STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION, LOCAL 1704, Charging Party, v. OMNITRANS, Respondent.	Case No. LA-CE-216-M PERB Decision No. 1996-M December 19, 2008

Appearances: Neyhart, Anderson, Freitas, Flynn & Grossboll by William J. Flynn, Attorney, for Amalgamated Transit Union, Local 1704; County of San Bernardino by Carol A. Greene, Deputy County Counsel, for Omnitrans.

Before Neuwald, Chair; McKeag, Rystrom and Dowdin Calvillo, Members.

DECISION

RYSTROM, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Omnitrans to the proposed decision of an administrative law judge (ALJ).

The ALJ found that Omnitrans retaliated against union negotiators in violation of sections 3502, 3503 and 3506 of the Meyers-Milias-Brown Act (MMBA)[1] for taking adverse action against Dale Moore (Moore) and William Truppe (Truppe) because they represented Amalgamated Transit Union, Local 1704 (ATU) in contract negotiations with Omnitrans.

The ALJ also found that Omnitrans unilaterally changed its policy regarding requests for union business leave without first giving ATU an opportunity to meet and confer in violation of MMBA section 3505, when on April 8, 2005, it directed that union paid leave

[1]MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

pursuant to Article 19 of the parties' memorandum of understanding could only be used for ATU business related to Omnitrans.

We have reviewed the entire record in this case, including but not limited to the complaint, the parties' post-hearing briefs, the proposed decision, Omnitrans' exceptions thereto, and ATU's response and cross-exceptions. Based on this review and for the reasons stated below, the Board: (1) reverses the ALJ's finding that Omnitrans retaliated against Truppe in violation of the MMBA; (2) affirms the ALJ's finding that Omnitrans retaliated against Moore in violation of the MMBA; and (3) reverses the ALJ's finding that Omnitrans changed its policy regarding Article 19 union paid leave in violation of MMBA section 3505.

PROCEDURAL HISTORY

ATU filed an unfair practice charge with PERB against Omnitrans on March 22, 2005. It alleged that Omnitrans retaliated against two union officers for engaging in protected activity and that Omnitrans unilaterally changed established union paid leave policy under Article 19 by narrowing the scope of activities where such leave could be used for only those directly related to Omnitrans.

A complaint was issued against Omnitrans on June 9, 2005. In its answer, Omnitrans denied all essential allegations in the complaint and alleged numerous affirmative defenses.

After an unsuccessful informal settlement conference on July 19, 2005, a formal hearing was held on September 12-15, 2005. The ALJ issued his proposed decision on April 19, 2006. Omnitrans timely filed exceptions to the proposed decision on May 15, 2006.

FACTUAL BACKGROUND

1. Retaliation Charge

Omnitrans is a public transit agency that employs bus drivers to service the San Bernardino Valley. ATU has been the exclusive representative for Omnitrans' bus drivers since 1995.

Truppe was hired by Omnitrans in May of 1988, where he worked as a bus driver until his dismissal on November 17, 2004. He had been an active member of his union since January 2001. From January 2001 through March 2004, Truppe was ATU's vice president. Truppe was president of ATU from March 2004 through November 2004. He also worked as a negotiator on behalf of ATU during the parties' 2004-2005 contract negotiations.

Moore, also a bus driver, was hired by Omnitrans in April of 1993 and has been active in ATU for several years. Within ATU, Moore worked as a shop steward and as an executive board officer. Moore was also the president/business agent of ATU from January 1999 through December 2001. At the time of the hearing, Moore had again been the president of ATU since January 2005. He served on the last three bargaining committees and was an ATU negotiator during the parties' 2004-2005 contract negotiations.

a. Practice and Contractual Provisions for Union Business Leave Requests

The first memorandum of understanding between the parties was effective from April 1, 1995 through October 1, 1998. It contained an attendance article which included an absenteeism policy with a progressive discipline system. This attendance article provided in pertinent part that "All days absent are counted absences except . . . authorized union business." (Emphasis added.) This part of the attendance article has remained the same since the parties' first contract in 1995. There were no provisions in this section specifying that a certain amount of notice was required for authorized union business.

Aside from Article 21, which provides for long-term union leave for elected officers and is not at issue in this case, the parties' first contract contained no written provisions regarding union business leave that would be paid by ATU. The only other provision in the first contract related to union business leave was Article 19, which at that time was limited to providing that shop stewards would be granted reasonable time off without loss of pay or benefits for processing grievances. This original Article 19 did not have any notice requirement provisions.

At all times at issue herein, it was the unwritten, established policy and practice of the parties to allow unit employees including union officers to request time off for union business leave which would be paid by either Omnitrans or ATU, provided they submit an employee vacation/sick leave request form 48 hours[2] in advance of the date(s) requested. During the effective dates of the first contract, if an employee took union business leave without giving the required advance notice, the practice was that the employee would not be paid for that day, and an absence would be counted under the attendance article's progressive discipline system.

In the subsequent October 2, 1998 through October 1, 2001, memorandum of understanding, the parties added a paragraph to Article 19 whereby at ATU's request, officers and shop stewards may request up to a total of 75 days per calendar year of union paid leave[3], provided that a written request was submitted 48 hours in advance of the date(s) requested. Article 19 specified that these union paid leave hours would be considered "authorized union

[2]All advance notice requirements for union leave mentioned herein exclude weekends and holidays.

[3]Under this contract's Article 19, bargaining unit members could be permitted by ATU to use up to 75 days per year of union paid leave if they followed certain requirements. This provision allowed the employee to be absent from work, yet receive credit (for pension and other benefit purposes) for the time spent on union business as if he or she were working for Omnitrans. Pursuant to this provision, Omnitrans would initially pay the employee's wages and benefits and would later be reimbursed by ATU for the wages paid.

business." Consistent with the parties' established unwritten policy regarding notice of requests for union leave, if an Article 19 union paid leave request was submitted in advance as required and approved, the employee was excused from work. If the request was not submitted 48 hours in advance, the union paid leave would not be approved. If the employee took the leave without approval, Omnitrans would not pay the employee for the day absent, and the employee would be charged with an absence under the parties' attendance article.

