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In the Matter of a Controversy

between

San Francisco Bay Area Rapid Transit District

and

United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555.

Final Decision and Order of the Director of the Department of Industrial Relations
RE: Unit Clarification Petition and Petition for Certification of Representative

On April 2, 1993, I issued a Tentative Decision to dismiss both of the Petitions at issue. The Tentative Decision advised the parties of their opportunity to avoid dismissal of their respective Petitions by submitting additional evidence demonstrating significant and substantial changes in the job duties of the positions in dispute. Upon review of the submissions by the San Francisco Bay Area Rapid Transit District ("BART") and Amalgamated Transit Union, Local 1555 ("ATU"), I have determined that the Tentative Decision should be adopted with respect to BART's petition, and that a hearing should be set regarding ATU's petition.

The BART Petition For Unit Clarification

The decision to dismiss BART's Unit Clarification Petition is based upon the reasoning set forth in my tentative decision, as well as the following. BART failed, despite repeated opportunities, to make even a prima facie showing that there have been significant and substantial changes in the duties of the Foreworkers since the original unit determinations were made in 1973. The Tentative Decision noted, at pages 4 and 6, that the job descriptions previously submitted by BART were only drafts, and that BART had not shown that they had ever been made final; given an opportunity to submit additional evidence, BART offered nothing further regarding the draft job descriptions. The Tentative Decision also noted, at page 6, that the first

Declaration of Andrew Eschen stated that in practice, BART does not allow Foreworkers to exercise supervisory authority with respect to the duties specified in section 19.1 of the BART/ATU agreement or in the substance abuse policy. Despite the invitation in the Tentative Decision to submit additional documentary evidence or declarations, BART submitted no evidence to rebut the Eschen declaration.

The only additional evidence submitted by BART in response to the Tentative Decision was selected excerpts from the transcript of the 1971 representation hearings. BART argues that these excerpts show that the duties presently performed by the Foreworkers differ from those contemplated in 1971, before BART became operational. Having reviewed the excerpts, however, I find that they offer little, if any, support for BART's argument. BART has not provided substantial evidence that the present duties of the Foreworkers are significantly different in character than those contemplated in 1971. Instead, BART notes at page 3 of its objections that "changes from the 1971 projections can be further detailed in testimony at a hearing," eventhough BART was placed on notice in the Tentative Decision that a hearing would not be granted absent a prima facie showing by means of documentary evidence or declarations. [1]

BART alleges it has experienced "substantial problems in getting Foreworkers who are in the same unit as their subordinates to effectively monitor, correct and report to higher management on performance deficiencies." Objections to Tentative Decision, page 3. However, BART has inexplicably failed to offer any evidence whatsoever in support of this serious allegation made in the body of its objections.

Given BART's failure to make a prima facie showing in support of its Petition, no hearing is required. While Public Utilities Code section 28851 provides for a public hearing on a question of whether a proposed bargaining unit is appropriate, it does not require a hearing on questions pertaining to existing bargaining units. The right to Petition for Unit Clarification is provided by

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[1] The burden of proving that one is a supervisor rests on the party alleging such status; the exercise of authority of a strictly routine nature, not involving the use of independent judgment or independently reviewed by higher supervision, does not make an employee a supervisor. Tucson Gas & Electric Co. (1979) 241 NLRB 181, 100 LRRM 1489. The employer's prior conduct is significant evidence as to the proper classification of employees, although not determinative. Newspaper Drivers & Handlers Local 372 v. N.L.R.B. (6th Cir. 1984) 735 F.2d 969, 971.

regulation, 8 CCR § 15805(c). Title 8 of the California Code of Regulations, section 15825(b), provides that following investigation, a decision on such a Petition may be made with or without a hearing. BART has been given a far greater opportunity to submit evidence and arguments in support of its Petition than is required for an investigation under Section 15825(b). In view of the inadequacy of the evidence proffered by BART, an evidentiary hearing is unnecessary, and the expenditure of scarce public resources required for such a hearing is not justified.

ATU's Petition for Certification of Representative

In response to the Tentative Decision, ATU submitted the Declaration of Michael Tormey in Support of Petition for Certification of Representative, and four pre-1991 position announcements for predecessor positions to Train Controller. BART did not submit any rebuttal evidence, although it was given an opportunity to do so. The uncontroverted evidence submitted by ATU indicates that the Train Controller position, created in 1991, has a significantly more limited range of duties than did the predecessor positions, and that the duties of the Train Controller are more technical than supervisorial.

Before, as ATU requests, an election can be held, the question whether the Train Controllers could be placed appropriately in the rank-and-file unit must be determined. This bargaining unit determination requires the evaluation of a number of interrelated factors. Such an evaluation can best be made after an evidentiary hearing pursuant to Title 8 of the California Code of Regulations, section 15825.

For the foregoing reasons, it is ORDERED:

1. With respect to BART's Unit Clarification Petition, and for the reasons set forth in both the Tentative Decision of April 2, 1993, which is adopted and incorporated by reference herein, and this Final Decision, said Petition is dismissed.

2. ATU's Petition For Certification of Representative will be set for hearing pursuant to Title 8 of the California Code of Regulations, section 15825. A Notice of Hearing will be served upon the interested parties, apprising them of the date, time and location of the hearing.

