STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS BARSTOW CHAPTER #306,	)	
Charging Party,	)	Case No. LA-CE-3396
v.	)	PERB Decision No. 1138
BARSTOW UNIFIED SCHOOL DISTRICT,.	)	February 20, 1996
Respondent.	)	

Appearances: California School Employees Association by William C. Heath, Attorney, for California School Employees Association and its Barstow Chapter #306; Atkinson, Andelson, Loya, Ruud and Romo by Ronald C. Ruud, Attorney, for Barstow Unified School District.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Barstow Unified School District (District) to a PERB administrative law judge's (ALJ) proposed decision. The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

refused to negotiate with the California School Employees Association and its Barstow Chapter #306 (CSEA), and unilaterally contracted out pupil transportation and vehicle maintenance services in June 1993.

After review of the entire record, including the hearing transcript, the proposed decision, and the filings of the parties, the Board reverses the ALJ's proposed decision and dismisses the unfair practice charge and complaint in accordance with the following discussion.

BACKGROUND

At all times relevant, CSEA and the District were parties to a collective bargaining agreement (CBA) effective October 5, 1990 through June 30, 1993, which included a provision indicating that the parties agreed that the CBA should remain in effect from "day to day until such time as a new or modified agreement is reached by the parties." For more than a year prior to June 1993 the District had considered contracting out its transportation services as a means of reducing its overall budget. The issue had been discussed at budget committee meetings which included CSEA representatives and at District board meetings, including

---

employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

the public board meetings of May 4, 18 and June 11 of 1993. The meetings were attended by CSEA representatives who strongly objected to the contracting out of transportation services.

At its May 4 meeting, the District board voted to contract with Mayflower Contract Services, Inc. (Mayflower) for all student transportation services and vehicle maintenance for the 1993-94 school year, and directed District staff to enter into contract negotiations with Mayflower. By taking this action, the board anticipated a budgetary savings of approximately $300,000. Prior to May 4, the District had not provided CSEA with the type of notice that it normally sent to the chapter president when contemplating a change of policy or action that affects bargaining unit members.

By letter of May 6, 1993, Jack Ashley (Ashley), the CSEA labor relations representative, demanded that the District not proceed with the contracting out until the parties had negotiated the decision and its effects. By letter of May 12, 1993, the District's chief negotiator and assistant superintendent, Robert Myers (Myers) replied that, "The District has always taken the position that the contract authorizes the District to contract for services without bargaining." Myers did offer to discuss the matter "informally." On May 17, Myers sent another letter to Ashley citing the District Rights article of the CBA as the District's authority for unilaterally contracting out services.

That letter concluded with an offer to negotiate the "effects of layoff."

On May 18, the District board adopted a resolution to reduce classified school services for transportation, and lay off 28 bargaining unit employees effective June 30, 1993. On May 24, Ashley responded and requested to meet and negotiate the effects of the proposed layoffs.

On June 3, CSEA and the District met and CSEA again demanded that the District negotiate the decision to contract out transportation services. The District responded that it had a contractual right to contract out transportation services and, therefore, needed to negotiate only the effects of that action on employees. Later that day, Ashley sent Myers a letter which purported to add two items to negotiations. The letter stated in part:

> As you know, the counter proposals which were presented to the district today, contain a proposal to eliminate the language in the District Rights article which addresses the district's right to contract. In addition we have also proposed to eliminate 25.1 of the contract. Therefore, the district is obligated to negotiate to impasse and through the impasse procedure, before it can rely on these sections of the contract.

In this letter, Ashley again reiterated CSEA's demand that the District desist from implementing plans to contract out the work of the transportation department until negotiations were completed with CSEA. The letter demanded that the District "maintain the status quo until the parties can negotiate the cost cutting measures which were previously submitted to the governing

board by employees of the transportation department."