The amendment of Article 19 to include the 75-day union paid leave provision did not change the parties' unwritten practice requiring notice for requests for union business leave not covered by the contract. The evidence showed that employees have used the same forms when requesting any type of union business leave at all times at issue herein.

Subsequently, the parties negotiated the October 2, 2001 through March 31, 2004, memorandum of understanding (MOU),[4] in which the 48-hour advance notice requirement for Article 19 union paid leave was reduced to 24 hours. The ongoing practice requiring notice for union business leave not covered by the MOU was also reduced to 24 hours at this time.

There were no substantive changes to Article 19 in the parties' subsequent April 1, 2004 through March 31, 2007, memorandum of understanding, and no changes to ongoing practices regarding notice for requests for union leave not covered by the contract.

Since its first contract with ATU, Omnitrans has always required written requests for union business leave to be submitted either 48 or 24 hours in advance and has consistently disciplined employees under its attendance policy whenever time was taken off without the timely written requests. In addition, it has been the consistent practice of Omnitrans to grant requests for union business leave without any discipline when they were submitted in a timely manner.

[4]Hereafter this memorandum of understanding will be referred to as "MOU".

The Omnitrans employees who testified in this case, including Truppe and Moore, had common knowledge of these practices regarding notice for union leave.

b. Truppe's and Moore's Requests for Union Business for November 8, 2004

On November 5, 2004, Truppe and Moore both submitted forms requesting union business leave[5] for Monday, November 8, 2004, so that they could participate in scheduled contract negotiations on behalf of ATU with Omnitrans over a successor memorandum of understanding.

Truppe admitted that he knew about the pre-scheduled November 8, 2004 negotiation day as of October 8, 2004. However, Truppe submitted his request form for union business leave on the afternoon of Friday, November 5, 2004, less than 24 hours prior to the requested day off.

Moore submitted his union leave request form on the morning of Friday, November 5, 2004, before his 4:30 or 5:00 a.m. shift began, more than 24 hours prior to the requested day off.

Both employees attended the negotiations on November 8, 2004, and both were charged absences for failing to submit their leave request 24 hours in advance. Because Truppe's absence was his tenth charged absence within a floating 12-month period, it resulted in an additional penalty of dismissal pursuant to the memorandum of understanding. Moore's absence was his first and it did not result in an additional penalty until June 28, 2005, after he

[5]There is no evidence as to whether Truppe and Moore were requesting union leave under Article 19 of the MOU or pursuant to current practices of the parties. However, as discussed below, it makes no difference because the notice requirements were the same for both.

had accumulated nine charged absences and received a four-day suspension to be effective August 2, 2005 through August 5, 2005.[6]

2. Unilateral Change Charge

Omnitrans' Chief Executive Officer and General Manager, Durand Rall (Rall) testified that he saw a picture of Moore picketing the San Bernardino County Building on behalf of its court reporters on the front page of the newspaper on January 6, 2005. Sometime after that, Rall met with Moore who confirmed the picketing activity on behalf of workers not employed by Omnitrans. It was during this same time that Omnitrans' Director of Operations, Cindy Peterson (Peterson), responsible for quarterly tracking of leaves, discovered that a large increase in the amount of Article 19 union paid leave from the previous quarter was making it difficult for Omnitrans to cover driver absences.[7] At the same time ATU had just begun representing Transportation Concepts (TC). Rall contacted TC and obtained its negotiation dates and Peterson verified that these were the same dates for which Omnitrans employees had submitted Article 19 union paid leave request forms.

Rall told Moore in early March 2005 that he was considering writing a letter to ATU because of the new union activity on behalf of employees for another employer. By letter dated April 8, 2005, Omnitrans advised ATU that the provisions for Omnitrans' employees to

[6]Although as of the hearing the effective dates of the suspension had expired, Moore had not yet served the proposed four-day suspension and had not been advised that it had been withdrawn.

[7]Peterson later learned that the amount of Article 19 union paid leave in the first half of 2005 exceeded all such leave used from 2003 to 2004. In the first half of 2005 there were occasions when routes were cancelled due to the heavy use of union paid leave.

be off work for ATU business without a charged absence given proper notification are only applicable to union business for Omnitrans.[8]

ALJ'S PROPOSED DECISION

The ALJ held that Omnitrans retaliated against Truppe and Moore for exercising their protected right under the MMBA by negotiating with Omnitrans on behalf of ATU.[9]

The ALJ found that Omnitrans had no right under the provisions of the parties' MOU, regarding authorized union leave, to charge Truppe with an unpaid leave of absence for November 8 for failing to submit a request for authorized union business leave 24 hours in advance or to dismiss him because of this absence under the MOU's attendance article. The ALJ made the same finding as to Moore's charged November 8 absence which resulted in his four-day suspension.

The ALJ held that MOU Article 19's 24-hour notice requirement was a procedural requirement for taking Article 19 union paid leave and that Omnitrans had no reason to apply the Article 19 notice requirement to Truppe and Moore on November 8, because their request was not for Article 19 union paid leave. The ALJ reasoned the requested leave on that date was for authorized union business leave under Article 24, the attendance article. The ALJ held that no charged absence nor discipline could result because the attendance article's provisions exempt "authorized union business" from being counted as an absence and there is no reference in the attendance article to a notice requirement.

