STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 390, Employee Organization, and SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, Employer.	)	Case No. SF-OS-19 PERB Decision No. 111 November 20, 1979

Appearances: Robert Bezemek and Stewart Weinberg, Attorneys (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 390; Jon Hudak, Attorney (Breon, Galgani & Godino) for San Ramon Valley Unified School District.

Before Gluck, Chairperson; Gonzales and Moore, Members.

PROCEDURAL HISTORY

This case is before the Public Employment Relations Board (hereafter the Board or PERB) on exceptions filed by the Service Employees International Union, Local 390 (hereafter SEIU) to the hearing officer's proposed decision dated September 20, 1978. In his decision, objections raised to the organizational security election were dismissed. The Board reverses that decision.

FACTUAL SUMMARY

On March 18, 1977, Local 390 was certified as the exclusive representative of approximately 140 classified employees of the San Ramon Valley Unified School District (hereafter the

District). Negotiation sessions were conducted over a five-month period and were concluded on November 30, 1977. Pursuant to section 3546(a) of the Educational Employment Relations Act[1] (hereafter the Act or EERA), the District insisted that the organizational security clause in the contract be severed from the agreement and be submitted to a separate vote of bargaining unit members. Because of the protracted nature of negotiations and the desire to have a dues deduction system in operation by January 1, 1978, both parties

---

[1]The Educational Employment Relations Act is codified in Government Code section 3540 et seq.

Government Code section 3546(a) provides:

> An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

All section references herein are to the Government Code unless otherwise noted.

agreed to waive the election notice period.[2]

Testimony in the record is in conflict as to which party initially proposed that the election be held as soon as possible. However, on or about December 2, 1977,[3] SEIU field representative Kathryn Haymes testified that she contacted the Board's San Francisco Regional Office to inquire as to the first available date for scheduling the organizational security election. She was advised that December 19th was available and relayed this information to Douglas Douglas, classified personnel director and member of the District's negotiating team. Haymes and Douglas then discoverd that December 19th was the first day of Christmas vacation for the 32 bus drivers in the bargaining unit. These bus drivers, therefore, would be

---

[2]Notice requirements for organizational security elections are set forth in PERB's rule 34000, California Administrative Code, title 8, section 34000, which provides in pertinent part:

34000. Petition by Employer.

(a) Pursuant to section 3546(a) of the Act, an employer may serve written notice on an exclusive representative that a proposed organizational security provision shall be voted upon separately from the remainder of the proposed agreement by the members of the unit.

(b) The notice to the exclusive representative shall be made only after agreement has been reached on an organizational security arrangement and prior to ratification of the entire proposed agreement.

[3]Unless otherwise indicated, all dates refer to 1977.

the only unit employees not on paid status on election day.

To promote the bus drivers' participation in the election, Douglas suggested the possibility of holding a paid in-service training session for bus drivers on December 19th election day. The parties are in disagreement as to the exact nature of their agreement concerning the election date and its relation to the training session commitment. Haymes testified as follows:

> Q. Okay. Did you ever tell Mr. Douglas that you would not agree to the December 19 date unless an in-service were held on that day?
>
> A. I think what we said was if we can't work out an in-service training on the 19th then we'll have to come back and discuss this again.
>
> Q. That's what you said?
>
> A. I think that was the general agreement in our conversation, that if an in-service training couldn't be given, if an in-service training couldn't be given on that day then we'd have to either find out another way to overcome the problem or change the day.

Douglas testified that when posing this suggestion, he indicated that he would have to make inquiries as to the possibility of scheduling such a session. He testified as follows:

> Q. Was there any discussion in that review to the effect that it should not be scheduled during December, or during the Christmas break unless there was to be an in-service training session?
>
> A. I don't recall anything that specific, Kathryn did express concern as she testified and that's when I told her that I would check into it to see if there was any possibility of having a --

Q. Okay.

A. -- training session.

For this reason, Douglas telephoned Don Capling, director of transportation for the District. Testimony of Capling places this telephone conversation approximately two weeks prior to a bus driver bidding session[4] conducted on December 13th. Douglas testified that after his conversation with Capling he believed that Capling had agreed to the training session. Capling testified that after this conversation, he believed he had rejected Douglas' training session proposal. Capling also testified, however, that he understood that a promise to hold the election day training session had been made to the union.

There is considerable ambiguity and conflict as to when the union was advised that Capling had apparently agreed to the training session on election day. Haymes testified that, approximately two weeks before the election on or about December 5, she spoke to Capling who indicated that he had discussed the training session with Douglas. According to Haymes, Capling gave no indication that he had any objection to offering the bus driver training as planned. Haymes also recalled a discussion on December 9th during which Douglas

---

[4]Two bidding sessions were held during the period prior to the election; on December 9 and 13. The purpose of the meetings was to allow bus drivers to bid on available routes.

announced, just prior to signing the election consent agreement, that the possibility of having the election day training session had been confirmed by Capling.

Capling, Douglas and Shari Ogden, acting chairperson, shop steward and negotiator for SEIU, all testified that on or about December 9th, a bus driver bidding meeting was held. In certain respects, the testimony of Douglas substantiates Ogden's description of that meeting. He agrees that they were present at the meeting during which a problem developed over the bidding procedure. A recess was called during which Douglas and Capling spoke privately. When Ogden rejoined the district administrators, Ogden testitied that:

A. Yes, I had left the room and was called back in and --

Q. Okay. And was there a discussion at that time?

A. Yes.

Q. And who spoke?

A. Mr. Douglas mainly.

Q. Okay. And could you, as best you can recall, tell us what Mr. Douglas said and what you said.

A. Okay. I don't know if it's the exact words that I was told that they had some good news, that there would be a two-hour in-service training before the election to encourage drivers to come in and vote and I said, great, and went out and wrote it on the board.

Q. Okay. What board did you write it on?

A. The chalk board that's in the main coffee room for the bus drivers.

Q. Okay. And what did you write on the board?

A. That there would be a paid two-hour in-service training two hours prior to the voting on the 19th.

Q. Okay. Now, when you had this conversation with Mr. Douglas, was Mr. Capling standing there?

A. Oh, Yes.

Q. Was he within earshot?

A. Oh, yes.

Q. Did he say anything at all?

A. He really didn't say too much.

Q. Did he say that there would be or wouldn't be in-service training?

A. I really don't, just, you know, Mr. Douglas did most of the talking. I don't remember what and if, you know, it was very little.

Q. Did Mr. Capling object to anything Mr. Douglas said?

A. No.

Q. Did he correct Mr. Douglas in any way?

A. No.

Capling's own testimony as to this meeting is contradictory. He testified that he had no recollection of the meeting and, after his initial conversation with Douglas, the next time he heard about the training session was on December 13 when the second bidding session was held. Capling also testified, however, that he did recall the meeting on December 9th, that he left that meeting without believing that the session was to be held, but that he did remember that the subject of training was discussed sometime during that day.

Although Douglas testified that he did not recall whether he had spoken to Capling prior to the December 9th meeting, he stated:

> Q. (By Mr. Hudak) Mr. Douglas, do you recall having a couple of meetings with Mr. Capling and Mrs. Ogden shortly before the December, December 19 election?
>
> A. We had a meeting on the ninth of December when we were having the bidding for buses, we had a problem, and we went into Mr. Capling's office.
>
> Q. Okay. Now, and also on the 13th or thereabouts, did you have a meeting with those two persons?
>
> A. I don't recall on the 13th.
>
> Q. Okay, or that --
>
> A. That was the day of the bidding.
>
> Q. -- vicinity. Well, okay, thereabouts. Did you have two meetings before the election or not?
>
> A. I don't know if we had any formal meetings, but we had several (inaudible) negotiations.
>
> Q. In any event you left that meeting with, what was your understanding about in-service training when you left that meeting?
>
> A. That there was going to be one.
>
> Q. And was that based on something you had said or something Mr. Capling had said?
>
> A. I had requested Don to, if it would be possible for us to have an in-service training on the 19th and it was my impression that we were going to have.