At its June 11 meeting, the District board reviewed the contract with Mayflower for approval. However, prior to taking action, the board entertained a written request from the president of the District's personnel commission to delay its contracting out decision because of possible legal implications for the District as a merit system. After devoting some discussion to the concerns raised by the personnel commission, the board approved the Mayflower contract, effective July 1, 1993.

Sometime after June 11, the District entered into a three-year contract with Mayflower for the period July 1, 1993 through June 30, 1996.

CSEA and the District met to continue their "effects" negotiations on June 18 and 22. Negotiations continued in July and August and were certified by PERB for impasse on October 1, 1993.[2] During this period, the parties were also engaged in their 1992-93 reopener negotiations which concluded in August 1993. The "effects" bargaining and the 1992-93 reopener negotiations ended with no change in the District Rights article of the parties' CBA.

On or about June 2, the District issued layoff notices to all affected transportation employees. Layoffs were to be

---

[2]Official notice is taken of Barstow Unified School District, impasse Case No. LA-M-2461, which is maintained in the PERB Los Angeles Regional Office. This record shows that mediation was eventually successful in resolving the matter. The case was closed on November 4, 1994.

effective July 5. In lieu of layoff, some employees elected to "bump" into other unit positions at reduced salaries. Others took positions with Mayflower at unknown wage rates and benefit levels.

All District pupil transportation and vehicle maintenance services have been provided by Mayflower since July of 1993.

The CBA contains several provisions which are relevant to this case. CBA Article IV, District Rights, states in pertinent part:

> 4.1 It is understood and agreed that the District retain [sic] all of its powers and authority to direct, manage and control to the full extent of the law. Included in but not limited to those duties and powers are the exclusive right to: determine its organization; . . . determine the kinds and levels of services to be provided, and the methods and means of providing them; maintain the efficiency of District operations; contract out work, which may lawfully be contracted for . . . .
> (Emphasis added.)
>
> 4.2 The exercise of the foregoing powers, rights, authority, duties and responsibilities by the District, the adoptions of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with the law.
> (Emphasis added.)

The language in section 4.1 of Article IV has existed as worded above since the late 1970's or early 1980's. There was no evidence presented by the parties with regard to their original intent or understanding when the language was first negotiated.

Article XXV, which is entitled "Completion of Meet and Negotiation," states, in pertinent part:

> 25.1 During the term of this Agreement, except as provided in sections 25.2 and 25.3 of this article, the Association expressly waives and relinquishes the right to meet and negotiate and agrees that the District shall not be obligated to meet and negotiate with respect to any subject or matter whether or not referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both the District or the Association at the time they met and negotiated on and executed this Agreement, and even though such subjects or matters were proposed and later withdrawn.
>
> 25.3 This agreement shall be reopened for negotiations on the 1992-93 salary schedule, benefits under Article XII, 1992-93 calendar, and up to two (2) additional articles which may be selected by each party (maximum of four), provided that one party gives the other written notice of its intention to reopen negotiations no later than March 15, 1992.

Juan Rubio, a member of the District's negotiating team since 1989, who had previously been on the CSEA negotiating team, testified that CSEA had tried unsuccessfully to change the language of section 4.1 regarding contracting out several times. During negotiations in the 1980's, the parties did agree to a procedure for bargaining the effects of layoffs or reductions in hours, but the District Rights article remained unchanged.

The District apparently contracted out for some transportation services on one prior occasion. In October of 1991, the District decided to reduce the hours of bus drivers by 15 minutes per day, and contract out bus washing services to a

private contractor. CSEA demanded to bargain the District's decision but the District refused. The parties ultimately agreed to negotiate the effects of the decision, but not the decision itself. CSEA filed an unfair labor practice charge against the District regarding this matter which was later withdrawn. Evidence was also submitted that private transportation companies had been used for special events such as out-of-town trips sponsored by individual schools. However, these events were paid for by student organizations, and no District funds were involved.

