* * * PUC TRANSIT CASE. PERB DECISION NUMBER CONTAINS INCORRECT LETTERING, AS CASE DID NOT ARISE UNDER MMBA * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO METROPOLITAN TRANSIT SYSTEM, Employer, and TRANSIT ELECTROMECHANICS UNION, Petitioner, and PUBLIC TRANSIT EMPLOYEES ASSOCIATION, Exclusive Representative.	SMCS Case No. 17-3-137 Case No. LA-PC-16-M PERB Order No. Ad-464-M May 15, 2018

Appearances: Juan G. Gonzalez, President, for Transit Electromechanics Union; Aguirre & Severson by Maria M. Severson, Attorney, for Public Transit Employees Association.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on Transit Electromechanics Union's (TEU) appeal from an administrative determination by the State Mediation and Conciliation Service (SMCS). SMCS dismissed TEU's petition for certification as the bargaining representative of a unit of employees of the San Diego Metropolitan Transit System (System). Because the employees in the proposed unit were already represented in a larger unit by the Public Transit Employees Association (PTEA), SMCS determined that TEU's petition was a petition for *de*certification, and that such a petition could only be filed for the existing unit.

On appeal, TEU argues that its petition should be treated as a petition for certification, and that federal law permits the filing of such a petition to sever a unit of craft employees from a larger existing unit. PTEA's opposition to the appeal acknowledges the right to sever a unit of craft employees, but contends that the proposed unit is not appropriate.

Based on our review of TEU's appeal, PTEA's response, and the case file in this matter,[1] we reverse the administrative determination and remand the matter to SMCS for further processing.

BACKGROUND

The System is a transit district established by Public Utilities Code (PUC) section 120000 et seq., and its labor relations are governed by sections 120500-120509.[2] Accordingly, it is not subject to the Meyers-Milias-Brown Act (MMBA), which applies to most local public agencies.[3] (See *San Diego Trolley, Inc.* (2007) PERB Decision No. 1909-M.) The System's enabling statute gives SMCS jurisdiction to investigate and resolve questions concerning representation. (PUC, § 120505.) In doing so, SMCS "shall be guided by relevant federal law and administrative practice developed under the Labor Management Relations Act, 1947, as amended." (*Ibid.*)

SMCS was transferred to PERB from the Department of Industrial Relations in 2012. (Stats. 2012, ch. 46, § 11.) Following this transfer, PERB issued regulations governing

[1] PERB's Appeals Office rejected TEU's appeal. We reversed (*San Diego Metropolitan Transit System* (2018) PERB Order No. Ad-460-M), and PTEA and the System were given the opportunity to file responses to the appeal. The System filed no response.

[2] The System is also referred to as the San Diego Metropolitan Transit Development Board. (PUC, § 120050, subd. (b).)

[3] The MMBA is codified at Government Code section 3500 et seq.

SMCS's handling of cases arising under the various PUC transit district statutes, including the System's. (PERB Regs. 93000-93080.)[4]

TEU filed its petition with SMCS on October 2, 2017. The petition described the proposed unit as comprising "skilled laborers specializing in electro-mechanical trades which require college coursework and completion of an apprenticeship."[5] The petition identified PTEA as an organization recognized or certified as the exclusive representative of or known to have an interest in representing the employees covered by the petition.

On October 6, 2017, SMCS issued the administrative determination dismissing the petition on the following grounds:

> California Code of Regulations, title 8, section 93005 governs petitions for certification and decertification pertaining to the District. This section defines petitions for certification and decertification as they are defined under Federal law. The instant petition appears to be a decertification, in that it seeks to remove the incumbent bargaining representative, and replace it with Petitioner.
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> Under applicable Federal law, the general rule is that the bargaining unit in which the decertification election is held must be co-extensive with the certified or recognized unit. (*Campbell Soup Co.* (1955) 111 NLRB 234; *W.T. Grant Co.* (1969) 179 NLRB 670; *Mo's West* (198[7]) 283 NLRB 130.) Because Federal law makes no provision for the decertification of part of a certified or recognized unit, the existing unit normally is the appropriate unit in decertification cases. (*Campbell Soup Co.*, *supra*, 111 NLRB 234.)