Regarding the unilateral change allegations, the ALJ held that Omnitrans' April 8, 2005, directive that future requests for union business leave, with the exception of long-term union leave, must be for union activities regarding Omnitrans, constituted a unilateral change

[8]This letter was delayed until April 8, 2005, because Rall first needed to check with Omnitrans' legal counsel and inform his board of directors at its monthly meeting.

[9]Unless otherwise indicated, all date references herein are to 2004.

in policy in violation of Omnitrans' duty to meet and confer under the MMBA. This holding was based on his finding that prior to April 8, 2005, bargaining unit members were permitted to use union business leave for union business unrelated to Omnitrans.

OMNITRANS' EXCEPTIONS

Omnitrans excepts to the ALJ's finding that the MOU did not permit Omnitrans to charge Truppe and Moore with counted absences for failing to submit their union leave request forms 24 hours prior to taking the leave and thereafter discipline them. Omnitrans contends that the MOU and past practice of the parties clearly demonstrate that Omnitrans negotiated a procedural 24-hour request requirement for all union leave whether paid for by Omnitrans or ATU. Omnitrans maintains that without the required notice, the leave is not considered "authorized" and therefore is a charged absence which subjects the employee to the attendance article's progressive discipline system.

Omnitrans also excepts to the ALJ's factual conclusion that it changed the parties' Article 19 union paid leave policy in violation of MMBA section 3505. Omnitrans argues that the evidence of the past practice of the parties demonstrates that there was no unilateral change and that ATU failed to demonstrate that Omnitrans had a past practice of knowingly granting release time for union business unrelated to Omnitrans.

ATU'S RESPONSE TO OMNITRANS' EXCEPTIONS

In response to Omnitrans' argument that past practice evidence proves it was permitted to charge Truppe and Moore with absences for failing to submit union leave request forms 24 hours in advance, ATU argues that Omnitrans failed to demonstrate such a past practice because there was evidence that ATU maintained Omnitrans had no such right; and Omnitrans

allowed three "emergency union business requests" per year without the required notice pursuant to a September 15, 2000 agreement.[10]

In response to Omnitrans' exceptions regarding unilateral change, ATU argues the evidence demonstrated that the past practice of the parties was to always grant union leave requests even if they did not relate to ATU business with Omnitrans because the request forms were always circled "Approved."

ATU also submitted the following cross-exceptions in the form of requested findings to be made in the event that the ALJ's decision is not affirmed:

(1) Under Omnitrans' "notice" rules, Moore gave timely notice for his November 8, 2004 absence because he gave notice prior to beginning his shift the previous Friday, November 5, 2004.

(2) The ALJ did not decide whether discipline could be lawfully given by Omnitrans to Truppe and Moore for days prior to November 8, 2004.[11]

(3) The ALJ did not decide whether the notice to Omnitrans officials prior to the November 8, 2004 meeting was sufficient.

DISCUSSION

In considering an appeal, PERB reviews the entire record de novo. It may reverse legal determinations of an ALJ and, from the factual record, may draw opposite inferences from those drawn by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808a (Woodland); Santa Clara Unified School District (1979) PERB Decision No. 104 (Santa Clara USD).) "[W]hile the Board will afford deference to the [ALJ's] findings of fact which incorporate credibility determinations, the Board is required to consider the entire

[10]No such agreement was entered into evidence.

[11]This issue is not discussed herein because it was not alleged in the complaint.

record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented." (Santa Clara USD.)

A. ATU's RETALIATION ALLEGATIONS

We first determine whether Omnitrans retaliated against Truppe and Moore when it took adverse action against them for absences on November 8, 2004, a day both spent negotiating with Omnitrans on behalf of ATU.

In order to prove that Omnitrans retaliated against Truppe and Moore in violation of MMBA sections 3502, 3503 and 3506, ATU must show that: (1) Truppe and Moore exercised rights under the MMBA; (2) Omnitrans had knowledge of the exercise of those rights; and (3) Omnitrans took adverse action against them because of the exercise of those rights. (Carmichael Park & Recreation District (2008) PERB Decision No. 1953-M; Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461] (Campbell); San Leandro Police Officers Assn. v. City of San Leandro (1976) 55 Cal.App.3d 553 [127 Cal.Rptr. 856] (San Leandro).)

Unlawful motivation is the specific nexus required in the establishment of a prima facie case of discrimination, and proving its existence can be a difficult burden. (San Diego Community College District (1983) PERB Decision No. 368.) Because direct evidence of unlawful motivation is rare, such motivation may be inferred from circumstantial evidence. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).)

The timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, but it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following nexus factors must be present: (1) the employer's

disparate treatment of the employee (Campbell; State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (San Leandro; Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent, contradictory or vague justifications for its actions (San Leandro; State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (Trustees of the California State University (1990) PERB Decision No. 805-H); (5) employer animosity towards union activists (San Leandro; Los Angeles County Employees Assn. v. County of Los Angeles (1985) 168 Cal.App.3d 683 [214 Cal.Rptr. 350]; Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District (1982) PERB Decision No. 264.)

The evidence establishes that Truppe and Moore engaged in protected activity when they requested union leave in order to negotiate a successor memorandum of understanding with Omnitrans on ATU's behalf. (City & County of San Francisco (2004) PERB Decision No. 1664-M (use of leave to participate in union activities is protected activity); Klamath-Trinity Joint Unified School District (2005) PERB Decision No. 1778 (participation on bargaining committee constitutes protected activity).) Omnitrans clearly had knowledge of the protected activity because on November 8, 2004, Truppe and Moore sat across from Omnitrans at the bargaining table negotiating on behalf of ATU.

