

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION & ITS CHAPTER 528,

Charging Party,

v.

FOLSOM-CORDOVA UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. SA-CE-2132-E

PERB Decision No. 1712

November 23, 2004

FOLSOM-CORDOVA UNIFIED SCHOOL
DISTRICT,

Charging Party,

v.

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION & ITS CHAPTER 528,

Respondent.

Case No. SA-CO-472-E

Appearances: California School Employees Association by David J. Dolloff, Attorney, for California School Employees Association & its Chapter 528; Atkinson, Andelson, Loya, Ruud & Romo by James Scot Yarnell, Attorney, for Folsom-Cordova Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: These consolidated cases come before the Public Employment Relations (Board) on exceptions filed by the Folsom-Cordova Unified School District (District) and cross-exceptions filed by the California School Employees Association & its Chapter 528 (CSEA) to the proposed decision (attached) of the administrative law judge (ALJ). The underlying issue in this matter involves the District's proposal to contract out

transportation services to Laidlaw Transportation Services (Laidlaw). CSEA alleged that the District made a unilateral decision to contract out to Laidlaw prior to the completion of bargaining. The District counters that CSEA engaged in surface bargaining, thereby waiving its rights to bargain over the contracting out issue.

In Case No. SA-CE-2132-E, the ALJ found that the District made a decision to unilaterally contract out prior to exhausting negotiations, thereby violating the Educational Employment Relations Act (EERA)¹.

In Case No. SA-CO-472-E, the ALJ found that CSEA did not engage in surface bargaining and dismissed that complaint. Both parties filed exceptions.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, the District's exceptions, and CSEA's response and cross-exceptions.² The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the Folsom-Cordova Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). The District violated EERA on December 30, 2002, by entering into a contract with Laidlaw Transportation Services (Laidlaw) to provide transportation services for District students. The District took this action prior to completion of the impasse procedures set out in EERA. By changing the past practice regarding transportation without first completing

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

²The District's motion to exclude CSEA's cross-exceptions on the grounds of untimeliness is denied.

negotiations with the California School Employees Association & its Chapter 528 (CSEA), the District failed to meet and negotiate in good faith in violation of EERA section 3543.5(c). Because these actions had the additional effect of interfering with the right of CSEA to represent its members, the failure to meet and confer in good faith also violated EERA section 3543.5(b) and the right of employees to be represented by CSEA, the District's actions also interfered with employee rights in violation of EERA section 3543.5(a).

The complaint in unfair practice Case No. SA-CO-472-E and companion unfair practice charge filed against CSEA is hereby DISMISSED.

Pursuant to EERA section 3541.5(c), it hereby is ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Entering into a contract with Laidlaw, prior to the completion of impasse resolution procedures, to provide transportation services for District students.
2. Interfering with the right of CSEA to represent its members.
3. Interfering with the right of individual employees to participate in the activities of an employee organization.

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

1. Effective immediately upon service of a final decision in this matter, cancel the contract with Laidlaw to provide transportation services for District students.
2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to members of the certificated employee bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that

the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Chairman Duncan and Member Whitehead joined in this Decision.



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

After a hearing in Unfair Practice Case No. SA-CE-2132-E, California School Employees Association & its Chapter 528 v. Folsom-Cordova Unified School District, in which all parties had the right to participate, it has been found that the Folsom-Cordova Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). The District violated EERA on December 30, 2002, by entering into a contract with Laidlaw Transportation Services (Laidlaw) to provide transportation services for District students. The District took this action prior to the completion of the impasse procedures set out in EERA. By changing the past practice regarding transportation without first completing negotiations with the California School Employees Association & its Chapter 528 (CSEA), the District failed to meet and negotiate in good faith in violation of EERA section 3543.5(c). Because these actions had the additional effect of interfering with the right of CSEA to represent its members, the failure to meet and confer in good faith also violated EERA section 3543.5(b) and the right of employees to be represented by CSEA, the District's actions also interfered with employee rights in violation of EERA section 3543.5(a).

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

A. CEASE AND DESIST FROM:

1. Entering into a contract with Laidlaw, prior to the completion of impasse resolution procedures, to provide transportation services for District students.
2. Interfering with the right of CSEA to represent its members.
3. Interfering with the right of individual employees to participate in the activities of an employee organization.

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

Cancel the contract with Laidlaw to provide transportation services for District students.

Dated: _____

**FOLSOM-CORDOVA UNIFIED SCHOOL
DISTRICT**

By: _____
Authorized Agent

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

that the union negotiators were frequently unavailable, showed up to meetings unprepared and otherwise attempted to stall negotiations as long as possible.

This action was commenced on October 15, 2002, when the California School Employees Association and its Chapter 528 (CSEA or Union) filed an unfair practice charge against the Folsom-Cordova Unified School District (District). The Union followed with a first amended charge on December 17, 2002. On December 20, 2002, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the District. The complaint alleges that the District failed to negotiate in good faith in violation of the Educational Employment Relations Act (EERA or Act)¹ when it unilaterally subcontracted transportation services to a private company. By this act, the complaint alleges, the District failed to negotiate in good faith and interfered with both employee and Union rights in violation of section 3543.5(a), (b) and (c).²

¹ The EERA is found at Government Code section 3540 et seq. Unless noted otherwise, all statutory references will be to the Government Code.

² In relevant part, section 3543.5 provides as follows:

It shall be unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

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

The District answered the complaint on January 9, 2003, denying that it had failed to negotiate in good faith and asserting that the Union had delayed and otherwise obstructed negotiations, thereby waiving its right to negotiate. The Union filed a second amended charge on February 6, 2003. This charge was treated as a motion to amend the complaint and but amendment of the complaint was denied by the undersigned on February 24, 2003.

The District filed an unfair practice charge against the Union on December 23, 2002, and then withdrew a portion of the charge on January 30, 2003. On January 31, 2003, the general counsel of the PERB followed with a complaint against the Union. The complaint alleges that the Union failed to negotiate in good faith when Union negotiators refused to meet during the month of September 2002 and during the last weeks of December. The complaint alleges further that the Union's chief negotiator said on November 12, 2002, that the Union had three votes on the District Board of Education and was "not sweating it" and that on the following day, November 13, the Union refused to negotiate about transportation. By these acts, the complaint alleges, the Union failed to negotiate in good faith in violation of section 3543.6(c).³ The Union answered the charge on February 21, 2003, denying both the factual allegations and the legal conclusions.

