ALRA advisor....

Association Of Labour Relations Agencies

JULY 2005

The December 2000 edition of Wallpaper* listed the ten best cities in the world to call home. Only two — Seattle and Montreal — are in North America.

According to Wallpaper*, "They should be seen as a barometer for the way things should be. None are perfect but all are preferable: None have come up with a secret tonic for city life in this century but all stand above their peers as centres that are making a conscious effort to improve daily life."

ALRA 2005

Seattle, July 9–13

President's Column

Reg Pearson

Reg Pearson

Seattle here we come!! Activities will begin on July 8th with the kick-off of this year's ALRA Academy. The Program and Professional Development Committees have put together a great conference that we believe you will find enriching and captivating. The Arrangements Committee started working immediately after Halifax in order to surround us with a level of comfort and fun that will make Seattle one of our fondest memories.

This year has gone by very quickly and I know that's nothing new having talked to past presidents, but it still feels like we just finished last year's conference. Enjoyable experiences in life always pass on too fast, especially when you get the chance to work with good dedicated people.

There has been a level of uncertainty for some of our member agencies this year. The leaving of Peter Hurtgen at FMCS (Washington) and delay in naming a permanent replacement, here and at other agencies, may cause a concern for some but the dedicated staff and appointees carry on with providing quality services to their clients which, as usual, will result in a seamless transition.

The Neutrality Committee will present its final draft of the first section of the report and it should remove all scepticism respecting things designed by a committee (we've all heard those old jokes). This document is clearly written and touches on the very foundation of what we are and need to be. The next phase of the project will prove to be challenging and there will be lots of opportunity, in Seattle, to help shape it.

It has been a privilege to serve as the president of this fine organization and I look forward to being able to continue to contribute in whatever way I can.

Again, I hope to see you in Seattle.

Nominations For Officer And Board Positions

The following people have been nominated
and have indicated their acceptance of the nomination:

President Elect	**Warren Edmondson**
Vice President – Administration	**Robert Hackel**
Vice President-Professional Development	**Les Heltzer**

In addition, nominations have been received
for two-year terms on the Executive Board for:

Mary Johnson

Marilyn Sayan

Elizabeth MacPherson

The Business of ALRA

The Neutrality Project

One of the most important ALRA initiatives of the past few years is the Neutrality Project. The project began with appointment of a Neutrality Committee by the President, Bob Anderson. John Higgins is the Chair of the Committee and Professor Marty Malin of Chicago Kent College of Law has been appointed as the Project Reporter.

Bob Anderson

The goal of the project is to prepare a comprehensive study of the importance of neutrality to the work of labor and mediation agencies. The plan is to publish this study so that it can be available to member agencies for training, to legislatures for assistance in legislative drafting and oversight and to the public. The first report of this committee was made at the Halifax meeting at which time conferees were provided with a draft of Chapter 1. Chapter 1 lays out the scope of the study, defines its goals, sets down some general principles and most critically, describes the responsibilities that Agencies, leadership as well as staff, have to protect the neutral image of their Agency. The substance of the Halifax discussions was reported in the November 2004 edition of the Advisor.

The Neutrality Committee is busy at work preparing for Seattle. Since the meeting in Halifax, the Committee has met electronically and then face to face in Chicago in conjunction with the Board meeting. The Chicago meeting provided an opportunity for some active interchange on the comments and suggestions made at the Halifax meeting concerning Chapter 1.

The Committee has also paid particular attention to the suggestion made in Halifax that there be a Preface to the work. This Preface will address how labor relations agenda can be pro-collective bargaining and still be neutral. A draft of the Preface has been prepared and will be the subject of discussion in Seattle.

At the February meeting the Committee decided that Chapter 2 will focus on the importance of "Independence" in the administration of labor relations agencies. Appointees as well as staff come to their positions with some background in the field, often as advocates. But as public servants they must put that advocate role aside. How to do it? What can appointees do to project the proper image that former allegiances are now behind them and they now serve the public goals defined in their enabling legislation? What is the proper deference that appointees owe to an appointing administration in matters involving that same administration? These were but a few of the questions discussed by the Committee.

John Higgins

Marty Malin has submitted a draft of Chapter 2 to the Committee. Committee members are working considering this material now and they expect to provide a draft of Chapter 2 as well as a revised Chapter 1 to those who will be attending the Seattle conference well in advance of the meeting.