This Decision and Order is made pursuant to Title 8 of the California Code of Regulations, section 15825. With respect to the dismissal of BART's petition, this decision is final under Section 15825(b). However, I wish to extend to both parties administrative remedies similar to those that would be available following a hearing and a proposed decision by a hearing officer. Accordingly, I will entertain a request for reconsideration on all issues filed in accordance with the procedure for filing Exceptions under Title 8 of the California Code of Regulations, section 15860. Within twenty days from the date of service of this decision, any party may file a request for reconsideration of this Final Decision. Thereafter, any party may, within the time limits prescribed by that regulation, file a brief in support of this Final Decision and Order and in opposition to the request for reconsideration.

Dated: 6/14/93

LLOYD W. AUBRY, JR.
Director of the
Department of Industrial Relations

In the Matter of a Controversy, between San Francisco Bay Area Rapid Transit District and United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555	**CERTIFICATE OF SERVICE**

I declare that:

I am employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is 455 Golden Gate Avenue, Room 3220, San Francisco, California 94102.

On June 15, 1993, I served the within

FINAL DECISION AND ORDER OF THE DIRECTOR
OF THE DEPARTMENT OF INDUSTRIAL RELATIONS
RE: UNIT CLARIFICATION PETITION AND PETITION
FOR CERTIFICATION OF REPRESENTATIVE

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

Anne E. Libbin, Esq.
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Sacramento, CA 95814-3363

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on June 15, 1993.

GLORIA M. CHEE - Declarant

In the Matter of a Controversy

between

San Francisco Bay Area Rapid Transit District

and

United Public Employees, Local 790, and Amalgamated Transit Union, Local 1555.

Tentative Decision of the Director of the Department of Industrial Relations RE: Unit Clarification Petition and Petition for Certification of Representative

INTRODUCTION

On September 24, 1991, the San Francisco Bay Area Rapid Transit District ("BART" or "the District") filed a Petition for Unit Clarification with the State Mediation and Conciliation Service ("Service") pursuant to Public Utilities Code ("PUC") § 28851 and 8 CCR § 15805(c). The petition seeks to remove 112 positions from the transportation, clerical and maintenance subunits of the umbrella unit certified by order of the Director of the Department of Industrial Relations ("DIR") on March 6, 1973, and to place those positions in the supervisory unit certified by order of the Director of DIR on April 28, 1976.

BART has submitted two legal memoranda and numerous exhibits in support of its petition. Memoranda and exhibits in opposition to the petitions were submitted by Local Division 1555 of the Amalgamated Transit Union International, AFL-CIO ("ATU"), the union representing the transportation subunit of the umbrella unit, and by United Public Employees Local 790 of the Service Employees International Union, AFL-CIO ("UPE"), the union representing the clerical and maintenance subunits of the umbrella unit.

On March 30, 1992, ATU filed a Petition For Certification of Representative pursuant to PUC § 28851 and 8 CCR § 15805(a). This petition seeks to remove the position of Train Controller from the supervisory unit and to place said position in the transportation subunit of the above-referenced umbrella unit.

ATU has submitted two legal memoranda and exhibits in support of its petition. Memoranda and exhibits in opposition to the petition were submitted by BART. BART Supervisory and Professional Association ("BARTSPA"), the union representing the Train Controllers, did not participate in the briefing.

Under the applicable regulations the Director may consolidate the petitions for decision and may issue a decision without a hearing. These petitions present common issues of law. After a thorough review of the memoranda and exhibits submitted by the parties, and extensive research of relevant legal authorities, I have concluded that no hearing on either petition is necessary at this time. For the reasons discussed below, both petitions will be dismissed unless within twenty days any party submits evidence demonstrating a significant and substantial change in the duties of the positions in question.

FACTS

The History of the Current Bargaining Units

BART is a public transit district established pursuant to the San Francisco Bay Area Rapid Transit District Act, Public Utilities Code §§ 28500-29757. PUC § 28850 provides for collective bargaining between BART and organizations representing its employees. PUC § 28851 assigns to the California Department of Industrial Relations ("DIR") certain responsibilities for the resolution of issues pertaining to labor representation:

> *If there is a question whether a labor organization represents a majority of employees or whether the proposed unit is or is not appropriate, such matters shall be submitted to the State Conciliation Service for disposition. The State Conciliation Service shall promptly hold a public hearing and may, by decision, establish the boundaries of any collective bargaining unit and provide for an election to determine the question of representation. Provided, however, any certification of a labor organization to represent or act for the employees in any collective bargaining unit*

shall not be subject to challenge on the grounds that a new substantial question of representation within such collective bargaining unit exists until the lapse of one year from the date of certification or the expiration of any collective bargaining agreement, whichever is later.

Beginning in early 1971, Hearing Officer Sam Kagel conducted extensive proceedings in order to establish the boundaries of collective bargaining units for BART. On February 26, 1973, he submitted recommendations for appropriate bargaining units to then DIR Director H. Edmund White. Mr. Kagel prefaced his recommendations with the following interpretation of PUC § 28851:

The governing statute provides that the Service is to "establish the boundaries of any collective bargaining units and provide for an election to determine the question of representation." (Public Utilities Code § 28851) (emphasis added). The term "boundaries" is not defined in the statute, nor is it a term used in other labor relations statutes which has come to have an accepted meaning. Rather, it appears that the Legislature utilized the unique concept of collective bargaining "boundaries" so that the Service could establish a collective bargaining structure suitable for BART with all its unique characteristics, instead of limiting the Service solely to the traditional task of merely determining which unit or units are appropriate. Taking into account the foregoing, the community of interest among the Employees involved, and the responsibility of BART and its Employees to provide the public with essential transportation services, the boundaries for collective bargaining for BART Employees pursuant to Section 28851 should be established as follows ...

