P012

Southern California Rapid Transit District

PETITION FOR CERTIFICATION
involving the
LONG BEACH METRO RAIL, BLUE LINE,
RAIL EQUIPMENT MAINTENANCE DEPARTMENT

filed August 17, 1990 by the
International Brotherhood of Electrical Workers
Local Union 889

REPORT OF INVESTIGATION
prepared by
California State Mediation and Conciliation Service
Case Number 90 3 086

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INTRODUCTION

The California State Mediation and Conciliation Service conducted an investigation, as referenced in Sections 15805(a) and 15825(a), Title 8 of the California Code of Regulations, relative to the Petition in question (B5) and herein presents the background, position of the parties, a discussion, its conclusion, and recommendation to the Director of the Department of Industrial Relations.

PARTIES

Southern California Rapid Transit District
International Brotherhood of Electrical Workers, Local 889
Amalgamated Transit Union, Local 1277

GLOSSARY OF TERMS

ATU:.....Amalgamated Transit Union, Local 1277
Amendment.....Amendment to the Petition
CCR:.....Title 8 California Code of Regulations, formerly called the California Administrative Code
CSMCS:.....California State Mediation and Conciliation Service
Director.....Director of the Department of Industrial Relations
District:.....Southern California Rapid Transit District
IBEW:.....International Brotherhood of Electrical Workers, Local 889
LAMTA:.....Los Angeles Metropolitan Transit Authority
LBMRBL:.....Long Beach, Metro Rail, Blue Line
Parties:.....See PARTIES (above)
Petition:.....Petition for Certification
PUC.....Public Utility Code
Property:.....The facilities and grounds of the District
Service:.....California State Mediation and Conciliation Service

VARIOUS CODES

Public Utilities Code

Section 30751. Determination of questions of representation.

"Any question which may arise with respect to whether a majority of the 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, 1947 as amended, and for this purpose shall adopt appropriate rules and regulations. Said rules and regulations shall be administered by the State Conciliation Service and shall provide for a prompt public hearing and a secret ballot election to determine the question of representation."

California Code of Regulations

Section 15805. Petition for Certification.

"(a) The investigation of a question concerning representation of employees shall be initiated by the filing of a petition with the service at the nearest office of the service."

"In the event any petition seeks to include employees covered in whole or in part by an existing collective bargaining agreement between the district and any labor organization, such petition in order to be considered timely must be filed within the period 120 to 90 days, inclusive, prior to the date such collective bargaining agreement is subject to termination, amendment or modification."

Section 15825. Investigation of Petition by Service.

"(a) After a petition has been filed under Section 15805(a) or (b), if no agreement for a consent election is entered into and if it appears to be [sic] service that there is reasonable cause to believe that a question of representation exists, that the policies of the act will be effected, and that an election will reflect the free choice of the employees on the appropriate unit, the service shall serve upon the petitioner, the district, any known individuals or labor organizations purporting to act as the representative of any employees directly affected by such investigation and any other parties a notice of hearing before a hearing officer at a time and place fixed....."

"(c) If after investigation of the petition [for certification] it appears to the service that there is no reasonable cause to believe that there exists a question whether a labor organization represents a majority of employees of the district in an appropriate unit, or if the service determines that the petition has not been filed in accordance with these regulations, it shall have the power with the approval of the Director to dismiss the petition without a hearing or approve the withdrawal of the petition."

BACKGROUND

B1 02/23/59 Archibald Cox, Hearing Officer makes his findings, opinion and recommendations in a question of representation regarding the then LAMTA.

B2 05/20/59 Certification of Representation issued by the CSMCS (then known as the California State Conciliation Service), to the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America--AFL-CIO (Now known as the Amalgamated Transit Union). The Certification was for a unit referred to as Group 2 (B2 page 43).

B3 03/01/62 Copy of the Agreement between the LAMTA and the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Transportation Union, division 1277.

B4 11/05/64 LAMTA was merged into the SCRTD.

11/06/64 Letter from the SCRTD announces the merger and the assumption of the LAMTA collective bargaining agreement with the ATU.

B5 08/17/90 Petition for Certification filed by the IBEW for a unit referred to as: "Equipment Maintenance Department."

B6 08/22/90 The CSMCS furnishes the other five Unions on the District's Property a copy of the Petition.

B7 09/06/90 The CSMCS notifies the SCRTD and the IBEW that the IBEW has more than the required thirty percent of Authorization for Representation Cards.

B8 09/11/90 Lane Kirkland, President, AFL-CIO, requests that action by the CSMCS be held in abeyance so they can attempt to settle a dispute between the IBEW and the ATU under their internal disputes plan.

B9 12/17/90 The Impartial Umpire of the AFL-CIO issues his determination that the IBEW is not in violation of Article XX of the AFL-CIO, Constitution.

B10 12/18/90 The ATU files an appeal to Lane Kirkland, President, AFL-CIO from the Impartial Umpire's determination (B9).

B11 01/3/91 The IBEW forwards to the CSMCS a copy of the decision of the Impartial Umpire (B9) and requests a consent election.

B12 01/09/91 The CSMCS advises the IBEW that their Petition does not comply with the filing requirements of Title 8 of the California Code of Regulations.

B13 02/06/91 The IBEW files an amended Petition with the CSMCS.

B14 02/15/91 & 03/13/91 The CSMCS forwarded a copy of the amended Petition to the District and the Unions on its property.

B15 06/10/91 Philip Tamoush, Arbitrator, submits a copy of the Award only to the District and the ATU dealing with the question of recognition of the unit in question by the District in earlier negotiations with the ATU.

B16 06/30/91 Philip Tamoush, Arbitrator, submits Opinion for the Award (and copy of the Award) issued June 10, 1991 (B15) to the District and the ATU.

B17 07/15/91 Lane Kirkland, President, AFL-CIO, advises the International President's of the IBEW and the ATU that the subcommittee has, by unanimous action, disallowed the appeal (B10).