According to Ogden's testimony, immediately after the December 9th meeting with Douglas and Capling, she wrote an announcement for the training session on the black board in the room used by the bus drivers. Soon thereafter, according to

Ogden, she was asked by the bus drivers whether the training session had been cancelled because Capling had been seen erasing the notice.[5] Capling admitted that before the meeting on December 13th he erased the notice after being advised that it had been written on the black board.

Haymes testified that because it was her understanding that the District had agreed to post notices of the training session, she checked the bus drivers' room during the week of December 5th and called Douglas to inform him that no notices had been posted. On Monday, December 12, Haymes tried to reach Capling but was unsuccessful. She advised Ogden to remind Capling of his tardiness and to ask him to make the posting.

The next day, Tuesday, December 13, the second bus driver bidding session was held. At that meeting, Douglas announced in Capling's presence that the training session would be held on the day of the election. Capling did not contradict Douglas' statement during the meeting because, according to Capling's testimony, he saw the matter as being something between Douglas and himself.

Ogden testified that after this bidding session she talked to Douglas about the training session notice being erased.

---

[5]Ogden testified that two days after the notice was posted, Laura Capuder, a District bus driver and SEIU member, told her that the notice had been erased. Although Capuder was called and testified as a witness at the hearing, she was not asked about this statement by either party.

Also after this meeting, Capling discussed his objections to the training session with Douglas. And after his discussion with Capling, Douglas again spoke to Ogden concerning the training. According to Ogden, her conversation with Douglas was as follows:

> A. Well, when I talked to him was right after the bidding. At the bidding he announced to all the drivers that there would be this in-service training and evidently Don told him shortly thereafter that this was not so, and I don't know who called who, whether I called him or what, but we had a telephone conversation in which he asked me, isn't that what Don said at the meeting that we were going to have this in-service training? Because he said he would not have announced this in front of all these drivers if he hadn't thought it was true. He was very embarrassed by it. And I said yes, that is what I understood, you know, that this meeting, I mean, that the in-service training had been set up.

Haymes testified that on Tuesday or Wednesday, she was advised by Ogden that there was some question as to whether the training session would be cancelled by Capling. She testified that she told Douglas that no notices had been posted and that his response was that he was surprised and would look into the matter. On Thursday, according to Haymes, she was first made aware of the "whole story" regarding Capling's decision to cancel the training session. This decision was confirmed by Douglas on Friday, December 16. Haymes testified that Douglas told her that Capling had indicated that, referring to the paid in-service training session, he would not pay employees to vote.

Ogden testified that on Wednesday, December 14, a notice was posted, signed by Capling, which said that there was a

misunderstanding but that no training session would be held on election day. After this notice was posted, Ogden testified, she talked to some employees who expressed disappointment that the training session had been cancelled. William Green, SEIU chairperson, testified that on or about Wednesday, December 14, Ogden telephoned him at his home in the evening. She told Green that Capling had cancelled the training session. After the union meeting held later that evening, Green testified that bus drivers were upset by this decision and that some indicated that they were not surprised at the district's decision to cancel the session.

Douglas' version of the events during this period are that he announced the training session to the drivers at the bidding session on Tuesday and again to the union representatives present when the contract was signed on Wednesday. In the course of the latter announcement, Douglas' testimony is that he specifically stated that Capling had agreed to the proposed training session. On Thursday, Douglas said that he spoke to Haymes about the lack of notices and that he was unsuccessful in reaching Capling on that day. Not until Friday, according to Douglas, was he able to verify from Capling and Capling's superior, Orin Bachelor, the district business manager, that no training would be held.

Again, Capling's testimony regarding his final decision to cancel the election day training session is internally

contradictory. While he testified that he contacted Bachelor before the December 13th meeting, he also stated that he did not advise his superior of his decision until Thursday and until Friday. His testimony regarding when the decision was communicated to the employees is also in conflict. He indicated that his announcement that the training was cancelled appeared both on Monday and on Tuesday and, in addition, that his final decision was not made until Thursday.

The explanations offered by Capling for cancelling the session were that he did not have money available in the budget, that training had not been given on a holiday before and that this particular training session was not necessary. Therecord reflects, however, that a paid bus driver training had, on one occasion, been conducted on a weekend although, according to Capling, that session had not been ordered by him. In general, bus driver training sessions were conducted by the district in order to satisfy the drivers' training requirements. The record reflects that during December 1977, one district trainer was prepared to conduct such a traning session, having just returned from a training session herself. With regard to the testimony of Haymes that Capling had said to Douglas that he would not pay people to vote, Capling testified that while he may have made this comment to Eileen McCauley, dispatcher for transportation, he meant that since a training session was not needed, scheduling such a session on election

day was, in effect, paying people to vote.

When SEIU representatives learned of Capling's decision on or about Wednesday, December 14, 1977, Ogden discussed rescheduling the election with Green, and with Haymes. Haymes said that it was too late to reschedule and, given the election consent agreement signed by the parties on December 9, she did not believe that she could reschedule the vote. She felt that SEIU would have to proceed with the election and hope for the best.

On Monday, December 19, the organizational security election was conducted by PERB agent Jerilyn Gelt. Colleen Matthews, district personnel secretary, served as the district's observer and Green served as observer for SEIU.[6] During the polling, Green commented to Gelt that he did not think that the election was fair because everyone in the unit was paid except the bus drivers. Gelt responded that SEIU had seven days to lodge an objection to the election. Haymes said that SEIU would contest the election if it lost.

---

[6]One of SEIU's objections to the organizational security election concerned the allegation that Green was informed by two unit custodians that a sign was posted near the polling site on election day, the contents of such suggested a negative vote in the election. Because of the Board's conclusions as set forth infra, the facts surrounding that allegation of serious irregularity in the conduct of the election are not included herein but are incorporated by reference to the hearing officer's proposed decision.

One hundred and seven unit employees voted in the election. The tally of ballots was 55 against and 52 in favor of the organizational security clause. Of the 32 bus drivers, 26 or approximately 81 percent cast ballots. As to the unit employees other than bus drivers, 81 or 75 percent voted. Official records enabled the parties to determine which unit members did not vote, and testimony was received from each bus driver who did not vote.

Viola Aquino, an SEIU member and non-voting bus driver, was not notified of the election or the training session and was on leave and out of the state on the day of the election.

Capuder, an SEIU member and non-voting bus driver, was aware of the election and saw the training session notice on the bulletin board. She recalled some discussion among bus drivers that the election cut into their Christmas vacation and that they did not want to come back to school during their vacation. She had no recollection of telling Ogden that she personally would not come in to vote unless paid. Her testimony was that if she did say that, it was said in jest.

Sheri Cuthbertson, also an SEIU member and non-voting bus driver, was aware of the election but not of the training session. No one called her to urge her to vote. On December 19, Cuthbertson was attending to personal affairs in preparation for the Christmas holiday. She normally attended

in-service training sessions in the past as it was her understanding that attendance was required unless one were ill.[7]

Beverly Jacops, SEIU member and non-voting bus driver, was aware of the election and the training session. She did not vote because she was ill during the week prior to the election and also during the entire Christmas vacation. She testified that she had attended the majority of training sessions in the past and believed that attendance was required because drivers were paid to attend. As to the election day session, she stated that people were upset that it was scheduled on a Monday during Christmas vacation.

Kathryn Larkin, an SEIU member and non-voting bus driver, was not aware of the training session although she was in attendance at the December 13th bidding meeting. She testified that she was not aware of the election because she was preoccupied with the Christmas vacation. She has attended several past in-service training sessions whenever Capling called such a session.