Mr. Kagel recommended the establishment of three bargaining units: a security unit, a supervisors unit, and a comprehensive umbrella unit, the last to be comprised of three subunits of transportation employees, clerical employees, and maintenance employees. Attached to his recommendations were exhibits listing the position classifications to be included in each unit and subunit. Among the classifications listed for the supervisory unit was Foreman III. The positions of Foreman I and II were included in the transportation, clerical and maintenance subunits. A separate exhibit listed certain categories of management and confidential employees to be excluded from any bargaining unit.

Director White adopted Mr. Kagel's recommendations in a Decision dated March 6, 1973. On March 8, 1973, Mr. Kagel notified the Director that he had

"erroneously excluded Foreman III from the Transportation Subunit and included them in the Supervisory Unit." On March 16, 1973, the Director issued an Amended Decision providing that the position of Foreman III in the Operations - Transportation Department would be in the transportation subunit, and that all other Foreman III positions would be in the supervisory unit.

The BART Petition For Unit Clarification

BART's petition seeks to remove all Foreworker (formerly Foreman) positions from the umbrella unit and place them in the supervisory unit. It seeks to remove 24 employees from the transportation subunit, which presently includes a total of 603 employees; 7 employees from the 240 employees in the clerical subunit; and 81 employees from the 1059 employees in the maintenance subunit. The 112 employees at issue are employed in 22 different job classifications. All these classifications are Foreworkers, with the exception of an Office Services Supervisor and a Transit Information Supervisor in the clerical subunit.

BART contends that, under the federal Labor Management Relations Act ("LMRA"), 29 U. S. C. 141 et seq, these positions must be removed from the rank-and-file umbrella unit because they have supervisory authority:

> *Each of the job classifications listed is a supervisory position with responsibility to exercise independent judgment in directing the work of other employees. In addition, most of the foreworker classifications listed have responsibility for effectively recommending performance appraisals and discipline, making work assignments, and for adjusting non-disciplinary grievances.*

(BART Petition at 4-5.)

Among the numerous exhibits submitted by BART are draft job descriptions for each of the positions it seeks to remove from the umbrella unit. The drafts bear 1987 and 1988 dates, and there is no evidence that any of them has been made final. While each of the job descriptions differs from the others as to certain specifics, they are similar in their descriptions of common classification characteristics. The following passage from the draft job description for Service Operations Foreworker (BART Exhibit A-1) is illustrative of common language contained in the descriptions for the other positions in question:

Work assignments to be completed are provided by a full supervisory class and the foreworker is either responsible for ensuring that passenger service activities in various stations are functioning within desired perameters during the shift, or for directing train movement within a specified yard. While the foreworker is considered to be management's first level of employee interface, employee selection and major personnel decisions are left to the full supervisor in charge.

BART has also submitted as exhibits portions of its collective bargaining agreements with ATU and UPE for the periods July 1, 1985 - June 30, 1988, and July 1, 1988 - June 30, 1991. The submitted portions contain provisions dealing with Foreworkers. For example, BART Exhibit D-1 includes "Side Letter of Agreement: #UPE-1-3, System Foreworker Job Description", dated June 25, 1974. This side letter with UPE provides that the System Foreworker: "Has the responsibility to recommend employment promotions, and discipline." Typical duties listed include:

1. Provides specific instruction and direction to maintenance crew personnel.

2. Maintains sound management-employee relations with personnel under his/her supervision, including proper administration of discipline, effective communication and safety standards.

3. Assist with evaluation of job performance.

Similarly, BART's agreement with ATU for 1988-1991 included a provision agreeing that Foreworkers would have the authority to administer formal counseling, process and resolve non-disciplinary grievances, approve vacations and verify employee absences. BART Exhibit E-1, § 19.1. Also included in this exhibit is Memorandum of Understanding No. ATU/03-82, dated June 21, 1982, which requires employees of the Field Services Department to report absences a minimum of 45 minutes prior to their scheduled reporting time. Violations of this rule are cause for disciplinary action, including "documented foreworker counseling" for a first offense.

BART also emphasizes that Foreworkers are deemed to be supervisors with authority to require employees to submit to drug testing upon reasonable cause under the BART substance abuse program. BART and the Unions agreed to the procedures in a letter of understanding dated July 24, 1990. (BART Exhibit F-2.)

The Unions assert that under federal law, the employer has a heavy burden of providing evidence to substantiate a claim that an employee is a statutory supervisor. Response to BART's Position Statement at 9, citing Tucson Gas & Electric Co., 241 NLRB 181 (1979), and cases cited therein. The Unions contend also that BART has failed to make a prima facie showing that the challenged Foreworkers are supervisors, and that BART's petition should therefore be dismissed without a hearing. Id.