B18 07/19/91 The IBEW forwarded a copy of President Kirkland's letter (B17) and requested that the CSMCS conduct a consent election.

B19 07/23/91 The CSMCS advised the District, the IBEW and the ATU that now that the AFL-CIO and the Arbitrator have concluded their procedures, it will resume its investigation of the Petition at a meeting, with the parties, on August 13, 1991.

B20 08/13/91 CSMCS investigation meeting. The question of representation was unable to be resolved, so the parties were given until August 27, 1991 to submit written statements concerning their positions.

The IBEW presented the CSMCS its written position statement, with copies to the District and the ATU, at the investigation meeting.

B21 08/16/91 Due to the press of negotiations with three unions and the Superior Court's injunction prohibiting a strike, expiring September 4, 1991, the District and the ATU requested the Service, with a copy of the request to the IBEW, to extend the date for submitting written statements to September 7, 1991.

B22 08/19/91 The CSMCS grants the request (B21), with a copy of its letter to the IBEW.

B23 09/02/91 Tentative Agreement, Rail and Metro Rail Addendum signed by the ATU and the District.

B24 09/02/91 Letter of Agreement signed by the ATU and the District.

B25 09/06/91 The District submits its written statements with copies to the ATU and the IBEW.

B26 09/07/91 The ATU submits its written statements with copies to the District and the IBEW.

B27 09/19/91 A packet of fifty-one identical, but separately signed letters, are sent to the CSMCS. Basically, the letters express the desire to have the IBEW represent them and request that a secret ballot election be held.

POSITION OF THE IBEW

STATEMENT OF FACTS [B20]

1. During the month of August of 1990 employees of the SCRTD, LBMRBL, sought out and submitted Authorization for representation Cards to the IBEW, and requested representation by the IBEW.

2. Under the date of August 17, 1990 they submitted a petition to the CSMCS requesting a consent election.

3. Thereafter, ATU filed Article XX charges under the provisions of the AFL-CIO constitution against the IBEW.

4. On October 1, 1990 a hearing was held before Impartial Umpire Howard Lesnick and on December 17, 1990 he issued his determination. His writings read in part:

> "In my judgment, IBEW's position has merit. Case No. 85-27 APCOA, Inc. relied on by ATU, was a situation in which a rival petition interfered with ongoing substantive negotiations, following employer agreement to extend the incumbent's recognition to a new facilitate. It was the very presence of the rival that led the employer to refuse to carry through on that agreement, and Umpire Mills quite reasonably declined to find that, "because it faced a recalcitrant employer," the incumbent lost its Article XX protection. Here, the extension was agreed to long before the hiring of employees was contemplated, and IBEW's challenge would remain applicable even if RTD and Local 1277 had reached agreement on contract language in 1988.
>
> Since ATU does not contend that it can maintain accretion rights independent of the claimed import of the 1988 agreement, there is no need to consider the question of accretion further. Cf.

Case Nos. 66-88, Shopper's Fair of Dayton, Inc, and 88-27, Kaiser Foundation Hospitals, on the significance of the length of time that a purported extension agreement has been in effect.

DETERMINATION

IBEW is not in violation of Article XX of the AFL-CIO Constitution."

s/Howard Lesnick
Impartial Umpire

5. Under date of December 18, 1990, Mr. Jim LaSala, International President ATU filed an appeal [10] of the decision of the Impartial Umpire to Mr. Lane Kirkland, President of the AFL-CIO.

6. On July 15, 1991, Mr. kirkland advised the Presidents of the IBEW and the ATU by letter [B17] that:

"....after careful consideration of the facts and arguments presented, the Subcommittee has, by unanimous action, disallowed this appeal. The determination of the Impartial Umpire will, therefore, go into full force and effect as provided in Section 13 of Article XX."

s/Lane Kirkland
President

7. Under date of July 18, 1991, Mr. Jim LaSala, President, ATU advised Mr. Lane Kirkland, President of the AFL-CIO by letter that the ATU intends, through action if necessary, to protect its established representational rights to the light and metro rail maintenance employees and to enforce

the award issued by Arbitrator Tamoush [B15].

8. Under date of August 6, 1991, Mr. J.J. Barry, President, International Brotherhood of Electrical Workers advised Mr. Jim LaSala, President, ATU, of the IBEW position relative to his letter of July 18, 1991.

> "In his award, Arbitrator Tamoush credited ATU's argument that, in 1988, it had secured the RTD's agreement to recognize it "as the exclusive Bargaining Agent for all current and <u>future</u> rail and metro rail employees," and on that basis, directed RTD to bargain with your union over the terms and conditions of employment. In his Article XX decision, Umpire Lesnick held that, even if such an agreement had been consummated, "at most, [it could] be viewed as a promise to recognize ATU <u>when the light rail operation came into existence;</u>" and that, for Article XX purposes, "any protracted collective bargaining relationship that flowed from it would not mature until at least a year <u>after hiring commenced</u>." Thus, he concluded that the IBEW was entitled to maintain its election challenge even if RTD and [ATU] had reached agreement on contract language in 1988."
>
> There is no conflict whatsoever between the decisions of Arbitrator Tamoush and Umpire Lesnick: the former found that the RTD agreed to recognize your organization to represent employees on a portion of the transit system that had yet to come into operation; the latter found that such recognition would not begin to mature into a protected relationship until the company hired employees for ATU to represent. As the IBEW filed its election petition less than a year after RTD hired its first light rail maintenance employees, there is no Article XX bar to our proceeding with that petition.
>
> It is our understanding that RTD is declining to bargain with your organization until the questions concerning representation are settled. Although ATU may be within its rights to attempt to enforce

> the arbitrator's decision, I want to make clear that if your organization uses the decision to attempt to further block the election, or to bar the company from bargaining with the IBEW, should we win the election, we will view that as a flagrant disregard of actions of the AFL-CIO Executive Council, and a violation of Article XX."
>
> s/J.J. Barry
> International President

The IBEW concludes:

"Rather than being a mere expansion of an already diversified unit, these employees constitute a new operation for the RTD. The light rail system is not simply an expansion of the existing business, but a different kind of operation; no work is being diverted from the old operation to the new; there is no interchange of employees; and the overwhelming majority of light rail employees come from outside the ATU unit.