Marty Malin

The Neutrality Project will be discussed on Sunday and Tuesday in Seattle. Sunday's session (1:00-2:30) will focus on a discussion of the project generally and on a review of the revised Chapter 1. On Tuesday morning the focus will be on the draft of Chapter 2.

Any thoughts our readers may have about the Project are very welcome so don't hesitate to send any comments along to John.Higgins@NLRB.gov.

On-line Directory

ALRA no longer publishes a hard copy of its directory. Instead, ALRA provides you an on-line directory that you can view or print at any time. A copy of your agency's directory page is sent to your agency each year with the annual ALRA membership billing. Please be sure to return the page with any needed updates.

The directory can be and is updated throughout the year as changes are submitted to the ALRA webmaster.

Highlights of the Executive Board Meeting
October 16-17, 2004

1) **Technology** – The ALRA Home Page has been redesigned to improve ease of use when accessing various website features. Now all Home Page features appear without the need to scroll. The same type of redesign is planned for the labor links page.

2) **Program** – An Advocates' Day will be included as part of the Monday program for the 2005 conference in Seattle.

3) **International Visitors** – Visitors from the national labor mediation agencies of Australia, New Zealand, Northern Ireland, South Africa, Great Britain, and Republic of Ireland will be meeting in Canada during the week prior to the ALRA Conference. The group has requested the opportunity to register for the ALRA Conference. Also, Geoff Giudice of Australia requested that two of his staff members be permitted to register for the conference. The ALRA conference is not open to visitors except by invitation. The Board agreed to the requests; and invitations will be issued.

4) **Grants** – FMCS-US has awarded a second grant to ALRA in the amount of at least $50,000.

5) **Institutional Memory** – The final draft of the Institutional Memory Guidebook is completed. Copies will be distributed routinely to new board members.

6) **Archives** – An inventory of the ALRA archives is being created. The archives are housed at the National Labor Relations Board.

7) **Site** – The 2006 conference will be held in Baltimore, Maryland from July 21 to 25, at the Renaissance Harborplace Hotel

8) **ALRA Alumni** – Because ALRA has no formal policy regarding the attendance of conferences by ALRA alumni, requests of alumni will be considered on an ad-hoc basis.

Note: Each year the ALRA Executive Board meets in October to hear committee reports and take action on various initiatives. On the day prior to the Board meeting, the Arrangements Committee and the Program Committee meet to begin plans for the upcoming annual conference. For a detailed look of the work of the Executive Board, please go to www.alra.org and review the draft and approved minutes of its meetings.

Host Agency – Washington PERC

Old Ideas, New Realities: Just Keep PERC-ing Along

WELCOME BACK TO SEATTLE! The Washington Public Employment Relations Commission (PERC) is honored to host ALRA-2005. PERC chair Marilyn Sayan is member of the ALRA Executive Board. Arrangements Chair Starr Knutson and other PERC staff members are the smiling folks with the evergreen ALRA badges. PERC Executive Director Marv Schurke was President of ALRA when Washington hosted the conference in 1988.

Starr Knutsen at Halifax 2004

PERC was among the small labor relations agencies when it commenced operations in 1976, but there never was any doubt it would be involved in ALRA. The newly-appointed Commission members recruited Executive Director Schurke from the Wisconsin Employment Relations Commission (which had been an ALRA member forever) and PERC staff member Willard Olson was a member of the ALRA Executive Board at that time. The Washington PERC has attended all but one of the annual conferences held since 1976.

Washington state has been fairly enlightened about collective bargaining. PERC and a predecessor agency have been mediating and arbitrating labor-management disputes since 1903; the "unions are unlawful conspiracies" theory was overruled by a law enacted here in 1919; the first fully-administered public sector bargaining law in the United States was enacted here in 1949 (covering the ferries that you can watch from the Edgewater hotel), and state law has authorized collective bargaining and union security for state employees since 1960. Later in the 1960's, separate public sector laws were enacted covering public utility districts (electric utilities), port districts (waterfronts and airports), K-12 teachers, local government, classified employees of state institutions of higher education, and faculty at community colleges. Even worse than the maze of separate laws, the state had at least six separate agencies and the courts dabbling in the resolution of labor-management disputes.

PERC was born out of a labor-management task force urging the Legislature to streamline the maze. Even so, the 1975 Legislature only consolidated the administration of some of the state's collective bargaining laws in PERC. All the separate laws continued to exist and two other state agencies and the courts continued to also administer collective bargaining laws covering public employment.