On March 24, 2003, the Union and District charges were consolidated for hearing. A hearing was conducted in Sacramento on May 13, 14 and 15, 2003. With the filing of briefs, the dispute was submitted for decision on July 16, 2003.

³ In relevant part, section 3543.6 provides:

It shall be unlawful for an employee organization to:

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

FINDINGS OF FACT

The District is a public school employer as defined in section 3540.1(k) of the EERA. The Union is an employee organization as defined in section 3540.1(d) and at all times relevant has been the exclusive representative, as defined in section 3540.1(e), of an appropriate unit of the District's classified transportation employees. The Union also represents a second unit of District employees composed of maintenance, custodial, clerical and technical employees. Throughout the relevant period, the parties were engaged in collective bargaining for successor agreements in both units. The parties ultimately reached agreement on a successor contract that expires in July of 2005, but the record does not reflect the date that agreement was reached.

In March of 2002,⁴ the District identified a need to make a reduction of \$4 million in its budget. District administrators charged each department with responsibility for proposing a way to cut their operational costs by 15 percent. For the transportation department, this amounted to a cut of \$430,000. CSEA was alerted by discussion at a school board meeting on April 18 to the possibility that the District might consider contracting out transportation services as a means to reduce the budget. On May 1, CSEA Labor Relations Representative Diana Criddle wrote to the District superintendent setting forth a demand to bargain "the decision and effects of any decision to contract out bargaining unit work." The District did not respond to Ms. Criddle's letter for more than six weeks.

On June 17, District Director of Classified Personnel Mindi F. Nunes replied that the District was interested in entering negotiations with CSEA about the subject of contracting out transportation. In her letter, Ms. Nunes stated that "contracting out of transportation services

⁴ Unless otherwise indicated, all subsequent dates will be to the year 2002.

has been determined to be a potential cost-saving measure.” She also stated that in order to determine whether there would be cost savings for contracting out transportation, the District would issue a Request for Proposal (RFP) from companies that might wish to supply transportation services for District students. She enclosed a draft of the RFP and invited Ms. Criddle to provide input by July 12. She also assured that the District would take no action “on any data received through the RFP process until the conclusion of negotiations with CSEA.” Ms. Nunes proposed that the parties meet on August 9, 15 and 29. Ms. Nunes testified that she did not propose any meeting dates in July because it is hard to get people together during that month.

The plan to issue an RFP drew a July 3 letter from Ms. Criddle in which she demanded to bargain about the issuance of the RFP. She also expressed a concern that the District was reverting to adversarial bargaining rather than the interest-based bargaining that the parties had employed in the prior three years. She said it would be counter-productive to return to adversarial bargaining and urged that the parties employ the interest-based process during bargaining about contracting out of transportation. Ms. Criddle agreed to meet with the District on August 15 and 29.

In the years they have been conducting interest-based bargaining, CSEA and the District have developed fairly extensive ground rules. Neither team has a chief spokesperson. Instead, they have a facilitator and a recorder. When they begin a round of bargaining, each side tells a story about the problem that side wants to solve in negotiations. They identify a question that has to be answered and each side lists the interests it wants to protect in resolving the problem. All participants from both sides list options which are recorded on a flip chart. The options are discussed and either accepted or rejected by consensus. Proposals that are neither accepted nor rejected are placed in the “parking lot” where they remain until one side

wishes to return to them. It is also a ground rule that tentative agreements are to be signed by all representatives of both sides. The parties also have a practice called “elephants on the table” under which either side can raise any issue it wants for a full discussion in order to clear the air.

The parties held their first negotiating session about contracting out transportation on August 15. The bargaining did not get off to a smooth start. CSEA opened the meeting with a statement that it had to throw some elephants on the table. Ms. Criddle then complained that CSEA first learned about some layoffs of classified employees the prior spring when the issue came up at a meeting of the school board. Ms. Nunes challenged the statement that CSEA did not know about the layoffs and provided the CSEA team with copies of minutes from prior negotiating sessions where the layoffs were discussed. There followed a debate about the financial condition of the District and a CSEA information request about the operation, revenue and expenditures of the District transportation department. By the time the meeting was adjourned neither side had told its story and there had been no brainstorming or presentation of ideas for how to deal with a reduction in transportation costs.

The second negotiating session took place on August 29. At the start of the meeting, Ms. Nunes provided to CSEA a stack of materials in response to CSEA’s information request made at the previous meeting. District Chief Financial Officer Debbie Bettencourt made a lengthy presentation about the District budget. The District then told its “story” about the negotiations which was to reduce the transportation budget by \$500,000. Some participants offered options in a first brainstorming session. Ms. Nunes complained about what she perceived as CSEA’s lack of readiness for negotiations. She asserted that after two days there had been no participation from CSEA.

At the end of the August 29 meeting, Ms. Nunes and Ms. Criddle opened their palm pilots and Ms. Criddle stated that she could not meet until October. The first day in October that both had available was October 18. Ms. Criddle testified that she has 10 CSEA chapters to service over a geographical area that extends from Folsom to South Lake Tahoe. She said September is her busiest month of the year because of the start of school. In addition, she testified, CSEA conducted mandatory staff training from September 23 through 27, making one week of the month unavailable.

Ms. Nunes testified that after the meeting of August 29, District administrators concluded that CSEA was not serious about negotiating cost savings for transportation. Therefore, Ms. Nunes testified, “[w]e decided we needed to look at the option of contracting out.” At that point, she said, the District did not know whether contracting out actually would save money and so District management decided to go forward with the RFP. The District published advertisements for the RFP on September 22 and 29. On October 8, the District held a pre-bid conference with potential bidders. Ms. Criddle and Debbie Jeffrey, president of CSEA chapter 528, attended the pre-bid conference.