ATU has also established that Omnitrans took adverse action against Truppe and Moore when it charged November 8, 2004, as an absence without pay and subsequently issued Truppe a notice of dismissal and Moore a notice of proposed four-day suspension in part for that day's

absence. Failing to pay Truppe and Moore for November 8 constituted concrete economic harm and were thus adverse actions. (Regents of the University of California (2006) PERB Decision No. 1804-H (objective test for adverse action is whether a reasonable employee would consider the action as being adverse to his or her employment); Santa Clarita Community College District (1996) PERB Decision No. 1178 (refusal to pay salary constitutes adverse action).) Truppe's subsequent dismissal by Omnitrans was also an adverse action. (State of California (Department of Forestry & Fire Protection) (2004) PERB Decision No. 1690-S.) Although Moore has not served the proposed suspension and its effective date has passed, Omnitrans has not withdrawn it. The notice itself is written, specific and unequivocal, unlike the vague verbal threat of future discipline that the Board found insufficient to constitute adverse action in State of California (Department of Health Services) (1999) PERB Decision No. 1357-S. Because of the firm and final nature of the notice of proposed four-day suspension, we find that it constituted adverse action. (County of Merced (2008) PERB Decision No. 1975-M (employer's unequivocal notice of intent to impose discipline in and of itself constitutes adverse action).)

The issue which remains is whether the requisite nexus exists to show that Omnitrans issuance of the unexcused absences on November 8 was motivated by Truppe's and Moore's exercise of their protected rights. To make this determination, we must first decide whether 24 hours advance notice was required from Truppe and Moore in order for their November 8, 2004, absences to be excused. For the reasons stated below, we find that Truppe and Moore's requests for union leave for November 8, were required to be submitted 24 hours in advance.

Our analysis begins by first determining if the MOU's provisions require the subject 24 hours notice.

The Board applies traditional rules of contract law when interpreting collective bargaining agreements. (King City Joint High School District (2005) PERB Decision No. 1777 (King City); Antelope Valley Union High School District (1998) PERB Decision No. 1287, pp. 5-6; Barstow Unified School District (1996) PERB Decision No. 1138 (Barstow); Grossmont Union High School District (1983) PERB Decision No. 313.) The Board has relied on provisions of the California Civil Code governing contract interpretation.[12] (Barstow.) Civil Code section 1638 provides that "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

Article 19 of the MOU contains 24-hour notice provisions for requesting union business leave. This article provides for shop stewards and union officers to take time off without loss of pay or benefits and for ATU to pay for up to 75 hours for this time off, if it is requested by the ATU president/business agent. Article 19 provides in pertinent part that: "The ATU Officer or Steward must also submit an 'Omnitrans Employee Vacation/Sick Leave Request Form' at least 24 hours in advance, (exclusive of Saturdays, Sundays and holidays)."

This language of Article 19 mandates that if Truppe's and Moore's requests for time off were made pursuant to Article 19, they were required to give 24 hours notice. We cannot resolve the notice issue solely on this basis because the evidence before us does not indicate whether or not Truppe's and Moore's union leave requests were made for Article 19 paid union leave.

However, the record before us does establish that Truppe and Moore were also required to give 24 hours notice for any union business leave requests which were not made pursuant to Article 19 of the MOU. This finding is based on the past practices of the parties. The evidence indicates that union business leave, in addition to that authorized by Article 19, has

[12]The California Civil Codes governing the interpretation of contracts are located at Sections 1635 through 1663.

been taken since the parties' first memorandum of understanding effective April 1, 1995, and at all times relevant herein, either 24 hours notice or 48 hours notice was required.

When a contract is silent, a policy may be ascertained by examining the parties' past practice. (King City; Marysville Joint Unified School District (1983) PERB Decision No. 314; Rio Hondo Community College District (1982) PERB Decision No. 279 (Rio Hondo); Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

Truppe testified that during the three years that he had been a union officer, first as vice-president and later as president, he always filled out a vacation/sick leave request form, "per policy" whenever the union requested his time off in order to conduct any type of union business. He did this because it was his understanding that it was necessary to turn in the form 24 hours in advance in order to take union leave. He also testified that Omnitrans was consistent in requiring 24-hour advance notice in these situations.

Moore, who was the president of ATU at the time of the hearing, testified that it was common knowledge among him and the other ATU executive board shop stewards that they would be charged an absence if they requested union business leave with less than 24 hours notice. He acknowledged that since he was a shop steward in 1998, Omnitrans has consistently required that employees file the vacation/sick leave request form with adequate notice.[13] Moore testified that in 1995, before Article 19's 75-day union paid leave provision existed, he was "sure" that advance notice was required when employees took union leave because absences were charged from the very beginning of the ATU-Omnitrans relationship.

[13]The shop steward's provision in the October 2, 1998 through October 1, 2001 memorandum of understanding required that employees requesting union paid leave turn in a vacation/sick leave request form 48 hours in advance of the date requested. The shop steward's provisions in the October 2, 2001 through March 31, 2004 and April 1, 2004 through March 31, 2007 memoranda of understanding replaced the 48-hour advance notification requirement with a 24-hour advance notification requirement.

Jeff Caldwell, the vice-president of ATU at the time of the hearing, testified that vacation/sick leave request forms were required to be turned in 24 or 48 hours in advance when requesting union leave.[14]

The three union officials above made no distinction as to the notice requirements for union leave under Article 19 or union leave not covered by the MOU.

Peterson and Rall both testified that even before the Article 19 75-day union paid leave provision was first put into the memorandum of understanding effective October 2, 1998, union officers and employees were required to fill out a vacation/sick leave request form and submit it 48 hours prior to taking union leave. ATU did not contradict this testimony by Peterson and Rall.

This evidence establishes that from the effective date of the parties' first memorandum of understanding until the October 2, 2001 MOU was effective, written requests for union business leave not covered by the contract were required to be submitted 48 hours in advance. From October 2, 2001, to the present, the evidence establishes that such requests were required to be submitted 24 hours in advance.[15] The long duration of both policies demonstrate that they have been sufficiently "regular and consistent" or "historic and accepted" to constitute an enforceable past practice. (Hacienda La Puente Unified School District (1997) PERB Decision No. 1186.)

