P021(b)

Feb 5, 2004

IN PROCEEDINGS BEFORE THE

DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), LOCAL 101, AFL-CIO, Petitioner, and SANTA CLARA VALLEY TRANSPORTATION AUTHORITY (VTA), and COUNTY EMPLOYEES MANAGEMENT ASSOCIATION (CEMA), affiliated with OPERATING ENGINEERS LOCAL NO. 3, AFL-CIO, Interested Parties.	FINAL DECISION AND ORDER OF THE DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS

PETITION FOR CERTIFICATION

INTRODUCTION

On December 15, 2003, Acting Director Chuck Cake served his Decision in the above matter. Thereafter, the Santa Clara Valley Transportation Authority ("VTA") filed exceptions to the Decision, and AFSCME and CEMA filed responses in support of the Decision.[1] Having reviewed the positions of the parties, I hereby adopt as my Final Decision the proposed decision and

[1] VTA filed a motion to correct the record and requested that the Director take judicial notice of "the Department's record in Case Number 95-1945." CEMA moved to strike the motion and request for judicial notice. VTA's motion will be treated as additional exceptions to the Director's Decision. Based thereon, CEMA's motion to strike is denied, and administrative notice is taken.

order of Hearing Officer Jerilou H. Cossack, a copy of which is attached as Exhibit A, as supplemented or modified herein.

BACKGROUND

In 1969, the Legislature enacted Public Utilities Code ("PUC") section 100300,[2] which grants "employees" of the Santa Clara County Transit District (now VTA) the right to organize and to bargain through representatives of their own choosing. At the same time, the Legislature enacted PUC section 100301, which requires the Director generally to "apply the relevant federal law and administrative practice developed under the Labor Relations Act of 1947, as amended," in making bargaining unit determinations.

In 1994, the Legislature enacted PUC sections 100308 and 100309, effective January 1, 1995, which concern the transfer of certain County and County Congestion Management Agency employees to VTA. Under Section 100309, VTA is required to "grant recognition" to the employee organizations which served as "recognized representatives" of these employees "until altered or revoked as provided by law."

In 1997, in Case Number 95-1495 ("95-1495"), on petitions for clarification filed by VTA, Director Lloyd W. Aubry, Jr. found the composition of the Supervisory-Administrative bargaining unit that is the subject of this proceeding to constitute an appropriate bargaining unit and directed VTA to bargain with CEMA as the representative of the employees in that unit.[3] None of the parties to the proceeding challenged that decision.

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[2] All Section references are to the PUC unless otherwise specified.

[3] In its motion, VTA requests that the Director take judicial notice of "the record" in Case Number 95-1495 without specifying any particular part of the record. I will take notice of the final decision and order and interim decisions in that case, as they bear on the issues presented here. They are attached as Exhibit B.

> Legislature has dealt with each district in separate enactments. The acts are similar to each other in most respects, but contain enough variation to indicate that the legislature has tailored the individual acts to address the specific characteristics of individual districts. A notable example of this variation is in the differing language of the particular sections of the transit district acts dealing with questions of union representation and appropriate bargaining units.

When the Legislature reorganized the Santa Clara Transit District in 1994, it "tailored" Sections 100308 and 100309 to deal with representation and bargaining unit issues peculiar to that transit district.[5] As noted, the Legislature in Section 100309 obligates VTA to recognize and to bargain with the representative of the former county employees in the Supervisory-Administrative bargaining unit who transferred to VTA.

In 95-1495, Director Aubry issued on May 14, 1997 a Unit Clarification Order ("UCO") defining the unit represented by CEMA that is the subject of this proceeding. The UCO was based in part on a Supplemental Interim Decision of the Director. In this Interim Decision, the Director specifically addressed the issue of whether VTA was obligated to recognize the statutorily mandated Supervisory-Administrative bargaining unit. The Director held that it was, adopting the conclusion of Hearing Officer Jean C. Gaskill that under PUC section 100309, VTA's obligation to "grant recognition" to the representative of this bargaining unit is "absolute and is not temporally proscribed by the occurrence of any subsequent event." *See* Exhibit B, Supplemental Proposed Interim Decision, p. 3.

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[5] The statutory reorganization of VTA is discussed at length in 95-1495. *See* Exhibit B, Proposed Interim Decision and Award of Hearing Officer Jean C. Gaskill dated February 5, 1997.

I find, consistent with the Decision of Director Aubry in 95-1495, that the effect of this Legislative mandate is to extend representation rights to VTA's managers and supervisors employed in the Supervisory-Administrative bargaining unit.

It is a general rule of statutory construction that a special statutory provision dealing with a particular subject controls a general statute. In light of the Legislative mandate in Section 100309, it is not necessary to reach the issue of whether Section 100300 extends bargaining rights to supervisors or managers. Likewise, the law regarding supervisors as it has developed under the LMRA, as amended, is not "relevant" (in the sense of being controlling) on the issue presented, when the Legislature has spoken specifically.

The third ground on which the Hearing Officer found the Supervisory-Administrative bargaining unit to be appropriate is that Section 100307(b) required it. The record presented to the Hearing Officer suggested that 95-1495 had made a unit definition before the 1996 passage of Section 100307, which preserved DIR "existing determinations". But later additions to the record made in the course of the exceptions indicates that the unit determination was a year after passage, although under a caption number, 95-1495, suggesting it had been made a year earlier. For that reason, I do not adopt this as a reason.

Finally, the Hearing Officer designated the appropriate unit to be the unit "certified" by the Department in 95-1495.[6] Technically, "certified" is not correct, as the Department did not "certify" the unit in that case. As noted, in 95-1495, the Director *defined* CEMA's bargaining unit and ordered VTA to

[6] The Hearing Officer appears to have taken this designation from VTA's unit clarification petition dated April 1, 2003, attached as Exhibit A to AFSCME's Pre-Hearing Brief, Joint Exhibit 6A. In its petition (p. 3), VTA states that In Case Number 95-1495, the Director "certified [CEMA] as the collective bargaining representative" for the subject bargaining unit.

recognize and to bargain with CEMA as the representative of that unit. Following NLRB procedures, the Director will not certify a union incident to clarifying a unit unless an election is conducted.

ORDER

For the foregoing reasons, it is ORDERED that the unit within which an election shall be held pursuant to the petition for certification filed by AFSCME is the Supervisory-Administrative bargaining unit as defined and ordered by the Department in Case Number 95-1495 and described in the Memorandum of Understanding between VTA and CEMA effective June 21, 1999 to June 8, 2003.

Dated: 5 FEB 04

JOHN M. REA
Acting Director
Department of Industrial Relatio

PROOF OF SERVICE BY MAIL

(Code Civ. Proc., §§ 1013a, 2015.5)

I am employed in the City of San Francisco and County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is 455 Golden Gate Avenue, Suite 9516, San Francisco, CA 94102.

On February 6, 2004, I served the within:

FINAL DECISION AND ORDER OF THE DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS

on all parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Sheila Sexton, Esq.
Beeson, Tayer & Bodine
1404 Franklin Street
Oakland, CA 94612

Vincent Harrington, Esq.
Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Suzanne B. Gifford, General Counsel
Richard A. Katzman, Assistant General Counsel
Santa Clara Valley Transportation Authority
3331 North First Street, C-2
San Jose, CA 95134-1906

Jerilou H. Cossack
Arbitrator, Mediator, Factfinder
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Micki Callahan
State Mediation/Conciliation Service
455 Golden Gate Avenue, 8th Floor
San Francisco, CA 94102

Keith Uriarte
Organizing Director
AFSCME District Counsil #57
1150 North First Street, Suite 101
San Jose, CA 95112-4923

Randy Johnese
Business Representative
County Employee Management Associate
1654 Via Alameda, Suite 110
San Jose, CA 95126

Kaye L. Evleth
Chief Administrative Officer
3331 N. First Street
San Jose, CA 95134-1906

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on February 6, 2004.