In this case, a group of employees has been hired from around the country to perform services never before required by the company, on a transportation system that has just recently gone into operation. They came to RTD without union representation, and throughout their first eleven months on the job, were never approached by any ATU representative regarding membership or representation. During that period, they sought out the International Brotherhood of Electrical Workers to serve as their collective bargaining agent, and the International Brotherhood of Electrical Workers, with authorization cards signed by all but one of the thirty-three unit employees, petitioned for a representation

and/or election.

The question this case presents is whether these employees should have the opportunity to select their own collective bargaining agent, or whether a promise made -- and later repudiated -- by RTD, long before the employees were hired, to recognize ATU as their representative should bar them from exercising this right. As demonstrated above, the most RTD's promise gave ATU was recognition effective when the employees were hired. Because the events about which ATU has complained occurred less than a year after the first light rail maintenance employee was hired, and because there is no basis for finding an accretion, ATU has failed to demonstrate that it had an established collective bargaining relationship with respect to these employees.

ATU, as an affiliate of the AFL-CIO, has exercised its due process under the AFL-CIO constitution when it filed Article XX charges and is unwilling to comply with the decision of Impartial Umpire Howard Lesnick and/or the AFL-CIO Subcommittee when both units are in favor of the International Brotherhood of Electrical Workers.

The time has arrived for the effected employees to have their representation and/or consent election to determine their wishes relative to their representation.

In view of the preceding, the effected employees and the International Brotherhood of Electrical Workers respectfully

request that the State Mediation/Conciliation Service proceed to conduct the representation and/or consent election at the earliest possible time."

POSITION OF THE ATU

The Petition of the IBEW is invalid, is barred, and should be dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Cox Unit Determination Findings [B1] And CSMCS's Certification Of ATU [B2] As The Exclusive Bargaining Representative Of All Non-Supervisory Bus And Rail Maintenance Employees Of SCRTD And Its Predecessor, The LAMTA.

The records of the CSMCS demonstrate that ATU has been the recognized exclusive collective bargaining representative of the bargaining unit at SCRTD and its predecessor, LAMTA, which comprise all equipment (bus and rail) and facilities (bus and rail) maintenance employees. The Service certified ATU as the exclusive bargaining representative of this single unit on May 10, 1959. As will be discussed below, this bargaining unit -- now comprising approximately 1850 bus maintenance employees and 70 rail maintenance employees -- has never been changed or amended in any way since.

In 1958, after the LAMTA was created to assume the

operating responsibilities of various private and public transit operators in the Los Angeles metropolitan area, Archibald Cox acting as the hearing officer for the Service conducted a hearing and issued findings which, after confirmation by the Director of Industrial Relations, established five bargaining units at the LAMTA [B1]. Cox's findings also proposed elections among the competing unions for representation right for those units. The competing unions at the hearing and in the subsequent bargaining unit elections were the Brotherhood of Railroad Trainmen (today known as the United Transportation Union), the Brotherhood of Railway and Steamship Clerks (today known as the Transportation Communication Union), the International Association of Machinists and the Amalgamated Association of Street, Electric Railway and Motor Coach Employees (today known as the Amalgamated Transit Union).

Cox established an operators unit denominated by him as Group 1; a maintenance unit denominated by him as Group 2; a miscellaneous shop clerks/stores unit denominated by him as Group 3; a unit of red-cap porters denominated by him as Group 4; and a clerical unit denominated by him as Group 5. (The unit (Group 4) of red-caps no longer exists.)

The Group 2 -- maintenance unit was defined as follows:

"2. (a) In Group 2 there shall be eligible to vote --

(i) all employees in the Equipment Maintenance Department, except supervisors, watchmen, shop clerks and janitors at 6th and Main Street:

(ii) all employees in the Electrical Department (including Laborer A) except steno-clerks and supervisors (including power supervisors);

(iii) all employees (including janitors) in the Department of Way and Structures except supervisors; and

(iv) the utility men in Zones and Stops

(b) Upon the ballot for Group 2, the choices shall be Amalgamated, Machinists and 'no union'."

Following elections in May 1959, the Brotherhood of Railroad Trainmen (UTU) won representation rights for operators; the Brotherhood of Railway and Steamship Clerks (TCU) won representation rights for clerical employees and the Amalgamated (ATU) won representation rights for maintenance employees.

On May 20, 1959 the Service certified ATU as the exclusive bargaining representative of all employees in the Group 2 -- maintenance unit [B2].

The maintenance unit included all non-supervisory maintenance employees who performed work on both bus and rail equipment and on bus and rail facilities of the LAMTA. Following certification, ATU and the LAMTA entered into successive collective

bargaining agreements which set the wages, hours and working conditions of all maintenance employees -- including those working on the then rail systems of the LAMTA. The 1962 collective bargaining agreement [B3] between the ATU and the LAMTA shows that ATU's bargaining unit included the rail classifications at issue in this matter. See for example pp. 30, 34, and 35 of the 1962 Agreement which list the rail classifications covered.