The ALJ reasoned that while Article 19 did contain an advance notice requirement regarding the 75 days of union paid leave, its notice provisions did not apply to requests for "authorized union business" and that this indicated there were two forms of leave. According

[14]See footnote 12 above.

[15]The date when the advance notice requirement for requests for union leave not covered by the contract was reduced from 48 hours to 24 hours, is the same date when the advance notice requirement for union paid leave pursuant to MOU Article 19 was also reduced from 48 hours to 24 hours.

to the ALJ, because neither MOU Article 19 nor Article 24 contain any notice requirement for requesting union business leave not covered by the MOU, and because Article 24 exempts "authorized union business" from being counted as an absence, Omnitrans could not discipline Truppe or Moore for taking the leave despite failing to give 24-hour advance notice.

We disagree with the ALJ's interpretations of Articles 19 and 24 and find that they do not change the parties past practices of requiring 24 hours of notice for union leave not covered by Article 19 of the MOU. This follows in part from the fact that the parties' policy regarding notice for union leave was first established in April 1995, whereas Article 19's union paid leave policy was not in effect until October 2, 1998. The 24-hour advance notice requirement for union business leave not covered by the contract was established by the practice of the parties well before the 75-day union paid leave provisions of Article 19 had been negotiated.

Article 24 of the MOU does not contain any notice requirements. The section of Article 24 relied on by the ALJ indicates that days absent for "authorized union business"[16] are not "counted absences." These provisions provide, in pertinent part:

> Method of Reviewing Absences. All days absent are counted absences except if an employee is in one of the following categories (as defined in the Personnel Rules and Regulations): approved leave of absence, vacation, holiday, bereavement, jury or military duty, or authorized union business or Agency confirmed FMLA, CFRA, PDL or absences specifically protected by State or Federal legislation. (Emphasis added.)

Article 24 cannot reasonably be interpreted as changing the parties past practice requiring 24 hours notice for authorized union leave. First, there is no language in Article 24 which indicates that it negates the procedural 24-hour advance notice requirement for union leave not covered by the contract. Second, the article's reference to "authorized union

[16]Omnitrans' Personnel Rules and Regulations do not contain a definition of "authorized union business."

business" cannot be reasonably interpreted to negate any notice requirements for union leave not requested pursuant to Article 19.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as to the same is ascertainable and lawful." (Emphasis added, Civ. Code sec. 1636.) The parties' first memorandum of understanding in 1995 contained the language "authorized union business" in Article 24 but not in Article 19. Therefore in 1995, the reasonable interpretation of this language would be that it referred to union leave which had been approved by Omnitrans. In 1998, when Article 19 first provided for paid union leave and required certain notice, the parties specified this properly noticed union leave would be considered "authorized union business."[17] Accordingly, since October 2, 1998, the phrase "authorized union leave" in Article 24 is reasonably interpreted to include Article 19 union paid leave as well as properly noticed union leave not covered by the MOU which is authorized by Omnitrans.

This interpretation also follows from reading Article 24 in context with the rest of the MOU. It is a well-established cannon of contract interpretation that "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code sec. 1641.)

The parties' MOU demonstrates that most of the other types of leave which are exempted from being charged as absences in Article 24, also have procedural advance notice requirements contained in the MOU. Article 24 of the MOU provides that verification of the need for continuing pre-scheduled medical treatments must be submitted "at least 48 hours before the appointments begin." Under the MOU's "Vacations" article, requests for additional full weeks of vacation (aside from vacation bid for at the annual vacation bid) "must be

[17]This is an obvious reference to the same term in Article 24.

submitted by at least 5:00 p.m. on the Wednesday before the first day (Monday) of the vacation week requested." (Emphasis in the original.) Cancellations of full weeks of vacations would only be approved if the employee submitted a vacation/sick leave request form "at least ten (10) calendar days before the first day (Monday) of the vacation week to be cancelled." A similar notice provision is required for employees who wish to exchange vacation weeks. Requests for "casual" vacation days must be submitted "no later than 11:00 a.m. two weekdays prior to the day(s) requested . . . ." (Emphasis in the original.) Requests for paid floating holidays must be requested "no later than 11:00 a.m. two weekdays (excluding Saturdays, Sundays and administrative holidays) in advance of the date requested" and cancelled "no later than 11:00 a.m. two weekdays (excluding Saturdays, Sundays and administrative holidays) before the date being cancelled." Employees may add or remove their names from the overtime list "up to 5:00 P.M. two days prior to their day off." The list of notice requirements above includes a few of the many notice requirements contained in the parties' MOU.

It is clear from the MOU as a whole that Article 24 does not negate any of these other notice requirements. If we were to interpret Article 24 otherwise, it would render these notice requirements ineffective. In accordance with Civil Code section 1641, the Board avoids an interpretation of contract language which leaves a provision without effect. (California State Employees Association (Hutchinson) (1999) PERB Order No. Ad-299-S.)

We would also note that there was considerable testimony about the need for the bus dispatchers at Omnitrans to receive timely notice of any leave of absence in order to secure substitute drivers to cover the necessary routes, not just Article 19 union business leave. This need is summarized in Omnitrans' step one response to a bus driver's grievance dated August 5, 2002, which states in pertinent part that:

> The intent of the provision is to allow the request, normally submitted to a Dispatcher, to get to a person with the authority (whose routine work schedule includes Saturdays, Sundays and Administrative holidays as their days off) to approve it, for them to be able to review, approve or deny it, advise Dispatch in reasonable time for them to be able to cover the shift in a routine manner, provide copies to the Dispatcher and submit the employee's copy to routine mailbox distribution back to the employee.