The Unions further claim that the job descriptions provided by BART are merely drafts, and that they do not reflect what the Foreworkers actually do. (Id. at 8.) In support of this assertion, the Unions submitted a declaration from Andrew Eschen, a Senior Operations Foreworker serving as Rules and Administration Foreworker, which states that in practice, Foreworkers are not permitted to exercise supervisory authority with respect to the duties specified in § 19.1 of the BART/ATU agreement, such as adjusting grievances, selecting employees for promotion, or exercising independent judgment with respect to disciplinary actions. (Declaration, ¶¶ 5-7.) The Eschen Declaration further asserts that Foreworkers are not permitted to effectively evaluate employees suspected of possible substance abuse. (Id., ¶ 9.)

The ATU Petition For Certification of Representative

ATU's Petition seeks to remove approximately eight to twelve employees in the Train Controller position from the supervisory unit represented by BARTSPA and to place them in the transportation subunit of the umbrella unit. ATU contends that the Train Controller duties are nonsupervisory under both the LMRA and any other recognized standard. ATU asks that an election be held in which the Train Controllers may decide which labor organization, if any, will represent them, or, in the alternative, that DIR conduct a hearing to determine the appropriate nature of the unit. In response, BART argues that under federal law, the Train Controllers are supervisors properly within the supervisory unit represented by BARTSPA.

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DISCUSSION

I. The Applicable Law

BART argues that the Foreworkers are supervisors under the LMRA and decisions of the National Labor Relations Board ("NLRB"). It contends that the Foreworkers must therefore be removed from the umbrella unit and Train Controllers kept in the supervisory unit pursuant to 8 CCR § 15875.1, which states: "In resolving questions of representation, the Director shall apply the *relevant* federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended." The Unions argue that 8 CCR § 15875.1 is inconsistent with PUC § 28851, quoted above, and is therefore invalid. As discussed below, an examination of both 8 CCR 15875.1 and PUC 28851 leads to the conclusion that the unit determinations made by Mr. Kagel and adopted by the Director should not, at this point, be disturbed.

A. The DIR Regulation Only Requires Adherence To *Relevant* Federal Standards.

8 CCR 15875.1 was adopted in the aftermath of a Court of Appeal decision holding that PUC Section 125521 requires adherence to relevant federal standards with respect to hearing representation questions concerning the North San Diego County district. North San Diego County Transit Development Board v. Vial and United Transportation Union (1981) 117 Cal.App. 3d 27, 172 Cal.Rptr. 440. Adopted in 1983, the regulation mirrors the language of the several transit district acts cited below that expressly mandate adherence to relevant federal standards.

8 CCR 15875.1, however, requires the Director to apply only the *relevant* LMRA law and administrative practice. With regard to the petitions filed herein, there is no relevant LMRA law or administrative practice to apply concerning the "boundaries" language contained in the BART Act for certification and the determination of appropriate bargaining units. Furthermore, the LMRA is not relevant in the treatment of supervisors, in light of the differences between the LRMA and public employment laws similar to the BART Act.[1]

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[1] For the purpose of these determinations, "relevant" is used in the sense of being dispositive of the issue. Certainly, federal precedent provides a useful analytical framework, but does not the control the resolution of this issue.

In Rae v. Bay Area Rapid Transit Supervisory and Professional Association (1980) 114 Cal.App.3d 147, 170 Cal.Rptr. 448, the court recited the general principle that when a subsequent state statute is "framed in identical language" to an earlier enacted federal statute, "it will ordinarily be presumed that the Legislature intended that the language used in the later enactment be given a like interpretation." (114 Cal.App.3d at 152 - emphasis added.) The court explained, however, that despite the usage of similar language in the earlier-promulgated NLRA and the later-enacted BART Act, "(t)he differences between the NLRA and the BART Act cannot be overlooked." Id. at 153. See also, Grier v. Alameda-Contra Costa Transit Dist. (1976) 55 Cal.App.3d 325, 332, 127 Cal.Rptr. 525. Where, as here, such differences exist, federal law is not "relevant" in the sense that the term is used in section 15875.1, i.e., determinative of the outcome of the dispute.

B. The Legislative History of Public Utilities Code Section 28851 Does Not Mandate the Application of Federal Law to Unit Matters.

PUC § 28851 does not mandate the application of federal law to unit clarification or certification matters. In order to determine under PUC 28851 whether these petitions must be decided in accordance with the LMRA, it is necessary to examine the legislative history of the transit district enabling acts to discuss the intent of the legislature with regard to the BART statute.

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

The first two transit district acts, passed in the mid-fifties, established two models that remained in competition for most of the next decade. The first model, codified at PUC § 25052, is found in the earliest of the modern transit acts, PUC § 24501 et seq. (Stats 1955, ch. 1036 § 2.) This 1955 act authorized formation of a transit district for Alameda and Contra Costa Counties - the district now known as A-C Transit. Of notable interest is the fact that PUC § 28851 in the BART Act is identical to PUC § 25052 in the Alameda-Contra Costa Act. Therefore, the legislative history of this earlier act

merits consideration. In the original bill, introduced as SB 984 on January 18, 1955 by Alameda County Senator Arthur H. Breed, Jr., Chapter 4 was titled "Merit Personnel Systems." The first section of this chapter, 25051, stated in part:

> *It is the purpose of this chapter to provide for a modern, comprehensive system of personnel administration for the district, whereby effectiveness in the personnel services rendered to the district, and fairness and equity to the employees and taxpayers alike may be promoted....*
>
> *Fair and equitable rates of pay shall be established with due consideration both of the taxpayers and the employees, and with the observance of the principle of like pay for like work, and suitable difference in pay for differences in kind of work.*
>
> *Full consideration shall be given to the interests and desires of the employees insofar as these are consistent with the welfare of the district and of the public it serves.*

In essence, the original bill did not contemplate collective bargaining, but provided for the establishment of a civil service-type system. However, the Senate subsequently amended SB 987 by deleting the original Chapter 4 in its entirety and replacing it with a completely new Chapter 4 titled "Labor Provisions", which simply replaced the original merit system provisions with new collective bargaining provisions. The final version of the bill enacted into law included the collective bargaining provisions, including § 25052. (Stats. 1955, ch. 1036 § 2.)

The next transit act to be enacted originated as AB 1104 and was introduced on January 17, 1957. It authorized the creation of the Los Angeles Metropolitan Transit Authority ("LAMTA"). In its final form, this act (stats. 1957, ch. 547) established a second model which required that the State Conciliation Service be "guided by" relevant federal law in deciding representation questions. [2]

As originally introduced, the LAMTA Act authorized collective bargaining in general terms, but did not address representation questions or

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2 The LAMTA Act was repealed in 1967. Meanwhile, in 1964, the legislature enacted the successor Southern California Rapid Transit District Act, which provided somewhat different language in PUC § 30751: "In resolving such questions of representation including the determination of the appropriate unit or units, ... the director shall apply the relevant federal law and administrative practice developed under the Labor Management Relations Act of 1947, as amended, and for this purpose shall adopt appropriate rules and regulations".

appropriate bargaining units. The Assembly amended the bill on March 11, 1957 to delete the general language on collective bargaining and substitute more detailed provisions. Among these provisions was Section 3.6(d), which used PUC § 25052 of the Alameda-Contra Costa Act as its model. Thus, the provisions gave the Service authority to "establish boundaries," and was silent as to the application of federal law.

AB 1104 was substantially amended in the Senate.[3] Among the amendments adopted by the full Legislature was a conference committee amendment to delete the language about bargaining unit boundaries and existing classifications, and to substitute new language providing that in making determinations, "the State Conciliation Service shall be guided by relevant federal law and administrative practices, including but not limited to the self determination rights accorded craft or classes in the Labor Management Relations Act, 1947, and the Railway Labor Act."

At the very same time, the BART legislation was making its way through the legislature. SB 850 was introduced on January 17, 1957 (the same day as the LAMTA bill) by a group of Bay Area senators. As originally introduced, the bill included in its labor provisions language identical to PUC § 25052 ("boundaries," no reference to federal law). This provision remained unchanged when the bill won final Assembly approval on June 8, 1957, and final Senate approval on June 10, 1957. Thus, within about three weeks after the legislature had enacted a new federal law model in the LAMTA Act, it opted for the previous "boundaries" model in the BART Act.

The two approaches again competed for consideration in AB 323, the bill which authorized the Stockton Metropolitan Transit District. As originally introduced by Assemblyman Monagan on January 22, 1963, Section 4.4 of the bill contained language similar (but not identical) to the final LAMTA language, providing that "the State Conciliation Service shall be guided by relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947 (29 U.S.C. 141 et seq.)"

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3 Among the amendments adopted by the Senate on May 2, 1957 was the addition of language to Section 3.6(d) to provide that no craft or classification of employees that had a pre-existing collective bargaining relationship would be deemed inappropriate without a majority vote of the employees. Another amendment required that "the authority shall assume and observe all existing labor contracts." (Section 3.6(e).)

However, on April 15, 1963, the Assembly adopted amendments extensively revising the labor provisions of the bill. The new section 50121 followed the Alameda-Contra Costa and BART language, providing for establishment of "boundaries" without reference to federal law. This version was enacted into law and currently appears in the Public Utilities Code.

Two years later, the Legislature again used the "boundaries" model in the Santa Barbara Metropolitan Transit District Act, (Stats. 1965, ch. 1825). PUC § 95651 in that Act parallels the BART Act.

At the same time, the language governing bargaining unit determinations in the remaining transit district enabling acts expressly refers to federal law. All these omit the "boundaries" language relied upon by Hearing Officer Kagel. Statutes for seven transit districts provide that in making unit determinations, the Director "shall be guided by relevant federal law and administrative practice, developed under the Labor-Management Relations Act, 1947, as presently amended."[4] Statutes for five other transit district acts go still further, providing that the Director "shall apply the relevant federal law and administrative practice" in making bargaining unit determinations[5].

Although the more recent transit district acts refer to relevant federal law, the Legislature has never amended the BART, Alameda-Contra Costa, Stockton, or Santa Barbara Acts to specifically incorporate reference to relevant federal standards.

Thus, the Legislature has, over several decades, consistently taken two distinctly different approaches to representation and bargaining unit questions in the transit district acts, which indicates that the legislature made deliberate choices about which language to use in the various acts. The legislative history of the transit district acts supports the position taken by Mr. Kagel and approved by the Director that the "boundaries" language in the BART Act does not require that the LMRA be followed in these unit matters.