Finally, Sharon Soto, a non-voting bus driver and SEIU member, was aware of the election. She testified that she saw

---

[7]The record in fact reveals that bus drivers are required to have a school bus driver certificate. The certificate expires every two years and a designated number of hours of training are required in order to obtain or renew these certificates.

the training session notice on the board but assumed it was cancelled when the notice was erased. Ogden called her prior to the election and reminded Soto to vote. On December 19, she attempted to get to the school to vote but a car breakdown prevented her from reaching the polling site.

SEIU filed timely objections to the election, alleging that the District committed an unfair practice by unilaterally revoking its agreement to hold the in-service training session which engendered a negative reaction toward SEIU among unit employees and also caused a number of eligible voters not to vote, the number being substantial enough to affect the outcome of the election. SEIU also asserts that the sign allegedly witnessed by the two custodians constituted a serious irregularity in the election proceedings.

In response to these objections, the District denied that its final decision not to conduct the training session on election day was an unfair practice or that this action caused the employees' negative vote in that election. The District urges that the SEIU dues increase from seven to ten dollars per month, enacted in December prior to the organization security election, explains the result.

DISCUSSION

The Board's rules and regulations do not specifically address objections to organizational security elections or provide a standard to apply in setting aside such election

results. However, the Board agrees with the hearing officer's application of PERB rule 33590[8] governing representation election challenges since in both election situations the goal is to foster an environment in which a free election can be conducted. PERB rule 33590 states:

> Objections shall be entertained by the Board only on the following grounds:
>
> (a) The conduct complained of is tantamount to an unfair practice as defined in Article 4 of the Act; or
>
> (b) Serious irregularity in the conduct of of the election.

In applying this rule to the instant case, the Board has reviewed SEIU's allegation that the District's conduct in conjunction with the training session and its cancellation was tantamount to an unfair practice in violation of section 3543.5 (c).[9] In that regard, the Board has examined the entire factual circumstances surrounding the organizational security election and the election day training session in light of SEIU's specific allegation that Douglas' lack of authority to

---

[8]California Administrative Code, title 8, section 33590.

[9]Section 3543.5(c) of EERA provides:

> It shall be unlawful for a public school employer to:
>
> (c) refuse or fail to meet and negotiate in good faith with an exclusive representative.

reach an agreement on the training session was evidence of bad faith bargaining.

While it is true that under certain circumstances, a negotiator's lack of authority to reach agreement constitutes a refusal to bargain in good faith, in this case, the fact that Douglas was required to get approval for the training session does not, in and of itself, so demonstrate.

Decisions arising under the National Labor Relations Act (hereafter the NLRA) clearly establish that bargaining team members are permitted to function subject to approval from superiors without violating section 8(a)(5) of the NLRA. (Maury's Fluorescent & Appliance Service (1976) 226 NLRB No. 206 [94 LRRM 1175]; Gulf States Canners, Inc. (1976) 224 NLRB No. 215 [93 LRRM 1425].) Thus, while the use of negotiators without authority to bind the company is some evidence of a lack of good faith (NLRB v. Coletti Color Prints, Inc. (2d Cir. 1967) 387 F.2d 298 [66 LRRM 2776]; National Amusements, Inc. (1965) 155 NLRB No. 113 [60 LRRM 1485]), as stated in NLRB v. Fitzgerald Mills (2d Cir. 1963) 313 F.2d 260 [52 LRRM 2174], cert. denied (1963) 375 U.S. 834 [54 LRRM 2312],

> If in other respects good faith is found it is not enough to establish an unfair labor practice solely that the representative of the company was not empowered to enter into a binding agreement. (52 LRRM at p. 2178.)

Therefore, in determining whether the District's conduct demonstrates bad faith bargaining in violation of

section 3543.5(c) of the EERA, the Board takes cognizance of the totality of circumstances (NLRB v. Virginia Electric & Power Co. (1941) 314 U.S. 469 [9 LRRM 405]; NLRB v. Advanced Business Forms Corp. (2d Cir. 1973) 474 F.2d 457 [82 LRRM 3189]; Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App. 3d 9 [92 LRRM 3373].) Here, the employer's conduct, including the actions of both Capling and Douglas, both administrators and agents of the District, must be reviewed in the context of the negotiations as they arose. (NLRB v. Randle - Eastern Ambulance Service, Inc. (5th Cir. 1978) 584 F.2d 720 [99 LRRM 3377].)

Initially, the Board notes that in assessing the refusal to bargain charge alleged, the rules of contract law are not determinative. (NLRB v. Donkin's Inn, Inc. (9th Cir. 1976) 532 F2d 138 [91 LRRM 3015], cert. denied (1976) 429 U.S. 895 [93 LRRM 2512]; Lozano Enterprises v. NLRB (9th Cir. 1964) 327 F.2d 814 [55 LRRM 2510].) Thus, the Board may find a refusal to bargain violation even assuming arguendo that, absent Capling's actual approval, the parties failed to reach a final contractual agreement as to the training session. This is so because the rules by which it is determined whether the parties have made a contract are not the rules by which it is determined whether or not the parties have bargained in good faith. (NLRB v. Shannon & Simpson Casket Co. (9th Cir. 1953) 208 F.2d 545 [33 LRRM 2270]; San Antonio Machine & Supply Corp.

v. NLRB (5th Cir. 1966) 363 F.2d 633 [62 LRRM 2674]; NLRB v. Downs - Clark, Inc. (5th Cir. 1973) 479 F.2d 546 [83 LRRM 2475].) Therefore, unlike the hearing officer, the Board finds it unnecessary to confine its analysis to a determination that the training session was a quid pro quo of the parties election consent agreement.[10]

In the instant case, the Board has reviewed the record paying particular attention to Capling's role in the training session negotiations. Based on the testimony of Haymes, Ogden, Green and Douglas, it appears that Capling exhibited apparent acquiesence to the training session. Haymes testified to a conversation with Capling two weeks prior to the election during which the training session was discussed and to which Capling voiced no opposition. Ogden recalled, and Haymes corroborated, that Capling was present at the meeting on December 9th where Douglas announced Capling's approval of the session. Capling himself testified that prior to the bidding session on December 13th, he erased the training session notice written by Ogden. But it is uncontested that Capling was

---

[10]The hearing officer determined that there was a lack of evidence to support the existence of a quid pro quo agreement although he found, as a matter of fact, that there was ample evidence that the training session was planned, that the election consent agreement was signed after the session was planned and that Douglas announced the training session to the bus drivers on December 13th and to the union negotiating team on December 14th, the day the parties' collective bargaining agreement was signed.

present and voiced no objection to the training session during the December 13th bidding meeting. Thus, while Capling's behavior demonstrated apparent approval of the training session, he nonetheless made no attempt to clearly announce that his intention was to the contrary. As a result, some confusion and uncertainty persisted until Capling's position was finally clarified on Friday, December 16th, the last work day prior to the election.