The purpose of the notice requirements, to enable Omnitrans to keep its busses running on schedule by substituting alternate drivers for those who will be absent, is consistent with the evidence of Omnitrans' past practice to require notice for any union leave business, not just union leave under Article 19.

For all of the above reasons, we hold that pursuant to MOU Article 19, as well as the past practice of the parties, there was a 24-hour notice requirement for Truppe's and Moore's requests for union business leave on November 8, 2004.

We now analyze whether or not ATU demonstrated the required nexus to establish Omnitrans' adverse actions against Truppe and Moore for their November 8, 2004 absences constituted retaliation.

(1) Truppe

Truppe submitted his request for union business leave on the afternoon of Friday, November 5, 2004, giving notice of his intent to be absent on Monday, November 8, 2004, for negotiations between ATU and Omnitrans.

Truppe's notice of dismissal based in part on this notice was issued on November 10, 2004, just two days after Truppe participated in negotiations. According to the dismissal notice, Truppe's absence on November 8 constituted his tenth absence within a floating 12-month period and cause for dismissal under the MOU. Therefore in terms of timing there is indicia of a nexus.

In Truppe's case, other than timing, there is no evidence of a connection between the adverse action and the protected activity upon which to base a finding of unlawful motivation on the part of Omnitrans. Additional circumstantial indicia of unlawful motivation as to Truppe was not presented. The reason for Truppe's discipline was his failure to submit his request for union business leave 24 hours in advance of the leave. The evidence shows this is an established past practice by Omnitrans, that Truppe was aware of it, and that since 1995 other unit employees had been similarly charged with unpaid absences by Omnitrans for failing to submit timely notices for union leave.

There is no evidence in the record indicating that Truppe was treated in a disparate manner from other employees. Omnitrans consistently charged employees with absences whenever they failed to timely file a vacation/sick leave request form in connection with a request for union leave.[18] No evidence was presented that Omnitrans offered inconsistent or shifting justifications for its discipline of Truppe. Omnitrans has continuously expressed a clear unequivocal explanation for its actions. Additionally, there is no evidence that Omnitrans has departed from its past practices or procedures. Instead, the record contains examples of requests for unpaid union business leave by Truppe from May 30, 2003, through November 17, 2004, that were not charged as absences because in those instances he had submitted his requests in a timely manner.

Accordingly, we are convinced that Omnitrans did not act with unlawful motive and would have counted November 8, 2004, as a leave of absence without pay for Truppe regardless of his acknowledged participation in union activity.

In the case of Truppe, ATU has failed to establish that Omnitrans was motivated by anything other than its desire to continue to enforce its notice requirements for requesting

[18]The sole exception being the one case involving Moore as discussed below.

union business leave. ATU has therefore failed to establish a prima facie case of retaliation under MMBA sections 3502, 3503 and 3506 in regards to Truppe.

(2) Moore

Moore consistently and credibly testified that he submitted his request for union business leave on Friday, November 5, 2004, before his 4:30 or 5:00 a.m. shift began. Moore's request was made for the purpose of attending negotiations with Omnitrans on November 8, 2004, on behalf of ATU. The request form is signed by Moore and dated November 5, 2004. There was no evidence produced by Omnitrans to contradict this testimony by Moore.

Our review of the testimony and Moore's November 5, 2004, request form indicates that after Moore turned it in, it was marked by an agent of Omnitrans, "L.W.O.P. [leave without pay] Charged absence per the MOU less than 2 days notice." (Emphasis added.)

As discussed above, Moore's November 5, 2004, request for union business leave was required to be submitted 24 hours prior to the date for which leave was requested, not two days as reflected by Omnitrans on Moore's leave request form.

The timing of the adverse action of charging Moore for an absence as indicated on his form was the same day that negotiations were held and as such is evidence of a nexus. Omnitrans had no authority under the parties' MOU or Omnitrans' past practices to charge November 8, 2004, as an unpaid absence. By applying the superseded and more onerous 48-hour notice requirement that was required prior to October 2, 2001, to Moore's timely request for union business leave, Omnitrans treated Moore in a disparate manner from all other similarly situated employees.

This different treatment of Moore also constituted a departure by Omnitrans from established procedures and standards which provides further circumstantial evidence of unlawful motivation. This is not the case of a mere clerical error on the part of Omnitrans that

was promptly corrected. If it was an unintentional oversight, because it has been discovered, Omnitrans should have corrected it as soon as discovered. This is not the case. Accordingly, we find that ATU has demonstrated a prima facie case of retaliation against Moore.

The burden now shifts to Omnitrans to demonstrate a legitimate business reason for its actions. (Culver City Unified School District (1990) PERB Decision No. 822.) There is no evidence in the record of a valid business reason to discipline Moore. We find Omnitrans had no grounds upon which to legitimately charge Moore with an absence for November 8, 2004, and thereafter to propose to discipline him in part for that absence.

For these reasons we conclude that Omnitrans retaliated against Moore in violation of MMBA sections 3502, 3503 and 3506 because of his protected activity.

B. UNILATERAL CHANGE CHARGE

The complaint alleges that Rall's April 8, 2005 directive that Article 19 union paid leave must only be used for ATU business related to Omnitrans was a unilateral change in policy.

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c),[19] PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)[20] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive

[19]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[20]When interpreting the MMBA, it is appropriate to take guidance from cases interpreting California labor relations statutes with parallel provisions. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 617 [116 Cal.Rptr. 507].)

representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin County Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Grant Joint Union High School District (1982) PERB Decision No. 196.)

In order to prevail on this charge, ATU must demonstrate that Rall's directive breached or altered the parties' written agreement or established past practice. (State of California (Department of Forestry and Fire Protection) (1998) PERB Decision No. 1260-S, p. 10; see e.g., Rio Hondo.) ATU as the charging party bears the burden of proof of a unilateral change. (Sacramento Housing & Redevelopment Agency (2008) PERB Decision No. 1939-M; County of Siskiyou (2007) PERB Decision No. 1894-M.)

