full-time positions in the grievances of Nelson and Ocegüerra, Local 99 failed to satisfy the demands of bus drivers. Three times during this period bus drivers have expressed their desire to be severed from Unit C.

Moreover, this tension between bus drivers and Local 99 has intensified over time due to the lack of appropriate mechanisms to mediate the political aspects of the conflict because California lacks an analog to the private sector Labor Management Reporting and Disclosure Act (LMRDA) and because of PERB's tradition of avoiding disputes involving internal union affairs.⁷⁷ The absence of a legal duty of fair representation on the part of Local 99 to represent employees in the extra-contractual disciplinary appeals process -- the only forum where bus drivers may contest dismissals -- and hence the inability of bus drivers to mediate their complaints about inadequate representation before an impartial forum have probably contributed to this conflict as well.⁷⁸

⁷⁷29 U.S.C, sec. 401, et seq.; see, especially, sec. 411 (union members' "Bill of Rights"); Local 1498, Am. Fed. of G. Emp. v. American Fed. of G. Emp. (3d Cir. 1975) 522 F.2d 486 [90 LRRM 2179] (no jurisdiction over local government employees). See also Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106 (internal union affairs).

⁷⁸Representation in merit system disciplinary proceedings is an extra-contractual forum and hence an exclusive representative owes its employees no duty of fair representation. (Los Rios College Federation of Teachers, Local 2279. CFT/AFT, AFL-CIO)

But this history of dissension and the lack of alternatives to mediate legitimate conflicts do not mandate the establishment of a separate unit of bus drivers. Severance is appropriate only in circumstances where it has been shown through negotiations and/or representation history that such processes are incapable of effectively addressing subjects within the scope of representation. (See State of California (Department of Personnel Administration), supra, PERB Decision No. 794-S.)

Despite the ample latitude granted to BAFU in terms of the period of history examined through this hearing, it has been successful in demonstrating only two or three issues which Local 99 has failed to address to the satisfaction of bus drivers. BAFU's showing is insufficient.

Other considerations militate against severance as well. With respect to the issue of supervision, the potential for any exclusive representative achieving measurable success in compelling the uniform application of discipline is somewhat

(1993) PERB Decision No. 992; Professional Engineers in California Government (1989) PERB Decision No. 760-S.) PERB has yet to consider the dynamic tension between the competing principles, where, on the one hand, rules of conduct are negotiable subjects and, on the other hand, there is no duty of fair representation imposed on the exclusive representative requiring enforcement of these rules. (See San Bernardino City Unified School District (1982) PERB Decision No. 255.) Despite the absence of any duty, the de-facto practice is that most exclusive representatives under the EERA provide representation in these proceedings, presumably in recognition of the singular importance job tenure to employees.

Nothing here, however, is intended to suggest that any or all of the alleged transgressions by Local 99 would establish violations of the LMRDA or the duty of fair representation.

problematic.⁷⁹ In a school district the size of this employer, negotiated solutions would appear to be preferable to reliance of the disciplinary appeals process, but whether the District would have any duty to negotiate over such proposals is debatable.⁸⁰

BAFU has not proven in any convincing manner that Local 99 caused widespread forfeiture of disciplinary appeals by its failure to file appeals in a timely fashion or as a result of deficient representation. Local 99 could have achieved greater success in bargaining with respect to the issues of reduction in full-time positions and the effects of mandatory drug testing, but it has not completely ignored these issues either.⁸¹

⁷⁹For example, Local 99 has no control over whom the District hires or retains as supervisors.

⁸⁰In San Bernardino City Unified School District, *supra*, PERB Decision No. 255, PERB found that both procedures and criteria for imposing discipline are negotiable. Relying on this case in Healdsburg Union High School District (1984) PERB Decision No. 375, PERB held that a provision for progressive discipline is negotiable. (Accord San Mateo City School District (1984) PERB Decision No. 383.) United Steelworkers of America v. Board of Education (1984) 162 Cal.App.3d 823 [209 Cal.Rptr. 16] overruled PERB's separate finding that arbitration of the sufficiency of cause for termination is not negotiable, but did not question the negotiability of causes for discipline of classified employees. (*Id.*, at p. 831, fn. 1.) However, Education Code section 45260 grants a district's personnel commission the power to prescribe rules "necessary to ensure the efficiency of the service and selection and retention of employees upon a basis of merit and fitness." PERB has not addressed whether this provision supersedes the right to negotiate causes for disciplinary action or principles of progressive discipline.