PERC started out with seven transferred employees and authorization to a total staff of twelve employees plus the three part-time Commission members. Similar to a problem described by many other agencies at ALRA conferences over the years, funding was scarce for the task. PERC set about accomplishing its statutory mission of providing "uniform and impartial, efficient and expert" resolution of labor-management disputes, but backlogs mounted with a heavy case intake. PERC went through a starvation period in the early 1980's, when its staff was cut from sixteen to less than eleven, but it kept chipping away at the backlog. PERC's focus on quality was rewarded in 1990 and 1991, when PERC went "43-0" on affirming votes on five cases before the state Supreme Court. After that and another joint task force recommendation, PERC was given additional staff in 1993 and began processing cases on a timely basis.

Four new laws enacted in 2002 fulfilled most of the prior task force recommendations, but returned PERC to a backlog situation for a time:

- Home health care workers paid by the state under Medicaid and similar laws were given collective bargaining rights, and PERC conducted the largest representation election in its history (25,501 eligibles voting by mail ballot);
- State civil service employees and classified employ-

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ees of state institutions of higher education were given expanded bargaining rights covering wages and benefits. PERC had to both reform existing bargaining units and process dozens of representation petitions, resulting in more than 225 bargaining units;

- Teaching and research assistants at the University of Washington were given collective bargaining rights, and PERC conducted the most complex hearing process in its history (18 days on-the-record) before conducting an election and certifying a union; and

- Faculty at six state higher education institutions were given collective bargaining rights, and PERC has had representation cases in three of those institutions.

This time, the Legislature responded to well-reasoned fiscal estimates provided by PERC, and gave PERC resources to do the tasks assigned. PERC again developed a backlog when its case intake jumped from 615 cases per year to 1000 per year in June 2002, but it is getting back to timely case processing with the additional resources provided by the Legislature and the help of a well-trained and highly skilled staff.

PERC Chairperson Marilyn Glenn Sayan retired after more than 30 years in state service, but then accepted appointment as Chairperson of PERC in 1996. She attended her first ALRA conference that year. Commissioner Pamela Bradburn was an ALRA participant in her former life as a member of the PERC staff (from 1994 to 2001), and was appointed as a member of the Commission in 2004. Commissioner Douglas Mooney was appointed as a member of the Commission in 2004, and is attending his first ALRA conference.

Marilyn Glenn Sayan

Two tips for other ALRA agencies about coping with the ups and downs of government budgets:

1. PERC uses "number of agency employees divided by number of Congressional districts" to make comparison with the agencies in other states more meaningful; and

2. PERC developed what we call the *"Effective Load"* (number of pending cases divided by the number of professional staff available to do the work) to compare agency readiness over time and over differing clientele bases. It has helped PERC communicate with fiscal staff who hold the purse strings in the state budget office and the Legislature.

Marv Schurke – The Man Who Built PERC

By Ken Latsch and Katrina Boedecker

With ALRA coming back to Seattle for the first time since 1988, it's appropriate to take a minute to highlight the career of Marvin L. Schurke, the Executive Director of our host agency, the Washington Public Employment Relations Commission. For one thing, Marv was our host the LAST time ALRA came to town. That's right, Marv's been PERC's Executive Director since 1988. As a matter of fact, Marv has been PERC's Executive Director since 1976, the year that the agency was created. Simply stated, Marv is the only executive director that PERC has ever had! As we write this, Marv is the longest serving agency director in Washington State government. He is also the longest serving state labor relations agency director in the nation. That kind of longevity in a high profile and stressful position doesn't just happen... it's earned through diligence, knowledge and a true commitment to the idea that conflict can be resolved in a structured and peaceful manner.

Marv was born and raised in Chicago. The product of a working class family, he had a keen mind and he was a good student. He also developed interests in music and anything to do with railroading. Marv graduated from

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Marv Schurke – Cont'd

the University of Chicago, where he met the one true love of his life, his wife Terry. Next came law school at the University of Minnesota.

After law school, Marv held several jobs in the private sector. More importantly for our story, he held labor relations jobs. First at Republic Steel, and then at International Harvester, Marv learned about the day-to-day realities of working in a unionized shop with well-established craft unions representing the workforce.

