

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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January 30, 2002

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Re: National Electronic Technicians Union
Petitions for Certification and Decertification
(SEIU local 790 and BART)

Gentlemen:

Enclosed is the Proposed Interim Decision and Order of Hearing Officer William Kasley in the above-referenced matter. The Decision is hereby adopted as the Director's decision.

This Interim Decision and Order is not subject to Title 8, Section 15860 or judicial review.

Sincerely,

A handwritten signature in cursive script that reads "Stephen J. Smith".

Stephen J. Smith
Director

Enclosure

1 **BEFORE THE DEPARTMENT OF INDUSTRIAL RELATIONS**
2 **OF THE STATE OF CALIFORNIA**

3 IN RE PETITION FOR DECERTIFICATION
4 AND PETITION FOR CERTIFICATION OF
5 REPRESENTATIVE FILED BY:

6 RICHARD ARMSTRONG AND NATIONAL
7 ELECTRONIC SYSTEMS TECHNICIANS
8 UNION,

9 Petitioners,

10 and

11
12 SERVICE EMPLOYEES INTERNATIONAL
13 UNION, LOCAL 790,

14 Respondent,

15 BAY AREA RAPID TRANSIT DISTRICT,

16 Employer/Party in Interest.

**Proposed Interim Decision
and Order**

17
18 **I**

19 **INTRODUCTION**

20 This matter involves the Decertification and Certification of Representative Petitions
21 filed pursuant to California Code of Regulations, Title 8, Section 15805, by National Electronic
22 Systems Technicians Union ("NESTU") and Richard Armstrong, a Bay Area Rapid Transit
23 District ("BART") employee covered by a collective bargaining agreement between BART and
24 Service Employees International Union, Local 790 ("SEIU"). By these petitions, NESTU seeks
25 to displace SEIU as the certified bargaining representative for a specified group of BART
26 employees.

27 A conference of interested parties was held on July 9, 2001, for the purpose of
28 considering the legal sufficiency of the petitions and the necessity for an evidentiary hearing.

1 Attorney Robert Hooy appeared on behalf of the petitioners, NESTU and Armstrong. Attorney
2 Vincent Harrington appeared on behalf of SEIU. Attorney Sherwood Wakeman, BART's general
3 counsel, appeared on behalf of BART.

4 At the conference, the parties discussed whether the decertification petition that attempts
5 to decertify only a part of the SEIU unit was legally sufficient. NESTU/Armstrong were directed
6 to submit either an application to voluntarily withdraw without prejudice the decertification
7 petition or a brief in support of its legal sufficiency by July 23, 2001. On July 23, 2001,
8 NESTU/Armstrong did submit their application to voluntarily withdraw the decertification
9 petition, which by this interim decision and order, I do hereby approve pursuant to Title 8,
10 Section 15825(a).

11 In addition, the parties were asked to brief the question of the legal sufficiency of the
12 remaining certification petition. In accordance with the agreed briefing schedule,
13 NESTU/Armstrong and SEIU have submitted their briefs on this issue. BART has submitted a
14 statement that it is not taking a position on this issue at this time.

16 II

17 FACTUAL BACKGROUND

18 NESTU/Armstrong filed their petition for certification of representative with the State
19 Mediation and Conciliation Service on March 29, 2001. In their petition, they seek to establish a
20 separate bargaining unit for the following employee classifications: (1) automatic fare collection
21 electronic technicians; (2) communications electronic technicians; (3) electronic repair shop
22 technicians; (4) elevator/escalator worker; (5) train control electronic technicians; (6) computer
23 technicians; (7) transit vehicle electronic technicians (EMRS and Shop); (8) transit vehicle
24 electronic technicians (Mainline) and (9) wayside quality control inspectors. NESTU/Armstrong
25 assert that the proposed new bargaining unit will number approximately 339 employees.
26 Petitioners further assert that they are supported by 177 employees within the proposed unit who
27 have signed NESTU authorization cards.

1 All of the employees which NESTU now seeks to represent work in classifications for
2 which SEIU has been the certified representative since the inauguration of BART service in the
3 early 1970's. At that time, pursuant to Public Utilities Code section 28851, Hearing Officer Sam
4 Kagel made recommendations, adopted by the Director, that an "umbrella unit" consisting of
5 maintenance, clerical and transportation "subunits" be established for bargaining purposes. SEIU
6 was duly elected and certified as the bargaining representative for the maintenance and clerical
7 subunits and has continued to represent these work groups since then.

8
9 **III**
10 **ISSUE**

11 Whether the NESTU/Armstrong certification for representation petition wherein NESTU
12 seeks to represent a part of a larger group of employees currently represented by another union is
13 legally sufficient.

14
15 **IV**
16 **DISCUSSION**

17 Labor relations for BART is governed by Public Utilities Code section 28851, which
18 provides in pertinent part:

19
20 If there is a question whether a labor organization represents a
21 majority of employees or whether the proposed unit is or is not
22 appropriate, such matters shall be submitted to the State Conciliation
23 Service for disposition. The State Conciliation Service shall promptly
24 hold a public hearing and may, by decision, establish boundaries of any
25 collective bargaining unit and provide for an election to determine the
26 question of representation.