When the SCRTD was created by the California State Legislature in 1964 to assume the responsibilities of the LAMTA, the law establishing the SCRTD (PUC § § 30000 et seq.) acknowledged, confirmed and extended to ATU the same representation rights it enjoyed with the LAMTA. For example PUC §30750(b) provides in relevant part as follows:

> (b) Upon the acquisition by the district of the property of the Los Angeles Metropolitan Transit Authority pursuant to the provisions of Chapter 8 (commencing with Section 31000) of this part, the district shall assume and observe all existing labor contracts and shall recognize the labor organization certified to represent the employees in each existing bargaining unit as the sole representative of the employees in each such bargaining unit. Any certification of a labor organization previously made under the provisions

> of the Los Angeles Metropolitan Transit Authority Act by the State Conciliation Service to represent or act for the employees in any collective bargaining unit shall remain in full force and effect and shall be binding upon the district....(Emphasis added)

Moreover on November 6, 1964 the SCRTD sent ATU a letter [B4] expressly acknowledging SCRTD's assumption of ATU's collective bargaining agreement with the LAMTA. SCRTD's letter stated:

> "Accordingly, the Southern California Rapid Transit District on November 5, 1964 succeed by operation of law to all of the rights and obligations of Los Angeles Metropolitan Transit Authority under the Authority's [collective bargaining] agreement with you dated June 8, 1964....
>
> The Southern California Rapid Transit District will be staffed by the same personnel as Los Angeles Metropolitan Transit Authority and the District's operations and services will be conducted in the same manner as those of the Authority. There will therefore be no change in any matters connected with the said agreement,

other than the change in the name of the contracting entity to the Authority's successor, the Southern California Rapid Transit District."

While the LAMTA and SCRTD temporarily discontinued rail service during the sixties and seventies, SCRTD is now reactivating rail service. The CSMCS's certification of ATU as the exclusive representative of all maintenance employees at the LAMTA [B2] and its successor, SCRTD, has never been amended or nullified and remains in full force and effect today.

B. The 1988 Negotiations And The Tamoush Award

During their 1988 contract negotiations ATU and SCRTD reaffirmed the status of ATU as the exclusive bargaining representative of all rail maintenance employees of SCRTD. While SCRTD initially offered to negotiate complete labor provisions to cover its rail maintenance employees during those negotiations, because both parties were up against time pressures to complete those negotiations before July 1, 1988 and because the light rail system was not to become operational until 1990, the parties acknowledged and re-confirmed ATU's recognition as the exclusive representative of SCRTD's rail maintenance employees and left to a later time the bargaining over modifications to their labor agreement for rail.

Subsequent to the settlement of the 1988 labor agreement, SCRTD took the position that it had not agreed to recognize ATU as the representative of its rail maintenance employees but merely that it agreed to negotiate over such recognition. After months of futile meetings over this issue, ATU was forced to go to court to compel SCRTD to arbitrate the issue of whether or not the parties had in fact reaffirmed ATU's representation rights and agreed to negotiate conditions for the maintenance employees of SCRTD's light rail system. An arbitration was finally convened and hearings were held on August 12 and 13 and October 10, 1990 before Arbitrator Philip Tamoush. It was during this period of stalemate that SCRTD proceeded to hire light rail maintenance employees, and the petition pending before the CSMCS was filed.

On June 10, 1991 Arbitrator Tamoush rendered his award [B15] and later on June 30 issued his opinion supporting the award [B16]. In his award, Tamoush found that the parties had indeed agreed that ATU was recognized as the exclusive bargaining representative of all current and future rail maintenance employees and ordered the SCRTD to negotiate with the ATU over the wages, hours and working conditions of those employees.

C. The 1991 Negotiations

On September 2, 1991, ATU and SCRTD successfully concluded their negotiations for a new collective bargaining agreement

effective June 30, 1991 through June 30, 1994. Pursuant to the Tamoush Award [B15] and in recognition that ATU long- established and certified bargaining unit at SCRTD includes all non-supervisory maintenance classifications -- both bus and rail -- the parties executed as a part of their new labor agreement a Rail and Metro Rail Addendum [B23]. The effect of this Addendum is to extend coverage of the terms and conditions (unless modified in the Addendum) of the collective bargaining agreement to all present and future rail maintenance employees of the District. The members of ATU and the Board of Directors of SCRTD have ratified the new labor agreement.

II. POSITION OF ATU

Based upon the facts set forth in this letter, as supported by the exhibits attached to it [see B1,2,3,4,15,16 & 23], it is the position of the ATU that the Petition for Certification of the IBEW should be dismissed without a hearing pursuant to Title 8, § 15825(c) of the CCR.

When the facts before the CSMCS are analyzed in relation to this and other regulations of the CSMCS regarding petitions for certification, the position of the ATU becomes inescapably meritorious and should be granted.

A. ATU's Bargaining Unit Certification By the CSMCS

Has Never Been Modified Or Annulled And The IBEW Has Not Shown It Has Authorization Cards From 30% Of The Employees In That Unit.

ATU's bargaining unit at SCRTD, as certified by the CSMCS in 1959, has never been modified or nullified. That unit includes all non-supervisory maintenance employees -- both rail and bus -- at SCRTD. While rail classifications at SCRTD were temporarily discontinued now that they are being reactivated they again become a part of the ATU unit. Under § 15815 of the Service's regulations, no question concerning representation shall be deemed to exist "unless the labor organization raising such question by petition shall make a showing of proved authorizations or memberships of at least 30 percent of the employees in the proposed unit." (CCR § 15815) The ATU maintenance unit at SCRTD includes nearly two thousand (2,000) employees. The IBEW's petition is supported by thirty-two authorization cards. Consequently it is barred by § 15815.

As you are aware, the UTU represents operators on both the bus and rail systems and, regarding the latter, has since rail service was reactivated in 1990. The same is true with respect to the TCU for clerical employees. Like the ATU both of these unions won their representation rights by election in 1959 and like the ATU their units were certified by the CSMCS following those

elections.

B. The Employees In The Rail Maintenance Classification Reactivated By SCRTD In 1990 Were Covered By The SCRTD-ATU 1988-91 Collective Bargaining Agreement And The IBEW's Petition Must Be Dismissed As Untimely.

Under § 15805(a) of the CCR any petition which seeks to include employees covered "in whole or in part" by an existing collective bargaining agreement between the district and the ATU "must be filed within the period 120 to 90 days, inclusive, prior to the date such collective bargaining agreement is subject to termination, amendment or modification."