Ollie J. Kinsey, Declarant

Jerilou H. Cossack
Arbitrator, Mediator, Factfinder
925-939-1904

PROPOSED DECISION AND ORDER OF THE HEARING OFFICER

In The Matter Of A Controversy Between:

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY (VTA)
Employer

and

COUNTY EMPLOYEES MANAGEMENT ASSOCIATION, (CEMA) Affiliated with OPERATING ENGINEERS LOCAL UNION NO. 3, IUOE, AFL-CIO

Incumbent Union

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), Local 101, AFL-CIO

Petitioner

APPEARANCES:

For the Employer: Suzanne B. Gifford, Esquire
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Richard A. Katzman, Esquire
Assistant General Counsel
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San Jose, California 95134-1906

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For the Petitioner: Sheila K. Sexton, Esquire
Stephen A. Sommers, Esquire
Beeson, Tayer & Bodine
1404 Franklin Street, Suite 500
Oakland, CA 94612

EXHIBIT A

OPINION

The Undersigned Hearing Officer issued a Preliminary Decision on November 17, 2003. That Preliminary Decision, a copy of which is appended, is incorporated and adopted as part of this Proposed Decision and Order.

I.

A hearing was held on November 24, 2003 in San Jose, California. The parties stipulated: (1) The unit defined in the collective bargaining agreement has been recognized by VTA; (2) In Case Number 95 1495 the Director of the Department of Industrial Relations certified CEMA as the collective bargaining representative for the unit described in the collective bargaining agreement; and (3) At all times thereafter, that unit has been continuously recognized by the Employer as the bargaining unit for supervisory-administrative employees.

VTA raised certain arguments in addition to those addressed in the Preliminary Decision. The Hearing Officer determined these constituted a motion for reconsideration. The Director of the Department of Industrial Relations, in the BART decision,[1] determined the enabling legislation of the Southern California Rapid Transit District Act and the enabling legislation of VTA were identical and required the most rigorous adherence to relevant federal law. VTA asserts that the recent enactment of AB 199, expressly granting bargaining rights to supervisors of the Los Angeles County Metropolitan Transportation Authority (successor to Southern California Rapid Transit District), establishes that supervisors in that transit district did not previously enjoy bargaining rights. It therefore follows, according to VTA, that the legislature did not intend to grant VTA supervisors and managers bargaining unit rights.

CEMA responds that AB 199 is irrelevant. It deals with a totally separate employer, does not say anything about existing law, and is not even in effect yet.

AFSCME joins CEMA's assertion of irrelevance and adds that there was no

[1] *In the Matter of a Controversy between San Francisco Bay Area Rapid Transit District and United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555* (1993).

EXHIBIT A.

evidence about the underlying bargaining relationships within which to evaluate the import of the statutory change. The intent of AB 199 was to place these employees under the jurisdiction of the Public Employment Relations Board, not to grant them previously denied bargaining rights.

VTA also asserts *Herman v. County of Los Angeles*, 98 Cal.App.4th 484, 119 Cal.Rptr.2nd 691 (2002) precludes finding all federal law excluding supervisors and managers irrelevant. Neither CEMA nor AFSCME had the opportunity to review this case and took no position with respect to it.

II.

The parties agreed the election should be conducted by mail ballot. They further agreed that the eligibility cut off date is November 14, 2003.

III.

I do not find either of VTA's additional arguments persuasive. With respect to the recent enactment of AB 199, there is simply not enough evidence to evaluate the intent of the Legislature and the implications, if any, for VTA. The history of bargaining in the Los Angeles District is unknown. The explanation advanced by AFSCME of the motivating reason for this legislation is viable.

In the *Herman* case the Court reasoned the agreement reached between the Los Angeles County and the Los Angeles County Metropolitan Transportation Authority (MTA) when MTA abolished its police force and contracted with the County to provide law enforcement services was plainly intended "to make sure no employee of the MTA's police department would be left jobless" as a result. The Court found no ambiguity in the language of the contract between the County and MTA. I would agree with VTA that the analogy could be apt if the enabling PUC legislation at issue here stated that "all" federal law and administrative practice were to be applied in determining bargaining units. That is not the case, however. PUC Section 100301 mandates application of "relevant federal law and administrative practice". Where, as here, there is a significant difference between the PUC legislation and that of the NLRA in terms of the grant of substantive rights, federal law is not determinative.

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IV.

For the reasons set forth above and in my Preliminary Decision, and based on my authority as set forth in Title 8 of the California Code of Regulations, Section 15855, and the stipulations of the parties, I conclude

1. The unit within which an election shall be held pursuant to the petition for certification/decertification filed by AFSCME is that certified by the Director of the Department of Industrial Relations in Case Number 95 1495 and described in the Memorandum of Understanding between VTA and CEMA effective June 21, 1999 to June 8, 2003.

2. The motion of VTA to exclude supervisors and managers from the bargaining unit is denied.

Respectfully submitted,

Jerilou H. Cossack
Hearing Officer

Submitted this 4th day of December 2003
Lafayette, California

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Jerilou H. Cossack
Arbitrator, Mediator, Factfinder
925-939-1904

PRELIMINARY DECISION OF THE HEARING OFFICER

In The Matter Of A Controversy Between:

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY (VTA)
Employer

and

COUNTY EMPLOYEES MANAGEMENT ASSOCIATION, (CEMA) Affiliated with OPERATING ENGINEERS LOCAL UNION NO. 3, IUOE, AFL-CIO
Incumbent Union

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), Local 101, AFL-CIO
Petitioner

APPEARANCES:

For the Employer: Suzanne B. Gifford, Esquire
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For the Union: Vincent A. Harrington, Jr., Esquire
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For the Petitioner: Sheila K. Sexton, Esquire
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OPINION

The Santa Clara County Transit District Act was passed in 1969.[1] It was last amended during the 1995-96 legislative session.

The pertinent provisions of the Public Utility Code, the governing legislation, are,

> 100300. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.
>
> 100301. Any question which may arise with respect to whether a majority of employees in an appropriate unit desire to be represented by a labor organization shall be submitted to the Director of the Department of Industrial Relations. In resolving such questions of representation including the determination of the appropriate unit or units, petitions, the conduct of hearings and elections, the director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act of 1947, as amended, and for this purpose shall adopt appropriate rules and regulations. . . .
>
> 100307. (a) Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code is not applicable to the district.[2]
>
> (b) The amendments to this section made at the 1995-96 Regular Session are not intended to modify, and shall not have the effect of modifying, an existing bargaining unit determination made by the Department of Industrial Relations pursuant to Section 100301.
>
> 100309. To the extent permitted by law, and until altered or revoked as provided by law, the district shall grant recognition to those employee organizations which served as the recognized representatives of the former county employees described in Section 100308 immediately prior to their employment by the district.
>
> The district shall assume and observe all applicable provisions, including wages, of existing written memoranda of understanding in effect between the county and the above

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[1] See footnote 5, at page 11, of the Tentative Decision of the Director of Industrial Relations *In the Matter of a Controversy between San Francisco Bay Area Rapid Transit District and United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555.*

[2] Known as the Meyers-Millias-Brown Act.

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> recognized labor organizations for those former county employees described in Section 100308 who are employed by the district in positions which would have been covered by those memoranda if the employees had remained employed by the county, . . .

In Case Number 95 1495 the Director of the Department of Industrial Relations certified CEMA as the collective bargaining representative for a unit defined as:

> All classified and unclassified employees in the coded classifications, and the positions held by such employees, in the Supervisory-Administrative bargaining unit, who transferred to the District effective as of January 1, 1995, as a result of the statutory reorganization mandated by Assembly Bill 2442 and who, prior to the transfer, held positions covered by a labor agreement in effect between County Employees Association and the County of Santa Clara.