All participants agreed that the meeting of October 18 went much better. At the start, Ms. Jeffrey stated that CSEA wanted to begin the transportation negotiations with a clean slate. Patti Abdo, a CSEA team member employed in the transportation department, presented CSEA’s “story” to begin the interest-based negotiations. The Union’s story was that the District had put out an RFP to obtain information on contracting out but the Union does not want transportation contracted out. The participants then identified and discussed 26 options for cutting transportation costs. Ms. Nunes testified that she felt frustrated that they had started over but at the end of the session she “was glad that they were finally willing to participate”

which, she said, “probably outweighed any frustration.” She said she “felt very positive about the progress being made” and “it looked like we were on the right track.”

At the end of the meeting, there was a discussion about future negotiations sessions for transportation. The minutes reflect that transportation negotiations were scheduled for November 13, December 5 and December 10. The November 13 date previously had been scheduled for negotiations in the re-opener on the comprehensive contract, not for transportation. However, Ms. Nunes testified, there was an agreement to use that already-scheduled date for transportation.

The bids from transportation contractors were opened on November 12. There were two bidders, the lowest bid coming from Laidlaw Education Services. District administrators concluded that the potential savings from the Laidlaw bid would be \$750,000 a year, although \$250,000 of this amount would be from Laidlaw’s use of District-owned school busses.

CSEA Chapter President Jeffrey attended the bid opening. According to Ms. Bettencourt, at the bid opening Ms. Jeffrey leaned over to District Transportation Director Darren Salo and said, “[W]e don’t have to sweat this. We’ve got three votes on the board.” Ms. Bettencourt said she understood the reference to be to a recent school board election after which two new members joined the five-member board. Ms. Nunes testified that she had been out of the room during this conversation but when she returned, Mr. Salo predicted that she would not get anywhere at negotiations the following day, quoting Ms. Jeffrey’s comment.

Ms. Jeffrey testified that one of the bidders, who was sitting across from her, asked her how it worked out with the new school board. She said the bidder was facing toward Mr. Salo and herself. She said she replied that “we do have three board members potentially against contracting out.”

At the start of the negotiating session on November 13, District team members began putting up the flip charts and other paperwork that were used in bargaining about transportation. The CSEA team took a brief caucus and when they returned, Ms. Jeffrey told District negotiators that CSEA had expected the negotiating session to be about the re-opener of the comprehensive contract and CSEA was not prepared to negotiate about transportation. Ms. Jeffrey testified that she had brought her negotiating folder for comprehensive negotiations as had other members of the team. Ms. Criddle testified that she also was ready to bargain about the comprehensive contract and the first she knew the District wanted to talk about transportation was when she saw District negotiators putting up the transportation paperwork.

Ms. Nunes testified that she reminded the CSEA team about the agreement at the end of the last negotiating session to devote the November 13 meeting to transportation. She acknowledged, however, that Ms. Criddle may not have been present at the end of the meeting when the change was made. Ms. Nunes testified that she was not able to negotiate about the re-opener of the comprehensive contract because she had not brought those materials. She said she was frustrated by CSEA's refusal to negotiate about transportation and concluded that the process had stopped again. Nevertheless, the meeting continued for about an hour and 45 minutes during which time Marsha Wilson, of the District special education office, explained the rules pertaining to special education and transportation of special education students.

The parties next met on December 5. They generated and discussed some additional options and discussed the state budget and potential cuts that would affect the public schools. For the first time, the parties also discussed an across-the-board \$1 an hour salary cut for transportation employees. Ms. Nunes put the value of such a reduction at \$79,000 a year. Although a salary cut was discussed, there was no agreement that it should take place.

The parties met again on December 10. More options were raised and discussed. At the end of the meeting, CSEA and the District had agreed upon transportation reductions that totaled approximately \$228,000. No salary reduction was included in this amount. Ms. Nunes told the CSEA team that a small salary reduction would go “a long way with the board in indicating their seriousness in actually negotiating contract language changes,” but according to Ms. Nunes, Ms. Criddle replied that CSEA was not interested in discussing a salary cut. According to the District-prepared minutes, CSEA negotiating team member Ms. Abdo explained that with other decreases a salary cut would amount to a 4 percent decrease and that employees could not afford to lose that much. Ms. Nunes told the CSEA team that she would take the proposed \$228,000 in cuts to the school board but did not believe that number would be sufficient because it was too far from the \$430,000 goal assigned by the District for transportation cuts. The next negotiating session was scheduled for January 14, 2003.

Both sides were well aware during these negotiations of a significant change in state law pertaining to subcontracting by school districts that would take effect on January 1, 2003. Under the new law,⁵ school districts are required to meet certain conditions before they can enter contracts for personal services. This change in law, both sides knew, would affect the ability of the District to subcontract transportation services. The new statute would be applicable only to those personal service contracts entered after January 1, 2003, and would not pertain to contracts or the renewal of contracts entered prior to that date.⁶

District administrators acknowledged during cross-examination that the District wanted the issue resolved under the law that existed prior to January 1, 2003. Ms. Nunes testified:

⁵ Chapter 894, Stats. 2002. This law added section 45103.1 to the Education Code. When they did discuss the change, the parties referred to the law by its bill number, SB 1419.

⁶ See Education Code section 45103.1(d).

We weren't trying to rush ahead to contract for transportation services. What we were trying to do was take advantage of what [the] law was at that particular point in time. We knew how that operated. We knew what the boundaries were. [¶] The new law was – had too many questions for us. Primarily, whether it even pertained to transportation contracting out.

Ms. Bettencourt testified:

. . . we at least knew in December what the existing law was regarding contracting out for transportation services. It was still a gray area as to whether [SB] 1419 applied to transportation. But at least for, yeah, for after January 1.

On December 12, the District school board voted unanimously to direct “staff to enter into a contract with Laidlaw and bring that item back for action no later than the end of December 31 of this year.” While the school board was considering this action, Ms. Criddle rose in the audience and began addressing the board. According to the minutes of the meeting, the president of the school board recessed the meeting “due to incessant interruptions by CSEA Labor Relations Representative Diana Criddle.” The minutes state that the District superintendent requested the Folsom Police Department to send an officer to restore order. Ms Criddle testified that she was “totally shocked” when the school board directed that a contract be entered by December 31. She said she believed that with all the effort they had put she believed Ms. Nunes would convince the school board to put off a decision.