Marv Schurke

His interest in labor relations became an interest in labor law. In 1970, Marv followed this calling by accepting a position with the Wisconsin Employment Relations Commission. Marv worked as a mediator and hearing examiner... a model he brought with him when he came to Washington State. Marv tells many stories about his time in Wisconsin. If you listen, you can tell that he enjoyed his time there. He speaks about his time in Wisconsin with good humor, often reminding his staff members that he, as a "rookie", got involved in the longest teacher strike in Wisconsin history.

Marv might well have spent his entire career in Wisconsin, but for events starting to take shape in Washington State. In 1975, the state legislature created a new labor relations agency, the Public Employment Relations Commission. A three member part-time, commission was empowered to resolve labor relations disputes involving Washington State cities, common school districts and "other political subdivisions of the state". The original commissioners saw that they needed to hire an exceptional person to become the agency's first Executive Director. That person would have to build an agency by working out a number of legislative and budgetary battles, hiring a complete staff of professional labor neutrals, and starting the agency's dispute resolution work. After going through a nationwide search, the Commission selected Marv as its first Executive Director. Marv, Terry and their young family moved to Olympia, Washington, where Marv began the job of creating a new agency.

Marv insisted on using the "Wisconsin model" for the new agency... each professional staff member would be a mediator, a hearing officer, an examiner or an arbitrator depending on the type of case presented. Marv has always been proud of his staff, and he has always been fiercely loyal to them.

The early days of the agency were tumultuous. Not only did Marv have to deal with all of the work associated with the start of a new agency, he had to deal with a number of teacher strikes throughout the state. In many respects, this was the litmus test for PERC... could it survive the onslaught of work at such an early time in its development? The agency not only survived, it flourished. With Marv's leadership and incredible work ethic, PERC did its job, and its clientele began to expect great things from this new agency.

Through the years that followed, Marv was there whenever there was a new development in state labor law. From the early days when the "big picture" issues were established to the present day when the issues can be much more sophisticated, Marv has been a calm and steady presence as PERC has continued to mature and grow.

In 2002, PERC was given labor relations jurisdiction over state employees, almost doubling the agency's jurisdiction. Once again, the agency was faced with a number of difficult legislative and budgetary issues. In addition, PERC had to recruit and fill a number of positions to meet its new workload demands. Marv rose to the challenge again. He successfully led the agency into its new place as one of the largest state labor relations agencies in the nation.

Marv's career has been a reflection of his knowledge of labor law and his commitment to the process of collective bargaining. If you happen to see Marv while you're attending the Seattle conference, stop and say hello. You'll enjoy the experience, and you just might learn something.

International Guests

For a number of years, the heads of the mediation agencies in Great Britain, Northern Ireland, the Republic of Ireland and the United States of America have been meeting to learn more about the practice of the profession in each of these jurisdictions. At the urging of former US FMCS Director Peter Hurtgen, the group was enlarged in 2004 when Canada, Australia, New Zealand and South Africa were invited to join. The 2004 meeting, held in Edinburgh, Scotland, was a great success and the eight nations decided to meet in Vancouver, British Columbia in 2005. The dates and location of the meeting were selected to enable the representatives of these economies to travel to Seattle for the 2005 ALRA Conference.

Justice Geoff Giudice

Participants at the Vancouver session were:

- Justice Geoff Giudice, President, Australian Industrial Relations Commission, Melbourne, Australia;
- Mr. Pat McCartan, Chair, Northern Ireland Labour Relations Agency, Belfast, Northern Ireland;
- Mr. Kieran Mulvey, Chief Executive, Labour Relations Commission of the Republic of Ireland, Dublin, Ireland;
- Mr. Kevin Foley, Director of Conciliation Services, Labour Relations Commission of the Republic of Ireland, Dublin;
- Mr. Ken Raureti, Chief Mediator, New Zealand Department of Labour, Wellington, New Zealand;
- Mr. Moe Ally, National Senior Commissioner, Commission for Conciliation, Mediation and Arbitration, Johannesburg, South Africa;
- John Taylor, Chief Executive, ACAS, London;

Elizabeth MacPherson

- Andrew Wareing, Director, Strategy Directorate, ACAS, London;
- Scot Beckenbaugh, A/ Director, Federal Mediation and Conciliation Service, Washington, DC; and
- Elizabeth MacPherson, Director General, Federal Mediation and Conciliation Service (Canada), Ottawa, Canada.

We welcome all those who have travelled down to Seattle to be with us at ALRA!

John Markle, Jr.