For the following reasons, we find that Omnitrans did not change the contract or alter the past practice in violation of the MMBA.

In holding that Omnitrans changed its union business leave policy, the ALJ interepreted "union business" under the MOU's union leave and attendance provisions to mean the same as "protected activity" under MMBA section 3502 as defined by McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293 [234 Cal.Rptr. 428] (McPherson).

This interpretation of "union business" is erroneous given McPherson and the cases cited therein deal with the definition of "protected activity" for purposes of determining if retaliation has occurred. Those cases are distinguishable from the present case because they are retaliation cases where the issue was whether activities on behalf of other unions, units of employees, or employers constituted protected activity. McPhereson's definition of "protected activity" is not relevant to this case.

The issue before PERB is what the parties intended the words "authorized union business" in the MOU to mean. There is no evidence before us that either party intended to use the broad definition of union activities under statutes providing against retaliation as their definition of union activities for purposes of excused absences from work.

ATU's position is that the MOU and the April 1, 2004 through March 31, 2007, memorandum of understanding permit employees to take union paid business leave for any purpose whatsoever, as long as it is authorized by the union. ATU also contends that this interpretation is consistent with the past practice of the parties and that prior to April 8, 2005, Omnitrans never restricted the type of activity for which union leave could be used.

Omnitrans argues that the term "authorized union business" under the parties' MOU does not extend to any business unrelated to Omnitrans and its employees and that ATU's failure to contradict its stated interpretation of that phrase as expressed during the negotiation of the April 1, 2004, through March 31, 2007, memorandum of understanding further supports such an interpretation. Omnitrans also contends that there was never a past practice or policy of knowingly granting requests for union paid leave for ATU business unrelated to Omnitrans.

(1) The Parties' Past Practices

The evidence before us indicates that for approximately six continuous years from October 2, 1998, to sometime after January 6, 2005, Omnitrans never knowingly granted Article 19 union paid leave for purposes that were unrelated to Omnitrans. Where an employer's action is consistent with the past practice, no unilateral change violation is found. (Oak Grove School District (1985) PERB Decision No. 503.)

As union president, Truppe authorized union leave for union work, organizing, filing at the office, arbitration, grievance meetings, a five-day ATU convention in Las Vegas in September 2004, and for participating in the activities of the central labor council.

Truppe testified that he first approved union leave for the purpose of organizing the employees of TC and later negotiating a contract on their behalf during the period when ATU and Omnitrans were negotiating a successor memorandum of understanding. These approvals by Truppe were between November 2004 and February 2005. Truppe testified that Omnitrans had always checked these union leave requests as "Approved."

Truppe's testimony conceded that union leave request forms never stated that the purpose was for organizing TC employees. Truppe testified that he told Rall ATU was organizing TC, but never told Rall that ATU was using Omnitrans employees on Article 19 union leave to do so.

Moore testified that prior to April 8, 2005, employees used union leave for conventions, conferences, education training seminars, work with other unions, and political activities such as election-day voting, which Moore testified was part of ATU's community outreach activities as a community organization. According to Moore, Truppe approved leave for Moore to work on organizational activities for TC in November or December 2004. As ATU president, Moore approved union leave for contract negotiations involving TC from January 2005 through April 8, 2005.

However, Moore testified that he did not specify the purpose of the leave in writing on his request forms when he used the leave for conventions, conferences, lobbying activities, labor council meetings, or political purposes. According to Moore, although Omnitrans knew ATU was organizing and later negotiating for TC employees in November/December 2004 and early 2005, Omnitrans never knew that ATU was using Omnitrans' union leave to do so. Moore testified as follows:

Q Did you advise Omnitrans in writing that ATU, Local 1704 was organizing Transportation Concepts' employees?

A No.

Q Did you ever put on any of your Union leave -- your Union leave request forms, the Vacation /Sick Leave Request forms that you were going to organize Transportation Concepts' employees?

A No. I didn't feel like it was necessary.

Q Okay. So you didn't feel it was necessary to tell Omnitrans anything other than Union business, is that correct?

A Only because that's what we had always done.

Q Okay. But had you ever used Union business -- Union business leave to organize employees of another employer before?

A No.

. . . . . .

Q Did you ever notify Omnitrans that you were using Union leave to negotiate a contract at Transportation Concepts?

A No.

According to the record, the sole exception in which employees occasionally informed Omnitrans of the purpose for the union leave they requested was for attending training seminars. ATU informed Omnitrans of the purpose of the leave when it involved training seminars because so many employees attend the training seminars and because Omnitrans management often attends portions of the training. Rall testified that he felt ATU conferences were part of the scope of representation of Omnitrans. For example, Rall was aware that Omnitrans employees attended an ATU international convention in September 2001, and

characterized that convention as "deal[ing] with the professionalism of Union Officers who represent the employees at Omnitrans and provides training."

The evidence before us shows that once Omnitrans discovered that ATU was using Omnitrans' employees on union paid leave for purposes related to employers other than Omnitrans, it stopped the practice. These actions indicate that Omnitrans did not knowingly approve union paid release time for non-Omnitrans related activities as claimed by ATU.

More specifically, Omnitrans first discovered that ATU was organizing the employees of TC and negotiating a contract on their behalf in November 2004. However, at that time, Omnitrans was unaware that ATU was using union paid leave under the MOU for those activities. ATU had never before sought to use Omnitrans employees under Article 19 union leave for organizing and negotiations on behalf of non-Omnitrans employees.

We therefore find that ATU has failed to demonstrate a past practice on the part of Omnitrans of knowingly granting Article 19 union leave for activities unrelated to Omnitrans.

