

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



AMALGAMATED TRANSIT UNION,
LOCAL 1704,

Charging Party,

v.

OMNITRANS,

Respondent.

Case No. LA-CE-372-M

PERB Decision No. 2010-M

March 10, 2009

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

Before Rystrom, Chair; McKeag and Neuwald, Members.

DECISION

RYSTROM, Chair: This case comes before the Public Employment Relations Board (Board) on appeal by Omnitrans of a proposed decision (attached) by an administrative law judge (ALJ). The unfair practice charge alleged that Omnitrans violated the Meyers-Milias-Brown Act (MMBA)¹ when it rejected a grievance because it was filed by Amalgamated Transit Union, Local 1704 (ATU) on its own behalf. ATU alleged that this conduct constituted a violation of MMBA sections 3502, 3503, 3505 and 3506.

Relying on a series of cases arising under the Educational Employment Relations Act (EERA)², the ALJ ruled that ATU had a statutory right under the MMBA to file grievances in

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

²EERA is codified at Government Code section 3540 et seq.

its own name and that it did not waive that right. Accordingly, the ALJ held that Omnitrans' refusal to process grievances filed by ATU in its own name unlawfully denied ATU its rights to represent its employees in violation of MMBA section 3503 and also unlawfully interfered with the rights of employees in violation of MMBA section 3506.

The Board has reviewed the entire record in this matter and finds the proposed decision well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the proposed decision as a decision of the Board itself.

ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that Omnitrans violated the Meyers-Miliias-Brown Act (MMBA), Government Code section 3500 and following, by refusing to process grievances filed by the Amalgamated Transit Union, Local 1704 (ATU).

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

A. CEASE AND DESIST FROM:

Refusing to process grievances filed by ATU.

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

1. Process those grievances that have not been processed because they were filed by ATU.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to Omnitrans employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of Omnitrans, indicating that it will comply with the terms of this Order. Such posting

shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Members McKeag and Neuwald joined in this Decision.



APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-372-M, Amalgamated Transit Union, Local 1704 v. Omnitrans, in which all parties had the right to participate, it has been found that Omnitrans violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 and following, by refusing to process grievances filed by the Amalgamated Transit Union, Local 1704 (ATU).

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

A. CEASE AND DESIST FROM:

Refusing to process grievances filed by ATU.

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

Process those grievances that have not been processed because they were filed by ATU.

Dated: _____

OMNITRANS

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



AMALGAMATED TRANSIT UNION LOCAL
1704,

Charging Party,

v.

OMNITRANS,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-372-M

PROPOSED DECISION
(6/5/2008)

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

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that a public agency unlawfully interfered with the union's right to file grievances, in alleged violation of the Meyers-Milias-Brown Act (MMBA).¹ The public agency denies any violation.

The Amalgamated Transit Union Local 1704 (ATU or Union) filed an unfair practice charge against Omnitrans (Omnitrans or Agency) on April 12, 2007. The General Counsel of the Public Employment Relations Board (PERB) issued a complaint against Omnitrans on October 3, 2007. Omnitrans filed an answer to the complaint on October 23, 2007.

PERB held an informal settlement conference on November 2, 2007, but the case was not settled, so PERB held a formal hearing on January 8, 2008. With the receipt of the final post-hearing brief on March 17, 2008, the case was submitted for decision.

¹ MMBA is codified at Government code section 3500 and following.

FINDINGS OF FACT

Omnitrans is a public agency under MMBA. The Union is a recognized employee organization under MMBA and the exclusive representative of an appropriate unit of Omnitrans employees.

There is little in the way of a factual dispute in this case. The PERB complaint alleged in part:

3. On or about October 26, 2006, November 20, 2006, and November 27, 2006, Charging Party [the Union] filed three grievances pursuant to Article 22 "Grievance Procedure" of the parties' memorandum of understanding (MOU). Respondent [Omnitrans] denied each of the Charging Party's grievances on the sole basis that under Article 22 of the parties' MOU, Charging Party is not entitled to file grievances in its own name and without the participation of an aggrieved employee.

The evidence at hearing showed this allegation was essentially correct.