John Markle Jr., 73, of Exton, a lawyer and labor negotiator, died December 14 of lung cancer at Paoli Hospital.

For 45 years, Mr. Markle was associated with the firm of Drinker, Biddle & Reath. He was named partner in 1964 and opened the firm's Berwyn office in 1992. As a labor specialist, Mr. Markle had been labor negotiator for several corporations and Lower Merion Township. Until the 1980s, he was chief labor negotiator for SEPTA. In the 1970s, he represented major-league baseball umpires in negotiations with team owners. Gov. Tom Ridge appointed him chairman of Pennsylvania's Labor Relations Board in 1996 and he served in that capacity until his retirement in 2004.

Mr. Markle grew up in Hazleton and Harrisburg and graduated from the Hill School in Pottstown, serving on the School's Board of Directors in later years. After earning a bachelor's degree from Yale University in 1953, he served in the Marine Corps in Korea. He remained in the Marine Reserves until retiring as a lieutenant colonel in 1973. He earned his law degree from Harvard University in 1958.

Mr. Markle was a contributor to the Developing Labor Law, the leading treatise of American Labor Law. He was President and member of the Board of Directors of the Children's Aid Society of Pennsylvania, former President of the Waynesborough Country Club, member and former President of the Board of Directors of Paoli Memorial Hospital and The Foundation at Paoli and was on the System Board of Main Line Health, Inc. and Chaired it Joint Conference Committee.

He enjoyed golf and spending time at his vacation villa in the Dominican Republic.

Immediate Past President Dan Nielsen remembers Jack Markle as a master of the labor relations trade, and one of the more colorful and outspoken figures in ALRA, as well as a heck of a nice guy to pass time with at meetings. He was heavily involved in the Philadelphia conference, and served the profession in numerous other capacities. It is sad to know that he's gone, but it's pretty much impossible to think of him without a smile, remembering the pleasure of his company.

Mr. Markle is survived by his wife of 14 years, Kathryn Wheeler Markle; daughters Ellen Mueller, Trisha Cernonok, and Mary Crouse; sons John III and Stephen; nine grandchildren; and his former wife, Molly Markle.

Federal – United States

FMCS Director Peter J. Hurtgen Announces Resignation

WASHINGTON, D.C. – Peter J. Hurtgen, Director of the Federal Mediation and Conciliation Service, announced his resignation, effective December 31, 2004. The Director cited "personal reasons" for his decision to depart the FMCS after nearly two and a half years.

Peter J. Hurtgen

He will rejoin the firm of Morgan, Lewis & Bockius LLP as a partner in early 2005.

In his letter of resignation to the President, Director Hurtgen wrote, "It has been an honor and a privilege to serve you and your Administration."

A former Chairman of the National Labor Relations Board, Director Hurtgen has led the FMCS since August, 2002. His tenure at the agency has been marked by major initiatives focusing on building the expertise of federal mediators in addressing complex collective bargaining issues and increasing public awareness of the FMCS and its important role in protecting the nation's economic well-being.

As the nation's top mediator,Director Hurtgen personally helped settle a number of high-profile labor disputes, including the West Coast ports dispute in 2002 that idled cargo docks in 29 West Coast cities for 10 days at a potential cost to the economy of $1 billion a day.

In 2003, he personally mediated a settlement between the nation's largest telephone company, Verizon Communications, Inc., and the Communications Workers of America (CWA) and the International Brotherhood of Electrical Workers (IBEW), affecting 78,000 workers in the Northeast and MidAtlantic regions. Earlier this year, his personal mediation helped end the nation's longest strike in the retail grocery industry, returning 60,000 workers to their jobs at Southern California supermarkets in February after 141 days.

Later in 2004, Director Hurtgen also joined in mediating major negotiations involving the CWA and IBEW and SBC Communications Inc. and Lucent Technologies Inc. He also assisted the ongoing negotiations between hotels and unions in San Francisco and Los Angeles.

Under his leadership, the Agency focused on increasing mediator expertise in collective bargaining issues affecting key economic sectors, including aerospace, transportation, construction, health care and telecommunications. With the higher cost of health care benefits creating increased labor-management friction, the Agency initiated special training for mediators to enable them to better assist negotiators in this contentious area.

On overseas missions to nations in Eastern Europe, Southern Africa and Asia, Director Hurtgen advocated the benefits of the U.S. system of labor relations and the importance of recognizing core labor standards – the freedom to associate and to bargain collectively – in the development of free market economies.