The morning after the school board meeting, December 13, Ms. Criddle called Ms. Nunes to get the exact wording of the resolution adopted by the school board the previous evening. The Union at that time was working on a request that the PERB obtain injunctive relief against any action by the District to contract out transportation services. During the course of that conversation, Ms. Nunes offered to meet and negotiate prior to a school board meeting then scheduled for December 19 during which meeting the board was expected to take final action on the contracting out issue. Ms. Criddle responded that she would be on vacation

and that they already had a meeting scheduled for January 14, 2003. Ms. Nunes testified that she then told Ms. Criddle that she would call Ms. Jeffrey and make the same offer to negotiate. Ms. Nunes quoted Ms. Criddle as telling her "I needed to do what I needed to do." Ms. Criddle denied that Ms. Nunes told her that she would attempt to negotiate with the chapter officers and said she would have been there.

Ms. Nunes then called Ms. Jeffrey. She said she told Ms. Jeffrey that she had offered to negotiate with Ms. Criddle and she wanted to make the same offer to her. Ms. Nunes said Ms. Jeffrey began to ask her many questions including how great a salary reduction would be required to make the District's goal of a \$430,000 reduction in transportation expenses. Ms. Nunes said she told Ms. Jeffrey it would require a cut of \$2.00 to \$2.50 an hour. Ms. Nunes said that a reduction of that amount would put drivers at a lower salary than what Laidlaw would be paying and that was a concern. Ms. Nunes said Ms. Jeffrey then asked a number of questions about the Laidlaw contract and what the District would require the contractor to pay in salaries and benefits. Following that discussion, Ms. Nunes testified, Ms. Jeffrey said she would contact her negotiating team. An hour later, Ms. Nunes said, Ms. Jeffrey called back and asked if Ms. Nunes would meet with her and bus driver representatives on the Union's negotiating team. She agreed.

On the morning of December 16, Ms. Nunes met with Ms. Jeffrey and Patti and Dyarl Abdo, a married couple who were both District bus drivers. Ms. Criddle was not present. The meeting was not conducted in accord with any of the ground rules to which the parties had agreed for interest-based bargaining. Both Ms. Nunes and Ms. Jeffrey agree that the purpose of the meeting was to be for Ms. Nunes to answer questions about the potential contract with Laidlaw. However, Ms. Nunes testified, when they began to talk she realized "[t]hey were interested in reaching settlement and asked me what it would take to do so." She said she

replied that it would take an across-the-board pay cut of \$2.00 to \$2.50. Ms. Nunes said they asked if such a cut would stop the contracting out issue on the December 19 school board agenda and she assured them it would.

Ms. Nunes said they then discussed the drafting of a tentative agreement and a special meeting with transportation employees to go over the draft. Ms. Nunes testified that she got the “impression” from Ms. Jeffrey and Ms. Abdo that CSEA state headquarters was opposed to a salary reduction and chapter officers would have to go the local and state headquarters of CSEA to get such a cut approved. At that point, Ms. Nunes testified, she believed she had a tentative agreement with the chapter officers. She later typed up the agreement and faxed copies to the CSEA members who had met with her. She acknowledged that the agreement was not reached with the entire CSEA bargaining team and had not been signed by all members of that team as required under the ground rules to which both sides had agreed. Ms. Nunes said she received a call later that day from Mr. Abdo who said “he was having difficulty getting support for the agreement and that there would be no need for a meeting.” She said Debbie Jeffrey called her the next day with the same message.

Ms. Jeffrey testified that the meeting on December 16 was not a negotiating session and that neither she nor the Abdos ever considered it to be one. She said that during the meeting Ms. Nunes told them about the salary and benefits that the contractor would be paying to drivers if transportation was contracted out. She said what she had expected Ms. Nunes to fax was the information she had provided to them. Ms. Jeffrey said that Ms. Abdo might have asked a question about the amount of a pay cut that would be required to remove contracting out from the school board’s agenda. However, she said, she did not agree to such a cut and she was offended when she received a tentative agreement from Ms. Nunes because she had not made any tentative agreement with the District.

By letter of December 17, Ms. Nunes complained to Ms. Jeffrey about her “lack of follow through” after the meeting at which they had reached a tentative agreement. She said she had made three telephone calls to Ms. Jeffrey that had not been returned. She said that since there were no other items to discuss the District was declaring impasse in the negotiations with CSEA and would file the necessary paperwork with the PERB.

On December 19, the school board voted to authorize the superintendent to sign a contract with Laidlaw. The motion considered to authorize contracting out as originally made stated:

. . . Moved to authorize Superintendent to enter a contract for transportation services with Laidlaw when he deems it necessary, for cost containment.

The motion was amended to remove the words “for cost containment” and then adopted on a vote of 3-2. The agenda materials prepared for the school board by the District administration state that the approval of a contract with Laidlaw has a “[p]otential savings” of \$750,000.

District Superintendent Norman Siefkin signed the agreement with Laidlaw on December 30. The contract contains provisions permitting termination for failure to perform or because of any judicial or administrative determination against the District. The contract also permitted a permissive termination without cost to the District by May 1, 2003. The superintendent was not a witness at the hearing. However, regarding the timing of the agreement, Ms. Bettencourt testified:

We knew what the existing law was in December, and it seemed prudent to protect the District and sign a contract under the existing law because we didn’t know what effect [SB] 1419 could have on the District.

The parties negotiated again on January 14, 2003. At that meeting, the CSEA team was joined by Jack Metcalf, a senior labor relations representative for the Union. During the negotiating session, Mr. Metcalf stated “unequivocally” that CSEA was willing to look at a

reduction in salaries. The parties met again on January 21, 2003. At that meeting, CSEA agreed to accept a salary reduction of 1.6 percent for bus drivers. Together with other cuts proposed that day and those agreed upon earlier, CSEA had agreed to transportation cost reductions totaling \$350,129. The District made no counteroffer. Ms. Nunes testified that the District goal was \$430,000 and nothing else would do.

Following the meeting of January 21, 2003, the PERB certified the dispute for impasse. The mediation had not yet been completed as of the conclusion of the hearing in these consolidated unfair practice cases.