The most recent collective bargaining agreement between the Employer and CEMA was a memorandum of understanding effective June 21, 1999 to June 8, 2003. The preamble of the memorandum of understanding contains the following paragraph:

> VTA and CEMA acknowledge that Public Utilities Code Sections 100308 and 100309 were enacted effective January 1, 1995, pursuant to Chapter 254, Statutes 1994 ("AB 2442"), and that pursuant there to certain employees formerly employed by the County of Santa Clara were hired by VTA, and this Memorandum of Understanding, and its appendices, are intended to, and do, among other things, implement the provisions of Section 100308 and 100309.

On March 6, 2003[3] AFSCME filed a petition for certification in the above-described unit. On March 21 Thomas Nagle of the California State Mediation and Conciliation Service verified that AFSCME had submitted a sufficient showing of interest to require an election. Mr. Nagle further advised that the incumbent union, CMEA, affiliated with Operating Engineers, Local 3, had filed a complaint under Article XX of the AFL-CIO Constitution and that further action on the petition would be deferred pending resolution by the AFL-CIO.

Valley Transportation Authority filed a petition to clarify the bargaining unit on April 1, seeking to exclude supervisors and managers. On April 23 Chuck Cake,

[3] Hereafter, all dates are 2003 unless otherwise specified.

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Acting Director of the Department of Industrial Relations, dismissed without prejudice the petition to clarify the bargaining unit, relying on the Rules and Regulations of the National Labor Relations Board (NLRB) which bar action on a unit clarification petition while there is a question concerning representation pending. The AFSCME petition raised a question concerning representation.

The Employer submitted a new petition to clarify the bargaining unit on August 7, again asserting the inclusion of supervisors and managers in the bargaining unit irremediably poisoned any election conducted in that unit. The Employer's petition was again rejected by Acting Director Cake on September 5, again relying on NLRB Rules and Regulations baring action on a unit clarification issue while a question concerning representation exists.

On October 6 the undersigned was appointed as hearing officer in the matter described as "Petition for Certification (AFSCME)/Santa Clara Valley Transit Authority". The hearing officer was directed to

> . . . determine whether an election is to be held, and, if so, the appropriate unit or units within which such election shall be held and the categories of employees who shall be eligible to vote in such unit or units.

Following a conference call with all parties and in accord with the briefing schedule therein agreed upon, the hearing officer directed the parties to submit briefs setting forth their respective positions on the scope of the hearing scheduled for November 24 and 26. Provision was also made for reply briefs. All reply briefs were received on November 13.

Positions of the Parties

Santa Clara Valley Transportation Authority (VTA) (Citations omitted.)

The organic law governing the determination of appropriate units and subsequent bargaining requires the Department of Industrial Relations to apply "the relevant federal law and administrative practice developed under the Labor

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Management Relations Act of 1947, as amended. . . ." Only federal labor law, not state labor law is applicable; Public Utility Code § 100307 explicitly exempts the Employer from the Meyers-Millas-Brown Act. The Department's decision respecting a representation question at VTA must be completely consistent with federal labor law.

The current unit within which an election is sought includes roughly forty rank-and-file employees and more than two hundred fifty supervisory and managerial employees. Allowing agents of management, supervisors and managers, to vote violates the laboratory conditions required and the right of rank-and-file employees to freely choose whether to be represented, and if so, by whom.

Allowing a unit with the gross over-weighting of supervisors and managers clearly constitutes an unfair labor practice in that it is an employer dominated or assisted bargaining unit. Allowing such a unit also exceeds the Department's jurisdiction, because the Department cannot compel the Employer to bargain with a unit of supervisors.

In the 1993 decision *In the Matter of a Controversy between San Francisco Bay Area Rapid Transit District and United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555* (hereafter referred to as the BART decision), the Department has already determined that in resolving representation questions at VTA it must apply the NLRA. When the NLRA is applied, supervisors and managers may not be included in a bargaining unit and may not vote in an election.

The initial stabilizing statute when VTA was created, requiring VTA to assume extant memoranda of understandings between Santa Clara County and employee organizations, does not trump and repeal the clear legislative command for the Department to apply the NLRA to VTA. Standard rules of statutory construction do not allow for such an extraordinary implied repeal. Further, the legislature as recently as this year reaffirmed its determination that VTA must adhere to the NLRA. Federal law, as the Department in the BART decision observed, allows the supervisory issue to be raised at any time.

Both of VTA's petitions for clarification were dismissed, without prejudice, by

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the Department. What the Department delegated to the hearing officer is the determination of ". . . the appropriate unit or units within which such election shall be held and the categories of employees who shall be eligible to vote. . . ." Supervisors and managers must be barred from voting for the reasons set forth above. None of the cases cited by CEMA are relevant because none deal with the problem of non-statutory employees in a bargaining unit, nor with the unfair labor practice of having management's agents, supervisors and managers, participate in elections with rank-and-file employees.

The Department does not have jurisdiction to compel VTA to recognize or bargain with a unit containing supervisors or managers. The Department should determine that only statutory employees may vote.

County Employees Management Association (CEMA), Affiliated with Operating Engineers Local Union No. 3, IUOE, AFL-CIO (Citations omitted.)

The order referring this matter to the hearing officer does not incorporate the employer's unit modification petition. Accordingly, the hearing officer is requested to issue a ruling in limine, precluding the offer by VTA, or any of the parties, of evidence offered because of its tendency to show that the existing representation unit should be modified, or clarified, to exclude from it any classification of employees, or incumbents, presently included within the existing unit.

Any election conducted on the AFSCME decertification/certification petition must be conducted within and among the employees assigned to the bargaining unit which is currently certified or recognized. The decertification procedure, to the extent it challenges a union's ongoing recognitional status, and its support among the employees affected, must reflect the view of the entire existing collective bargaining unit, and not just a portion, or modified version of that unit. The only question before the hearing officer is what is the presently recognized unit. The hearing officer should issue a second ruling in limine precluding the tender of any evidence offered to show that some unit other than the presently recognized unit

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covered by the present collective bargaining agreement is the unit in which a decertification election should be directed.

Any evidence offered to show that the unit presently recognized should be modified to exclude so-called "supervisory" employees should be rejected because it is not "relevant". Federal cases excluding supervisors from representation, and therefore from bargaining units, is not applicable to the labor relations of the employer. The Director in the BART decision has determined there is no "relevant law or administrative practice" which has arisen under the LMRA that relates to the representation rights of supervisors, because of the marked differences between the statutory definition of "employee".

VTA was obligated to recognize the employee organizations and existing collective bargaining agreements of its predecessor, without reference to or distinction between supervisory and non-supervisory employees. By virtue of its enactment of other legislation dealing with public employees in the state, it is obvious the legislature knows how to distinguish between supervisory, managerial and rank-and-file employees. It has not done so in the enabling legislation governing labor relations at VTA. One cannot invent statutory exclusions from substantial labor rights which the legislature itself has not created when it created the bargaining rights at issue.

There has never been an historical exclusion of supervisors from this bargaining unit, there is no statutory basis for excluding them from the unit, or from representation rights, and the Director has previously determined, in the BART decision involving an analogous situation and under the same set of regulations, that there is no relevant federal labor relations authority which would support the exclusion of supervisory employees from collective bargaining rights under this statute.

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American Federation of State, County and Municipal Employees (AFSCME), Local 101, AFL-CIO (Citations omitted.)

For both procedural and substantive reasons, VTA's attempt to sever the supervisors and managers from the bargaining unit is inappropriate. The hearing officer has not been vested with jurisdiction over VTA's modification petition, but rather is vested solely with regard to the issues related to AFSCME's election petition. Assuming arguendo that the appropriateness of supervisors and managers in the existing bargaining unit is properly before the hearing officer, the historical and legal basis for appropriate unit determinations in transit districts leads to the conclusion the existing unit is appropriate and should be upheld.