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

[5] The petition identified the following classifications as included in the proposed unit: LRV Electromechanic, MOW Electromechanic, LRV Lineman, MOW Lineman, LRV Assistant Lineman, MOW Assistant Lineman, Revenue Maintainer I, Revenue Maintainer II, Revenue Maintainer III, Track Serviceperson.

> Under these authorities, the regulations do not allow for Petitioner to sever or carve out a smaller bargaining unit where the larger bargaining unit has a bargaining representative in place. Therefore, the petition must be denied.[6]

DISCUSSION

TEU argues that SMCS erred by characterizing its petition as a decertification petition, and that a petition for certification under PERB Regulation 93005 may seek to sever a unit of craft employees from an existing unit.[7] We agree.

PERB Regulation 93005 allows the filing of petitions for certification and decertification, describing them as follows:

> (a) The investigation of a question concerning representation of employees shall be initiated by the filing of a petition with SMCS. Such petition shall be called a petition for certification and is a petition which would arise under paragraph (1)(A)(i) and (1)(B) of Section 9C [*sic*] of the Labor-Management Relations Act. It may be filed by any employee or group of employees or any individual or labor organization acting on their behalf and claiming to represent a majority of the employees in an appropriate unit or by a district.
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> In the event any petition seeks to include employees covered in whole or in part by an existing collective bargaining agreement between the district and any labor organization, such petition in

[6] The administrative determination also stated in a footnote that it was "unclear" whether the petition was served on the System and PTEA, as required by PERB Regulations. No specific service defect is identified, however. Because an administrative determination must "contain a statement of the issues, fact, law and rationale used in reaching the determination" (PERB Reg. 32350, subd. (b)), it is not clear that the administrative determination in this case intended to rely on lack of service as an alternative ground for dismissing the petition. In any event, both the System and PTEA have acknowledged receiving the petition—the System in an e-mail message to SMCS on October 3, 2017, and PTEA in its response to the appeal—and neither has disputed that the petition was properly served.

[7] As we concluded in *San Diego Metropolitan Transit System*, *supra*, PERB Order No. Ad-460-M, SMCS's determinations regarding representation petitions involving the PUC transit districts are appealable to the Board pursuant to PERB Regulation 93025, subdivision (d).

> order to be considered timely must be filed within the period 120 to 90 days, inclusive, prior to the date such collective bargaining agreement is subject to termination, amendment or modification.
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> (b) Petition for Decertification. The investigation of a question concerning representation, alleging an individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative shall be called a petition for decertification and is one of the type which would arise under paragraph (1)(A)(ii) of Section 9(c) of the Labor-Management Relations Act. It may be filed by any employee or group of employees or any individual or labor organization acting on their behalf and shall be filed as set forth in (a).

Nothing in the text of this regulation compels SMCS to treat TEU's petition as a decertification petition. Although PERB Regulation 93005, subdivision (b) allows a labor organization acting on behalf of a group of employees to file a decertification petition, such a petition only concerns whether the recognized or certified bargaining representative enjoys the support of the bargaining unit. Replacement of the incumbent by a different organization is not expressly contemplated. On the other hand, subdivision (a) contemplates a petition for certification by a labor organization seeking to replace the incumbent. Subdivision (a)'s first paragraph does not foreclose such a petition. And its second paragraph—defining a specific window period in which a petition for certification must be filed if it "seeks to include employees covered in whole or in part by an existing collective bargaining agreement between the district and any labor organization" (PERB Reg. 93005, subd. (a))—would be out of place if a petition for certification was not available to a labor organization seeking to replace the incumbent.