In assessing Capling's conduct, the hearing officer concluded that, while one would have expected Capling to "register some dissent" to the apparent scheduling of the training session which he believed he had rejected, it was unnecessary to pursue this "seeming inconsistency" since, in the hearing officer's opinion, the sole question to be addressed was whether the training session was a quid pro quo for SEIU's agreement to the election date. As noted infra, the Board does not adopt this legal analysis. Rather, the Board concludes that bad faith bargaining is demonstrated when Capling's failure to "register some dissent" is viewed in conjunction with Douglas' apparent agreement to the training session. This conclusion is supported by cases arising under the NLRA where refusal to bargain violations have been found when, notwithstanding a negotiator's lack of actual authority, the negotiator's conduct during the course of negotiations leads a reasonable person to rely on apparent authority to bind

the party to a final agreement. (Niagara Therapy Mfg. Corp. (1978) 237 NLRB No. 1 [99 LRRM 1440]; Naccarato Construction Co. (1977) 233 NLRB No. 196 [97 LRRM 1060].) A party may reasonably rely on the apparent authority of a negotiator absent clear disclosure to the contrary. (Aptos Seascape Corp. (1971) 194 NLRB 540 [79 LRRM 1110]; H. C. Thomson, Inc. (1977) 230 NLRB No. 106 [95 LRRM 1472].) Silence can also be an affirmance of unauthorized conduct if, fairly construed, it is indicative of an intent to authorize the negotiator's conduct. (Wometco-Lathrop Company (1976) 225 NLRB No. 92 [92 LRRM 1593].) In ambiguous situations, it is incumbent on the party wishing to dispel apparent agreement on issues to inform and clarify its actual position. (NLRB v. Mayes Bros., Inc. (5th Cir. 1967) 383 F.2d 242 [66 LRRM 2031]; Reppel Steel & Supply Co., Inc. (1978) 239 NLRB No. 53 [99 LRRM 1620].) Notice sufficient to dispel the reasonable presumption of apparent authority and accord must be affirmative, clear and timely and, if such announcement is not made, "then the principal must bear the responsibility for and the consequences of any misunderstandings that might arise." (University of Bridgeport (1977) 229 NLRB 1074, 1082 [95 LRRM 1389].)

In this case, in light of the parties' successful bargaining history and Douglas' participation in that process which extended over a five-month period, SEIU did reasonably rely on Douglas' assertion that Capling had granted his

approval to the training session. Contrary to the hearing officer's conclusion, it was not incumbent on SEIU to postpone the organizational security election when it was finally advised that Capling had no intention of conducting the training session as planned. (Great Atlantic and Pacific Tea Company (1952) 101 NLRB 1118 [31 LRRM 1189].) Rather, since Capling had never approved of the session, the duty to dispel that erroneous impression fell on Capling. Good faith bargaining demands such square dealing. What was stated by the court in NLRB v. Industrial Wire Products Corp. (9th Cir. 1972) 455 F.2d 673 [79 LRRM 2593], is equally applicable here.

> [N]egotiators charged with the ultimate responsibility of approving or rejecting collective bargaining agreements may not remain mute in the presence of a negotiated accord and...later...catch their tongues at a moment they deem most likely to frustrate the progress that has been made. (455 F.2d at p. 679.)

Based on the foregoing, the Board finds that by the preponderance of the evidence, SEIU has demonstrated that the District bargained in bad faith and thereby engaged in conduct tantamount to an unfair practice in violation of section 3543.5(c).[11]

---

[11]Having determined that the manner in which the District engaged in bargaining evidenced bad faith and therefore violated section 3543.5(c) of the Act, it is unnecessary to specifically examine SEIU's allegation that the cancellation of the training session was an improper unilateral change. Without making such an express finding, the Board nevertheless

In addition, the Board finds that the District's conduct interfered with the employees' rights as protected by section 3543.5(a) of the Act.[12] In so finding, the Board does not assert that the school administrators were required to affirmatively act to facilitate voter participation by offering the training session on election day. (NLRB v. W. S. Hatch Co., Inc. (9th Cir. 1973) 474 F.2d 558 [82 LRRM 2662]; A. D. Juilliard & Co., Inc. (1954) 110 NLRB 2197 [35 LRRM 1401]; Richmond Federation of Teachers (2/7/77) EERB Order No. Ad-4.) In fact, an employer is prohibited from granting benefits to employees during the period prior to an election. (NLRB v. Exchange Parts Co. (1964) 375 U.S. 405 [55 LRRM 2098].) However, an employer is also prohibited from withholding benefits from employees during the election process, a period which is most susceptible to the employer's subtle influences. (Gates Rubber Co., Inc. (1970) 182 NLRB No. 15 [74 LRRM

---

views Capling's eleventh-hour cancellation of the training session as a departure from SEIU's reasonable expectation, derived from communication and contact with Douglas, that the session would in fact be offered on election day.

[12]Section 3543.5(a) provides:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

1049].) When, as here, the employer both promises and withdraws benefits during the sensitive election process, the employer has improperly interfered with the employees' right to vote. (Larand Leisurelies, Inc. (1974) 213 NLRB No. 37 [87 LRRM 1129].) In this case then, it is the District's eleventh hour decision to cancel the training session, apparent agreement notwithstanding, which serves to evidence the unlawful interference with rights guaranteed by EERA. In deciding whether to alter the scheduled training session, the District was obligated to act "precisely as it would if a union were not in the picture" and commits an unfair practice "if the employer's course is altered by virtue of the union's presence." (McCormick Longmeadow Stone Co., Inc. (1966) 158 NLRB 1237, 1242 [62 LRRM 1185].)

In examining the District's conduct, the Board is persuaded by the fact that Capling, apparently withholding his decision to cancel the training, caused confusion and some discord among the eligible voters on the eve of the organizational security election. In addition, Capling's comment that he would not agree to the training session because he did not want to pay employees to vote obviates the hearing officer's conclusion that his decision was unaffected by the union's organizational security election and provides the necessary nexus between his decision to cancel the training session and the employees' protected right to vote. Thus, while Capling's explanations

for not agreeing to the training session may be unpersuasive in light of the inferences raised by the record as a whole, the Board finds, contrary to the hearing officer, that it is unnecessary to consider whether there is sufficient evidence to call into question Capling's reasons or motives for his refusal to conduct the training session. This is so because in this case, the question is not whether Capling would initially have been justified in refusing to conduct the in-service training session. Rather, the Board considered whether the manner in which he in fact participated in the training session negotiations interfered with the employees' rights. The Board finds that Capling not only failed to provide any timely business justification for the decision to cancel the session but that he also failed to dispel his apparent agreement to the session as was conveyed to the bus drivers just prior to the election. It is this equivocal and inconsistent conduct which harmed the employees' right to vote, was without business necessity and was therefore conduct tantamount to an unfair practice in violation of section 3543.5(a). (Oceanside-Carlsbad (1/30/79) PERB Decision No. 89.)

In addition to the Board's finding that the District's conduct was evidence of a refusal to bargain with union representatives, the Board also finds that the employer's same conduct was concurrently tantamount to a violation of

section 3543.5(b)[13] of the Act. In so finding, the Board determines, contrary to the hearing officer's conclusion, that it is unnecessary for SEIU to demonstrate that this conduct directly translated into a negative vote by employees in the organizational security election[14] or that individual unit members specifically vocalized negative comments as to the union's abilities. Rather, the manner by which Capling frustrated and obstructed SEIU representatives' negotiation efforts concerning the training session impaired its protected right to function as exclusive representative of the bargaining unit employees.

In light of the following discussion and conclusion that the relief requested by the union be granted, it is unnecessary to specifically address all objections raised by SEIU including the questions concerning the serious irregularities of election

---

[13]Section 3543.5(b) provides:

> It shall be unlawful for a public school employer to:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[14]In cases involving election challenges, the Board is unwilling to require that the secrecy of an individual's election conduct be invaded in order to present affirmative proof that the protested activity had a direct impact on the election results. In the appropriate case, the Board may infer from the record as a whole that the conduct tantamount to an unfair practice improperly influenced the employees' vote. (Oceanside-Carlsbad, supra.)

conduct based on the training session cancellation or the sign appearing at the polling place.