Labor relations at VTA are governed by Public Utility Code § 100300, *et seq.* That code section does not distinguish between supervisors and rank-and-file employees in any manner. Neither do the regulations promulgated by the Director of the Department of Industrial Relations to certify and clarify bargaining units in the various transit authorities.

The enabling Code and corresponding regulations instruct the Director to "apply relevant law and administrative practice developed under the Labor Management Relations Act, 1947, as amended." The NLRB is without jurisdiction to certify bargaining units which contain certain individuals who do not fit the definition in the LMRA for "employee". The Public Utility Code (PUC) and DIR regulations diverge from the LMRA in regard to treatment of supervisors. Whereas the LMRA specifically excludes supervisors from the definition of employee, the DIR regulations and the PUC do not. Further, the industry practice is that transit districts throughout California regularly recognize and negotiate collectively with supervisor units and mixed supervisor/non-supervisor units. The PUC covering VTA employees is not in accord with the LMRA on this issue and thus the LMRA is not relevant, consistent with the Director's conclusion in the BART decision. Since there is no qualification to the term "employee" in the PUC provisions applicable here, as there is in the LMRA, the term embraces supervisory and managerial, as well as non-

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supervisory, employees. Indeed, supervisory employees were determined to be within the meaning of "employees" under the NLRA until it was amended in 1947 to expressly exclude them.

VTA's assertion rank-and-file employees may not be placed in a bargaining unit along with supervisors and managers is unsupported by the law. The enabling statute prescribes no inherent limitation with regard to mixed rank-and-file and supervisory units. The hearing officer should not presume a limitation where none exists.

VTA has bargained with its mixed rank-and-file, supervisory and managerial unit for many years and over successive collective bargaining agreements. By its conduct VTA has waived its right to challenge the appropriateness of the unit. This assertion is buttressed by the fact that the 1995/1996 amendments to VTA's enabling legislation were not intended to modify or have the effect of modifying an existing bargaining unit determination made by DIR.

DISCUSSION

There is no pending petition for clarification of the bargaining unit currently represented by CMEA and sought by AFSCME. Both VTA-filed petitions for clarification have been dismissed by the Acting Director.

The issue of whether an election may be conducted and the results certified by the Director in a bargaining unit including purported supervisors and managers is not thereby resolved. If, as VTA asserts, the enabling legislation requires adoption of NLRA substantive law, the Director would be precluded from certifying a bargaining unit containing supervisors and managers. It would be necessary to hold an evidentiary hearing to determine which, if any, of the persons in the existing unit were supervisors or managers. VTA's reliance on NLRB precedent, however, is misplaced.

The LMRA both defines the term supervisor and provides for the exclusion of supervisors from bargaining units and from the Act's protection. There is neither

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definition nor preclusion in the enabling PUC legislation applicable to VTA, nor may either be inferred. Where, as here, there is a significant statutory difference between the enabling legislation of the LMRA and that of the PUC, LMRA precedent cannot control, i.e., it is not "relevant". Nor does the recent enactment of AB 1064 render LMRA precedent on supervisors and managers determinative. AB 1064 mandates application of the LMRA to pension systems in the public transit industry. It has no bearing on bargaining rights or unit determinations.

VTA misconstrues the import of *Public Employees of Riverside City v. City of Riverside*, 75 Cal.App.3d 882 (1978). Although this case involved the Meyers-Millas-Brown Act, the critical holding relevant to the present matter is the analysis of the effect of the statutory differences between LMRA and Meyers-Millas-Brown with respect to supervisory employees. Significantly, the court reasoned,

> . . .[Meyers-Millas-Brown] extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy. The act is silent about their unit placement. The California Legislature thus minimized the potential or actual conflict of interest that, as mentioned in *NLRB v. Bell Aerospace Co.* (1974) 416 U.S. 267, 271-272 [94 S.Ct. 1757, 40 L.Ed.2d 134, 141-142], was the basis for the total exclusion of management employees that obtains under federal law.

PUC Section 100300 extends the right of organization and representation to employees without restriction, including to supervisors and managers. This construction of the enabling PUC legislation is consistent with early NLRB and court decisions, which similarly extended bargaining rights to supervisors and managers prior to the 1947 Taft Hartley amendments. See *Packard Motor Car Co. v. NLRB*, 330 US 485 (1947), the Supreme Court decision which prompted the 1947 amendments reversing its holding, and the Court's lengthy discussion in *Bell Aerospace*, *supra*.

Absent evidence to the contrary, it is to be presumed the Legislature was knowledgeable about the composition and structure of transit bargaining units when it passed the PUC provisions here in question. The Legislature mandated bargaining in the very unit VTA now challenges. The Legislature, however, consistent with its

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other ventures into public sector collective bargaining, has determined that the private sector model excluding supervisors and managers from representational rights is not the most desirable public policy. The Legislature placed the imprimature of approval on the existing bargaining unit.

Various California courts have recognized that bargaining in the public sector raises issues not present in the private sector. In *International Brotherhood of Electrical Workers, Local 889 v. Lloyd w. Aubry, Jr.*, 42 Cal.App.4th 861, 871 (1996) the Court of Appeal noted,

> The evaluation of what is an appropriate unit involves consideration of whether the employees of a unit are united by community of interest. . . In public sector employment, additional factors to be considered are the employer's authority to bargain effectively at the level of the unit and the effect of a unit on the efficient operation of the public service. . . .

The existing unit has been approved by the Legislature. The governing code has been amended with the specific admonition, at Section 100307(b), that the amendments not change the existing bargaining unit determination made by the Department of Industrial Relations. That determination described the existing unit. It shall not be disturbed.

Accordingly, for the reasons set forth above and based on my authority as set forth in the Director's October 6 appointment of the undersigned as hearing officer, I issue the following

Preliminary Proposed Decision and Order

1. The appropriate unit within which an election shall be held pursuant to the petition for certification/decertification filed by AFSCME is that certified by the Director of the Department of Industrial Relations in Case Number 95 1495 and as described in the recently expired Memorandum of Understanding between VTA and CMEA.

2. The motion of Employer VTA to exclude supervisors and managers from the bargaining unit is denied.

3. The motion in limine of CMEA to preclude evidence offered to show the existing representation unit should be modified to

EXHIBIT A

exclude from it any classification of employees presently included is granted.

4. The motion in limine of CMEA to preclude the tender of any evidence offered to show that some unit other than the presently recognized unit covered by the present collective bargaining agreement is the unit in which a decertification election should be directed is granted.

Respectfully submitted,

Jerilou H. Cossack
Hearing Officer

Submitted this 17th day of November 2003
Lafayette, California

EXHIBIT A

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
P.O. Box 420603
San Francisco, CA 94142

PETE WILSON, Governor

May 14, 1997

Richard J. Loftus
Michael W. Droke
Littler, Mendelson, Fastiff & Tichy
50 West San Fernando Street, 14th Floor
San Jose, CA 95113

Vincent A. Harrington
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600 Harrison Street, Suite 535
San Francisco, CA 94107-1370

Robert L. Mueller
Operating Engineers Local Union No. 3
1620 South Loop Road
Alameda, CA 94502

Re: Santa Clara Transit District - Unit Clarification Petitions

Dear Parties,

Enclosed is the Proposed Unit Clarification Order of Hearing Officer Jean Gaskill in the matter referred to above. The decision is hereby adopted as the Director's decision, pursuant to the Department's regulations, 8 California Code of Regulations, section 15855.

The Department's regulations, 8 California Code of Regulations, section 15860, provide that any party may file a statement, setting forth exceptions or newly discovered evidence, together with two copies of a supporting brief, within 20 days from the date of service of the Decision. All other parties may file a response to the exceptions within seven days

EXHIBIT B

after the mailing of the exceptions, or 20 days after the mailing of the initial decision, whichever is later.