On October 26, 2006, Omnitrans denied a Union-filed grievance with the following explanation:

Your request for relief makes it clear that you are submitting this grievance by the ATU 1704 Bargaining Unit on behalf of the Union itself and that it is not a grievance regarding a specific situation or occurrence of an aggrieved employee. According to the MOU, only an aggrieved employee with a specific situation or occurrence can submit a grievance using this procedure (Article 22).

On November 20 and 27, 2006, Omnitrans rejected two other Union-filed grievances with similar explanations.

Article 22 (Grievance Procedure) of the then-current Memorandum of Understanding (MOU) provided in part:

DEFINITION

A. A grievance is defined as:

1. An alleged violation or noncompliance with the provisions of this M.O.U., the Agency's written personnel rules and regulations, or department rule[s] and regulations. No policy or practice can violate a written term of the M.O.U.
2. It is further agreed that this grievance procedure will apply to any alleged violation of [sic] noncompliance with the provisions of the M.O.U., the Agency's written personnel rules and regulations, [or] department rules and regulations unless otherwise agreed by the parties. No policy or practice can violate a written term of the M.O.U.

PROCEDURE

Any grievance or dispute which may arise between the parties including the application, meaning or interpretation of this M.O.U., will proceed in the following manner.

INFORMAL REVIEW

The employee, with or without an ATU Representative, must discuss and attempt to resolve the grievance with a Transportation Manager who must respond as part of the informal review step before the formal steps are pursued.

FORMAL PROCEDURE

The procedures outlined herein constitute the formal steps necessary to resolve any employee's grievance. . . .

FORMAL STEPS

Step 1. If the grievance has not been informally resolved with the appropriate Transportation Manager, it may be presented, in writing, by the employee, with or without an ATU Representative, to the Director of Operations. . . .

Step 2. If the grievance has not been resolved in Step 1, it shall be presented by the employee, with or without the ATU representative, to the CEO/General Manager, in writing within fifteen (15) calendar days after the response of the Director of Operations or their designee is received. . . .

Step 3. If the grievance is not resolved in Step 2 and if the grievance is a dispute over this MOU's interpretation, or if it is over a disciplinary action that resulted in a written caution, suspension or termination, with ten (10) calendar days after the completion of Step 2, the employee, with the ATU representative, may request, in writing, that the grievance be referred to a Grievance Committee, made up of a representative appointed by the Agency, a representative appointed by the ATU and a third party mutually selected by the parties. . . .

This version of Article 22 was effective from April 1, 2004, through March 31, 2007.

At the same time, the MOU's fifty-eight other articles included at least seven that concerned the rights of the Union: Article 14 (Notice to New Employees), Article 15 (Information to the Union), Article 16 (Orientation), Article 17 (Agency Shop Provisions), Article 18 (Access to On Duty Employees), Article 19 (Shop Steward's Provision), and Article 20 (Use of Bulletin Boards).

ISSUE

Did Omnitrans unlawfully interfere with the Union's right to file grievances?

CONCLUSIONS OF LAW

In Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista), PERB held that under the Educational Employment Relations Act (EERA)² an exclusive representative has a basic statutory right to file grievances in its own name.³ PERB based this holding on EERA section 3543.1(a), which states in part, "Employee organizations shall have the right to represent their members in their employment relations with public school employers." MMBA section 3503 similarly states in part, "Recognized employee

² EERA is codified at Government Code section 3540 and following.

³ See also South Bay Union School Dist. v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 502 [279 Cal.Rptr. 135].

organizations shall have the right to represent their members in their employment relations with public agencies.”

In Chula Vista, PERB adopted the following analysis:

The system of labor relations created by the EERA envisioned employees acting collectively through a chosen representative to bargain with their employer about matters within the scope of representation. The grievance procedure is a contractual tool for enforcing the results of a negotiated agreement. For contract violations to be grievable and arbitrable only by the initiation of an individual employee runs counter to the EERA’s statutory system of collective action. In a system of collective bargaining, the ability to challenge contractual [sic] violations must lie with the party that negotiated the contract, i.e., the exclusive representative. Any other system makes the viability of the contract dependent upon the willingness of each unit member to stand individually.

(Chula Vista, supra, PERB Decision No. 834.) This analysis appears equally applicable to the system of labor relations created by MMBA.