District witnesses testified throughout the hearing that the District had made no irrevocable commitment to the contracting out of transportation services. Ms. Nunes testified that no irrevocable decision had been made as of the negotiating session of August 15. Ms. Bettencourt testified that no irrevocable decision had been made as of October 8, the date of the pre-bid conference. Ms. Bettencourt testified that no irrevocable decision had been made as of December 19, when the staff prepared the materials for the school board meeting of that night. Finally, Ms. Bettencourt testified that even as of May 14, 2003, the date she was a witness at the hearing,

... Our preference is to reach a settlement with CSEA. And if we're able to do that, then we will not contract out.

She said that as of the completion of the hearing, nothing had been done to implement the contracting out of transportation services.

ISSUES

1. Did the District make a unilateral change by contracting out transportation and thereby fail to meet and negotiate in good faith?
2. Did the Union waive its right to bargain by delays and other obstructionist conduct during negotiations over contracting out?

3. Did the Union fail to meet and negotiate in good faith about the contracting out of transportation by:

A. On or about August 29, 2002, refusing to schedule negotiating sessions during the month of September?

B. On or about November 13, 2002, refusing to negotiate about transportation when that subject previously had been scheduled for that date?

C. On December 10, 2002, refusing to discuss a District proposal to reduce the salaries of bus drivers?

D. On or about December 13, 2002, refusing to meet and negotiate about contracting out prior to the close of school for the holidays?

CONCLUSIONS OF LAW

If an employer makes a pre-impasse unilateral change in an established, negotiable practice that employer violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) the change in policy concerns a matter

within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.)

The Board long ago held that the subject of contracting out of unit work was within the scope of representation. (Archoe Union School District (1983) PERB Decision No. 360 (Archoe)). At first, the Board required no showing that in order for contracting out to be negotiable, its purpose had to be to save labor costs. (See generally, Oakland Unified School District (1983) PERB Decision No. 367.) Where the employer “sought to transfer existing functions and duties from unit employees to persons . . . not employees of the District,” the Board held that the decision to subcontract was not at the core of entrepreneurial control and was therefore negotiable. (Archoe.)

This policy changed in State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S (State of California). In State of California, the Board adopted the rule from Otis Elevator Company, a wholly owned subsidiary of United Technologies (1984) 269 NLRB 891 [116 LRRM 1075] and First National Maintenance Corporation v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705]. Under State of California contracting out is not automatically negotiable. Rather, it becomes negotiable only when the decision to contract out turns on labor costs. If the decision turns instead on a “change in the nature and direction of a significant facet” of the employer’s business, it is not negotiable. This rule was reaffirmed in Redwoods Community College District (1997) PERB Decision No. 1242.

However, the Board changed directions again in Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar), basically reaffirming the Archoe rule but not displacing the rule from State of California. Thus under Lucia Mar contracting out is

negotiable in either of two circumstances: (1) where the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances, and (2) where the decision was motivated substantially by potential savings in labor costs.

Unlike the employer in Lucia Mar, the District had not put its subcontracting plan into operation as of the conclusion of the hearing. Although the plan calls for the private contractor to use District buses and hire many of the former District drivers, the record closed prior to Laidlaw assuming control over student transportation within the District. It appears probable that the employer will simply replace its employees with those of a contractor to perform the same services under similar circumstances and thus meet the first test for negotiability under Lucia Mar. However, since the plan was not yet in operation at the close of the hearing, I will not attempt to determine negotiability under this standard but will, instead, apply the labor costs standard.

It is abundantly clear from the evidence that cost savings is the single reason the District entered a contract with Laidlaw to provide transportation service for District students. The issue first arose in March of 2002 when the District was reviewing how to cut \$4 million from its budget. Transportation was assigned a \$430,000 share of the District-wide cut. In a letter to CSEA dated June 17, Ms. Nunes stated that “contracting out transportation services has been determined to be a potential cost-saving measure.” At the negotiating meeting of August 29, the District “story” under the interest-based process was about the need to reduce transportation costs by \$500,000. The District issued an RFP on September 22 soliciting proposals from transportation suppliers for the stated purpose of determining whether contracting out would save money. Negotiations at virtually every meeting from August through December dealt with the issue of cutting transportation costs. In its original version, the motion to authorize contracting out explicitly stated its purpose as being “for cost

containment.” Although those words were dropped from the motion prior to the vote, it is clear that cost containment was the reason that the District entered into the contract with Laidlaw. I conclude that the District’s decision to contract out transportation services was not to change the basic direction of how the District operated but to save money. The decision was therefore a negotiable decision for the reasons set out in Lucia Mar.

The District argues that it has made no unilateral change that had a “generalized effect or continuing impact upon the terms and conditions of employment of CSEA unit members.” The District argues that it has not implemented the proposed contract with Laidlaw and has continued to pursue its bargaining obligations with CSEA. Although the superintendent signed a contract with Laidlaw, the District continues, it has done nothing to implement “the proposed contract with Laidlaw.” The District observes that unit members are still driving District buses and transportation continues to operate as before. The bargaining obligation arises only when an employer has made a “firm decision” to make a change, something that has not occurred here, the District concludes.

CSEA rejects this rationale, arguing that the District’s failure to implement its contract with Laidlaw does not detract from what obviously is a decision that already has been made. Citing PERB cases, the Union observes that the six months statute of limitations under the EERA begins to run on the date that the charging party has actual or constructive knowledge of respondent’s clear intent to implement a unilateral change. Thus, CSEA continues, if it waited until the District actually implemented the contracting out its unfair practice charge would be time barred. CSEA argues that the District’s failure to disclose to CSEA that it signed a contract with Laidlaw in December “is powerful evidence that the District had no intent of bargaining but was rather simply trying to get to impasse and beyond so that it could implement the contract it had already executed.”

In a unilateral change case, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's intent to implement a change in policy providing that no subsequent action evinces a wavering of intent. (Regents of the University of California (1990) PERB Decision No. 826-H.) Thus it is clear that had CSEA waited to file its charge until the District implemented the contract with Laidlaw, the charge would long since have been untimely.