Based on the foregoing, the Board has determined that the District's conduct concerning the election day training session was tantamount to an unfair practice in violation of section 3543.5(a), (b) and (c) of EERA. It is additionally necessary, however, for the Board to determine whether this conduct is sufficient cause to set aside the results of the organizational security election since PERB rule 33590, set out supra, merely provides this Board with the authority to entertain objections to elections where conduct tantamount to an unfair practice is established. Demonstration of such unlawful conduct is therefore viewed as a threshold question when the remedy requested is to overturn election results and this Board will not, necessarily, in every situation where conduct tantamount to an unfair practice is evidenced, order that the election be rerun. This standard is in accord with recent decisions of the NLRB which conclude that conduct violative of section 8(a)(1) of the NLRA is not a fortiori conduct which interferes with an employee's free choice in election proceedings. (McIndustries, Inc. (1976) 224 NLRB No. 180]93 LRRM 1046]; Coca Cola Bottling Co. Consolidated

(1977) 232 NLRB No. 114 [96 LRRM 1289].)[15] The decision to direct such relief depends on the totality of circumstances raised in each case and, when appropriate, the cumulative effect of the conduct which forms the basis for the relief requested. (NLRB v. Decoto Aircraft, Inc. (9th Cir. 1975) 512 F.2d 758 [88 LRRM 3231], cert. denied (1975) 423 U.S. 836 [90 LRRM 2554].) In general, this will require that the objecting party satisfy its burden of establishing a prima facie case that specific activities interfered with the election process. (NLRB v. Singleton Packing Corp. (5th Cir. 1969) 418 F.2d 275 [72 LRRM 2519]; National Cash Register v. NLRB (5th Cir. 1969) 415 F.2d 1012 [72 LRRM 2051]; Magnolia Screw Produces, Inc. v. NLRB (6th Cir. 1976) 542 F.2d 130 [94 LRRM 3255].) The Board views this requirement as necessarily consistent with PERB rule 32178 which imposes on the charging party the burden of proving the alleged unfair practice by a preponderance of the evidence. (Cal. Admin. Code, title 8, section 32178.)

In the instant case, the Board is persuaded that the employee organization has satisfied its burden of proving that

---

[15]The decision in Dal-Tex Optical Co., Inc. (1962) 137 NLRB 1782 [50 LRRM 1489] which established the a fortiori rule has not been explicitly overruled by the Board's decisions in McIndustries or Coca Cola Bottling, supra. These cases do suggest, however, that where the Board has found that the alleged violation was of an extraordinary limited nature, an exception to the a fortiori rule is warranted.

the District's conduct, intimately related to the election itself, had a probable impact on the employees' vote. (NLRB v. Golden Age Beverage Co. (5th Cir. 1969) 415 F.2d 26 [71 LRRM 2924].) The fact that the District delayed in dispelling its apparent acquiesence to the election day traning session and thereby caused confusion among employees and administrators alike supports the relief granted in this case. (NLRB v. Monroe Auto Equipment (5th Cir. 1972) 470 F.2d 1329 [81 LRRM 2929], cert. denied (1973) 412 U.S. 928 [83 LRRM 2320]; A. D. Juilliard, supra.) The Board cannot accept the hearing officer's determination that SEIU was advised that no training session would be conducted "well before the election." To the contrary, SEIU representatives were definitively advised of the cancellation only a few days prior to the election. The close proximity of this conduct to the election itself makes it unlikely that the District had successfully purged the taint which resulted from withdrawing their earlier apparent agreement. (Coca Cola Bottling Co., supra; Columbia Pictures Corp. (1949) 81 NLRB 1313 [23 LRRM 1504].)

Thus, where the training session agreement was inexorably linked to the election itself, where the apparent acquiesence and delay in cancellation caused confusion and discord which remained throughout the election proceedings, and where the results of the election were such that the margin by which the organizational security clause was defeated was so narrow, the

Board finds is sufficiently likely that the objectionable conduct did influence the vote so that it cannot be said with assurance that the employees would have voted as they did absent the influence caused by the employer's unlawful conduct. (Solon Mfg. Co. v. NLRB (1st Cir. 1976) 544 F.2d 1108 [93 LRRM 2786].) Therefore, based on the totality of circumstances surrounding the organizational security election, the Board finds probable cause to believe that the District's conduct was disruptive of the election process and was likely to have influenced the employees' attitude toward the organizational security clause proposed by SEIU.

ORDER

The Board, therefore, orders that the results of the organizational security election conducted on December 19, 1977, be set aside and a second election be conducted by the Regional Director.

By: Barbara D. Moore

Harry Gluck, Chairperson

Raymond J. Gonzales, Member, dissenting:

I do not believe that the organizational security election should be overturned in this case. Unlike my colleagues, I am

unable to make a leap of faith between the District's conduct and the election results. Such a leap is necessary in this case in order to overturn the election since there is no evidence supporting a contention that the specific activities of the District influenced the votes so that the election results did not reflect the employees' desires. Generally, I feel that in the absence of an affirmative showing by the party objecting to the conduct of the election that the alleged unlawful conduct interfered with employees' free choice, elections should not be overturned.

The District's conduct involved a misunderstanding between two management employees. As a result of this misunderstanding, a certain amount of confusion developed in the days preceding an organizational security election as to whether an in-service training session for bus drivers would be held on the day of the election, which would have otherwise been the first day of the bus drivers' vacation.

The facts are set forth exhaustively in the majority decision. It should be noted, however, that the record is ambiguous as to the exact sequence of events prior to the election. Several events were telescoped into a relatively short period, and it is understandable that after several months, the witnesses' memories would be vague and possibly conflicting. The confusion over the training session was resolved on December 13 or 14 when union representatives were

informed that there would be no in-service training on election day and notices were posted to that effect.

The most likely result of the District's decision not to have a training session on December 19 did not occur; instead of discouraging bus driver turnout, 81 percent of the bus drivers voted in the organizational security election, despite the fact that they were on vacation, compared with 75 percent of other unit employees. All six of the bus drivers who did not vote testified at the hearing on this matter. From their testimony, it is clear that several would not have voted even if a training session had been scheduled, indicating that there is no causal connection between the District's conduct and the voter turnout.

Thus, the majority must reach to find some other grounds on which they can overturn the election. They do so by finding that the District's conduct had a "probable impact" on the employees' vote, that it was "sufficiently likely" to have influenced the vote so that it cannot be said with assurance that the employees would have voted as they did absent the influence of the employer's conduct. This finding is based on the creation of hypotheses drawn from the conduct itself rather than on any independent evidence. Terms such as "sufficiently likely" and "probable impact" only underline the weakness of the majority's reasoning.

I cannot go along with such speculation. I believe that election results should not be overturned unless there is strong reason to believe that unlawful conduct had such an impact on the employees that the election results do not accurately reflect their wishes. I see no reason to impose the delay and expense of a new election on the parties in the absence of evidence more solid than mere conjecture.

Federal courts, in developing standards governing overturning elections, have placed "a heavy burden" on parties objecting to the conduct of an election. In NLRB v. Golden State Beverage Co. (5th Cir. 1969) 415 F.2d 26 [71 LRRM 2924], the court stated:

> Further, in reviewing the Board's disposition of the Company's objections to the election, it 'must be kept in mind that the burden is on the party objecting to the conduct of the representation election to prove that there has been prejudice to the fairness of the election.' Southwestern Portland Cement Co. v. N.L.R.B., 407 F.2d 131, 134, 70 LRRM 2536 (5th Cir. 1969) [cert. den. 396 U.S. 820] [other citations omitted]. This is a heavy burden; it is not met by proof of mere misrepresentations or physical threats. Rather, specific evidence is required, showing not only that the unlawful acts occurred, but also, that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election. [Emphasis added; citations omitted.]

In a later case, NLRB v. Monroe Auto Equipment (5th Cir. 1972) 470 F.2d 1329 [81 LRRM 2929], cert. denied (1973) 412 U.S. 928 [83 LRRM 2320], the court emphasized:

> Elections, whether won by a company or the union, are not to be lightly put aside. Courts ought not to so act without some assurance appearing in the record that the election results were not reflective of the employees' desires. The objecting party must shoulder this burden. [Citation omitted.]