In resigning, Director Hurtgen praised the staff of the FMCS and the work of its federal mediators. "For its size, no agency has a bigger impact on the nation's economic life than the Federal Mediation and Conciliation Service," he said. "I salute the hard work, dedication and commitment of FMCS mediators and staff. By working long hours to resolve the potentially disruptive disputes of our nation's workplaces, the FMCS mediators and staff contribute greatly to our country's productivity, economic growth and global leadership."

Acting Director, Scot L. Beckenbaugh

Scot L. Beckenbaugh was appointed Acting Director of the Federal Mediation and Conciliation Service on January 1, 2005. He is responsible for FMCS operations in all 50 states, Puerto Rico, the U.S. Virgin Islands and Guam.

Born in Libertyville, Illinois, Acting Director Beckenbaugh has been with the FMCS since 1988. He was appointed Western Regional Director in January, 2004,

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Scot Beckenbaugh

having served as Regional Director for the Upper Midwest Region since 1997. He was the Director of Mediation Services for the Upper Midwest for two years and, before that, he was a field mediator stationed in Des Moines, Iowa. In addition to providing the full range of FMCS services to the labor management community in Iowa, he served as the Minneapolis District Alternative Dispute Resolution Coordinator.

Acting Director Beckenbaugh has mediated national master agreements in the cereal, heavy equipment manufacturing, aluminum and meatpacking industries. He has extensive experience in public sector dispute mediation, as well as regulatory negotiations, public policy, land use and civil rights disputes. A long-time member of the Association of Labor Relations Agencies, Acting Director Beckenbaugh has served on the ALRA Board.

From 1986 to 1988, Acting Director Beckenbaugh was a Member of the Iowa Public Employment Relations Board (PERB). Prior to his appointment to the Board, he was an Administrative Law Judge and Director of Mediation Services for PERB. He also had a private arbitration practice and was listed with FMCS. He has served on the Twin Cities Labor Management Committee and is currently Chairman of the Industrial Relations Advisory Council at the University of Minnesota. He has taught at the high school, junior college and university level and was a bill drafter and research analyst for the Iowa Legislature.

Acting Director Beckenbaugh holds a B.A. in Political Science from the University of Northern Iowa and an M.A. in Public Administration with an emphasis in Industrial Relations from the University of Iowa.

Federal Mediation And Conciliation Service

The FMCS has announced that it is seeking recipients for grants to labor-management committees for the 2005-2006 period as provided for by the Labor-Management Cooperation Act of 1978. Grants are awarded to promote best practices in labor-management cooperation and support the creation and operation of joint labor-management committees at the company level, on a community or area-wide basis, within a particular industry, as well as for public sector employees. Application forms and further information are available on the agency Web site, www.fmcs.gov.

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FMCS is working with one of the largest public sector agencies of the District of Columbia government, the Department of Human Services (DHS), on a pilot project intended to demonstrate how organizations can develop their own systems for resolving potentially disruptive disputes in unionized workplaces. DHS has approximately 1,800 employees. It administers social service programs and services that primarily benefit low-income District of Columbia residents, including Temporary Assistance for Needy Families (TANF), Medicaid/Healthy Families, food stamps, family services, early childhood development, rehabilitation services, mental retardation and developmental disability services, and youth services. AFSCME, AFGE, and Fraternal Order of Police locals are among the unions that represent the Department's employees.

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DHS and the AFSCME, AFGE, and Fraternal Order of Police locals, with FMCS's facilitation, will collaborate to design a system that resolves all kinds of workplace disputes falling outside of their traditional collective bargaining agreements. This effort is an example of the innovative process for addressing such disputes, known as Dynamic Adaptive Dispute Systems (DyADS) unveiled in 2004 that resulted from an FMCS-sponsored 18-month review that included a national team of dispute system design experts from academia and the practitioner community.

National Mediation Board

Representatives of railway labor and management testified in January 2005 at a hearing on a proposal of the NMB to impose fees on the parties for the arbitration of grievances. Arbitration of such so-called "minor" disputes under the Railway Labor Act has been conducted without cost to the parties under the auspices of the National Railroad Adjustment Board, which was created by the 1934 amendments to the 1926 Act. (Airline labor and management, also subject to the RLA, must pay for grievance arbitration services.)