Arbitrator Tamoush found in his opinion and award [B15 & 16] that "this record is replete with understandings and even obvious intents that the ATU is the exclusive Bargaining Agent of all rail and metro employees and was recognized as such by the terms of the MOU being interpreted and applied by the undersigned here." [B16 pg.12] He went on to find that SCRTD violated the 1988 labor agreement by refusing to bargain with ATU over any modifications to the agreement for the rail maintenance employees. The fact that the rail employees hired in 1990 were covered in part by the 1988 labor agreement, as found by Tamoush, means that the IBEW's petition, which was filed on August 17, 1990, was filed

outside the window period provided by § 15805(a) (CCR). The term of the 1988 agreement was June 30, 1988 through June 29, 1991. The window period for filing (120 to 90 days prior to June 29, 1991) would have been March 1, - March 31, 1991.

C. SCRTD's Refusal To Bargain With ATU Regarding Rail Maintenance Employees During The 1988-91 Contract Period Barring Any Petition For An Election For At Least One Year After The Tamoush Award.

By refusing to bargain with ATU over modifications to the 1988 labor agreement for the rail maintenance employees it hired in 1990, SCRTD frustrated the ability of the parties to bring these rail employees under the full coverage of the 1988 ATU labor agreement. The Petition by the IBEW was a direct result of SCRTD's refusal to bargain with ATU. The policy under the National Labor Relations Act has long been established that an election will be barred where a lawfully recognized union has failed to reach agreement due to the employer's misconduct.

For example, in Mar-Jac Poultry Co., 136 N.L.R.B. 785 (1962), the facts showed that the employer had entered into a settlement agreement with the union and then the parties held eight bargaining sessions over a six-month period. The NLRB found that it was the employer's actions, and its refusal to bargain, which

took from the union a substantial part of its certification year and therefore extended for a period of at least one year of actual bargaining the certification bar. See also J.P. Stevens and Co., 239 N.L.R.B. 738 (1978).

Similar, it is NLRB policy that if it issues as a remedy a bargaining order against an employer (as Arbitrator Tamoush did in the arbitration proceeding between SCRTD and ATU), during the period of compliance bargaining, a petition for an election will be dismissed as untimely. See Hermet, Inc., 207 N.L.R.B. 671 (1937).

Based upon NLRB policy and standards, which are to guide the Service in this matter, the IBEW petition would be dismissed until SCRTD and ATU had a reasonable period (at least one year) from the date of Tamoush's award [B15] within which to negotiate terms for the new rail employees. Now that SCRTD and ATU have consummated a new labor agreement which covers rail maintenance employees, the IBEW petition would be dismissed as untimely under § 15805[a] [CCR].

D. IBEW's Argument That The Article XX Proceedings Of The AFL-CIO Favorably Support its Petition Is Without Merit.

The Article XX proceedings merely decided (improperly in view of the ATU) that the IBEW was not found to be in violation of Article XX of the AFL-CIO Constitution which deals with organizing raids by one union against another. Those proceedings did not

involve the issues before the Service presented by the IBEW's petition. The AFL-CIO did not direct the ATU or the IBEW to do or not to do anything nor did it express any opinion with respect to appropriate bargaining units at the SCRTD. The IBEW's argument that the Article XX proceedings advance its case before the CSMCS is totally without merit.

E. Conclusion

SCRTD and ATU have had a collective bargaining relationship covering all of the non-supervisory maintenance employees of the District since the establishment of the District. The Unit represented by ATU, as certified by the Service, has always included the classifications at issue in this matter. The fact that those classifications were temporarily deactivated by SCRTD and its predecessor has no bearing on the legitimacy and vitality of the ATU unit now that those classification have been reactivated. When viewed from any angle, the facts underlying the certification of the ATU'S bargaining unit and that union's history of collective bargaining with the SCRTD lead to the conclusion that the IBEW's petition should be dismissed without a hearing pursuant to § 15825(c) [CCR]. There is overwhelming evidence that the petition should be dismissed under § 15805(a) [CCR] as well.

Now that SCRTD and ATU have reached a new collective bargaining agreement accomplishing for their rail maintenance

employees what they should have accomplished (and had agreed to accomplish) during the term of their last labor agreement to order a hearing in this case would do violence not only to the Service's regulations and certifications but also to a long established collective bargaining relationship between SCRTD and ATU. The petition of the IBEW should be dismissed.

POSITION OF THE DISTRICT

INTRODUCTION

On August 13, 1991 the State Mediation and Conciliation Service held an informal conference with representatives of ATU, IBEW and SCRTD to determine whether a petition by IBEW for a consent election among SCRTD's rail employees should be dismissed forthwith or whether the Service should hold a formal hearing on the matter. The parties were instructed to submit position papers to the Director by August 27, 1991. Due to time restraints of ongoing labor negotiations by SCRTD with ATU, United Transportation Union and Transportation Communications Union, the Service granted SCRTD and ATU's request for an extension of filing their position papers to September 7, 1991 [B21].

SUMMARY

Pursuant to Arbitrator Philip Tamoush's finding and ruling that ATU is the exclusive bargaining agent for SCRTD's non-supervisory rail and metro rail employees, IBEW's petition must be

dismissed because the contract bar rule is in effect until 1944. In accordance with Arbitrator Tamoush's ruling, ATU and SCRTD have bargained and recently reached agreement (effective as of June 30th, 1991) on the terms and conditions of employment for maintenance employees including maintenance employees in rail; accordingly, the contract bar rule is in effect and no petition for an election may be submitted until 60 to 90 days before the expiration of the new agreement reached between ATU and SCRTD.

ARGUMENT

In May of 1988 representatives of ATU and SCRTD commenced negotiations to renew their collective bargaining agreement. The parties negotiated many times over a two month period and were successful in signing a memorandum of understanding (MOU) by June 30, 1988. Subsequently, a dispute arose between the parties as to the meaning of item 44 of the MOU which stated, "The parties to negotiate the language of rail and metro rail." ATU took the position that item 44 memorialized an agreement that SCRTD had recognized ATU as the exclusive bargaining agent of all non-supervisory maintenance workers in SCRTD's rail system. SCRTD contended that item 44 memorialized an agreement to bargain with ATU on rail recognition.