⁸¹Local 99's rejection of bus driver demands during the 1991-92 negotiations was justified by its tactical decision to eschew cost-adding proposals during the District's major fiscal crisis. If it is to be faulted, it is for failing to revisit these issues at a later time.

Notwithstanding Local 99's removal of certain popular rank-and-file bus driver representatives in the past, the record lacks evidence that bus drivers favoring severance are driven by a coherent agenda to address negotiable subjects.⁸² At the same time, BAFU has failed to challenge Local 99 with viable proposals for solving the issues legitimately facing bus drivers.

In short, the record reflects that Local 99's alleged shortcomings with respect to representation of bus driver interests have been due to acts of omission more than commission.

Extent of Organization

BAFU concedes that its extent of organization is not strong. The 600 supporters claimed by BAFU is roughly equivalent to a bare majority within the classification. This is significant to the extent that BAFU predicates much of its case on the claim that severance is necessary to vindicate employee free choice. BAFU's level of representational activity also has been quite low. In addition, BAFU's level of sophistication with respect to legal aspects of both meeting and negotiating, contract enforcement, and defense in disciplinary matters, as revealed during the hearing, has not been impressive.

In contrast, Local 99's extent of organization showing is strong with respect to membership rates. Its overall representational capacity has been at least adequate. Local 99

⁸²This would be reflected in the Local 99 bargaining surveys or in demands raised with the current negotiating team representative. The record contains no such evidence. Despite BAFU's contention that current representative Michael Bird sits without legitimate democratic support, no such showing was made.

is the prototypical "modern" public sector union in terms of its outlook, its emphasis on the need for political access, its reliance on professionals (as opposed to rank-and-file staff), and its somewhat bureaucratic character compared to the "town hall" model espoused by BAFU. These characteristics do not diminish Local 99's showing with respect to extent of organization. Given its choice of direction, Local 99 has been successful.

Efficiency of Operations

The presumptively appropriate classified units found in Sweetwater reflect PERB's concern with an overly fragmented work force and its effect on the employer's operations. PERB explained:

. . . It is a legitimate concern that excessive fragmentation of negotiating units may burden an employer with multiple negotiating processes and postures and with a variety of negotiated agreements difficult to administer because their provisions differ. Interorganization competition may increase demands made upon the employer by an employee organization. The employer may have to give the benefits of the "best" settlement in each area of negotiations to all employees to avoid employee unrest or the administrative inconvenience caused by multiple agreements.
[Footnote omitted.]

(Sweetwater Union High School District, supra, PERB Decision No. 4, p. 11.) In this context, the size of the severed unit relative to the existing unit is not controlling. (Compare Pleasanton Joint School District (1981) PERB Decision No. 169 with San Francisco Community College District (1994) PERB Decision No. 1068.)

In severance cases, the party seeking severance will never be able to demonstrate that adding an additional unit will improve an employer's efficiency of operations. Therefore, PERB only requires that the additional unit not be unduly burdensome. (See State of California (Department of Personnel Administration), supra, PERB Decision No. 794-S.)

The efficiency of operations factor is not an impediment to granting severance here. The creation of an additional unit composed of bus drivers will not necessarily lead to a proliferation of more units. Proposals to create other new bargaining units would all be required to overcome the presumption in favor of the Sweetwater units. (See State of California (Department of Personnel Administration), supra, PERB Decision No. 794-S.) The additional costs required by the negotiation and administration of an additional contract would not have an adverse effect on a school district of this size. A new contract for bus drivers would not lead to a variety of provisions difficult to administer.⁸³

⁸³Bus drivers appear to be satisfied with most of the provisions in the current agreement. It is also noted that any resulting interorganization competition through negotiations as a result of one additional unit would not significantly increase economic demands on the District nor lead to a "whipsawing" effect. At present, the certificated unit, represented by UTLA, is the single greatest determinant of economic demands imposed on the District. "Most favored nation" treatment and coalition bargaining are already existing negotiations practices for these other units and there is no evidence that the District has been unable to survive with its requirements. (See Los Angeles Unified School District, supra, PERB Decision No. 1079.)