Sincerely yours,

Lloyd W. Aubry Jr.
Director of Industrial Relations

cc: Jean Gaskill
Pete Lujan
Vanessa Holton

EXHIBIT B

IN PROCEEDINGS BEFORE THE

DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

SANTA CLARA COUNTY TRANSIT DISTRICT, Petitioner, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715 and AMALGAMATED TRANSIT UNION, DIVISION 265, AFL-CIO, Respondents.	PROPOSED UNIT CLARIFICATIONS
SANTA CLARA COUNTY TRANSIT DISTRICT, Petitioner, v. COUNTY EMPLOYEES MANAGEMENT ASSOCIATION (CEMA), AFFILIATED WITH OPERATING ENGINEERS LOCAL UNION NO. 3 and AMALGAMATED TRANSIT UNION, DIVISION 265, AFL-CIO, Respondents.	

CONSOLIDATED PETITIONS FOR CLARIFICATION OF EXISTING BARGAINING UNITS

On April 17, 1997, the parties met at a conference attended by the Hearing Officer and counsel for all the parties. The purpose of the conference was to consider and hear argument

EXHIBIT B

on the question whether any issues framed by the petitions and amended petitions filed in this case remain undetermined.

Having heard the arguments of counsel and having reviewed the papers heretofore filed in the matter, the Hearing Officer is persuaded that no issues remain to be decided and that the unit clarifications sought by the District can be issued on the basis of the Interim Decision and Supplemental Interim Decision adopted by the Director on February 27, 1997 and March 17, 1997, respectively.

Accordingly, the Hearing Officer proposes that the definitions of the three bargaining units involved in this case be as follows:

I.

The Unit Represented By
Amalgamated Transit Union,
Division 265, AFL-CIO

All employees in production, operation and maintenance activities of the Santa Clara County Transit District, including drivers, dispatchers and maintenance personnel, except employees and the positions held by those employees who transferred to the District effective as of January 1, 1995, as a result of the statutory reorganization mandated by Assembly Bill 2442 and who, prior to the transfer, held positions covered by a labor agreement in effect between Service Employees

EXHIBIT B

International Union Local 715 and the County of Santa Clara, and excluding clerical employees, guards and supervisors not presently covered by a Collective Bargaining Agreement with the Santa Clara County Transit District, and excluding also all classified and unclassified supervisory and administrative employees in coded classifications and the positions held by such employees who transferred to the District effective as of January 1, 1995 as a result of the statutory reorganization mandated by Assembly Bill 2442 and, who prior to the transfer, held positions covered by a labor agreement in effect between County Employees Management Association and the County of Santa Clara.

II.

The Unit Represented By
Service Employees International Union
Local 715

All classified and unclassified workers in the coded classifications, and the positions held by such workers, within the following bargaining units: Clerical; Administrative, Professional and Technical; Blue Collar; Public Health Nursing, who

EXHIBIT B

transferred to the District effective as of January 1, 1995 as a result of the statutory reorganization mandated by Assembly Bill 2442 and, who prior to the transfer, held positions covered by a labor agreement in effect between Service Employees International Union Local 715 and the County of Santa Clara.

III.

The Unit Represented By
County Employees Management Association

All classified and unclassified employees in the coded classifications, and the positions held by such employees, in the Supervisory-Administrative bargaining unit, who transferred to the District effective as of January 1, 1995, as a result of the statutory reorganization mandated by Assembly Bill 2442 and who, prior to the transfer, held positions covered by a labor agreement in effect between County Employees Management Association and the County of Santa Clara.

Date: 5/12/97

Joan C. Gaskill
Hearing Officer

EXHIBIT B

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
P.O. Box 420603
San Francisco, CA 94142

PETE WILSON, *Governor*

March 17, 1997

Richard J. Loftus
Michael W. Droke
Littler, Mendelson, Fastiff & Tichy
50 West San Fernando Street, 14th Floor
San Jose, CA 95113

Vincent A. Harrington
Van Bourg, Weinberg, Rogers & Rosenfeld
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San Francisco, CA 94107-1370

Robert L. Mueller
Operating Engineers Local Union No. 3
1620 South Loop Road
Alameda, CA 94502

Dear Parties:

Enclosed is the Proposed Supplemental Interim Decision of Hearing Officer Jean Gaskill in the matter referred to above. The decision is hereby adopted as the Director's decision, pursuant to the Department's regulations, 8 California Code of Regulations, section 15855.

No exceptions to the Interim Decision will be accepted at this time.

The hearing officer will issue an order convening a conference, preferably during the month of April, to solicit the views of the parties as to: (1) whether any issues framed by the petitions filed in this case remain undetermined and (2) whether the taking of any evidence is necessary to allow the hearing officer to determine any remaining issues. If it appears likely that an additional evidentiary hearing will be needed, the hearing officer at the April conference will also hear the views of the parties as to whether the filing of exceptions to the Interim Decision shall be permitted prior to the convening of an an additional hearing, or, in the

EXHIBIT B

alternative, whether the filing of exceptions shall be permitted only after issuance of the final decision in this matter, deciding all issues raised by the pending petitions.

Notice of the date, time and place of the second part of the hearing will be served on all parties by the hearing officer.

Sincerely yours,

/s/

Lloyd W. Aubry, Jr.
Director of Industrial Relations

cc: Jean Gaskill
Pete Lujan
Vanessa Holton

EXHIBIT B

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. §§ 1013a, 2015.5)

Case Name: SANTA CLARA COUNTY TRANSIT DISTRICT v. SERVICE EMPLOYEES INTERNATIONAL, et al.

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 45 Fremont Street, Suite 450, San Francisco, California 94105. On February 28, 1997, I served the following document: Proposed Interem Decision Of Hearing Officer Jean Gaskil on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

EXHIBIT B

IN PROCEEDINGS BEFORE THE

DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

SANTA CLARA COUNTY TRANSIT DISTRICT, Petitioner, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715 and AMALGAMATED TRANSIT UNION, DIVISION 265, AFL-CIO, Respondents.	SUPPLEMENTAL PROPOSED INTERIM DECISION AND AWARD
SANTA CLARA COUNTY TRANSIT DISTRICT, Petitioner, v. COUNTY EMPLOYEES MANAGEMENT ASSOCIATION (CEMA), AFFILIATED WITH OPERATING ENGINEERS LOCAL UNION NO. 3 and AMALGAMATED TRANSIT UNION, DIVISION 265, AFL-CIO, Respondents.	

CONSOLIDATED PETITIONS FOR CLARIFICATION OF EXISTING BARGAINING UNITS

The director has observed that, in the Proposed Interim Decision and Award issued by the Hearing Officer on February 5,

EXHIBIT B

1997, there is no explicit disposition of the following question:

> Whether, upon the expiration of the existing labor agreements between the County and SEIU and CEMA, which agreements were adopted by the District as a result of the statutory reorganization, the obligation of the District to recognize the SEIU and CEMA units ceases.

The question arises because of the suggestion in ATU's briefs that the District was obligated or entitled under Public Utilities Code § 100309 to recognize SEIU and CEMA, if at all, only until the labor contracts existing as of January 1, 1995 unexpired. Upon the expiration of the agreements, according to ATU, the employees in the SEIU unit and the non-supervisory employees, if any, in the CEMA unit would accede to ATU.

The Legislature could not have intended such a result, nor does the statute dictate such a conclusion. It makes no labor relations sense, in the context of a statutory scheme that clearly mandates the transfer intact of the existing bargaining units to the successor entity, that the units should later simply cease to exist and be handed over to another Union without so much as a vote or other expression of the employees in the units to their acquiescence in being so handed over.

The only logical conclusion is that the Legislature intended that the distinct units continue to exist and that, upon the expiration of the labor agreements, the District be obligated to negotiate new contracts instead of continuing to be bound by the terms of the expired agreements. The statute supports such a conclusion.