The parties were unable to resolve this dispute and, pursuant to Article 20 of the parties' Collective Bargaining Agreement, ATU demanded that the matter be arbitrated. SCRTD

refused to arbitrate on the claim that the matter was not substantively arbitrable. Consequently, on February 21, 1990, ATU petitioned the Los Angeles Superior Court to compel binding arbitration. The court granted ATU's motion on March 8, 1990, and arbitration on the matter was held before Arbitrator Philip Tamoush. The arbitration spanned three days of hearings and on June 10, 1991 Arbitrator Tamoush issued his award [B15]; on June 30, 1991 Arbitrator Tamoush issued his formal opinion supporting his award [B16]. SCRTD submits that Arbitrator Tamoush's award is dispositive of the issues raised before the Service: whether IBEW's Petition should be dismissed or whether a formal hearing on the matter is required.

Based on all the evidence and testimony presented before him, Arbitrator Tamoush ruled that SCRTD did in fact recognize ATU as the exclusive bargaining agent for SCRTD's non-supervisory rail maintenance employees, in effect ruling that these employees were in a bargaining unit represented exclusively by the ATU, for the prior three years. Arbitrator Tamoush did not agree, however, that the parties had agreed to all terms and conditions of employment; consequently, pursuant to his findings that ATU was recognized as the exclusive bargaining agent for SCRTD's non-supervisory rail maintenance employees, Arbitrator Tamoush ruled that "...the District is ordered to negotiate forthwith with the ATU when it requests such, as the exclusively recognized Bargaining Agent of

all current and future rail and metro rail employees." [B16. pg. 19]

With regard to the issues raised here, Arbitrator Tamoush's decision is pivotal. Arbitrator Tamoush found that SCRTD had granted recognition to ATU as to SCRTD rail systems. The arbitrator found and so ruled that SCRTD's non-supervisory rail employees were part and parcel of a bargaining unit represented by ATU [B16 pg.18]. Thereafter, the District and ATU negotiated in good faith pursuant to Arbitrator Tamoush's award, resulting in an agreement incorporating rail employees into the existing unit. A copy of this currently in force agreement is attached [B23 & 24]. As a result of this agreement, effective as of June 30, 1991, the contract bar rule applies and no petition for an election may be processed until 60 to 90 days prior to the new contract's expiration (in 1994).

In light of the preceding, IBEW's Petition cannot legally be processed. Accordingly, SCRTD requests that the Service dismiss IBEW's Petition without formal hearing.

DISCUSSION BY THE SERVICE

The IBEW's Petition, accompanied by thirty-two Authorization For Representation cards, seeks to represent a unit referred to as "Equipment Maintenance Department." The Amendment to the Petition (B13), defines the unit as Signals Division,

Traction Motor Division, Tract Division Rail Equipment Specialists, Rail Equipment Maintenance Assistants. The Amendment, unlike the Petition itself, excludes Professionals, Guards-Security, Supervisors, Clerical, Operators and alleges that the unit comprises 66 people.

Neither the District nor the ATU filed written objections with the Service as to the unit, the timeliness, appropriateness, etc. of the Petition or the Amendment until September 6 and 7, 1991, respectively (B25 & 26); at this time they submitted their position papers. At the request of the District and the ATU (B21), and without objection from the IBEW, the Service extended the original submittal date for position papers from August 27, 1991 (B20) to September 7, 1991. The IBEW also had until August 27 to file its position paper with the Service and they, too, could have requested an extension of time; they chose to submit it at the meeting of August 13 (B20).

At the time of the filing of the Petition (August 17, 1990), the District and the ATU were engaged in arbitration (court ordered) before Arbitrator Philip Tamoush as to the ATU's claim of representation rights for the unit in question. Subsequent to the filing of the Petition the ATU filed Article XX charges under the provision of the AFL-CIO constitution against the IBEW. Out of deference to the request of Lane Kirkland, President of the AFL-CIO (B8), the Service, without objection of the parties, held any

further action in abeyance so the AFL-CIO could attempt to settle the dispute between the IBEW and the ATU under their internal disputes plan.

On December 17, 1990 the AFL-CIO Impartial Umpire issued his decision; "....that the IBEW is not in violation of Article XX of the AFL-CIO Constitution."

Subsequently the ATU filed an appeal (B10) of the decision of the Impartial Umpire to Lane Kirkland, President of the AFL-CIO, who later responded:

> "....after careful consideration of the facts and arguments presented, the Subcommittee has, by unanimous action, disallowed this appeal. The determination of the Impartial Umpire will, therefore, go into full force and effect as provided in Section 13 of Article XX."

The IBEW places emphasis on the writings of the Impartial Umpire, the rejection of the ATU appeal of the Umpires Determination, and that of J.J. Barry, President, International Brotherhood of Electrical Workers. In writing to Jim LaSala, President, Amalgamated Transit Union, Mr. Barry says in part:

> "In his award, Arbitrator Tamoush credited ATU's argument that, in 1988, it had secured the RTD's agreement to recognize it "as the exclusive Bargaining Agent for all current and future rail and metro rail employees," and on that basis, directed RTD to bargain with your union over the terms and conditions of employment. In his Article XX decision, Umpire Lesnick held that, even if such an agreement had been consummated, "at most, [it could] be viewed as a promise to recognize ATU when the light rail operation came into existence;" and that, for Article XX purposes, "any protracted collective bargaining

> relationship that flowed from it would not mature until at least a year after hiring commenced." Thus, he concluded that the IBEW was entitled to maintain its election challenge even if RTD and [ATU] had reached agreement on contract language in 1988."
>
> There is no conflict whatsoever between the decisions of Arbitrator Tamoush and Umpire Lesnick: the former found that the RTD agreed to recognize your organization to represent employees on a portion of the transit system that had yet to come into operation; the latter found that such recognition would not begin to mature into a protected relationship until the company hired employees for ATU to represent. As the IBEW filed its election petition less than a year after RTD hired its first light rail maintenance employees, there is no Article XX bar to our proceeding with that petition."