I further note an NLRB case, A. D. Julliard & Co., Inc. (1954) 110 NLRB 2197 [35 LRRM 1401], in which employees were told on the day of an organizational security election that they must vote on their own time, in alleged violation of the election agreement. The NLRB found:

> There is no evidence that this alleged alteration in the election procedure did in fact cause confusion among the voters....
>
> [I]n the present proceeding, assuming arguendo the Employer did violate the election agreement as to whose time was to be utilized by the employees for purposes of voting, there is no proof of actual prejudice; nor was it affirmatively shown that any disfranchisement of eligible voters may have resulted from the asserted withdrawal of the Company's offer to permit voting at the Employer's expense. [Emphasis added.]

While I am not always swayed by NLRB precedent, I agree with the premise of all of these cases: there must be some affirmative evidence in the record that the election results were influenced by the allegedly unlawful conduct.

In this case, the majority relies on its belief that the District's conduct might have influenced the vote. It seems to me that if we are going to speculate, we should also speculate about the impact of other factors. For example, I could argue that the dues increase from seven to ten dollars a month, imposed by SEIU only shortly before the election, explains the election result much more persuasively than the theory that the District's conduct so undermined SEIU that its members voted against it. The presence of other factors which could explain the election results makes it all the more imperative that there be some affirmative showing that the factor in question, the District's conduct, influenced the employees' votes.

The decision to overturn an election should not be made lightly. By overturning the organizational security election in this case on the basis of pure speculation, the majority has, in my opinion, stretched too far in its efforts to reach its desired result and may very well be invalidating the employees' legitimate preference against an organizational security provision.

Raymond J. Gonzales, Member

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 390, Employee Organization, and SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, Employer.	REPRESENTATION Case No. SF-OS-19 PROPOSED DECISION (9/20/78)

Appearances: Robert Bezemek and Stewart Weinberg, Attorneys (Van Bourg, Allen, Weinberg & Roger) for Service Employees International Union, Local 390; Jon Hudak, Attorney (Breon, Galgani & Godino) for San Ramon Valley Unified School District.

Before Michael J. Tonsing, Hearing Officer.

STATEMENT OF THE CASE

On December 19, 1977, an organizational security election was held among classified employees in the San Ramon Valley Unified School District (hereafter District). The measure was defeated, 55 to 52. The certified employee organization, Service Employees International Union, Local 390 (hereafter SEIU), subsequently filed timely objections to the election alleging that:

1) The unilateral revocation by the District of a mutually agreed upon in-service training session for bus drivers in the unit, scheduled to be held on the day of the election, resulted in a number of eligible voters not voting, that the number of

such affected voters was substantial enough to affect the outcome of the election, and that such conduct by the District violates Government Code section 3543.5(a) through (c).[1] The day of the election was not a scheduled work day for bus drivers.

2) Certain conduct encouraging a negative vote occurred in close proximity to the polling place during voting hours and that such activity constituted a serious irregularity in the election proceedings.

The District maintained that the election agreement was not conditioned upon the District's training offer, that all eligible voters had an adequate opportunity to vote, that the cancellation of the training session did not result in employees not voting, and that the alleged polling place misconduct was not sufficient to warrant setting aside the election.

---

[1]All statutory references are to the Government Code unless otherwise specified.

Section 3543.5 provides in pertinent part:

It shall be unlawful for a public school employer to:

> a. Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of the exercise of rights guaranteed by this chapter.
>
> b. Deny to employee organizations rights guaranteed to them by this chapter.
>
> c. Refuse or fail to meet and negotiate in good faith with an exclusive representative.

A formal hearing was held on January 26, 1978 and February 22, 1978. Briefs were subsequently filed on behalf of the parties.

ISSUES

1. Did the District's unilateral decision to cancel an in-service training program for its bus drivers planned for the same day as the unit's organizational security election constitute either conduct tantamount to an unfair practice under section 3543.5(a), (b), or (c) or a serious irregularity in the conduct of the election, thereby providing grounds for invalidating the election?

2. Did activities at the polling site on the day of the election constitute a serious irregularity in the conduct of the election and thereby provide grounds for invalidating it?

FINDINGS OF FACT

1. Cancellation of Training

A. Background

SEIU was certified as the exclusive representative of the 140 classified employees in the San Ramon Valley Unified School District on March 18, 1977. Initial contract negotiations concluded on November 30, 1977. An agreement was signed on December 14, 1977. However, during negotiations the District had insisted that the organizational security clause in the proposed contract be severed from the remainder of the

agreement and be submitted to a vote of the unit membership. The District was entitled to do this under section 3546.[2]

There was a desire to have the organizational security vote conducted at an early date. But there is conflicting testimony regarding which party sought the early election date. The most plausible reconciliation of the conflicting accounts, which is accepted here, was provided by Ms. Haymes, SEIU field representative and one of the contract negotiators, who testified that negotiations had continued for five months, that both sides were tired, and that both sides felt it would be desirable to have the matter resolved by the end of the year. She indicated that although this was probably the feeling on both sides, she may have been the first to express it, since she considers herself to be "a very verbal person".

In any case, Ms. Haymes contacted PERB to obtain possible election dates. Advised that December 19, 1977 was available,

---

[2]Section 3546(a) provides:

> An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

she then contacted Mr. Douglas, classified personnel director and District negotiator, to obtain his agreement to that date.

During the ensuing conversation it was discovered that December 19 was the first day of Christmas vacation for bus drivers only, and that the 32 bus drivers in the unit would not be in a paid status on that day. Both Ms. Haymes and Mr. Douglas agreed that it would be unfortunate if such a significant portion of the unit was not readily available to vote. Mr. Douglas suggested the possibility of holding a paid, two hour in-service training program for bus drivers on December 19 preceding the voting hours to facilitate voter turnout. Mr. Douglas offered this proposal tentatively until he could determine if it would be possible to hold the training.

B. Alleged Agreement

At this point a series of apparent misunderstandings occurred which eventually gave rise to the present charge. Following up on his suggestion, Mr. Douglas talked with Mr. Capling, director of transportation for the District, to determine if it was possible to provide such training for the drivers. Since Mr. Douglas did not have supervisory authority over Mr. Capling, it was necessary to secure his cooperation. The exchange ended with Mr. Douglas believing he had Mr. Caplings's assent to the training idea, while Mr. Capling believed that the proposal had been rejected.

Mr. Douglas then told Ms. Haymes that the training proposal was acceptable. Ms. Haymes testified that only then did she

agree to the December 19 election date, stating that she had earlier told Mr. Douglas that if training could not be arranged for that day they would have to discuss the date of the election further. Mr. Douglas, on the other hand, testified that there was no agreement that the election would not be held during vacation unless training was given. He stated that the only promise he made was to contact Mr. Capling to determine the possibility of training.

There was no external evidence introduced which could substantiate the existence, as argued by SEIU, of a quid pro quo agreement in which SEIU assented to the December 19 date only upon the condition that the District agree to provide paid training for the bus drivers. The consent election agreement and the collective bargaining contract, both signed after the training decision had allegedly been made, contained no reference to such an agreement. Although there is ample evidence that training was at one time planned[3], such evidence cannot, by itself, support the further inference that the training was the quid pro quo for SEIU's acceptance of the early December 19 date. As indicated earlier, SEIU desired an immediate election and had been apparently advised by a PERB agent that December 19 was the only date available in the near future. Mr. Douglas perceived his offer to provide training as

---

[3]Mr. Douglas himself announced the training session to the bus drivers at a December 13 route bidding meeting as well as to the negotiators at the signing of the collective bargaining agreement on December 14.

a gratuitous gesture. Ms. Haymes may have perceived it as the reciprocal of SEIU's acceptance of the December 19 date. In the absence of firmer evidence of a "meeting of the minds" of the parties that SEIU's acceptance of the election date was expressly conditioned on the scheduling of a paid training session on the election day, it is concluded that there was not a quid pro quo exchange as asserted by SEIU.