Summary of Factors

Although the creation of an additional unit would not significantly impact the efficiency of the District's operations, BAFU has failed to rebut the Sweetwater presumption in favor of an operations-support unit because the other three factors favor maintenance of the existing configuration.

BAFU offers a novel community of interest argument relying on the distinguishing factors of pupil management duties and management's strict supervision. But it has failed to demonstrate that bus drivers lack a community of interest with other operations-support employees so as to justify the creation of a separate unit. Bargaining practices of school districts in the state do not reveal the existence of units consisting solely of bus drivers. And despite the fact that bus drivers in this distinctly large and urban school district may exhibit characteristics different from those examined in previous cases, BAFU has failed to demonstrate that a break with precedent with regard to community of interest is justified.

BAFU's extent of organization showing is concededly weak and is outweighed by the showing made by Local 99.

The negotiations history reveals that the interests of bus drivers have been sacrificed on occasion for the greater interests of the bargaining unit and that Local 99 might have been more successful in advancing issues of concern to bus drivers. However, merely showing a failure to achieve success does not justify granting a severance request. BAFU has failed

to establish that Local 99 has repeatedly imposed the will of the majority over the minority, at least with respect to any concrete economic issues, or that it has consistently forfeited the tenure rights of bus drivers in the disciplinary appeals process. Some sacrifice of minority interests is inevitable when multiple classifications are grouped in a single unit. (Compare State of California (Department of Personnel Administration) (1993) PERB Decision No. 1025-S.)

BAFU relies on a line of cases under the NLRA holding that effectuation of employee free choice is one of the factors that must be considered in severance cases, and that indeed, it is the paramount factor. (See Pacific Southwest Airlines v. NLRB (9th Cir. 1978) 587 F.2d 1032 [100 LRRM 2566]; Pittsburgh Plate Glass Co. v. NLRB (1941) 313 U.S. 146, 153, 165 [61 S.Ct.908, 8 LRRM 425]; Sheraton-Kauai Corp. v. NLRB (9th Cir. 1970) 429 F.2d 1352 [74 LRRM 2933]; NLRB v. Ideal Laundry & Dry Cleaning Co. (10th Cir. 1964) 330 F.2d 712, 716 [56 LRRM 2036]; see also NLRB v. Sunset House (9th Cir. 1969) 415 F.2d 545 [72 LRRM 2283].)

The unit determination language of the EERA differs from that under the NLRA in that the latter expressly refers to employee free choice, whereas the former does not. (See 29 U.S.C, sec. 159(b).) In enacting the EERA, the advisory council appointed by the Legislature to recommend provisions for the state's first collective bargaining statutes, explained that the NLRA practice of permitting employees of a particular craft to vote for representation in a smaller unit within a broader

industrial unit should not be followed in the public sector "because of its tendency to result in a proliferation of units -- the principal evil to be avoided." (Cal. Assem. Advisory-Council, Final Rep. (Mar. 15, 1973) pp. 85-86.)⁸⁴ An analysis of the NLRA precedent on unit determination confirms that a different practice has evolved in the private sector. That model is rooted in the industrial model of organization, where employers diverge greatly in terms of size, manner of supervision, and type of product or service, and where the law defers to the tradition of craft organization in labor. In the public school setting, a more limited range of units is appropriate given the general uniformity with respect to these factors of organization.

BAFU has failed to demonstrate that the proposed unit of bus drivers is more appropriate than the existing operations-support unit. Accordingly, the severance petition is denied.

PROPOSED ORDER

Based upon the foregoing and the entire record in the case, IT IS ORDERED that the severance petition filed in this case is DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and order shall become final unless

⁸⁴The council's proposed statutory language on unit determination is similar to the language adopted in section 3543(a). (Id., at pp. 13-14; compare State of California (Department of Personnel Administration), supra, PERB Decision No. 1025-S [discussion of Globe Machine and Stamping Co. (1937) 3 NLRB 294 [1-A LRRM 122]] .)

a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing. . ." (Cal. Code of Regs., tit. 8, sec. 32135; Code of Civ. Proc, sec. 1013.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (Cal. Code of Regs., tit. 8, secs. 32300, 32305, 32140.)

DONN GINOZA
Administrative Law Judge