Organized labor strongly opposed the proposed rule change. Union representatives argued that the NMB lacks statutory authority to impose fees for arbitration. They cited the legislative history of the 1934 amendments and the underlying actions of the parties in agreeing to provide for an arbitration structure, as a quid pro quo for the unions' giving up the right to strike over grievances. Labor contends that the NMB proposal would threaten the stability of labor relations in railroads.

The National Association of Railroad Referees also testified in opposition to the proposal. The association was founded in 1990 and includes several former members of the NMB and of presidential emergency boards, which may be appointed to resolve interest bargaining disputes under the Act. The association argued that the Board is not authorized to impose such fees and that the proposal is contrary to the consensual spirit of the RLA.

Railroad management was represented by the general counsel of the National Railway Labor Conference. The general counsel endorsed the proposed fees, arguing that no other industry enjoys the benefits of grievance arbitration provided by the federal government for free. She noted that grievances in the airline industry are far fewer than those in railroads, even though airlines have many more employees.

As of this writing the NMB still has the proposed fee schedule under consideration.

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The NMB has announced that it will be working with the University of Massachusetts at Amherst on a research project designed to improve the use of online dispute resolution technology. The three-year project is funded by a grant from the National Science Foundation. Mediators will help to design and conduct the research, and the Board will coordinate participation by rail and airline carriers and unions.

Further information on these and other developments can be obtained from the agency Web site, www.nmb.gov.

National Labor Relations Board

In recent months the National Labor Relations Board has announced several changes intended to improve the efficiency of its procedures and resultant service to its customers. It has expanded a pilot project on E-filing to include all documents in unfair labor practice and representation cases. It has improved the legal research capabilities of its Web site by making documents, particularly advice memoranda from the General Counsel, more easily accessible to the public. Advice memoranda address novel or difficult legal issues arising in unfair labor practice cases.

Another innovation at the Web site is a self-service automated system designed to provide answers to questions about the Board and its processes, enabling users to obtain information outside normal business hours. According to the Board, the user types in a question or views a "tree structure" of questions and answers in a particular category. The site interprets the user's question and provides potential answers for review. If the system cannot provide an answer, it notifies the system administrator. Answers are then provided by actual human subject experts, and those answers will be incorporated into the system's knowledge base.

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The NLRB has created a new alternative representation case procedure, the "Full Consent Election" Agreement, under which parties can agree that disputed pre-election and post-election issues will be resolved with finality by a Regional Director, with no appeal to the Board. The Board also makes available to the parties two other types of procedures to expedite resolution of representation issues, the "Stipulated Election" and the "Consent Election." Details on these and other NLRB developments are available at the web site, www.nlrb.gov.

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The NLRB General Counsel's summary of operations for FY 2004 reported a 96.1 percent settlement rate in meritorious unfair labor practice cases. Over $200 million was recovered during the year on behalf of employees as back pay or reimbursement of fees, dues and fines. Over 4600 employees were offered reinstatement. Regional Offices conducted 2537 initial elections for representation during the year, of which 89 percent were held pursuant to agreement of the parties. The median time for conducting an election was 39 days from filing of a petition, and 93.6 percent were conducted within 56 days of the petition.

The NLRB announced that its case production improved in FY 2004. It issued decisions in 381 unfair labor practice cases and 195 representation cases. The Board's stated goal for the year of focusing on overage cases was hampered by its having to function with only 4 of 5 members for a third of the year.

Unfortunately, functioning at less than full strength is a frequent occurrence at the Board. As of this writing the terms of members Ronald E. Meisburg and Dennis P. Walsh have expired. The President has announced their renominations, which are pending in the Senate. Additionally, the term of Peter Schaumber expires in August, and General Counsel Arthur Rosenfeld's term expired on June 3.

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Some recent substantive case developments of note follow. In Oakwood Care Center and N&W Agency, Inc, 343 NLRB No. 76, the Board held that employees obtained from a labor supplier cannot be included in a unit of permanent employees unless all parties consent. The decision overruled a 2000 decision by the Clinton Board, M.B. Sturgis, 331 NLRB 1298. While the Board majority argued that they were returning to longstanding Board precedent, the minority stated that the ruling would effectively bar such workers from union representation and "accelerate the expansion of a permanent underclass of workers."