SEIU learned of the cancellation of the training on or before December 14. Ms. Ogden, acting chairperson of Local 390 and an SEIU negotiator, testified that after a meeting she had with Mr. Douglas and Mr. Capling approximately two weeks before the election in which Mr. Douglas had indicated there would be training held on December 19, she wrote an announcement of the training on the blackboard used by the bus drivers.[4] However, two days later Ms. Capuder, one of the drivers, informed her that Mr. Capling had erased the notice. Subsequently, on Monday, December 12, one week before the election, Ms. Haymes discovered that the notice of the training was not posted. She could not reach Mr. Capling to remind him to post the notice so she asked Ms. Ogden to do it. She did not attempt to call Mr. Douglas regarding the lack of posting.

---

[4]Although one would have expected Mr. Capling to register some dissent concerning the training since he apparently believed at this time that he had rejected the idea, it is not necessary to pursue this seeming inconsistency since the question is only whether the training was a quid pro quo for SEIU's agreement to the election date.

There were the above early unrecognized clues to indicate that the paid training was in jeopardy. Yet, clues notwithstanding, the drivers were informed by Mr. Douglas at a meeting on Tuesday, December 13, that the training would still be held. Mr. Douglas and Mr. Capling were evidently still operating under their opposite impressions at that time. Mr. Capling was present at the same meeting and said nothing there to contradict Mr. Douglas. However, the two men talked after the meeting. For the first time Mr. Douglas realized that Mr. Capling did not wish to have the training.

On the next day, December 14, Mr. Capling posted a notice indicating the training was cancelled.[5] The cancellation elicited negative comments by the drivers at the SEIU meeting that same evening.

According to Ms. Ogden's testimony, Mr. Douglas advised her by phone of the cancellation either on the afternoon of December 13 or on December 14.

Ms. Haymes testified that she learned of the cancellation on either Tuesday, the 13th, or Wednesday, the 14th, from Ms. Ogden and then confirmed it with Mr. Douglas. Ms. Haymes

---

[5]Mr. Capling testified that he posted a notice of the cancellation the day before the bidding meeting held on December 13. Ms. Ogden testified the notice was posted the day after the bidding. Given the sequence of events, and the fact that Mr. Capling's overall testimony was inconsistent in terms of dates, it is concluded that Ms. Ogden's time estimate is correct.

testified that Mr. Douglas told her during this conversation that the reason for the cancellation was that Mr. Capling did not feel it was fair to pay anyone to vote. Mr. Capling testified later that if he had made that statement he meant only that the proposed training was not necessary. He stated that his main reasons for not agreeing to the proposal centered on the facts that he had no budget for it, that training had not been given on a holiday before, and that it simply was not necessary. Ms. Ogden stated that the driver trainers had told her they had enough information to disseminate at a training meeting. But, beyond this hearsay nothing further was introduced to rebut Mr. Capling's justification for his position.

Though Ms. Haymes testified that she and her predecessor had difficulty in working with Mr. Capling in the past, the reasons given by Mr. Capling for the cancellation of the training are plausible, and the evidence introduced was insufficient to call them into question.

Upon learning of the cancellation, both Ms. Ogden and Mr. Green, an SEIU election observer, suggested to Ms. Haymes that the election be postponed. Ms. Haymes replied to Mr. Green that it was impossible to postpone the election and told Ms. Ogden to hope for the best. Ms. Haymes testified she did not ask anyone to reschedule the election, believing it was not possible since she had signed the consent election agreement. Her only communication with PERB on the matter was

on the election day itself when she told the PERB election officer that a challenge would be filed if the organizational security measure lost.

C. Effect on The Election

One hundred and seven of the one hundred and forty (76 percent) members in the unit cast ballots. Twenty-six of the thirty-two (81 percent) bus drivers cast ballots. Eighty-one of the one hundred and eight (75 percent) non-bus drivers in the unit cast ballots. The voter turnout among the bus drivers was, obviously, somewhat higher than among the other members in the unit.

Official records enabled the parties to subsequently determine which unit members had not voted. Testimony was received from each of the six bus drivers who did not vote.

Ms. Aquino, one of these drivers, stated that she had been on leave and was out of the state on the day of the election. No one had notified her of the election or training, she testified.

Ms. Capuder, another driver, stated that she knew the election and training had been scheduled. However, she decided to stay home that day and not vote. She stated that if she told anyone that she would not come in to vote unless she were paid for it, she had intended the statement in jest.

Ms. Cuthbertson, another driver, testified that she knew about the election but did not know about the proposed

training, even though she had been at the December 13 meeting at which Mr. Douglas announced the training. Ms. Cuthbertson stated that no one called her to urge her to vote. She said she knew drivers were supposed to attend training sessions unless they were sick and she had attended prior training sessions herself.

Ms. Jacops, the fourth of the six nonvoting bus drivers, knew that the election and training were scheduled for December 19 but did not vote because she had become ill the previous week, missed school December 15 and 16, and was ill during the entire Christmas vacation. She had attended the majority of previous training sessions held, she said.

Ms. Larkin, another nonvoting driver, was not aware that an election was going to be held or that training had been planned, although she had attended the December 13 meeting.

No one called to inform her. In the short time she had been driving buses she had attended in-service training whenever it had been held.

Ms. Soto, the last of the six nonvoting bus drivers, knew the election was going to be held. She also knew about the training and believed it had been cancelled. Nevertheless, she was driving to the school to vote on the 19th when a car breakdown prevented her from reaching the polling site. She had attended previous training sessions.

Thus, there was no testimony offered that any of the drivers who refrained from voting did so because of the District's actions.

Ms. Ogden testified that when she learned of the cancellation she tried to contact the drivers to inform them. She stated that the general feeling of the drivers was that they would not give up their Christimas vacation to come in and vote unless they got paid, although she could not say that any driver had said specifically that she would come in if training were paid for. Ms. Haymes testified that no one came to school on the 19th believing that training would be held. Mr. Douglas indicated that no one showed up for training and no one complained to him about not receiving pay.

Evidence was also introduced that the SEIU membership dues had been increased from $7 to $10 per month in December.

2. Election Day Misconduct

The voting hours were 10:00 a.m. to 1:00 p.m. Mr. Green testified that toward the end of the voting period, two voters came in and said that there was a sign encouraging a "no" vote posted outside under the polling place sign. Polling place signs had been placed outside the door to the polling place and also at the ends of the long hallway. There was no indication from the two regarding which polling place sign was being referred to. Mr. Green believed he told the PERB election officer that he felt that the sign should not be there. He

could not recall the election officer's response. Mr. Green went out to look for the sign at some point, he thought perhaps it was at 1:00 p.m., but he could not find it. He subsequently signed the certification of conduct of election because he felt things had run smoothly. However, he indicated that he did not consider his signature to be a waiver of the right to protest the election. Mr. Green had previously held official positions in employee organizations and had been an election observer on two other occasions.

Ms. Matthews, the District election observer, testified that about noon, two custodians in the bargaining unit said that there was a sign in the hall which said "teachers get your five percent vote now." Ms. Matthews stated that the PERB official commented that as long as the sign was in the hall and not in the voting area it was permissible, but that SEIU could take it down if it desired. Ms. Matthews said Mr. Green asked the custodian to take down the sign, but the custodian replied that he would only turn the sign over. When Ms. Matthews left the polling site at 1:00 p.m. she looked for the sign but could not find it.

No testimony was introduced from anyone who actually saw the sign, nor could it be determined how long the sign, if it indeed existed, was posted.

SEIU also alleged in its opening remarks at the hearing that two individuals had campaigned against the organizational

security clause within 25 feet of the polling site. However, no evidence was introduced at the hearing to support this allegation.

DISCUSSION

California Administrative Code, title 8, section 33590, establishes the bases on which objections to representation elections will be heard, but the Administrative Code contains no corresponding provision relating to objections to organizational security elections. However, it is reasonable to apply the representation election criteria to organizational security elections since the goal in both cases is to encourage an environment in which an election can be conducted to determine the will of the majority in an atmosphere that is not coercive.