EXHIBIT B

Section 100309 has two distinct aspects: (1) a command that the District "shall grant recognition to those employee organizations which served as the recognized representatives of the former county employees . . . ," and (2) a directive that the District "shall assume and observe all applicable provisions, including wages, of existing written memoranda of understanding . . . . This obligation extends only for the remainder of the term of the respective existing written memoranda of understanding and to the extent not superseded by a successor agreement . . . ."

The first aspect, i.e., the requirement to "grant recognition," is absolute and is not temporally proscribed by the occurrence of any subsequent event. It contemplates that the obligation will continue until something happens between SEIU and CEMA, on the one hand, and the District, on the other, to terminate the relationship (e.g., decertification).

The second aspect, i.e., the obligation to observe the terms of the existing agreements, is the only one of the two aspects of § 100309 that is temporally proscribed by the duration of the agreements. Upon the expiration of those agreements, the District may cease observing the terms of the expired agreements "to the extent [they are] superseded by . . . successor agreement[s] . . . ."

Thus, this Supplemental Proposed Interim Decision and Award makes explicit what was implicit in the earlier Decision and Award:

- The obligation of the District to recognize the

EXHIBIT B

SEIU and CEMA units survives the expiration of the labor agreements that were in effect on January 1, 1995.

Date: March 10, 1997

Jean C. Gaskill
Hearing Officer

EXHIBIT B

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
P.O. Box 420603
San Francisco, CA 94142

PETE WILSON, Governo

February 27, 1997

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Robert L. Mueller
Operating Engineers Local Union No. 3
1620 South Loop Road
Alameda, CA 94502

Dear Parties,

Enclosed is the Proposed Interim Decision of Hearing Officer Jean Gaskill in the matter referred to above. The decision is hereby adopted as the Director's decision, pursuant to the Department's regulations, 8 California Code of Regulations, section 15855.

The Department's regulations, 8 California Code of Regulations, section 15860, provide that any party may file a statement, setting forth exceptions or newly discovered evidence, together with two copies of a supporting brief, within 20 days from the date of service of the Decision. All other parties may file a response to the exceptions within seven days after the mailing of the exceptions, or 20 days after the mailing of the initial Decision, whichever is later.

Notice of the date, time and place of the second part of the hearing

EXHIBIT B

will be served on all parties by the hearing officer.

Sincerely yours,

Lloyd W. Aubry Jr.
Director of Industrial Relations

cc: Jean Gaskill
Pete Lujan
Vanessa Holton

EXHIBIT B

A Richard J. Loftus
Michael W. Droke
Littler, Mendelseon, Fastiff & Tichy
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San Francisco, CA 94107-1370

A. Robert L. Mueller
Operating Engineers Local Union No. 3
1620 South Loop Road
Alameda, CA 94502

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 28, 1997, at San Francisco, California.

Barbara Richard

Barbara Richard - Declarant

EXHIBIT B

IN PROCEEDINGS BEFORE THE

DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

SANTA CLARA COUNTY TRANSIT DISTRICT, Petitioner, v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715 and AMALGAMATED TRANSIT-UNION, DIVISION 265, AFL-CIO, Respondents.	PROPOSED INTERIM DECISION AND AWARD
SANTA CLARA COUNTY TRANSIT DISTRICT, Petitioner, v. COUNTY EMPLOYEES MANAGEMENT ASSOCIATION (CEMA), AFFILIATED WITH OPERATING ENGINEERS LOCAL UNION NO. 3 and AMALGAMATED TRANSIT UNION, DIVISION 265, AFL-CIO, Respondents.	

CONSOLIDATED PETITIONS FOR CLARIFICATION OF EXISTING BARGAINING UNITS

EXHIBIT B

I.

INTRODUCTION

These consolidated petitions for clarification of bargaining units within the workforce of the Santa Clara County Transit District ("District") are brought under California Public Utilities Code Section 100301.[1] Jean C. Gaskill is the Hearing Officer, having been duly appointed by the Director of the Department of Industrial Relations ("Director") pursuant to California Code of Regulations Section 15830. An initial hearing, at which all parties and their attorneys appeared, was held on June 14, 1996.

The petitions constitute the District's request for a declaration of its obligations to recognize and bargain with each of three contending labor organizations and require resolution of a dispute regarding which of the Unions is entitled to be the exclusive bargaining representative of which District employees. The Unions are: Service Employees International Union Local 715 ("SEIU"); Amalgamated Transit Union, Division 265 ("ATU"); and County Employees Management Association ("CEMA").[2]

At the June 14 hearing, it was determined after oral presentations by counsel that the matter would proceed in two

---

[1] Unless otherwise indicated, all section references are to the California Public Utilities Code.

[2] Originally, the District filed a petition for clarification relating to the SEIU and ATU bargaining units. It later filed another petition seeking clarification relating to the CEMA and ATU bargaining units and moved to consolidate the two petitions for hearing and determination. At the June 14 hearing, the Hearing Officer heard arguments on, and granted, the motion to consolidate.

EXHIBIT B

phases. Phase one, in the nature of cross-motions for summary judgment, would be decided upon briefs, declarations and supporting documentation.[3] Phase two, requiring further factual hearings, would deal with the specific disputes regarding the scope of the respective bargaining units in light of the decision rendered in the first phase.

This Proposed Interim Decision and Award deals only with the agreed-upon first phase.

II.

THE ISSUE

The overarching legal issue in this phase of the proceeding is:

> Under the 1994 legislation that reorganized and established the Santa Clara County Transit District as an independent agency, was the District required to, and did it properly, recognize SEIU and CEMA as the exclusive bargaining agents and assume existing labor agreements for County and Congestion Management Agency employees who transferred to the District?[4]

III.

THE BACKGROUND

Legislation that became effective on January 1, 1995, consolidated all public transportation functions in Santa Clara County into a reorganized, independent District and provided for

---

[3] The Unions each filed answers to the petitions in an effort to narrow the legal issues, and all parties then filed opening and reply briefs.

[4] This is the only issue raised by the petitions that can be decided at this stage. The Unions, in their briefs, nevertheless, have requested declarations of the scope and composition of their respective bargaining units. These are issues that must be resolved in phase two.

EXHIBIT B

the transfer to the District's workforce of certain support and supervisory employees from the workforces of the County of Santa Clara ("County") and the Santa Clara County Congestion Management Agency ("CMA"). As County and CMA employees, these support and supervisory personnel had been represented by SEIU and CEMA, respectively. The operating employees of the Transit District before the reorganization were represented by ATU.

A. The Pre-Reorganization Lineup:

The District came into existence in 1972 and took over from private entities the public transportation functions in Santa Clara County. At its inception, the District was run by the five-member Santa Clara County Board of Supervisors as its governing body. The District was basically an operating entity of limited jurisdiction employing bus drivers, dispatchers, mechanics and maintenance personnel. Support services relating to the transportation functions, such as management, administrative, clerical and building maintenance services, were provided by persons employed by the County and the CMA.

In August 1973, following an election supervised by the Department of Industrial Relations, ATU was certified as the exclusive bargaining representative for:

> All employees in production, operation and maintenance activities of the Santa Clara County Transit District, including drivers, dispatchers and maintenance personnel, and excluding clerical, guards and supervisors not presently covered by a Collective Bargaining Agreement with the Santa Clara

EXHIBIT 4.B

County Transit District.[5]

The labor contract in existence between the District and ATU at the time these proceedings commenced covers the period from February 15, 1993 to February 11, 1997 and provides that:

> The District recognizes the Union as the exclusive bargaining agent for all employees in the bargaining unit.