27 Beginning in 1971 Hearing Officer Sam Kagel conducted extensive hearings on the
28 question of the appropriate bargaining units for BART. On February 26, 1973, he submitted
recommendations for appropriate bargaining units to Department of Industrial Relations ("DIR")

1 Director H. Edmund White. Kagel prefaced his recommendations with the following
2 interpretation of section 28851:

3 The governing statute provides that the Service is to "establish the
4 boundaries of any collective bargaining units and provide for
5 an election to determine the question of representation...." The term
6 "boundaries" is not defined in the statute, nor is it a term used
7 in other labor relations statutes which has come to have an
8 accepted meaning. Rather, it appears that the Legislature utilized
9 the unique concept of collective bargaining "boundaries" so that the
10 Service could establish a collective bargaining structure suitable for
11 BART with all its unique characteristics, instead of limiting the
12 Service solely to the traditional task of merely determining which
13 unit or units are appropriate. Taking into account the foregoing, the
14 community of interest among the Employees involved, and the
15 responsibility of BART and its Employees to provide the public
16 with essential transportation services, the boundaries for collective
17 bargaining for BART Employees pursuant to Section 28851 should
18 be established as follows ...

19 Kagel then proposed a security unit, a supervisor unit, and an "umbrella" unit comprised of
20 transportation, clerical and maintenance subunits. At elections held after the Director confirmed
21 Kagel's recommendations, SEIU was selected as the representative for the clerical and
22 maintenance subunits.

23 Thereafter, DIR promulgated regulations under which questions of representation could
24 be raised in the various state mass transit districts. Title 8, Section 15805(a) provides in
25 pertinent part:

26 The investigation of a question concerning representation of employees
27 shall be initiated by the filing of a petition with the service at the nearest
28 office of the service.... Such petition shall be called a petition for
certification and is a petition which would arise under paragraph
(1)(A)(i) or (1)(B) of Section 9C of the Labor-Management Relations
Act. It may be filed by any employee or group of employees or any
individual or labor organization acting on their behalf and claiming to
represent a majority of the employees in an appropriate unit or by a district.

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,

1 inclusive, prior to the date such collective bargaining agreement is
2 subject to termination, amendment or modification.

3 In their brief, NESTU/Armstrong characterize their petition as one for certification or unit
4 clarification or craft severance or departmental severance. They argue that, irrespective of the
5 characterization of their filing, California Code of Regulations section 15805(a) and/or (c) allow
6 this proposed employee group to summarily secede from SEIU and have an election to confirm
7 NESTU as their new certified representative. SEIU argues equally forcefully that the
8 "boundaries of any collective bargaining units" language of Public Utilities Code section 28851
9 and the Director's 1973 adoption of Hearing Officer Kagel's recommendations are dispositive for
10 all times so that irrespective of how NESTU/Armstrong may characterize their petition, there is
11 no basis for this group of employees to obtain the relief they seek under any set of facts.

12 Neither party is absolutely correct in its position. SEIU correctly points out that a rival
13 union cannot file a certification petition to challenge the existing recognitional arrangement for a
14 group of workers less than the presently recognized unit. SEIU also correctly argues that a
15 "stranger" labor organization has no right to seek modification of an existing unit by means of a
16 unit clarification petition. *Manufacturing Woodworkers Association of Greater New York, Inc.*
17 179 NLRB 538, 72 LLRM 1391 (1969).

18 It is clear, though, that Title 8, Section 15805(a) contemplates a set of circumstances in
19 which less than all employees covered by an existing collective bargaining agreement may seek
20 representation by another union. Otherwise language in the second paragraph of 15805(a) - "in
21 the event any petition seeks to include employees covered in whole or in part by an existing
22 collective bargaining agreement ..." - becomes mere surplusage and is meaningless. However,
23 this section cannot be read to mean, as NESTU/Armstrong suggest, that outside unions may
24 "cherry pick" small work groups from existing certified units merely by filing a petition under
25 which the question of whether the proposed unit is "appropriate" is measured as if the workers
26 were unrepresented. Where the proposed unit is comprised of less than all of the workers from
27 an existing certified unit, whether that unit is "appropriate" is determined by considering factors
28 relevant to unit modification.

1 Historically, the Director has considered applications for unit modification at BART
2 where the employee group can demonstrate a substantial change in circumstances so that their
3 community of interests now set them apart from the larger bargaining group. The Director has
4 applied this standard in *San Francisco Bay Area Rapid Transit District and United Public*
5 *Employees, Local 790, and Amalgamated Transit Union, Local 1555* (1991) (supervisor unit
6 clarification) and in *BART Professional Chapter, Service Employees International Union, AFL-*
7 *CIO and Bay Area Rapid Transit District, and BART Chapter, Service Employees International*
8 *Union, Local 790, AFL-CIO* (1997) (BART Professional Chapter clarification/redesignation). It
9 will be applied here as well.