California Administrative Code section 33590 states that objections to elections will be entertained only if the conduct complained of is tantamount to an unfair practice[6] or if it constitutes a serious irregularity in the conduct of the election.

1. Cancellation of Training

A. Conduct Allegedly Tantamount to an Unfair Practice

SEIU claims in its original charge that section 3543.5(a), (b) and (c) was violated by the District.

---

[6]For the relevant unfair practice sections see footnote 1, supra.

But, SEIU has made no argument directly raising a section 3543.5(a) issue on the record or in their brief. No violation of section 3543.5(a) is found by the hearing officer and that portion of the charge is hereby dismissed.

SEIU contends that the District agreed to hold in-service training on December 19, 1977 and then reneged on that agreement. They argue that this alleged repudiation is a unilateral action indicative of bad faith and, hence, is violative of section 3543.5(c). They claim that the District's action had the effect of reducing the wages and hours and an unspecified term and condition of employment of employees, citing the leading case of NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] for the proposition that unilateral changes by an employer during the course of a collective bargaining relationship concerning matters which are proper subjects of bargaining are normally regarded as per se refusals to bargain. They argue in the alternative that if there was no agreement it was because Mr. Douglas was not afforded sufficient authority to reach an agreement or was not capable of good faith negotiations because he was not sufficiently informed, citing a series of National Labor Relations Board cases. However, as noted earlier, it was not clear that there was an agreement on an election date that was conditioned upon the paid status of the drivers on that day.

SEIU's second argument, that the cancellation of training altered wages and hours and terms and conditions of employment, fails as well. There is no evidence that the contract addressed the subject of training. Therefore, it cannot be concluded that unit members were deprived of a benefit to which they were entitled by contract. It is certainly not true that the employees were deprived of a benefit to which they had become entitled by practice, since at issue was not the question of whether to train bus drivers but whether to provide training on the 19th of December. The decision by management to cancel in-service training on a particular day clearly lies outside the realm of matters contemplated by Katz and its progeny. There is no evidence that the District intended a decrease in the total amount of training over the year. Thus, absent a showing of anti-organizational animus or a finding of a quid pro quo agreement, no violation of the duty to bargain can be found.

Hence, the allegation of a section 3543.5(c) violation must fail. With it, the contention that Mr. Douglas was given inadequate authority by management must also fail.

SEIU further contends that the District's conduct constituted a separate violation under section 3543.5(b) in that it allegedly substantially undermined and derogated the organization in the eyes of its members. SEIU asks rhetorically, in their brief, "Who is to say how many individuals decided to vote against the union after the employer undermined the union by repudiating its prior agreement?" This is precisely the point. Unfortunately, the effect of the District's change of position is not directly explored on the record. There is, however, testimony indicating that a contract acceptable to the parties was negotiated during the same time period, indicating an atmosphere generally favorable to the bargaining process.[7] Furthermore, there is evidence that dues were increased substantially just before the election, raising a plausible alternative motive for antiunion feelings among unit members. It would be as reasonable to interpret the results of the elections as a message from the unit members at large regarding the results of recent negotiations or the increase in dues as it would be to find the results attributable to the actions of the District. In the absence of any further evidence this argument by SEIU is unpersuasive.

---

[7]It is not clear from the record what method was used to authorize the SEIU negotiating team to sign the contract. The fact that a contract was signed should not necessarily be taken as an endorsement of SEIU by a majority of the bargaining unit members.

Though this proposed decision is based on other grounds, it should nonetheless be pointed out that SEIU had been advised of the cancellation of training well before the election but chose to take no formal action until after it learned of the unfavorable results of the election. Ms. Haymes was first forewarned that something might be amiss on Monday, December 12, when she discovered that notice of the proposed training had not been posted. Yet, she did not attempt to contact Mr. Douglas and was unsuccessful in contacting Mr. Capling. She confirmed the cancellation on Tuesday or Wednesday. There was sufficient time to contact the PERB election official to explain the situation and to inquire about alternatives. A postponement had been suggested to Ms. Haymes by both Ms. Ogden and Mr. Green but she dismissed the idea. Although she complained to the District about the cancellation, she did not insist or demand that further discussion be held if the District intended to cancel the training and still proceed with the election. SEIU asserts that the promise to hold the training was the foundation upon which the consent agreement was signed. Yet its cancellation prompted no one from SEIU to assert that the consent election was voided by the District's alleged breach, to register a complaint with PERB or to insist that the District honor the alleged promise. If the training issue was as essential to the fair conduct of the election as

SEIU now urges, it seems more reasonable that efforts would have been appropriate to postpone the election or secure the paid training.

B. Alleged Serious Irregularity

SEIU also contends that the District's conduct already described constitutes a "serious irregularity", having the effect of either discouraging voter turnout or of encouraging a negative vote among those who did cast ballots, and providing an independent basis for invalidating the election. But, this contention, suffers from the same difficulties which the charging party was unable to overcome relative to its "conduct tantamount to an unfair practice" allegation.

The first decision rendered by the PERB itself, Tamalpais Union High School District (7/20/76) EERB Decision No. 1, established a two-pronged test for determining whether voter participation had been discouraged: (1) direct evidence that voter participation was discouraged or (2) the conduct complained of had the natural and probable effect of discouraging voter participation. The charging party has failed to sufficiently establish by direct evidence or inference that voters were discouraged from voting by District conduct. Nor has the charging party provided any significant evidence which would tend to show that voters changed to a negative position on the organizational security decision as a

consequence of District conduct. Hence, the charging party's claim of "serious irregularity" must also be dismissed.

2. Election Day Misconduct

SEIU alleges that both the posting of a sign encouraging a "no" vote and the campaigning against the organizational security measure by certain individuals within 25 feet of the polling place constitute a serious irregularity in the conduct of the election and warrant overturning the results of the election. But, there was no evidence introduced into the record that the complained of campaigning took place. That portion of the charge is, therefore, dismissed.

With respect to the alleged sign that encouraged a "no" vote, it is somewhat significant that no testimony was introduced from anyone who actually saw the sign. There were only vague and conflicting second-hand accounts of where the sign was located and what it indicated. A finding cannot be based on such weak hearsay.[8]

Even assuming the existence of such a sign, objections to the election based on it must be dismissed under the Tamalpais tests, supra. There was no evidence presented that a single

---

[8]California Administrative Code, title 8, section 32176 reads, in pertinent part, as follows:

> . . . Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. . . .

individual was discouraged from voting because of the presence of the sign. It is also improbable that the sign had the natural and probable effect of discouraging voter participation. If the presence of television cameras for brief periods during the balloting does not have the natural and probable effect of discouraging voter participation, as was the case in Tamalpais, it is unlikely that a passively posted sign, posted for an uncertain period of time, if it was posted at all, would have any greater discouraging, confusing or misleading effect. Moreover, without sufficient evidence that the sign was within the officially designated polling area, it cannot be concluded that the sign ought to have been removed. It follows that the failure of the PERB election official to cause the sign to be removed did not constitute a serious irregularity.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and the entire record of the case it is found that:

1. The cancellation of training for bus drivers on the date of the organizational security election constitutes neither an unfair practice nor a serious irregularity in the conduct of the election and therefore does not provide a basis for setting aside the election.

2. The posting of a sign encouraging a negative vote outside a polling place does not constitute a serious irregularity in the conduct of the organizational security election.

PROPOSED ORDER

Based on the conclusion of law, findings of fact and the entire record of the case, the unfair practice charge filed by the Service Employees International Union, Local 390, against the San Ramon Valley Unified School District is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on October 13, 1978 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 P.M.) on Tuesday, October 10, 1978 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service

shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

DATED: September 20, 1978

MICHAEL J. TONSING
Hearing Officer