(2) The Parties' MOU:

Omnitrans does not dispute that it issued the directives contained in Rall's April 8, 2005 memo without first giving ATU notice and an opportunity to request negotiations. Rather, it defends the charge by contending that the parties' MOU does not permit employees to take Article 19 leave for non-Omnitrans related activities.

As discussed below, we find that ATU has failed to meet its burden of demonstrating a contractual right to use Article 19 union paid leave for union activities unrelated to Omnitrans.

Prior to October 2, 1998, Article 19 of the parties' April 1, 1995 through October 1, 1998 memorandum of understanding was limited to reasonable release time for ATU shop stewards as follows:

> The ATU will submit, in writing, the names of employees designated at (sic) ATU Shop Stewards.
>
> Shop Stewards will be granted a reasonable amount of time, without loss of pay or benefits, for the purpose of meeting with the Agency representatives to process grievances, provided, however, that such time does not interfere with normal department operations.

As set forth below, the parties' subsequent October 2, 1998 through October 1, 2001 memorandum of understanding added to Article 19 a provision whereby unit members could request up to a total of 75 days per year of paid leave from work to participate in "authorized union business."

> The ATU will submit, in writing, the names of employees designated as ATU Shop Stewards.
>
> Shop Stewards will be granted a reasonable amount of time, without loss of pay or benefits, for the purpose of meeting with the Agency representatives to process grievances, provided, however, that such time does not interfere with normal department operations.
>
> Upon specific request of the ATU President/Business Agent, the Agency will initially pay wages lost from regularly assigned work, at the employee's current wage rate, to ATU Officers and Shop Stewards for up to a total of 75 times per calendar year for all Officers and Stewards. The ATU Officer or Steward must also submit an 'Omnitrans Employee Vacation/Sick Leave Request Form' at least 48 hours in advance (exclusive of Saturdays, Sundays and holidays). The ATU will reimburse the Agency for these wages on a Quarterly basis. Omnitrans will pay all benefits associated with these hours at the time they are incurred. These hours will also be considered authorized union business and an active work status.

The parties subsequently altered some of the language in Article 19 above. For example, in the current MOU, the parties clarified the definition of "75 times" and reduced the requirement to submit the request from 48 hours in advance to 24 hours in advance. However, there were no changes made to the "authorized union business" language.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code sec.1636.) Additionally, a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. (Civ. Code sec. 1647.)

The facts in existence as of October 2, 1998, when the parties first agreed on the union business leave provision in Article 19 above, guides our analysis of the scope of the undefined term "authorized union business." The evidence shows that on October 2, 1998, the only employees represented by ATU were the employees of Omnitrans and the only employer ATU had ever negotiated a contract with was Omnitrans. These facts remained true until some time after the first negotiating session between TC and ATU was held on December 28, 2004.[21]

Therefore, the evidence shows that the only union business that would likely have been contemplated by the parties when Article 19 was first negotiated is the representation of Omnitrans employees under the parties' memorandum of understanding.

Prior to bargaining the April 1, 2004 through March 31, 2007, memorandum of understanding, ATU had never used Omnitrans employees to organize, or negotiate and picket on behalf of non-Omnitrans employees. Nor had Omnitrans knowingly granted union paid leave for Omnitrans employees to engage in activities wholly unrelated to any of the parties' memoranda of understanding, such as for political purposes or for getting out the vote on election day.

Rall testified that during negotiations he expressed Omnitrans' position that union paid leave was to be used for Omnitrans business only. Rall could not recall any response by ATU

[21]According to Truppe's knowledge, Omnitrans was not aware of this negotiating session as of December 28, 2004.

to his statements at the bargaining table. Peterson also testified that she recalled Rall telling ATU during negotiations that union paid leave could only be used for issues involving Omnitrans employees. As with Rall, Peterson did not recall ATU making any specific response to Rall's statement.

We find the record does not contain any evidence showing that the parties intended the words "authorized union business" in the MOU to include non-Omnitrans related business.

Based on our findings that neither the parties' MOU nor their past practice authorize taking union paid leave for union business unrelated to Omnitrans, ATU has not met its burden of demonstrating Omnitrans unilaterally changed its Article 19 union leave policy in violation of the MMBA.

ORDER

Based on the entire record in this case, our findings of fact and conclusions of law, we find that Omnitrans violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503 and 3506 by retaliating against Dale Moore (Moore).

Pursuant to section 3509(b) of the MMBA, it is hereby ORDERED that Omnitrans, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against Moore.

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

1. Rescind Moore's charged absence for November 8, 2004, and make him whole for any monetary losses resulting in whole or in part from that charged absence, with interest at the rate of seven percent per annum.

2. Rescind all discipline issued to Moore that is based in whole or in part on the charged absence for November 8, 2004, including, but not limited to the resulting notice of proposed four (4) day suspension dated June 28, 2005.

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

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Omnitrans shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Amalgamated Transit Union, Local 1704.

As to the remaining allegations in the complaint, we find that they are DISMISSED.

Chair Neuwald; Members McKeag and Dowdin Calvillo joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-216-M, Amalgamated Transit Union, Local 1704 v. Omnitrans, in which all parties had the right to participate, it has been found that Omnitrans violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3502, 3503, and 3506 by retaliating against Dale Moore (Moore).

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

A. CEASE AND DESIST FROM:

1. Retaliating against Moore.

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

1. Rescind Moore's charged absence for November 8, 2004, and make him whole for any monetary losses resulting in whole or in part from that charged absence, with interest at the rate of seven percent per annum.

2. Rescind all discipline issued to Moore that is based in whole or in part on the charged absence for November 8, 2004, including, but not limited to the resulting notice of proposed four (4) day suspension dated June 28, 2005.

Dated: _____ OMNITRANS

By: _____
Authorized Agent

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