CSEA filed the instant unfair practice charge against the District on June 21, 1993, and an amended charge on January 13, 1994. On January 20, 1994, after investigation, the Office of the PERB General Counsel issued a complaint alleging that the District had unilaterally contracted out pupil transportation and vehicle maintenance services performed by bargaining unit members without affording CSEA an opportunity to negotiate the decision and/or its effects in violation of section 3543.5(a), (b) and (c) of EERA.[3] A PERB-conducted settlement conference was held on March 3, 1994, which failed to resolve the dispute. A formal hearing was held June 6 through June 8, 1994. After continuances, the parties completed the filing of post-hearing briefs on October 7, 1994, and the ALJ issued her proposed

[3]The complaint also included an allegation that the District had contracted out the transportation department work as retaliation against CSEA. Prior to the formal hearing, this allegation was withdrawn.

decision on January 12, 1995, in which she found that the District had violated the EERA by its actions.[4]

POSITIONS OF THE PARTIES

CSEA asserts that the District's established policy and practice prior to June 1993 had been to utilize bargaining unit members to provide transportation and vehicle maintenance services. CSEA argues that any prior contracting out of transportation services within the District was isolated and remote and, therefore, does not constitute an established past practice of contracting out.

Noting that the contracting out of bargaining unit work is a negotiable subject under EERA, CSEA argues that the record clearly establishes that a timely request to negotiate the District's contracting out decision was made by CSEA, and denied by the District.

CSEA further asserts that the record establishes that it did not waive, in the District Rights article of the CBA, its right to negotiate over the subject of contracting out the District's transportation services. Citing PERB precedent, CSEA notes that a contractual waiver of the right to bargain must be clear and

[4]In her decision, the ALJ interpreted the CBA District Rights article language giving the District the authority to "contract out work, which may lawfully be contracted out" and found that the meaning of the word "lawfully" within the provision was unclear with respect to the lawful bargaining obligations of the employer under the EERA. Accordingly, the ALJ concluded that those lawful bargaining obligations had not been waived by CSEA through this language. CSEA did not offer this interpretation to the ALJ in its post-hearing briefs, and does not advance it in the instant appeal pending before the Board.

unmistakable, and argues that the language of the CBA District Rights article is overly broad and cannot be considered a waiver of the specific right to negotiate over the contracting out of transportation services. Furthermore, CSEA argues that testimony offered by various witnesses establishes that the topic of contracting out transportation services was never fully discussed by the parties, much less a waiver of CSEA's right to negotiate over that subject. Therefore, there is no clear indication of the mutual intent of the parties at the time agreement was reached on the District Rights article of the CBA, the consideration of which is a primary rule of contract interpretation.

In response, the District readily admits that it contracted out transportation services and refused CSEA's demand to bargain over the decision to do so. The District claims its action was lawful because the District Rights article of the CBA expressly authorizes the District's actions, constituting a clear and unmistakable waiver by CSEA of its right to negotiate over the subject. The District asserts that the Board in Goleta Union School District (1984) PERB Decision No. 391 (Goleta USD) found similar language to be a valid express waiver. The District also refers to a decision by a PERB ALJ, Alvord Unified School District (1983) PERB Decision No. HO-U-199 (Alvord USD), in which a similar finding was reached.

The District also asserts that the parties' bargaining history and past practice with regard to contracting out

transportation services support a finding of contractual waiver in this case.

DISCUSSION

An employer violates the EERA duty to negotiate in good faith when it unilaterally changes an established practice or policy affecting a subject within the scope of representation without affording the exclusive representative with notice and a reasonable opportunity to negotiate the matter. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) The Board has held that when an employer's decision to contract out work turns upon labor costs, the decision is within the scope of representation. (State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S.)

In this case, it is clear that the District's decision to contract out its transportation services was an attempt to lower labor costs associated with the salaries and benefits of the classified unit employees in its transportation department. The District acknowledges that it steadfastly refused to negotiate this decision despite written and oral demands for bargaining from CSEA on May 6 and June 3. The District admits that in June 1993, it unilaterally contracted out all pupil transportation and vehicle maintenance services formerly provided by unit employees.