The record does not disclose when it was that SEIU became the bargaining agent for the County employees but it appears circumstantially that the relationship predates 1974. The most recent labor contract between the County and SEIU, covering the period from July 18, 1994 through July 14, 1996, provides that:

> The County recognizes Local 715 [SEIU] (Santa Clara County Chapter) as the exclusive bargaining representative for all classified and unclassified workers in the coded classifications within the following bargaining units:
>
> Clerical
> Administrative, Professional and Technical
> Blue Collar
> Public Health Nursing

It was SEIU-represented employees within these units who, before January 1, 1995, had been County and CMA employees furnishing support services to the District's transportation operations and who, after the statutory reorganization of the District, transferred to and became employees of the District.

Neither does the record reflect when it was that CEMA first became the bargaining agent of the supervisory support

[5] In its brief, ATU points out that it has represented the operating transportation employees in Santa Clara County since the early part of this century.

EXHIBIT B

employees but that relationship also appears to have been in existence since before 1974. The most recent Memorandum of Understanding between the County and CEMA, covering the period from June 20, 1994 through August 25, 1996, provides that:

> The County recognizes County Employees Management Association (CEMA) as the exclusive bargaining representative for all classified and unclassified employees in coded classifications within the Supervisory-Administrative bargaining unit.

It was CEMA-represented supervisory employees within this unit who, before the statutory reorganization, were County and CMA employees furnishing support services to the District and who, afterwards, transferred to and became employees of the District.

Thus, for a long period of time before the reorganization of the District on January 1, 1995, employees from the three recognized bargaining units, albeit working for three different employing entities, were performing the work relating to the provision of public transportation services in Santa Clara County.

B. The Statutory Reorganization:

During its 1993-94 Regular Session, the Legislature enacted AB 2442 amending the Public Utilities Code to provide, in pertinent part, as follows:

> § 100060. Creation of Board; Membership
>
> (a) The government of the district shall be vested in a board of directors which shall consist of 12 members . . . .
>
> § 100126. Effect of reorganization on contracts and obligations of the district
>
> The district, which was established with the approval of the voters in 1972, shall

EXHIBIT B

continue as an entity under the control of its governing board as reorganized pursuant to amendments to this part by statutes that were enacted in 1994. Nothing in this act that added this section in the second year of the 1993-94 Regular Session shall be construed to alter, impair, or terminate existing contracts between the district and other parties, including, but not limited to, funding agreements, grants, labor agreements, agreements entered into pursuant to section 13(c) of the Federal Transit Act and its antecedents, bonds, notes, equipment trust certificates, or other obligations of the district. All rights and powers of the district shall continue in full force and effect and no affirmation, adoption, or assumption by the board of directors is required for that continuation. the district shall become the successor to certain county contracts as provided by agreement between the county and the district. [Emphasis added.]

§ 100308. Transfer of county employees and employees of the Santa Clara County Congestion Management Agency

County employees and employees of the Santa Clara County Congestion Management Agency who, on a date or dates determined by the board of directors, terminate their employment and immediately thereafter become employees of the district, shall transfer to the district, and the district shall assume liability for, all of their accrued and unused vacation, sick leave, personal leave, compensating time off and STO balances and days of accrued service in accordance with the records of their former employer in lieu of any payment by the former employer for those balances. Those employees who were covered by a county or congestion management agency pension plan shall be entitled to the same or equivalent rights, options, privileges, benefits, obligations, accrued service, and status under the pension plan of the district.

§ 100309. Recognition of organizations representing former county employees

To the extent permitted by law, and until altered or revoked as provided by law, the

EXHIBIT B

district shall grant recognition to those employee organizations which served as the recognized representatives of the former county employees described in Section 100308 immediately prior to their employment by the district.

The district shall assume and observe all applicable provisions, including wages, of existing written memoranda of understanding in effect between the county and the above recognized labor organizations for those former county employees described in Section 100308 who are employed by the district in positions which would have been covered by those memoranda if the employees had remained employed by the county. This obligation extends only for the remainder of the term of the respective existing written memoranda of understanding and to the extent not superseded by a successor agreement between the district and a recognized labor organization.

C. The Current Alignment:

In August 1994, in anticipation of the passage of AB 2442, representatives of the District as it was then constituted met with representatives of SEIU and CEMA to plan the transition. They entered into "Sideletter Agreements" which, inter alia, provided that:

> Specific provisions were included in the legislation to protect the benefits of County employees who, on specified dates, terminate their employment and immediately thereafter become employees of the [reorganized] District. . . . The District will assume and observe all applicable labor agreement provisions, including wages, for the above County employees until these agreements expire or are superseded by successive labor agreements. In addition, the legislation provides, to the extent permitted by law, that the District shall grant recognition to the County's recognized employee organizations which represented the transferred County employees.

EXHIBIT B

Officially on January 1, 1995, some 238 County employees represented by SEIU and 170 County employees represented by CEMA, in a wide range of support and supervisory positions, transferred and became District employees. The District assumed the collectively bargained obligations under the existing labor contracts and recognized the representative status of SEIU and CEMA for the transferred employees.

Several months later, in May 1995, ATU lodged with the General Manager of the District a grievance challenging the entry of the former County employees into the District's workforce.[6] ATU claimed that those employees should be part of the ATU bargaining unit.[7]

The District filed its petition for clarification in order to resolve the issues raised by ATU's grievance.

---

[6] CEMA, SEIU and the District all assert that ATU should be barred by laches or equitable estoppel from challenging the petitions because of ATU's initial five-month delay. To varying degrees, they claim to have changed position in detrimental reliance. At this stage of the proceedings, and in light of the result here reached, it is unnecessary to consider those issues. Any assertions of prejudice suffered as a result of the delay can be considered in phase two as it relates to particular contested job classifications.

[7] It is noted in passing that there is a history of challenges by ATU to the performance by County employees of work that ATU considers as falling within its jurisdiction. The District's SEIU petition asserts, and ATU's answer does not deny, that in 1974 a jurisdictional dispute arose and was settled between SEIU and ATU concerning SEIU-represented employees performing work on the then District's Dial-A-Ride project, and again in 1992 a dispute concerning allocation of work as between the two Unions relating to the Lite Rail workers was settled by a tripartite agreement entered into among SEIU, ATU and the District.

EXHIBIT B

V.

DECISION

Resolution of this phase of the dispute turns upon the meaning and effect of the 1994 amendments that added sections 100126, 100308, and 100309 to the Public Utilities Code. The starting point, therefore, is with the statutory language itself. And, in keeping with the rubric of statutory interpretation, if the meaning of the statute is clear on its face, one need not inquire further.

Section 100126 states in the plainest terms possible that the enactment of the 1994 amendments "shall not alter, impair, or terminate existing contracts between the district and other parties, including . . . labor agreements . . . ." On January 1, 1995, when the amendments became effective, there was in existence a labor agreement between SEIU and the County. That agreement had a term commencing on July 18, 1994 and ending on July 14, 1996. Likewise, on January 1, 1995, there was in existence a labor agreement between CEMA and the County, which agreement had a term commencing on June 20, 1994 and ending on August 25, 1996.

It is undisputed that, before January 1, 1995, SEIU was the employee organization recognized by the County as the exclusive bargaining agent for the County employees who were performing the support functions for the transit system. It is also undisputed that, before January 1, 1995, CEMA was recognized by the County as the employee organization representing the supervisory employees employed by the County and performing

EXHIBIT B

certain management and supervisory functions for the transit system.

The core provisions of section 100309 state equally plainly that "the district shall grant recognition to those employee organizations which served as the recognized representatives of the former county employees . . ." That is exactly what the District did in this case, i.e, it recognized SEIU and CEMA as the bargaining representatives for the transferred employees.

Section 100309 goes on to state that the "district shall assume and observe all . . . existing written memoranda of understanding in effect between the county and the above recognized labor organizations . . . for those former county employees . . . employed by the district in positions which would have been covered by those memoranda if the employees had remained employed by the county . . . ." [8] Again, that is what the District did here.