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4 The seven districts are: Orange County Transit District Act, § 40122 (1964); Marin County Transit District Act, § 70122 (1964); Fresno Metropolitan Transit District Act, Appendix 1, § 4.4 (1964); San Diego County Transit District Act, § 90300b (1965); Golden Empire Transit District (Greater Bakersfield), § 101344 (1971); Sacramento Regional Transit District, § 102403 (1971); and San Diego Metropolitan Transit System, § 120505 (1978)

5 Those five transit districts are: Southern California Rapid Transit District Act, § 30751 (1964); Santa Clara County Transit District Act, § 100301 (1969); West Bay Rapid Transit District (San Mateo County), Appendix 2, § 13.94 (1971); San Mateo County Transit District, § 103401 (1974); and North San Diego County Transit Act, § 125521 (1975).

C. Other California Public Sector Labor Laws Support the Conclusion that the LMRA is Not Relevant to the Issues Herein.

Finally, and assuming only arguendo that the Foreworkers perform some supervisorial functions, neither the BART Act nor other public employee laws contain the clear exclusion of supervisors from the definition of employees that the LMRA does. The LMRA, upon which BART's petition is based, both defines the term "supervisor", and provides for their exclusion from bargaining units and from the protections of the Act.[6] In contrast to the LMRA, California laws governing public sector collective bargaining are frequently more liberal with regard to supervisors. In some instances, these laws do not differentiate between supervisors and other employees. In other instances, they define supervisors more narrowly than the LMRA, and/or extend to them certain collective bargaining rights, either together with the rank-and-file or in separate bargaining units.

An example of this more liberal approach to the treatment of supervisors is provided by the Meyers Milias Brown Act ("MMBA"), Cal.Govt. Code §§ 3500-3510, which provides to local government employees the right to bargain collectively. The rights of supervisors under the MMBA, in contrast to the LMRA, were addressed in Organization of Deputy Sheriffs v. County of San Mateo (1975) 48 Cal.App.3d 331, 338, 122 Cal.Rptr. 210:

> *Contrary to federal practice, by virtue of the broad definition of "public employee" in section 3501, subdivision (d), which excludes only elected officials and those appointed by the Governor, MMB extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy. The act is silent about their unit placement. The California Legislature thus minimized the potential or actual conflict of interest that, as mentioned in NLRB v. Bell Aerospace Co. (1974) 416 U.S. 267, 271-272 [40 L.Ed.2d 134, 141-142, 94 S.Ct. 1757], was the basis for the total exclusion of management employees that obtains under federal law.*

See also, Public Employees of Riverside County, Inc. v. County of Riverside (1977) 75 Cal.App.3d 882, 142 Cal.Rptr. 521.

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6 By its terms, the LMRA applies only to the private sector and not to public employment of workers meeting the definition.

In Organization of Deputy Sheriffs, supra., 48 Cal.App.3d at 338 n.5, the court quoted from a commentator's explanation of one reason for the more liberal treatment of supervisors in the public sector:

> *Schneider ["Unit Determination, Experiments in California Local Government, " 3 Civ.Pub. Employment Relations 1, 16-17], postulates that in the public sector, conflict of interest between management and supervisory employees is not as clear-cut as it is in the private sector because (a) supervisorial powers are ordinarily qualified or limited by civil service and merit systems in a manner that takes supervisorial employees out of LMRA's definition; (b) all ranks of public employees share common goals and have a community of interest in the functioning of their common employer - the public as represented by the particular agency; and (c) the high proportion of professionals in both supervisory and rank-and-file positions "reinforces the cohesiveness that inheres in public employment." He also notes that in the private sector unions do not ordinarily accord membership to such employees - thus preserving historic Them vs. Us (!) separations between labor and management.*

PUC § 28851 more closely resembles the MMBA than the LMRA, both in content and in the type of workers covered. The Foreworkers at issue here, even if they did perform some supervisorial functions, could be included in a bargaining unit with rank-and-file under the MMBA. Accordingly, and in the absence of any significant or substantial change in the actual work responsibilities of the Foreworkers since Mr. Kagel's original unit determination, that original determination made nearly twenty years before the filing of the petitions herein will not be disturbed.

II. The Petitions Are Barred By The Doctrine of Collateral Estoppel

The BART petition to remove the Foreworker positions from the umbrella unit was filed over eighteen years after the certification of that unit by the Director on the recommendation of Mr. Kagel. ATU's petition to remove the Train Controller position from the BARTSPA unit was filed over fifteen years after the certification of the supervisory unit.[7]

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[7] It should be noted that neither party has alleged a substantial change in the job duties of the positions they wish to have removed from the respective bargaining units, a condition which might, under certain circumstances, warrant a reexamination of the appropriateness of their inclusion in the bargaining units.

BART asserts that under federal law, "no past conduct can estop BART from claiming now that the Foreworkers should be excluded from the umbrella unit as supervisors." (Id., citing Newspaper Drivers & Handlers Local 372 v. N.L.R.B. (6th Cir. 1984) 735 F. 2d 967, 971, and cases cited therein.

In Newspaper Drivers & Handlers, the Court held that an employer could not be estopped from challenging the "employee status" of workers it has previously recognized as employees. (735 F. 2d at 971.) The Court explained that:

> *[A]pplying collateral estoppel in this area would frustrate a fundamental purpose of the Act, namely not requiring employers to bargain collectively with workers also connected with management. See 29 U.S.C. § 164(a) ("no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law ... relating to collective bargaining"). Such frustration of purpose cannot be allowed.*

Id.