While the District concedes that it did not negotiate with CSEA, it argues that negotiations were not required because CSEA expressly waived its right to bargain the subject in the parties' CBA. The District claims that the provision in Article IV,

section 4.1 of the 1990-1993 CBA, which permits the District to "contract out work, which may be lawfully contracted for" constitutes a "clear and unequivocal" waiver by CSEA of the right to bargain regarding decisions to contract out. (San Mateo City School District (1980) PERB Decision No. 129.)

CSEA, by contrast, rejects the claim of waiver. It contends that the District has not produced evidence of either clear and unmistakable contract language, or behavior indicating an intent by CSEA to waive its bargaining rights over the subject.

This case turns on the interpretation of the disputed contact language. The issue before the Board is whether the CBA language in question gives the District the right to decide to contract out a specific area of work, transportation services, without further negotiations with CSEA. Restating the issue, the Board must decide whether the language of the CBA constitutes a waiver by CSEA of the right to negotiate over the District's specific decision to contract out transportation services.

Initially, it is important to note that the parties have negotiated over the subject of contracting out work. The result of those negotiations is embodied within the language of the District Rights article of the CBA, a management rights clause which reserves the rights of management to take certain actions and make certain decisions. Under the terms of a broad management rights clause "the employer may not be required to bargain about some changes upon which, in the absence of such clause, he might otherwise be compelled to bargain." (Elkouri

and Elkouri, How Arbitration Works (4th ed. 1985) p. 479.) We also note that the parties' CBA contains a "zipper" clause at Article XXV, "Completion of Meet and Negotiation," under which CSEA "expressly waives" the right to negotiate over any subject "referred to or covered in this Agreement."

The California Civil Code provides guidance in the interpretation of contractual language. Civil Code section 1638 states, in part:

> INTENTION TO BE ASCERTAINED FROM LANGUAGE. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

Additionally, Civil Code section 1641 states, in part:

> EFFECT TO BE GIVEN TO EVERY PART OF CONTRACT. 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.

The Board follows this guidance in determining whether contract language constitutes a waiver of the right to bargain. A waiver of the right to bargain will not be lightly inferred. For the District to demonstrate contractual waiver it must show clear and unmistakable contract language waiving CSEA's right to bargain. (Los Angeles Community College District (1982) PERB Decision No. 252.) When contract language is ambiguous, the Board may examine bargaining history for evidence of a conscious abandonment of the right to bargain over a particular subject. (Colusa Unified School District (1983) PERB Decision No. 296 (Colusa USD)'.)

Applying this Civil Code guidance and Board precedent to the instant matter, the Board concludes that the language of the contract is clear and explicit in giving the District the right to make the decision to contract out transportation services; and that the language in question constitutes a clear and unmistakable waiver by CSEA of the right to negotiate over the subject of that decision.

Turning to the actual language of the CBA, sections 4.1 and 4.2 affirm the District's power and authority to direct and manage the operations of the District. Specifically, the District's "exclusive right" to make certain determinations and take certain actions is itemized, including the exclusive right to "contract out work, which may lawfully be contracted for." Moreover, the District's exercise of these powers and rights "shall be limited only by the specific and express terms" of the CBA. Since the CBA contains no express limiting terms and further negotiations of the subject have been waived in Article XXV, the parties have agreed that the District's right to contract out work is to be exercised broadly. The clear and explicit meaning of this contract language is that the District has the right to make the decision to contract out a specific area of work, transportation services, without engaging in negotiations with CSEA over that decision.