PERB has left open the possibility that an exclusive representative’s basic statutory right to file grievances in its own name might be subject to waiver. In South Bay Union School District (1990) PERB Decision No. 791, one PERB member, in a concurring opinion, said he would have found the right to be nonwaivable, but no other member has ever expressed agreement with such a finding. In Chula Vista, PERB relied in part on Marine & Shipbuilding Workers v. NLRB (3d Cir. 1963) 320 F.2d 615 [53 LRRM 2878], in which the court acknowledged that collective bargaining agreements might lawfully require employee signatures on grievances. (Chula Vista, supra, PERB Decision No. 834.)

In Amador Valley Joint Union High School District (1978) PERB Decision No. 74, PERB stated in part,

[G]enerally, waiver must be established by clear and unmistakable language, and particularly where waiver of a statutory right is asserted. [Footnotes omitted.]

See also Building Material & Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651 [224 Cal.Rptr. 688] and the cases cited therein.

In only one case, Trustees of the California State University (1995) PERB Decision No. 1094-H, has PERB found a clear and unmistakable waiver of an exclusive representative's right to file grievances in its own name. In that case, the collective bargaining agreement stated in part:

The term "grievant" as used in this [grievance procedure] may refer to the Union when alleging a violation of Union Rights as provided for in this Agreement.

An arbitrator had held pursuant to this language that "union grievances must allege a violation of [the exclusive representative's] 'union rights' under [the union rights article of the agreement]." PERB concluded that the exclusive representative had, through negotiation, limited its ability to file grievances in its own name.⁴

In the present case, in contrast, there is no definition of the term "grievant" that limits the Union's right to file grievances in its own name, nor is there anything in the definition of the term "grievance" that does so. On the contrary, the "Procedure" section of Article 22 states:

Any grievance or dispute which may arise between the parties including the application, meaning or interpretation of this M.O.U., will proceed in the following manner. [Emphasis added.]

The parties to the MOU are, of course, Omnitrans and the Union.

⁴ PERB found the contractual waiver sufficiently clear that it did not find it necessary to decide whether a statutory right was actually involved. The case arose under the Higher Education Employer-Employee Relations Act, Government Code section 3560 and following, which does not include language similar to that of EERA section 3543.1(a) and MMBA section 3503.

It is true that the various steps of the grievance procedure in the MOU generally refer to the grievant as “the employee,” with or without a Union representative. As a description, this may generally be accurate: in many cases the grievant will be an individual employee, with or without a Union representative. I do not, however, find this language to be a clear and unmistakable prescription that an individual employee must be the grievant, or a clear and unmistakable proscription that the Union itself may not be the grievant.

Indeed, in some cases it would appear that the Union itself must be the grievant. There are at least seven articles in the MOU (Articles 14-20) that concern the rights of the Union, not the rights of individual employees. If “only an aggrieved employee with a specific situation or occurrence can submit a grievance,” as Omnitrans says, then it would appear that no one can grieve a possible violation of those articles. If that is true, then the grievance procedure cannot fulfill its stated purpose of addressing “[a]ny grievance or dispute” between the parties concerning the application, meaning or interpretation of the MOU.

I conclude that the Union had a basic statutory right to file grievances in its own name and that it did not clearly and unmistakably waive that right. The refusal of Omnitrans to process grievances filed by the Union thus denied the Union its rights, in violation of MMBA section 3503. This conduct also interfered with the rights of employees, in violation of MMBA section 3506.

REMEDY

MMBA section 3509(b) in part gives PERB jurisdiction to determine “whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter [MMBA].” In the present case, Omnitrans has been found to have violated MMBA by refusing to process grievances filed by the Union. It is therefore appropriate to order Omnitrans to cease and desist from this conduct and to process those

grievances. It is also appropriate to order Omnitrans to post a notice incorporating the terms of the order in this case. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that Omnitrans violated the Myers-Milias-Brown Act (Act), Government Code section 3500 and following, by refusing to process grievances filed by the Amalgamated Transit Union Local 1704 (Union).

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

A. CEASE AND DESIST FROM:

Refusing to process grievances filed by the Union.

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

1. Process those grievances that have not been processed because they were filed by the Union.

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

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board),

or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Union.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Thomas J. Allen
Administrative Law Judge