Throughout the hearing, District witnesses repeatedly asserted that no firm decision to contract out ever had been made. At every stage of the process, District witnesses testified, there always was the possibility that an agreement would be reached with CSEA and no contracting out would take place.

However, I find it impossible to square the District's claim that no firm decision ever was made with the two school board resolutions on contracting out. The resolution of December 12th ". . . direct[ed] staff to enter into a contract with Laidlaw and bring that item back for action no later than the end of December 31 of this year." The resolution of December 19th ". . . authorize[d] Superintendent to enter a contract for transportation services with Laidlaw when he deems it necessary. . . ." Then, on December 30th, the District superintendent signed a contract with Laidlaw. While the contract has several escape clauses, it is clearly a binding agreement to contract out transportation services.

The Board long has rejected arguments that a unilateral change does not occur until it is implemented. In Anaheim Union High School District (1982) PERB Decision No. 201 (Anaheim), the Board found an employer to have made a unilateral change by adopting a resolution on June 29 to reduce salaries for certificated employees, even though it did not immediately implement the change. The Board reached a similar result in a more recent case, Clovis Unified School District (2002) PERB Decision No. 1504.

In Anaheim the Board held that the school district's delay in implementing a June 29 resolution did not alter its official character. Moreover, the Board continued, the school district had made a curiously inconsistent argument. While arguing that it made no unilateral change because it had not implemented the pay cut, the school district simultaneously argued that it was legally obligated to act prior to July 1 or entirely forego for a year the possibility of making a reduction in teacher pay. The Board found that the school employer could not, at the same time, claim both to have acted, and not to have acted.

The contract with Laidlaw is not a "proposed contract" as the District describes it. It is an actual contract that commits the District to turn its transportation services over to Laidlaw. The contract is a legal binding document and I conclude that the District made a unilateral change when it entered the contract, if indeed the school board's actions of December 12 and 19 were not sufficient in themselves to constitute a unilateral change. Like the employer in Anaheim, the District here attempts to argue that it made no change while simultaneously contending that it was compelled to enter the contract prior to January 1, 2002, because of SB 1419. The contradictions inherent in this argument make it entirely unpersuasive.

The District next argues that it gave CSEA numerous opportunities to bargain both the decision and the effects of contracting out for transportation services. Yet, the District argues, CSEA declined to meet in September and was not prepared on November 13. Ms. Criddle refused to meet again in December after the bargaining session of December 13, the District asserts. Citing cases from the National Labor Relations Board (NLRB) the District argues that it was CSEA's own conduct that forced the District to enter the agreement with Laidlaw. CSEA delayed and rebuffed the District's efforts to promptly complete negotiations and because of this, the District concludes, waived its right to complain about the change.

The Union, relying on the same NLRB cases, reaches an entirely different conclusion. In those NLRB cases where a union was found to have waived its right to bargain, CSEA continues, that union had refused to bargain over many months. Under the federal cases, CSEA contends, a union will waive its right to bargain only where (1) in response to an employer's diligent and earnest efforts the union avoids or delays bargaining and (2) the employer's action is compelled by economic exigencies that compel prompt action. Here, CSEA concludes, neither of these conditions is met. CSEA argues that it did negotiate with the District over many months and made numerous concessions. Moreover, CSEA contends, the District never advised it of any condition that required immediate action and, in fact CSEA contends, there was no pressing condition.

PERB has never held that a union, once having made a timely demand to bargain, will then waive its right to bargain if it causes delays in negotiations. As argued by both parties, the NLRB has made such a finding, but only in very tightly limited circumstances. The rule was first applied in AAA Motor Lines (1974) 215 NLRB 793 [88 LRRM 1253]. In that case, the NLRB dismissed an unfair practice charge against an employer that made a unilateral change in its health benefits. For 2 and ½ months prior to making the change, the employer had warned the union that was withdrawing from a multi-employer bargaining association and that a new contract would be necessary by July 1 to provide the continuance of certain benefits for employees. Among the benefits which would expire on July 1 was medical coverage for the company's employees. The employer made numerous offers to commence negotiations and provided the union with specific contractual proposals. After promising at various times to commence negotiations, the union always backed out. In dismissing the charge, the NLRB wrote:

. . . Having refused to meet and bargain with the Respondent right up to the date the contract terminated, the Union placed the

Respondent in the position of having to take immediate action to avoid losses of certain benefits to its employees. In doing so, we note that the Respondent instituted only those changes that had already been proposed to the Union; and that only matters of immediate concern to employees were instituted [7]

In addition to dismissing the charge against the employer, the Board also made a finding that the union had failed to meet and negotiate in good faith.⁸

The facts in the present case do not even approach those in which the NLRB has excused an employer's unilateral change because of a union's obstructionist tactics in bargaining. CSEA never refused to bargain about contracting out or about ways to reduce the cost of operations in the transportation department. Indeed, CSEA participated in six negotiating sessions about the subject of reductions in transportation operating costs. CSEA made numerous proposals for cutting transportation costs and participated in lengthy discussions on the subject. It is true that Ms. Criddle declared that she was unable to negotiate in the month of September. There is no evidence, however, that Ms. Criddle's claim of unavailability in September was not genuine. Moreover, I find it hard to understand the District's complaint about no meetings in September when the District waited six weeks before even responding to Ms. Criddle's May 1 request to bargain and then proposed no negotiating dates for another six weeks. If the District viewed the need to bargain as being so urgent, one would expect the District to have demonstrated more urgency in getting to the bargaining table.

⁷ 215 NLRB 793, 794.

⁸ The NLRB has revisited this rule in several subsequent cases. A partial listing includes: Mountain Excavating Co. (1979) 241 NLRB 414 [100 LRRM 1505], M&M Building and Electrical Contractors (1982) 262 NLRB 1472 [110 LRRM 1512], R.A. Hatch Company (1982) 263 NLRB 1221 [111 LRRM 1569], Stone Boat Yard (1982) 264 NLRB 981 [111 LRRM 1427], Gresham Transfer (1984) 272 NLRB 484 [117 LRRM 1299], Tampa Sheet Metal Co. (1988) 288 NLRB 322 [129 LRRM 1188], Pinkston-Hollar Construction Services (1990) 298 NLRB 1 [134 LRRM 1050], Master Window Cleaning, Inc., d/b/a Bottom Line Enterprises (1991) 302 NLRB 373 [137 LRRM 1301].