CSEA's argument that this contract language is too broad and non-specific to indicate its intent to waive its right to negotiate over the contacting out of transportation services is

without merit. First, as noted above, the ordinary meaning of the words of the disputed language is clear and unambiguous. The parties' agreement in CBA section 4.2 that the powers and rights given the District in section 4.1 may be limited only by specific terms of the CBA, indicates a clear agreement that those powers are broad and unlimited in the absence of any express contractual limitation. No such limitation of the power to contract out work is included in the parties' CBA. Second, under the rules of contract interpretation, the intent of the parties is to be ascertained from the contract language itself, if it is clear and explicit. The language in question here is clear and explicit. Third, to find that this language is too broad to allow the District to contract out a specific area of work, such as transportation services, would essentially render the language meaningless and ineffective, since presumably no contracting out of specific work could occur pursuant to this language. In accordance with Civil Code section 1641, the Board avoids an interpretation of contract language which leaves a provision without effect. (Riverside Community College District (1992) PERB Decision No. Ad-229.) As noted in 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, section 690, page 623: "An interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." The language of the parties' CBA is clear and explicit, it affirms the intent of the parties that it not be interpreted as limited,

and to interpret it as argued by CSEA would leave it without effect.[5]

The Board concludes that the disputed language clearly gives the District the right to decide to contract out transportation services, and constitutes a clear and unmistakable waiver by CSEA of the right to negotiate over the District's decision. Therefore, the District did not violate EERA section 3543.5(a), (b) and (c) when it refused to negotiate with CSEA over that decision.[6]

As noted above, the Board may examine bargaining history to determine if a waiver should be found in contract language it finds to be ambiguous. (Colusa USD.) In this case, the Board finds the disputed language to be clear and unambiguous and, therefore, a review of bargaining history is unnecessary. The Board notes, however, that the record contains no bargaining history evidence to suggest that the Board's interpretation of the contract language here is incorrect. CSEA made several unsuccessful attempts during negotiations prior to 1993 to modify the contracting out language contained in CBA Article IV. CSEA

---

[5]Similarly, the ALJ's interpretation of the word "lawfully" in the CBA language to include the employer's lawful bargaining obligations under EERA would render the language meaningless and ineffective. The language itself is the product of a lawful EERA bargaining process. The word "lawfully" clearly refers to legal restrictions beyond the EERA bargaining obligation.

[6]The Board notes that the question of the lawfulness under the Education Code of contracting out transportation services is being pursued by the parties in a separate legal action in the courts. The Board's decision here addresses the District's right with regard to contracting out which is determined to be lawful.

also attempted to expand the parties' 1992-93 reopener negotiations to include a proposal to eliminate what CSEA described as "the language in the District Rights article which addresses the district's right to contract." In the same reopener negotiations, CSEA proposed elimination of CBA section 25.1, which expressly waives the right to negotiate over any subject referred to in the CBA. Though not dispositive, this bargaining history is clearly not inconsistent with the Board's finding that the CBA Article IV language unambiguously gives the District the right to make the decision to contract out transportation services, and constitutes a clear and unmistakable waiver by CSEA.[7]

Finally, the complaint issued in this case alleges that the District also violated EERA section 3543.5(a), (b) and (c) by refusing to negotiate with CSEA over the effects of its decision to contract out transportation services. While under the language of the CBA the District had no obligation to negotiate with CSEA over the decision itself, the effects of that decision on matters within the scope of representation are negotiable. (Mt. Diablo Unified School District (1983) PERB Decision No. 373.) The record here clearly establishes that the District offered to negotiate with CSEA over the effects of its decision. In the negotiating sessions which followed the parties continued

[7]The Board finds it unnecessary to consider the other arguments raised by the parties. However, CSEA is correct in noting that the Goleta USD case cited by the District is inapposite, and that the Alvord USD decision of a PERB ALJ is non-precedential and nonbinding on the Board.

to dispute the need to engage in negotiations over the District's decision, but it is apparent that some level of effects negotiations occurred and were ultimately concluded. As a result, there is insufficient evidence to support a conclusion that the District violated the EERA by refusing to engage in bargaining over the effects of its decision to contract out transportation services.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-3396 are hereby DISMISSED.

Members Garcia and Johnson joined in this Decision.