The above passage demonstrates that the flat ban on estoppel arguments in Newspaper Drivers & Handlers depended on a federal provision forbidding compelled recognition of "supervisors" as "employees." Indeed, the LMRA expressly excludes supervisors from the definition of "employee." "The term 'employee' ... shall not include ... any individual employed as a supervisor ... ." (29 U.S.C. § 152(3) Thus, Newspaper Drivers & Handlers stands for the proposition that the employer's past treatment of a supervisor as an employee does not override the express statutory exclusion. Following federal law, BART would presumably be allowed to raise the supervisory issue at any time.[8]

As discussed previously, however, the BART Act contains no such statutory exclusion for supervisors. Supervisors clearly are employees under that Act, as demonstrated by the fact that the 1973 determination established a supervisory bargaining unit. Thus, the rationale for not applying the doctrine of collateral estoppel in Newspaper Drivers & Handlers does not exist under the BART Act.

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8 The Court in Newspaper Drivers & Handlers did note, however, that under NLRB decisions, "prior conduct of an employer is significant evidence as to the proper classification of employees, but is not determinative." (735 F.2d at 971, citing The Washington Post Co. (1981) 254 N.L.R.B.168, 169.)

Accordingly, it is appropriate to look to California cases applying the collateral estoppel doctrine. At the outset, it should be noted that BART's reference to "past conduct" suggests that it is confusing collateral estoppel with the very different concept of equitable estoppel. Collateral estoppel is not based on the past conduct of a party, but rather on a prior adjudication. Collateral estoppel is an aspect of res judicata sometimes referred to as "issue preclusion." Knickerbocker v. City of Stockton (1988) 199 Cal.App.3d 235, 244 Cal.Rptr. 764, 767. "Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding." People v. Sims (1982) 32 Cal.3d 468, 477, 186 Cal.Rptr. 77, 82. "Collateral estoppel may be applied to decisions made by administrative agencies '[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . .'" Id., at 186 Cal.Rptr. 83, quoting United States v. Utah Construction Co. (1966) 384 U.S. 394, 86 S.Ct. 1545, 1560.

The 1973 unit determination was made by the Director, acting in a judicial capacity, and resolved disputed issues of fact properly before him, i.e., the "boundaries" of the bargaining units. The parties here fully participated in the exhaustive proceedings before Hearing Officer Kagel, and had a more than adequate opportunity to litigate the issue as to which bargaining unit should include the employees in question. Accordingly, in the absence of a showing of clear and convincing evidence that the job duties of the classifications at issue have significantly and substantially changed, the petitions are barred by the doctrine of collateral estoppel.

III. Whether BART Has Waived its Right to File the Unit Clarification Petition

The parties pursued a point/counterpoint in their briefs as to whether the parties during collective bargaining waived their respective rights regarding the petition for unit clarification for the Foreworker positions. Their general legal and factual contentions were thereby narrowed to a specific factual dispute that could be disposed of in a brief hearing, should the determinations herein need to be revisited.

BART's petition was filed in September 1991, shortly after the execution of the present collective bargaining agreements for the umbrella unit. The petition acknowledges that BART sought, in its negotiations with the unions, to exclude the

disputed classifications from the bargaining unit, but asserts that BART did not want to "press this issue at the expense of reaching an agreement." (Petition, p.6.) Thus, BART argues:

> *Since the District did not abandon its request to exclude the disputed classifications from the unit in exchange for any concession in negotiations, the petition should be entertained by the Service as timely under binding federal LMRA precedents. Baltimore Sun Co., 296 NLRB No. 131, 132 LRRM 1210 (19889); St. Francis Hospital, 282 NLRB 950, 951 (1987); WNYS-TV (WIXT), 239 NLRB 170 (1978); Massey Fergusson, Inc., 202 NLRB 193 (1973).*
> Id.

The Unions respond that the cases cited by BART stand for the proposition that if the parties cannot resolve a unit dispute in negotiations, the party seeking the change may leave the issue unresolved in negotiations and pursue a unit clarification petition after the collective bargaining agreement is signed, provided that the petitioner has not abandoned its unit request in exchange for concessions in the negotiations. (Opposition to Petition at 14-15.) The Unions argue that "BART must be deemed to have abandoned its unit request because it insisted upon concessions in the most recent negotiations." (Id. at 15.)

It is undisputed that when it entered into the present collective bargaining agreement, BART stated it was reserving its right to pursue the unit clarification. The Unions assert, however, that at the same time, BART extracted major concessions from the Unions in exchange for retaining the Foreworkers in the bargaining unit. Id. Specifically, BART demanded as one of the conditions of keeping the Foreworkers that the Unions give up a fee-for-service medical plan and accept in its place a less costly health maintenance organization ("HMO") plan. (Exhibit C to Opposition to Petition, September 12, 1991 letter from Sanford N. Nathan to Larry Williams, p. 2.) In order to avoid an impasse, the Unions reluctantly agreed to the concessions demanded by BART. The Unions argue that because BART obtained concessions in exchange for not removing the Foreworkers from the unit at the bargaining table, BART should not now be allowed to accomplish that end through a unit clarification petition.

