STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMALGAMATED TRANSIT UNION LOCAL 1704, Charging Party, v. OMNITRANS, Respondent.	Case No. LA-CE-371-M PERB Decision No. 2001-M January 30, 2009

Appearance: Neyhart, Anderson, Freitas, Flynn & Grossboll by William J. Flynn, Attorney, for Amalgamated Transit Union Local 1704.

Before McKeag, Rystrom and Dowdin Calvillo, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Amalgamated Transit Union Local 1704 (ATU) of a dismissal of an unfair practice charge. The charge alleged that Omnitrans violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to meet and confer over changes to an employment rulebook. ATU alleged this conduct constituted a violation of MMBA section 3505 and PERB Regulation 32603(c).[2]

Based on our review of the entire record, we affirm the dismissal of this case for the reasons set forth below.

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

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

BACKGROUND

Omnitrans is a public agency under the MMBA that provides fixed route bus service in the San Bernardino Valley. ATU is the exclusive representative for coach operators employed by Omnitrans.

In 1985, Omnitrans adopted the Omnitrans Rules and Regulations and Codes of Performance for Operations and Maintenance Personnel (1985 Rulebook). The 1985 Rulebook remained in effect until Omnitrans implemented the Coach Operators Performance Standards (2007 Rulebook), which, by its express terms, superseded the 1985 Rulebook. The implementation of the 2007 Rulebook forms the basis of the instant charge.

According to Omnitrans, on or about May 16, 2006, Scott Graham (Graham), Omnitrans director of operations, provided ATU with a draft of revisions to the 1985 Rulebook.[3] On June 9, 2006, ATU President Dale Moore (Moore) formally requested to meet and confer over the proposed changes.

On June 23, 2006, Graham sent an e-mail to Jeff Caldwell, ATU vice president. Attached to this e-mail was a memo entitled, "Meet and Confer Request on Coach Operator Handbook." The memo indicated that, in order to include bargaining unit members in the revision of the 1985 Rulebook, numerous focus groups (which included ATU stewards) were assembled to discuss the proposed revisions. The focus groups met bi-monthly on six occasions commencing on March 9, 2006. The memo encouraged ATU's participation in the

[3]ATU's pleadings failed to reference any bargaining in connection with the 2007 Rulebook that occurred prior to 2007. In stark contrast, Omnitrans provided a position statement dated April 27, 2007, which included a detailed summary of the parties' bargaining activities on this issue. Many of these facts were incorporated into the warning letter. It is noteworthy that ATU filed both its amended charge and its statement of exceptions after Omnitrans filed its initial position statement and after the Board agent issued the warning letter. ATU, however, failed to rebut most of these facts in its subsequent filings. Thus, because of the paucity of facts plead by ATU, we have incorporated herein some of the unrebutted facts that were plead by Omnitrans and included in the warning letter.

process and requested that ATU provide a written statement outlining its concerns regarding the proposed changes, as well as any conflicts the 2007 Rulebook may have with the parties' memorandum of understanding (MOU).

By letter dated June 26, 2006, Moore responded to Graham's memo. Moore provided a list of nineteen "areas of concern" regarding the proposed changes. Moore noted that, while ATU agreed that the focus groups were a "good thing," the parties had a mutual obligation to meet and confer in good faith upon matters within the scope of representation upon request of either party. Moore further noted that discipline was defined in the MOU, and ATU would not agree to or support any proposed changes that conflicted with the MOU.

On August 3, 2006, Moore sent a letter to Graham, referencing a meeting between the parties on July 24, 2006 and acknowledging receipt of an e-mail copy of the 2007 Rulebook. Moore stated he would meet with his staff to discuss the changes and get back to Graham shortly thereafter. Moore further stated, "I expect this will be our final review." Moore then indicated that another meeting between the parties would be required. Moore explained:

> We need this meeting before you go to print to discuss the final details regarding distribution to our members your employees. We need at least an hour to give some specific recommendations for your consideration.

On August 7, 2006, Moore sent a letter to Graham, outlining ATU's six remaining areas of concern regarding the 2007 Rulebook, three of which related directly to discipline. Moore noted that, "As stated in this handbook the Memorandum of Understanding takes precedent where conflict arises." After enumerating ATU's remaining areas of concern, Moore then stated:

> We agreed that there would be a thirty day grace period for notice and employee adjustment [to] these changes. Our recommendation is that you make yourself available for questions and answers.

Omnitrans claims the final rulebook was adopted in August of 2006. ATU, however, notes that Omnitrans distributed a proposed draft of the 2007 Rulebook in January of 2007 in order to receive employee input and indicated a willingness to make changes based on that input.