In its closing arguments the IBEW contends in part:

"Rather than being a mere expansion of an already diversified unit, these employees constitute a new operation for the RTD. The light rail system is not simply an expansion of the existing business, but a different kind of operation; no work is being diverted from the old operation to the new; there is no interchange of employees; and the overwhelming majority of light rail employees come from outside the ATU unit."

"Because the events about which ATU has complained occurred less than a year after the first light rail maintenance employee was hired, and because there is no basis for finding an accretion, ATU has failed to demonstrate that it had an established collective bargaining relationship with respect to these employees.

ATU, as an affiliate of the AFL-CIO, has exercised its due

process under the AFL-CIO constitution when it filed Article XX charges and is unwilling to comply with the decision of Impartial Umpire Howard Lesnick and/or the AFL-CIO Subcommittee when both units are in favor of the International Brotherhood of Electrical Workers."

In recounting the history of their relationship with the District, the ATU submits its rationale and contends:

The records of the CSMCS demonstrate that ATU has been the recognized exclusive collective bargaining representative of the bargaining unit at SCRTD and its predecessor, LAMTA, which comprise all equipment (bus and rail) and facilities (bus and rail) maintenance employees. The Service certified ATU as the exclusive bargaining representative of this single unit on May 10, 1959.

Additionally, they assert that while the LAMTA and SCRTD temporarily discontinued rail service during the sixties and seventies, SCRTD is now reactivating rail service. The CSMCS's certification of ATU as the exclusive representative of all maintenance employees at the LAMTA (B2) and its successor, SCRTD, has never been amended or nullified and remains in full force and effect today.

And further they argue that during their 1988 contract negotiations ATU and SCRTD reaffirmed the status of ATU as the exclusive bargaining representative of all rail maintenance employees of SCRTD. While SCRTD initially offered to negotiate

complete labor provisions to cover its rail maintenance employees during those negotiations, because both parties were up against time pressures to complete those negotiations before July 1, 1988 and because the light rail system was not to become operational until 1990, the parties acknowledged and re-confirmed ATU's recognition as the exclusive representative of SCRTD's rail maintenance employees and left to a later time the bargaining over modifications to their labor agreement for rail.

Subsequent to the settlement of the 1988 labor agreement, SCRTD took the position that it had not agreed to recognize ATU as the representative of its rail maintenance employees but merely that it agreed to negotiate over such recognition. After months of futile meetings over this issue, ATU was forced to go to court to compel SCRTD to arbitrate the issue of whether or not the parties had, in fact, reaffirmed ATU's representation rights and agreed to negotiate conditions for the maintenance employees of SCRTD's light rail system. An arbitration was finally convened and hearings were held on August 12 and 13 and October 10, 1990 before Arbitrator Philip Tamoush.

On June 10, 1991 Arbitrator Tamoush rendered his award (B15). In his award, Tamoush found that the parties had indeed agreed that ATU was recognized as the exclusive bargaining representative of all current and future rail maintenance employees and ordered the SCRTD to negotiate with the ATU over the wages,

hours and working conditions of those employees.

On September 2, 1991, ATU and SCRTD successfully concluded their negotiations for a new collective bargaining agreement effective June 30, 1991 through June 30, 1994.

Additionally they claim that SCRTD and ATU have had a collective bargaining relationship covering all of the non-supervisory maintenance employees of the District since the establishment of the District. The Unit represented by ATU, as certified by the Service, has always included the classifications at issue in this matter. The fact that those classifications were temporarily deactivated by SCRTD and its predecessor has no bearing on the legitimacy and vitality of the ATU unit now that those classifications have been reactivated. When viewed from any angle, the facts underlying the certification of the ATU'S bargaining unit and that union's history of collective bargaining with the SCRTD lead to the conclusion that the IBEW's petition should be dismissed without a hearing pursuant to § 15825(c) (CCR). There is overwhelming evidence that the petition should be dismissed under § 15805(a) (CCR) as well.

The District states that pursuant to Arbitrator Tamoush's finding and ruling that ATU is the exclusive bargaining agent for SCRTD's non-supervisory rail and metro rail employees, IBEW's petition must be dismissed because the contract bar rule is in effect until 1994. In accordance with Arbitrator Tamoush's ruling,

ATU and SCRTD have bargained and recently reached agreement (effective as of June 30th, 1991) on the terms and conditions of employment for maintenance employees including maintenance employees in rail; accordingly, the contract bar rule is in effect and no petition for an election may be submitted until 60 to 90 days before the expiration of the new agreement reached between ATU and SCRTD.

In the main, they do not disagree with the ATU's account of what lead to the Tamoush arbitration. They do note that in May of 1988 representatives of ATU and SCRTD commenced negotiations to renew their collective bargaining agreement. The parties negotiated many times over a two month period and were successful in signing a memorandum of understanding (MOU) by June 30, 1988. Subsequently, a dispute arose between the parties as to the meaning of item 44 of the MOU which stated, "The parties to negotiate the language of rail and metro rail." ATU took the position that item 44 memorialized an agreement that SCRTD had recognized ATU as the exclusive bargaining agent of all non-supervisory maintenance workers in SCRTD's rail system. SCRTD contended that item 44 memorialized an agreement to bargain with ATU on rail recognition.

The parties were unable to resolve this dispute and, pursuant to Article 20 of the parties' Collective Bargaining Agreement, ATU demanded that the matter be arbitrated. SCRTD refused to arbitrate on the claim that the matter was not

substantively arbitrable. Consequently, on February 21, 1990, ATU petitioned the Los Angeles Superior Court to compel binding arbitration. The court granted ATU's motion on March 8, 1990, and arbitration on the matter was held before Arbitrator Philip Tamoush.