Nor do I find any indication of waiver in Ms. Criddle's refusal to meet again in December following the school board's December 12 direction to District staff to return a contract with Laidlaw to the school board not later than December 31. By that time CSEA had met with the District six times and had additional meetings scheduled in January. Ms. Criddle's refusal to bargain during a scheduled vacation was not unreasonable. This is especially the case when the contracting out under consideration by the District was not even scheduled to occur until the following August.

Any waiver of the right to bargain will not be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) For an employer to show that an exclusive representative has waived its right to negotiate, the employer must produce evidence of either "clear and unmistakable" language (Amador Valley Joint Union High School District (1978) PERB Decision No. 74) or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. I find nothing in CSEA's conduct during bargaining over transportation to demonstrate a waiver under traditional PERB analysis or under the NLRB cases that excuse an employer's unilateral change in the face of obstructionist conduct by a union.

The District argues finally that its "proposed" contract with Laidlaw was justified by operational necessity. An employer may make a unilateral change prior to the completion of bargaining, the District argues, when the necessity results from (1) a sudden unforeseen occurrence beyond the employer's control, (2) the timing precludes negotiations, and (3) there is no alternative to the action taken. The District describes the passage of SB 1419 as "a sudden unforeseen occurrence beyond the District's control." The District argues that it did not learn until October that the Legislature had passed SB 1419. "The unforeseen uncertainties of SB 1419 threatened the District's ability to contract for transportation services as a cost

savings alternative in the event it was not able to reach an agreement with CSEA.” Because the change in law was to go into effect on January 1, the District asserts, it did not have time to complete negotiations under the old law. Therefore, the District concludes, it had no alternative but to enter the contract with Laidlaw prior to the completion of bargaining with CSEA.

CSEA characterizes the District’s argument as an “assertion that the District had no alternative but to violate the EERA so as to not be inconvenienced by SB 1419,” an argument CSEA describes as “simply ludicrous.” Reviewing PERB cases on necessity, CSEA notes that the defense has been unpersuasive when it previously was put before the Board. CSEA argues that the District had other alternatives, including bargaining to impasse with CSEA and, absent reaching agreement, subcontract pursuant to the provisions of SB 1419.

To defend on a claim of business necessity, an employer must show:

. . . an actual . . . emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action.[⁹]

In a case analogous to the present action, the Board rejected a claim of business necessity where an employer unilaterally increased the length of the school year in order to secure additional state funding. Although the state had offered the additional funding as an incentive to a longer school year, the school district was not compelled to seek it. Noting that the legislative change was non-mandatory, the Board concluded that the school district could not unilaterally increase the length of the work year beyond what it had contracted with the exclusive representative in order to secure the additional funds. (Fountain Valley Elementary School District (1987) PERB Decision No. 625.)

⁹ Calexico Unified School District (1983) PERB Decision No. 357, adopting proposed decision of administrative law judge at p. 20.

The change brought on by SB 1419 was plainly non-mandatory. The District is not compelled to contract out its transportation services. Nor, if it chose to contract out, was it compelled to sign a contract prior to the effective date of SB 1419. The District faced no true emergency that required it to act prior to January 1, 2003. The timing, Ms. Bettencourt testified, was because the District didn't know what effect SB 1419 would have. As CSEA argues, the District wanted to contract out under the old law as a matter of convenience. There was another alternative. The District could have completed negotiations with CSEA and, if no agreement were reached, seek to contract out under the terms of the new law. The District chose instead to rush into a contract with Laidlaw. Because the District was not faced with a true emergency and because it had other alternatives, I reject the defense of business necessity.

Accordingly, I find that by entering into a contract to subcontract transportation services prior to the completion of impasse procedures the District failed to meet and negotiate in good faith in violation of section 3543.5(c). Because this conduct interfered with the Union's right to represent its members, the District also violated section 3543.5(b). Because the conduct had the further effect of interfering with the right of employees to be represented by the Union and changed the working conditions of employees, the District also violated section 3543.5(a).

The final question presented here is whether CSEA engaged in surface bargaining by delaying negotiations and refusing to meet on certain dates. The Union is accused of four acts which, in the theory of the complaint, constitute a failure to negotiate in good faith. None of the specific allegations in the complaint would be sufficient to constitute a flat refusal to bargain or other per se unfair practice. It is clear, therefore, that although the complaint does not use the term "surface bargaining" it is surface bargaining of which the Union is accused.

It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. (2nd Cir. 1969) 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland Unified School District, *supra*, PERB Decision No. 326.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and renegeing on tentative agreements the parties already have made (Charter Oak Unified

School District (1991) PERB Decision No. 873; Stockton Unified School District, supra, PERB Decision No. 143; Placerville Union School District (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (Oakland Unified School District, supra, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].)

The four acts of which the Union is accused are: (1) refusing to schedule negotiating sessions during the month of September; (2) refusing to negotiate on November 13, 2002, about transportation when that subject previously had been scheduled for that date; (3) refusing on December 10, 2002, to discuss a District proposal to reduce the salaries of bus drivers; (4) refusing to meet and negotiate during the month of December on any dates after December 13 about contracting out. Although not alleged in the complaint, the District also accuses the Union of reneging on a tentative agreement made on December 16 between representatives of CSEA Chapter 528 and Ms. Nunes.

I find nothing untoward about Ms. Criddle's refusal to negotiate in the month of September. She was required to attend a CSEA training session for one week of that month and she credibly testified that September is her busiest month of the year. There is no evidence that Ms. Criddle's claim of unavailability was anything other than genuine. At that point the District had made no claim of urgency and its own behavior was inconsistent with a claim of urgency.

I similarly find no evidence of surface bargaining in the refusal of Union negotiators to discuss transportation at the negotiating session of November 13. The meeting of that date

originally had been scheduled to negotiate about the comprehensive agreement covering both bargaining units. District witnesses contend that the purpose of the meeting was changed at the conclusion of the prior negotiating session. However, Union witnesses testified that they did not recall such an understanding and were unprepared to negotiate about transportation. Ms. Nunes said she was unprepared to negotiate about the comprehensive contract and as a result the negotiating session was terminated after a presentation about special education. I find in this evidence proof of nothing more than a misunderstanding.