Also in January of 2007, the parties were negotiating a MOU. Because the previous MOU referenced the 1985 Rulebook, Omnitrans submitted a proposal on January 23, 2007, to replace references to the 1985 Rulebook in the MOU with references to the 2007 Rulebook. ATU rejected that proposal.

POSITIONS OF THE PARTIES

ATU asserts the 2007 Rulebook made numerous changes to matters within the scope of representation, including, among other things, changes to the discipline system. Thus, Omnitrans failed to meet and confer in good faith in violation of the MMBA when it unilaterally implemented the 2007 Rulebook.[4]

Omnitrans, on the other hand, claims the August 7, 2006, letter by Moore demonstrates ATU was fully aware in August 2006, that Omnitrans intended to implement the 2007 Rulebook. Therefore, since the charge was not filed until April, 2007, the charge was not timely filed.

With regard to the merits, Omnitrans claims that its meet and confer obligations regarding the 2007 Rulebook were fully satisfied by the meetings between the parties. Specifically, Omnitrans claims Moore's August 3, 2006, letter demonstrates the parties did, in

[4]In both its initial charge and its amended charge, ATU claimed Omnitrans violated the MMBA when it implemented the new disciplinary standards set forth in the 2007 Rulebook prior to impasse. However, other than this bare assertion, ATU provided no evidence to support its claim. After reviewing the local rules regarding impasse, the Board agent determined that there was insufficient evidence in the record to find Omnitrans failed to follow impasse procedures. This finding was not appealed by ATU. Accordingly, we do not further address this issue herein.

fact, meet and confer regarding the 2007 Rulebook. Moreover, the letter indicated ATU would meet to consider the latest changes to the 2007 Rulebook and that Moore expected this to be ATU's final review. Omnitrans also claims that Moore's August 7, 2007, letter discusses the issuance of the 2007 Rulebook and, therefore, constitutes additional evidence that bargaining on this issue was complete.

Omnitrans also notes that tentative agreements for the MOU were reached on January 23, 2007 and February 21, 2007, and these agreements substituted references to the 1985 Rulebook with references to the 2007 Rulebook. According to Omnitrans, this provides further evidence that the parties satisfied their bargaining obligations regarding the 2007 Rulebook.

BOARD AGENT'S DISMISSAL

The Board agent initially found the charge was not timely filed. However, based on evidence provided in the amended charge, the Board agent concluded Omnitrans showed a wavering of intent in January 2007 to implement the earlier-discussed changes. Consequently, the Board agent concluded that the charge which was filed in April 2007 was timely filed.

As to the merits, the Board agent found that ATU received adequate notice and an opportunity to bargain the changes. Accordingly, the Board agent concluded the charge failed to demonstrate that Omnitrans committed a per se violation of the duty to bargain in good faith. Looking to the totality of Omnitrans' conduct, the Board agent noted that although ATU, in its August 7, 2006 letter, expressed concerns regarding discipline and other matters, ATU did not make further demands to bargain. Accordingly, the Board agent found Omnitrans did not violate its duty to bargain based on the totality of its conduct and dismissed the charge for failure to state a prima facie case.

ISSUES ON APPEAL

1. Was the charge timely filed?

2. Did Omnitrans fail to meet and confer in good faith when it implemented the 2007 Rulebook?

DISCUSSION

A. Timeliness

PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd. (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].) In unilateral change cases, the statute of limitations begins to run on the date a charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (Folsom-Cordova Unified School District (2004) PERB Decision No. 1712; Cloverdale Unified School District (1991) PERB Decision No. 911; The Regents of the University of California (1990) PERB Decision No. 826-H.)[5] A charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

As indicated above, Omnitrans claims that in August 2006, ATU was aware of Omnitrans' intention to implement the 2007 Rulebook. Consequently, since ATU filed its charge in April 2007, the charge should be deemed untimely under the MMBA's six-month statute of limitations.

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

In its amended charge, ATU alleged that William McLean (McLean), ATU international vice president, had a conversation with Graham in January 2007 regarding the 2007 Rulebook. According to ATU, Graham told McLean that the 2007 Rulebook was not in effect, but sample copies were distributed to Omnitrans employees for feedback. ATU further alleged that Graham said he was looking forward to employee input regarding the proposed 2007 Rulebook and that he was amenable to making changes (including changes to the proposed disciplinary system) in response to the feedback.