Subsequently the Tamoush Arbitration was held and his award was issued June 10, 1991, wherein he ruled that SCRTD did in fact recognize ATU as the exclusive bargaining agent for SCRTD's non-supervisory rail maintenance employees, in effect ruling that these employees were in a bargaining unit represented exclusively by the ATU, for the prior three years. Arbitrator Tamoush did not agree, however, that the parties had agreed to all terms and conditions of employment; consequently, pursuant to his findings that ATU was recognized as the exclusive bargaining agent for SCRTD's non-supervisory rail maintenance employees, Arbitrator Tamoush ruled that "...the District is ordered to negotiate forthwith with the ATU when it requests such, as the exclusively recognized Bargaining Agent of all current and future rail and metro rail employees.

The District argues that Arbitrator Tamoush found that SCRTD had granted recognition to ATU as to SCRTD rail systems. The arbitrator found and so ruled that SCRTD's non-supervisory rail employees were part and parcel of a bargaining unit represented by ATU. Thereafter, the District and ATU negotiated in good faith pursuant to Arbitrator Tamoush's award, resulting in an agreement

incorporating rail employees into the existing unit.

There is no question, nor does anyone raise one, that prior to and at the time of the filing of the Petition and/or the Amendment by the IBEW that the ATU was a certified representative of a bargaining unit. Nor is there any question, nor does anyone raise one, that the ATU had a long and continuous ongoing representational relationship with the District. What is in question is the representational status of the unit filed for in the IBEW's Petition (B5).

The Service does not argue with the Article XX determination of the AFL-CIO Impartial Umpire, nor does it question the authority of the AFL-CIO to hold such a hearing and issue a determination when a question of representation is properly before the Service. As noted above the Service honored the request of AFL-CIO President, Kirkland and held its investigation in abeyance until they concluded their internal disputes plan.

The Service notes with interest a comment of the Umpire (pg.7):

> "Here, the extension was agreed to long before the hiring of employees was contemplated, and IBEW's challenge would remain applicable even if RTD and Local 1277 had reached agreement on contract language in 1988." (Emphasis added CSMCS)

and the comments of IBEW President J.J. Barry (pg.9)

> "In his Article XX decision, Umpire Lesnick held that, even if such an agreement had been consummated, "at most, [it could] be viewed as a promise to recognize ATU when the light rail

> operation came into existence;" and that, for Article XX purposes, "any protracted collective bargaining relationship that flowed from it would not mature until at least a year after hiring commenced."

and:

> "There is no conflict whatsoever between the decisions of Arbitrator Tamoush and Umpire Lesnick: the former found that the RTD agreed to recognize your organization to represent employees on a portion of the transit system that had yet to come into operation; the latter found that such recognition would not begin to mature into a protected relationship until the company hired employees for ATU to represent. (Emphasis added CSMCS)

What is noticeable about the above comments is the thread of commonality and it is best said by President Barry:

> "There is no conflict whatsoever between the decisions of Arbitrator Tamoush and Umpire Lesnick: the former found that the RTD agreed to recognize your organization to represent employees on a portion of the transit system that had yet to come into operation;....As the IBEW filed its election petition less than a year after RTD hired its first light rail maintenance employees, there is no Article XX bar to our proceeding with that petition."

From the above we see that there is recognition and acceptance of the Tamoush award and that it is not in conflict with the Umpire's determination.

While with different emphasis than the IBEW, the ATU and the District also give recognition to the Tamoush award. Additionally, the ATU contends that (pg.17):

> While the LAMTA and SCRTD temporarily discontinued rail service during the sixties and seventies,

> SCRTD is now reactivating rail service. The CSMCS's certification of ATU as the exclusive representative of all maintenance employees at the LAMTA [B2] and its successor, SCRTD, has never been amended or nullified and remains in full force and effect today.

A review of the Tamoush opinion and award shows no such argument being made at the arbitration nor does the ATU show or suggest that it made that argument to the District prior to the arbitration or to this investigation. In review of the District's position paper, nothing is seen of this argument there. The Service will let the subject rest and not deal with it any further.

It is important to note that neither the IBEW, the District or the ATU has expressed disagreement with or has in any way, contested the Tamoush award.

Basically the ATU and the District argue that in compliance with the Tamoush award the District negotiated with the ATU as the exclusively recognized Bargaining Agent of all current and future rail and metro rail employees and on September 2, 1991 successfully concluded their negotiations for a new collective bargaining agreement effective June 30, 1991 through June 30, 1994.

The Service is now left with the question of whether or not there is a question of representation within the meaning of § 15805(a) of the CCR.

If the Service accepts the Tamoush award, and none of the parties have suggested that it should not, it must conclude, as is argued by the ATU and the District, that at the time of the filing

prior to June 30, 1991 would be March 1 to March 31, 1991. The Petition having been filed on August 17, 1990 it was some six and a half months premature.

CONCLUSION OF THE SERVICE

In consideration of the position papers of the parties, the various codes, the Tamoush Award and all of the above, the Service concludes that at the time of the filing of the Petition the ATU was the exclusive Bargaining Agent for the unit in question and that the Petition was not filed timely within the meaning of § 15805(a) of the CCR.

The Service also concludes that since the Petition was not timely filed, and there is no reasonable cause to believe that there exists a question whether a labor organization represents a majority of employees of the district in an appropriate unit, then the Director, as permitted by § 15825(c) of the CCR, allow the Service to dismiss the Petition without a hearing.

Such being the case, there is no purpose in addressing the packet of fifty-one identical, but separately signed letters, sent to the CSMCS (B27).

RECOMMENDATION OF THE SERVICE

That the Director of the Department of Industrial Relations concur with the "CONCLUSION OF THE SERVICE" and adopt it as his own and, in so doing, authorize the Service to dismiss the petition without a hearing as provided for in § 15825(c) of the CCR.

Edward W. Allen, Supervisor
Mediation/Conciliation Service

11/27/91

Date: November 27, 1991