The allegation that the Union refused on December 10, 2002, to discuss a proposal to reduce salaries of bus drivers was not proven. Ms. Nunes quotes Ms. Criddle as making such a comment and the District-prepared minutes quote Ms. Criddle as saying CSEA would not consider across the board salary reductions. But the minutes also quote Ms. Abdo, another CSEA negotiator, as replying that employees could not afford to lose as much as proposed by the District. At most, therefore, the record establishes that on December 10 the Union said it was not interested in reducing the salaries of bus drivers, i.e., the Union rejected the proposal and gave an explanation. A party is not required to yield its position on any topic of negotiations and is entitled to maintain its position adamantly. (Oakland Unified School District, supra, PERB Decision No. 275.) There is no evidence of surface bargaining in the Union's rejection of a District proposal.

Finally, I find no evidence of surface bargaining in the conduct of the Union during the last half of December 2002. The Union met with the District and negotiated about transportation twice during the early weeks of December. Another meeting was scheduled in January. There is no evidence of surface bargaining in the Union's refusal to schedule still more meetings to satisfy a deadline imposed by the District.

Nor do I find that the Union reneged on a tentative agreement supposedly reached on December 16 between Ms. Nunes and the three representatives of CSEA Chapter 528. This meeting was conducted in a manner completely contrary to the ground rules which the parties had used throughout their transportation negotiations to that date. The meeting was not conducted as an interest-based negotiations. Only part of the Union's negotiating team was present and Ms. Criddle, the principal spokesperson, was among the missing. Since only a part of the team was present, the supposed tentative agreement was not signed by every member as required in the ground rules. I find nothing in the record from which I could conclude that the small group that met with Ms. Nunes on December 16 had any authority to negotiate, much less to enter a tentative agreement. If there was wrong-doing in the meeting of December 16, it was in the District's attempt to engage in bargaining with only a part of the CSEA team.

Finally, it is important to note that in a surface bargaining case the Board weighs the totality of the conduct in the negotiations. Viewed in its totality, the Union's conduct here shows an effort to reach an agreement with the District, perhaps not on the terms desired by the District but an agreement nonetheless. By December 10, the Union had agreed to cuts that would reduce the transportation budget by \$228,000. By January 21, 2003, the Union had agreed to cuts that would reduce the transportation budget by \$350,000, including a salary reduction of 1.6 percent for District bus drivers. Such concessions do not demonstrate that the Union was merely going through the motions while attempting to delay or prevent agreement.

Accordingly, I find that the accusation of surface bargaining against the Union must be dismissed.

REMEDY

The PERB in section 3541.5(c) is given:

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such

affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The District has been found in violation of its duty to meet and negotiate in good faith by entering into an agreement with Laidlaw Education Services to provide transportation for District students. Although the parties have now completed the impasse procedures,¹⁰ these proceedings were undertaken with the Union in a position of severe disadvantage. The District already had signed the contract with Laidlaw prior even to the commencement of the impasse procedures. This fact inevitably clouded the entire procedure. The only appropriate remedy, therefore, is to direct the District to rescind the contract with Laidlaw. (Lucia Mar.) If subsequent to rescinding the agreement with Laidlaw the District wishes to undertake impasse procedures with the parties on an equal footing, it shall not be prohibited from doing so by this decision.

It is appropriate also that the District be directed to cease and desist from failing to meet and negotiate in good faith by subcontracting transportation services prior to the completion of the impasse resolution procedures contained in the EERA. No award of back pay or reinstatement is granted because there is no evidence at this time that the District has laid off any member of the bargaining unit represented by CSEA. If the District does in the future lay off unit members in order to contract out bargaining unit work, CSEA is free to seek an appropriate modification of the order in a compliance hearing.

It is further appropriate that the District be directed to post a notice incorporating the terms of the order at all District schools where notices customarily are posted for members of the bargaining unit represented by the Union. Posting of such a notice, signed by an

¹⁰ Pursuant to the District's request, I take notice of Factfinding Report and Recommendations dated June 23, 2003, PERB Case No. SA-IM-2692-E.

authorized agent of the District, also will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District, *supra*, PERB Decision No. 69.)

As a final remedy, CSEA asks for attorney's fees and costs. Attorney's fees and costs of the litigation are not appropriate "unless there is a showing that the respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit." (Modesto City Schools and High School District (1985) PERB Decision No. 518.) There is no pattern of repetitive findings of violations against the District and it cannot be said that the District's defense was without arguable merit. Nor do I find evidence of the misrepresentation and misconduct of which CSEA accuses the District. Accordingly, attorney's fees and other costs of litigation are denied.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Folsom-Cordova Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(c), (b) and (a). The District violated the Act on December 30, 2002, by entering into a contract with Laidlaw Transportation Services to provide transportation for District students. The District took this action prior to completion of the impasse procedures set out in the Act. By changing the past practice regarding transportation without first completing negotiations with the Union, the District failed to meet and negotiate in good faith in violation of section 3543.5(c). Because these actions had the additional effect of interfering with the right of the Union to represent its members, the failure to meet and confer in good faith also violated section

3543.5(b). Because these actions had the further effect of interfering with the right of unit members to be represented by the Union and affected the working conditions of unit members, the District's actions also interfered with employee rights in violation of section 3543.5(a).

The complaint in unfair practice case SA-CO-472-E and companion unfair practice charge filed against the Union is hereby DISMISSED.

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Entering a contract with Laidlaw Transportation Services, prior to the completion of impasse resolution procedures, to provide transportation for District students.

2. Interfering with the right of the Union to represent its members.

3. Interfering with the right of individual employees to participate in the activities of an employee organization.

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

1. Effective immediately upon service of a final decision in this matter cancel the contract with Laidlaw Transportation Services to provide transportation for District students.

2. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to members of the classified employee bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

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

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

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

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

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

Ronald E. Blubaugh
Administrative Law Judge