That should end the inquiry, and the result should be that the District acted properly in recognizing SEIU and CEMA and assuming the existing contracts. ATU, however, would parse the words differently and, in a irony that should not go unnoticed,

[8] In its briefs, ATU argues that it has always had within its bargaining unit certain support and supervisory employees and that, even since the effective date of the amendments, there have been created additional support and non-statutory supervisory positions which belong in the ATU unit. Whether that is so and, if so, which bargaining unit the positions belong in is a subject to be resolved at the second phase of these proceedings. But at this stage, the only question is whether the preexisting ATU unit of production, operation and maintenance employees trumps the District's recognition of the representational rights of SEIU and CEMA or whether those rights survived the transition.

EXHIBIT B

would have the 1994 amendments "alter, impair or terminate" the existing contracts of the other Unions, but not its own.[9]

ATU argues that the introductory phrase of section 100309, "To the extent permitted by law," modifies the otherwise plain meaning of the remainder of the section.[10] First, says ATU, the petition is an effort by the District to "alter" the existing labor agreement between ATU and the District. It views the petition as a challenge to its 1974 certification on the rationale that, if SEIU and CEMA are allowed to represent certain District employees, it would make incursions into ATU's certified unit. Thus, asserts ATU, the petition is faulty because, under section 100301, the existing labor agreement between ATU and the District is a contract bar.[11]

---

[9] Much of the argument in ATU's briefs focuses on particular job classifications and the notion that SEIU and CEMA are attempting to capture for themselves the representation of employees who are properly classified as production, operation, and maintenance employees and therefore belong in the ATU unit. Again, this phase of the proceedings is not intended to deal with those issues. Jurisdictional minutiae, if any, can be dealt with in phase two.

[10] ATU's arguments focus on that introductory phrase and rest largely on the requirement in section 100301 that, "In resolving . . . questions of representation including the determination of the appropriate unit or units, . . . the director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act . . . "

[11] Section 100301 provides in part: "Any certification of a labor organization to represent or act for the employees in any collective bargaining unit shall not be subject to challenge on the grounds that a new substantial question of representation within such collective bargaining unit exists until the lapse of one year from the date of certification or the expiration of any collective bargaining agreement, whichever is later, except that no collective bargaining agreement shall be considered to be a bar to representation proceedings for a period of more than two years."

The fallacy in the argument is that the petition does not challenge ATU's unit certification at all. While it may have the effect of dampening ATU's hopes of expanding its existing unit, it will not curtail the unit in any way.

ATU also argues that the object of the petition -- to have multiple Unions representing District employees in multiple bargaining units -- offends the notion that, in a public utility such as a transit district, a systemwide unit is preferable to a multi-unit configuration. In support, ATU cites IBEW 899 v. Aubry, 42 Cal. App.4th 861 (1996). Ordinarily, that would be the rule but, like other rules, this one too has it's exceptions.

To ordain a systemwide unit would be to ignore what has de facto been the case since at least 1974. Employees in three bargaining units, represented by the same three contending unions, have always performed the transit system work of the District. It is true that the District was organizationally fragmented before the reorganization of 1994, but it is nonetheless the case that the transit functions were being carried out by a single workforce spread among the three employing entities and dedicated to those functions. As a consequence of the 1994 amendments, that same workforce was merely gathered up from its existing disparate organizational situs and transposed to a unified one.

Indeed, if it is necessary to place a Labor Management Relations Act gloss upon the events that resulted in a consolidated workforce, the apt analogy is to a merger,

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acquisition and successorship situation.[12] Under such a construct, where the acquiring employer hires a majority of the employees who were performing the pre-acquisition work and assumes the labor contracts of the predecessor (which is exactly what happened here), the acquiring employer is the "successor" for collective bargaining purposes, the majority status enjoyed by the predecessor's Unions carries over, and the successor must recognize those Unions. See NLRB V. Burns International Sec. Svcs., 406 U.S. 272 (1972); Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27 (1987); NLRB v. Fabsteel Co. of Louisiana, 587 F.2d 689 (1979); cert. denied, 442 U.S. 943 (1979)(the presumption of majority status continues even when the successor acquires only part of the predecessor's bargaining unit).

The record shows amply that the drafters of AB 2442 and those who shepherded it through the Legislature undeniably intended the result that the status quo be unaffected by the bill, i.e, that the Unions representing the pre-reorganization County and CMA employees continue to represent them and that their labor contracts carry over to the new regime. There is, in these circumstances, no federal law or administrative practice

[12] In fact, the legislative history of the amendments repeatedly characterizes the reorganized District as the "successor" to the contracts and employees of the pre-amendment District. See, e.g., AB 2442, Legislative Counsel's Digest, January 4, 1994; Assembly Committee on Transportation Minutes, March 4, 1994, March 22, 1994; Senate Rule Committee Minutes, May 2, 1994, June 21, 1994; Assembly Committee on Transportation Minutes, July 1, 1994.

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developed under the LMRA that prevents such a result.[13] SEIU, in particular, was meticulously careful in guiding and following the bill to insure that result. ATU's participation in the process appears to have been to express its opposition on one occasion and very little else. It would be the ultimate irony if, despite the clear intent of the authors, drafters, proponents and legislators, ATU were now free to ignore that intent.

In the final analysis, the result is dictated by the clear, unambiguous language of the statute. The District did what it was required to do and what was permitted by law.

V.

AWARD

Accordingly, the Hearing Officer finds that:

- The District was required by the 1994 amendments to the Public Utilities Code to recognize SEIU and CEMA as the exclusive bargaining agents for County and CMA employees who transferred to the District as a result of the statutory reorganization and whom SEIU and CEMA each represented prior to the transfer;

- The District was likewise required to assume and observe the provisions of existing labor agreements between it and SEIU and CEMA for former County and CMA employees employed by the District in positions that would have been covered by those

[13] ATU makes the argument that, to the extent the CEMA unit is comprised of statutory supervisors exempt under the LMRA, the District is not "permitted by law" to recognize and bargain with CEMA and that, therefore, the District acted improperly in doing so. The argument misses the mark. It is correct that, under the LMRA, the District could not be compelled to recognize and bargain with a unit of supervisors; but it is certainly the law that, if an employer chooses to recognize and bargain with a unit of supervisors, it is permitted to do. The facts that CEMA represented the supervisory employees before the reorganization and that section 100309 mandates post-reorganization recognition on the condition that it be permitted by law, certainly justifies the District's decision to recognize CEMA.

agreements if the employees would have remained employed by the County;

- The District properly recognized SEIU and CEMA as the exclusive bargaining agents for County and CMA employees who transferred to the District and whom SEIU and CEMA each represented prior to the transfer; and

- The District's recognition of SEIU and CEMA and the assumption of the existing contracts were and are permitted by law.

To the extent of the foregoing findings, the petitions are granted.

There are remaining issues that relate to whether, in the reorganized District's workforce, particular employees and disputed classifications claimed by each of the contending Unions are correctly allocated.[14]

Such issues are to be dealt with in phase two of the proceeding unless the parties, guided by the foregoing findings, can resolve them without further hearings.

Date: February 5, 1997

Jean C. Gaskill
Hearing Officer

[14] By way of example only, and not by way of limitation, there evidently are disputes over whether certain "supervisors" claimed by CEMA are truly statutory supervisors or whether they are production, operation or maintenance personnel claimable by ATU; whether there are "support" personnel claimed by SEIU who are really production, operation and maintenance employees and should be in the ATU unit; whether certain District positions are "positions which would have been covered by [existing SEIU or CEMA] memoranda if the employees had remained employed by the county" within the meaning of section 100309 or whether ATU can lay claim to them; whether post-reorganization positions held by true managers and supervisors, who are exempt under LMRA standards, can be declared to be within a statutorily recognized bargaining unit.

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