10 Under federal labor law, the factors utilized in deciding whether such a community of
11 interests exists are:

- 12 • wages or compensation including method of payment
- 13 • hours of work
- 14 • employee benefits
- 15 • supervision
- 16 • qualifications, training and skills
- 17 • job functions
- 18 • time spent away from the employment situs
- 19 • contact or interaction with other employees
- 20 • integration of the work functions with other employees
- 21 • history of bargaining and impact on labor stability
- 22 • degree of departmental identity
- 23 • degree of integration of the employer's operation including the extent to which the
24 normal operation is dependent on the performance of the assigned function by
25 employees in the proposed unit
- 26 • extent to which the employees have maintained their separate identity
- 27 • degree of distinct and homogeneous nature of proposed unit
- 28 • unique nature of skills of proposed unit

- 1 • tradition of separate representation in industry
- 2 • qualifications of the union seeking to "carve out" the separate unit

3 See *Mallinckrodt Chemical Works*, 162 NLRB 387, 64 LRRM 1011 (1966); *Kalamazoo Paper*
4 *Box Corp.*, 136 NLRB 134, 48 LRRM 1715 (1962); *Stephens Produce Company*, 214 NLRB
5 131, 88 LRRM 1363 (1974).

6 The foregoing list is not exhaustive, nor is any one factor dispositive. Any employment
7 related factor which tends to support or detract from a community of interests may be brought to
8 bear on either side of this dispute, and the determination will be made on the basis of the
9 prevailing weight of the factors.

11 IV

12 FURTHER PROCEEDINGS

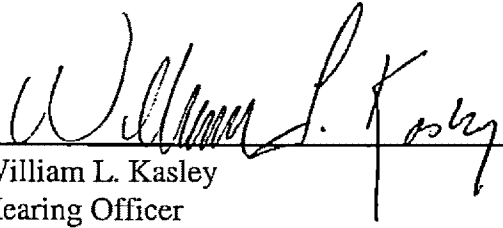
13
14 In accordance with this interim decision and order, to further develop this record, the
15 parties are directed as follows:

- 16 • Within 30 days after service of the Director's decision adopting this proposed interim
17 decision, NESTU/Armstrong shall file with this hearing officer and serve on all
18 interested parties evidentiary declarations under penalty of perjury, and all other duly
19 authenticated relevant documentation in support of their petition relating to the factors
20 recited in Section III of this decision. NESTU/Armstrong shall also file a legal
21 memorandum of points and authorities which shall address the issue of the sufficiency
22 of their proffered evidence to entitle them to the relief they seek.
- 23 • Within 30 days after service of NESTU/Armstrong's evidence and legal
24 memorandum, SEIU shall lodge with this hearing officer and serve upon all interested
25 parties its responsive evidentiary declarations under penalty of perjury, and all other
26 duly authenticated relevant documentation in support of its position. SEIU shall also
27 file a legal memorandum of points and authorities in which it states the grounds upon
28 which it opposes NESTU/Armstrong's petition.

- Within 15 days after service of SEIU's responsive evidence and legal memorandum, NESTU/Armstrong shall, if it deems it necessary, lodge with this hearing officer and serve on all interested parties a reply memorandum answering the points raised in SEIU's responsive evidence and legal memorandum.
- BART and any other interested party may, within 15 days after service of SEIU's responsive evidence and memorandum, lodge with this hearing officer and serve upon all interested parties a memorandum stating its support for or opposition to NESTU/Armstrong's petition and grounds therefor.

At the conclusion of the foregoing schedule, the hearing officer will make a determination whether the matter can be decided on the evidence and argument submitted or whether a further evidentiary hearing shall need to be held, and will make a recommendation to the Director.

DATED: 1/30/02



William L. Kasley
Hearing Officer

1 **PROOF OF SERVICE BY MAIL**

2 (Code Civ. Proc., §§ 1013a, 2015.5)

3 I am employed in the City of San Francisco and County of San Francisco; I am over
4 the age of eighteen years and not a party to the within entitled action; my business address is
5 455 Golden Gate Avenue, Suite 9516, San Francisco, CA 94102.

6 On 2/8/02, I served the within:

7 **PROPOSED INTERIM DECISION and ORDER, and DIRECTOR'S**
8 **DECISION**

9 **RE:** National Electronic Technicians Union
10 Petition for Certification and Decertification
(SEIU local 790 and BART)

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

14 Vincent A. Harrington, Jr.
15 Van Bourg, Weinberg, Roger & Rosenfeld
16 A Professional Corporation
180 Grand Avenue, Suite 1400
17 Oakland, CA 94612

Robert J. Hooy
Hooy & Hooy
3125 Clayton Road, Second Floor
Concord, CA 94519-2732

18 Sherwood Wakeman, General Counsel
19 San Francisco Bay Area Rapid Transit
800 Madison Street - Lake Merritt Station
P.O. Box 12688
20 Oakland, CA 94604-6000

21
22 I declare under penalty of perjury that the foregoing is true and correct, and that this
23 declaration was executed at San Francisco, California, on 2/8/02.

24
25
26 
27 Robbin L. Joseph, Declarant
28