ATU also alleged that on January 23, 2007, during negotiations for the MOU, Omnitrans proposed to replace references to the 1985 Rulebook in the MOU with references to the 2007 Rulebook. ATU, however, rejected that proposal. According to ATU, the 2007 Rulebook was not in effect when the MOU was being negotiated.

Based on the foregoing, we find ATU plead sufficient facts to demonstrate the 2007 Rulebook was not implemented as of January 2007 and that Omnitrans was amenable to making changes to the rulebook based on the feedback it received. We, therefore, find Omnitrans had a wavering of intent in January 2007 regarding the implementation of the 2007 Rulebook. Accordingly, ATU's April 2007 filing was timely under the MMBA's six-month statute of limitations.

B. Unilateral Change

In determining whether a party has violated MMBA section 3505 and PERB Regulation 32603(c), 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.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer breaches or alters the parties' written agreement or its own established past

practice; (2) such action is taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (County of Riverside (2003) PERB Decision No. 1577-M.)

The 2007 Rulebook is a 100 page booklet that, by its express terms, "outlines some of the policies and governs operating rules, procedures and performance standards for Bus Operations for Omnitrans." It is undisputed that the 2007 Rulebook contains numerous changes in policy. Moreover, since it adopts, among other things, new standards of discipline for all bargaining unit members, some of the policy changes are within the scope of representation. Accordingly, we find, and the parties do not dispute, that the first, third and fourth elements of a unilateral change violation have been satisfied.

With regard to the second element, it must be shown that Omnitrans made the change without giving ATU notice or an opportunity to bargain over the change. The Board has held that the obligation to meet and negotiate in good faith is one that must be fulfilled before implementing changes to matters within the scope of representation. (Calexico Unified School District (1983) PERB Decision No. 357.) Indeed, MMBA section 3505 provides, in relevant part:

> 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific

> procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent. [Emphasis added.]

Thus, absent a waiver by the exclusive representative, an employer violates its duty to meet and confer in good faith when it makes a unilateral change prior to the completion of bargaining.

As indicated above, Moore sent a letter to Graham on August 3, 2006, indicating he received a copy of the 2007 Rulebook. Moore informed Graham that he would meet with his staff to discuss the changes and get back to Graham shortly thereafter. Moore stated, "I expect this will be our final review." Moore indicated that another meeting would be required to "discuss the final details regarding distribution [of the 2007 Rulebook] to our members." In addition, Moore stated ATU would "need at least an hour to give some specific recommendations for [Graham's] consideration."

On August 7, 2006, Moore sent a follow-up letter to Graham, outlining the ATU's six remaining areas of concern regarding the 2007 Rulebook, three of which related directly to discipline. Moore then stated:

> We agreed that there would be a thirty day grace period for notice and employee adjustment [to] these changes. Our recommendation is that you make yourself available for questions and answers.

Based on the foregoing, it is evident the parties engaged in bargaining with regard to the 2007 Rulebook. Thus, the question in this case is not whether bargaining occurred; rather, the question is whether the parties completed bargaining.

By indicating to Omnitrans on August 3, 2006, that ATU would meet to conduct its final review of the 2007 Rulebook, Moore clearly signaled that negotiations were nearly complete. Indeed, in his August 7, 2006, follow-up letter, Moore did not request further bargaining. Instead, after citing six remaining areas of concern, Moore acknowledged a thirty-

day grace period in which to provide employees notice and an opportunity to adjust to the changes contained in the 2007 Rulebook. In light of Moore's August 3, 2006 letter, we find ATU's failure to request additional bargaining (or even object to the distribution of the 2007 Rulebook) on August 7, 2006, demonstrates that both parties reached agreement regarding the changes and believed bargaining was complete in August 2006.

In its position statement, Omnitrans alleged that the parties completed bargaining on the 2007 Rulebook and cites to the August 3 and August 7, 2006 letters in support of its claim. Relying, in part, on the unrebutted information provided by Omnitrans, the Board agent concluded ATU was afforded actual notice and an opportunity to bargain over the changes. It is noteworthy that although both the position statement and the warning letter were filed prior to ATU's amended charge and its subsequent appeal, ATU failed to present any evidence that bargaining for the 2007 Rulebook was not complete. We find ATU's failure to rebut the findings set forth in the warning letter also supports the conclusion that the parties completed negotiations regarding the 2007 Rulebook.

We, therefore, find ATU failed to plead sufficient evidence to establish it was not afforded notice and an adequate opportunity to bargain over the 2007 Rulebook. Accordingly, the second element of the prima facie case for unilateral change was not established and this case is properly dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-371-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Rystrom and Dowdin Calvillo joined in this Decision.