In response to the Unions' argument, BART notes that in the September 12, 1991 letter, ATU acknowledged that it "can have no objection to the District's

seeking a unit classification per se ..." (Union Exhibit C at 4.) BART argues that the Unions understood, before agreeing to the present contracts, that BART was reserving its right to petition for unit clarification. If the Unions viewed the reservation as unfair, BART contends, they should have rejected the contracts. (BART's Response in Support of Petition at 11.) BART does not deny, however, that it obtained concessions from the Unions in exchange for not pressing the foreworker issue in negotiations.

For the reasons discussed previously, NLRB decisions are not binding precedents in this forum as contended by BART. Waiver of unit clarification by bargaining appears relevant. There is merit in the Unions' contention that the NLRB cases cited by BART are factually distinguishable from the present case. The NLRB has explained its policy as follows:

> *The Board generally declines to clarify bargaining units midway in the term of an existing collective-bargaining agreement that clearly defines the bargaining unit. Wallace-Murray Corp., 192 NLRB 1090, 78 LRRN 1046 (1971). To do otherwise, the Board has held, would be unnecessarily disruptive of an established bargaining relationship. San Jose Mercury & San Jose News, 200 NLRB 105, 81 LRRM 1448 (1972); Wallace-Murray, above. In some limited circumstances, however, the Board finds the interests of stability are better served by entertaining a unit-clarification petition during the term of a contract. Thus, where the parties cannot agree on whether a disputed classification should be included in the unit but do not wish to press this issue at the expense of reaching an agreement, the Board will entertain a petition filed shortly after the contract is executed, absent an indication that the petitioner abandoned its request in exchange for some concession in negotiations. WNYS-TV (WIXT), 239 NLRB 170, 99 LRRM 1516 (1978); Massey-Ferguson, Inc., 202 NLRB 193, 82 LRRM 1532 (1973).*

St. Francis Hospital, supra., 124 LRRM at 1249 (emphasis added).

While BART's conduct in collective bargaining negotiations may have amounted to a waiver of its right to petition for unit clarification, that issue need not be reached if BART's and ATU's petitions are barred by collateral estoppel. If, however, evidence is submitted demonstrating a substantial and significant change in the job duties of the Foreworkers, so that a hearing is necessary on the issue of collateral estoppel, then further evidence will also be allowed at that time regarding the waiver issue.

Conclusion

BART's Petition For Unit Clarification

Given the lack of relevance of federal precedent allowing a challenge to inclusion of supervisors at any time, and absent a significant and substantial change in actual job duties of the Foreworkers, BART 's petition is subject to and barred by the doctrine of collateral estoppel, as discussed above. Accordingly, I intend to dismiss BART's Petition unless I am persuaded to the contrary by any party, through the submission of additional documentary evidence and/or declarations. In order to justify a change in the boundaries of the bargaining units that have been in existence throughout a long history of collective bargaining, such evidence must demonstrate, in the context of the boundaries decision made by Hearing Officer Kagel, a significant and substantial change in the duties of the positions in question, such that they now have more in common with existing members of the supervisory unit than with the other members of their present unit.

Such evidence must be submitted to me within twenty days from the date of service of this tentative decision.[9] Thereafter, any party may within seven additional days from the time such evidence is filed, submit rebuttal evidence. Copies of all written submissions must immediately be served on each of the other parties and proof thereof shall be promptly filed with the Director.

ATU's Petition For Certification of Representative

For the identical legal reasons, ATU's Petition suffers from the same defect as BART's. On page 5 of its Memorandum in Support of Petition For Certification of Representative, ATU advises that the District redefined the Train Controller position in December, 1991. BART does not dispute that this redefinition occurred in that it both attaches the job description of Train Controller dated "Revised December 4, 1991" as Exhibit A to its Position Statement in Response to ATU's Petition and refers to the description in its argument. Absent from either party's discussion is adequate information as to whether the December, 1991 revision reflects a significant and substantial change in the actual work duties of the Train Controller. Therefore, the

[9] While it is my intention to consider additional evidence of material changes in job duties, if submitted, this is not an invitation to the parties to re-argue the legal issues decided herein. Once the decision has become final, any party may pursue other applicable administrative or civil appeal rights.

parties may submit documentary evidence and/or declarations regarding this issue in accordance with the same procedures and time frames set forth with regard to the BART petition above. It is suggested that at least one of the parties should submit the previous Train Controller job description(s). Unless a significant and substantial change is demonstrated, the ATU petition is also barred by the doctrine of collateral estoppel. In any event, the boundaries of the present, long-standing bargaining units will also not be altered absent proof that the Train Controllers have more in common with members of the rank-and-file unit than with other members of their current supervisory unit.

Dated: 4/2/93

Lloyd W. Aubry, Jr.
Director

In the Matter of a Controversy,

between

San Francisco Bay Area Rapid Transit

and

United Public Employees, Local 790, and Amalgamated Transit Union, Local 555

CERTIFICATE OF SERVICE

I declare that:

I am employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is 455 Golden Gate Avenue, Room 3220, San Francisco, California 94102.

On April 2, 1993, I served the within

TENTATIVE DECISION OF THE DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS RE: UNIT CLARIFICATION PETITION AND PETITION FOR CERTIFICATION OF REPRESENTATIVE.

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

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