The Labor-Management Relations Act (LMRA)[8] provisions referred to in PERB Regulation 93005 shed no light on this question. Those provisions describe types of petitions, but do not use the terms "petition for certification" or "petition for decertification."[9]

In light of this ambiguity, we turn to "relevant federal law and administrative practice developed under the [LMRA]," as directed by the governing statute. (PUC, § 120505.) As TEU's appeal correctly points out, and as PTEA does not dispute, the National Labor Relations Board (NLRB) has long entertained petitions to sever a craft unit from an existing, represented unit. (*National Tube Co.* (1948) 76 NLRB 1199, 1202 (*National Tube*).) These petitions are contemplated by section 9(b)(2) of the LMRA, which states: "[T]he [NLRB] shall not . . . decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation." (29 U.S.C. § 159(b)(2).) The NLRB continues to consider craft severance petitions, although the precise test to be applied to

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[8] The LMRA is codified at 29 U.S.C. section 141 et seq.

[9] Section 9(c)(1)(A) of the LMRA provides that a petition may be filed:

> by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section.

(29 U.S.C. § 159(c)(1)(A).) Section 9(c)(1)(B) provides that a petition may be filed "by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a)." (29 U.S.C. § 159(c)(1)(B).)

determine the appropriateness of the proposed unit has evolved since *National Tube.* (See *American Potash & Chem. Corp.* (1954) 107 NLRB 1418, 1422 (*American Potash*) [declining to extend *National Tube*]; *Mallinckrodt Chem. Works* (1966) 162 NLRB 387, 397 (*Mallinckrodt*) [overruling *American Potash*]; *Battelle Mem'l Inst.* (2016) 363 NLRB No. 119 [declining to revisit *Mallinckrodt*].)

The NLRB cases cited in the administrative determination—*Campbell Soup Co.*, *supra*, 111 NLRB 234, *W.T. Grant Co.*, *supra*, 179 NLRB 670, and *Mo's West*, *supra*, 283 NLRB 130—are not controlling here. While these cases do hold that the appropriate unit for a decertification election is the existing unit, each involved a petition filed by an employee seeking to oust the incumbent bargaining representative in favor of no representative. Because they did not involve one organization seeking to replace another, they do not conflict with *National Tube* and its progeny.[10]

Therefore, we conclude that TEU's petition should be treated as a petition for certification, not decertification, and it cannot be rejected on the sole ground that TEU seeks to

[10] The NLRB appears to reserve the term "decertification" exclusively for petitions seeking to oust the incumbent representative in favor of no representative. (29 C.F.R. § 102.60(a).) As explained in Member Peterson's concurrence in *Campbell Soup Co*, *supra*, section 9 of the LMRA was specifically amended to allow decertification petitions because "the Board's decisional policy allowed employees to oust an unwanted incumbent union only by designating some other union." (*Id.* at pp. 236-237; see also Wohlmuth & Krupka, *The Taft-Hartley Act and Collective Bargaining* (1948) 9 Maryland L. Rev. 1, 10 ["Under the [NLRA], the Board recognized the right to change bargaining representatives and provided election machinery for this purpose. However, the effect of the new decertification provision [in the LMRA] is to provide a way that employees can change bargaining representatives for no representatives at all"].)

In this regard, the NLRB and PERB use the term "decertification" differently. (See PERB Reg. 32770, subds. (a) and (b) [petition for decertification may be filed by employees or by employee organization, and must be accompanied by proof that employees no longer desire to be represented by the incumbent or that they wish to be represented by another employee organization]; *Mendocino College Instructors Association, CTA/NEA (Piche)* (1983) PERB Decision No. 369.)

supplant PTEA as the representative of only some of the employees in the existing unit. We express no opinion on PTEA's contention that the proposed craft unit is inappropriate, which is properly addressed by SMCS on remand.

ORDER

State Mediation and Conciliation Service's administrative determination in Case No. LA-PC-16-M is hereby REVERSED and the matter is remanded to SMCS for further processing.

Chair Gregersen and Member Banks joined in this Decision.