In Crown Bolt, Inc. 343 NLRB No. 86, a Board majority held that an employer's threat to close its facility in the event employees vote for union representation will not be presumed disseminated throughout the bargaining unit. The decision overruled a 2000 holding in Springs Industries, Inc., 332 NLRB 40, that plant-closure threats are presumed disseminated throughout the plant absent evidence to the contrary.

In Alyeska Pipeline Service Co., 19-RC-14600, the Board granted review and asked for amicus briefs on issues including whether the employer is a public utility for purposes of unit determination, and whether the case, involving an oil pipeline, is affected by deregulation of the natural gas industry.

The Board is reviewing cases involving voluntary recognition agreements. The November 2004 Advisor described the Metaldyne and Dana Corporation cases, which concerned whether voluntary recognition bars consideration of a petition for decertification. In Shaw's Supermarkets (Reg. Dir. Case No. 1-RM-1267) the Board is considering whether an employer waived its right to seek an election by negotiating a clause in the union agreement providing for recognition of the union in "after-acquired" stores upon demonstration of majority support, and, if so, whether public policy reasons outweigh the private agreement not to have an election.

Labor And Employment Relations Association (Formerly Industrial Relations Research Association)

The Labor and Employment Relations Association, formerly the IRRA, has announced the formation of industry councils in the public sector, health care, construction, automobiles, airlines and aerospace, to engage in discussions, research, and educational and scholarly activities regarding industrial relations. The effort is supported by a grant from the Alfred P. Sloan Foundation. The airline industry council has received a one-year grant from the Federal Mediation and Conciliation Service to conduct case studies of firms operating as lower-cost carriers and to identify training needs and opportunities to enhance the effectiveness of labor relations in the industry. Information on the councils can be obtained from the LERA Web site, www.lera.uiuc.edu.

Union Membership In The United States

Union membership as a proportion of the workforce in the United States continued its steady decline in 2004, as reported by the Department of Labor's Bureau of Labor Statistics. Twelve and a half percent of wage and salary workers were union members, down from 12.9 percent the year before. Only about 8 percent of private sector workers were in unions, compared to about 36 percent of government workers at the local, state and federal levels. Total membership also declined, from 15,776,000 to 15,472,000. Additionally, however, about 1.6 million wage and salary workers were represented by a union while not being union members themselves. About half of these were in government. Further information and caveats on the data may be obtained from the BLS Web site, www.bls.gov/cps.

Submitted by Joy K. Reynolds, May 2005

Canadian Industrial Relations Board (CIRB)

New Appointments to the Canada Industrial Relations Board – The Honourable Joe Fontana, Minister of Labour and Housing, appointed for a term of three years:

Employer Representatives

- Mr. André Lecavalier, as part-time Member (term ending in December 2007)
- Mr. Alan D. Levy, as part-time Member (term ending in December 2007)
- Mr. Patrick J. Heinke, as full-time Member (term ending in April 2008)

Employee Representatives

- Mr. Gary Fane, as full-time Member (term ending in August 2008)

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Consultation Committee – The Canada Industrial Relations Board (CIRB) has created a CIRB Client Consultation Committee in the fall of 2004 for the purpose of canvassing the labour community, both labour and management sides, with respect to their expectations regarding industrial relations issues that concern them. The creation of this Committee is an important initiative that will provide a much-needed opportunity for ongoing dialogue between the CIRB and its client communities and stakeholders. The CIRB, as represented by its Chairperson and selected officials, will meet with the Committee twice a year. The Committee will be comprised of an equal number (5) of representatives of both employers and unions (i.e., the Canadian Association of Labour Lawyers (CALL), the Canadian Labour Congress (CLC), the Confédération des syndicats nationaux (CSN), the Canadian Association of Counsel to Employers (CACE) and the Federally Regulated Employers - Transportation and Communications (FETCO)). It will be chaired by Mr. Michael McDermott, who played a key role in supporting the Sims Task Force, which led to the amendments to Part I of the *Canada Labour Code* and who is presently a Fellow of the School of Industrial Relations at Queen's University. The Committee has been mandated to provide the Chairperson of the CIRB with its views, feedback and suggestions regarding the role the CIRB plays in the continuing development of effective labour relations in the federal jurisdiction.

Michael McDermott

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Key Decisions – The Canada Industrial Relations Board has issued a number of decisions involving complex issues. These decisions are briefly discussed below.

In a decision involving the Canadian National Railway Company, the Board was asked, by way of a referral from the Minister of Labour pursuant to section 87.4(5) of the Code, to determine whether the maintenance of activities agreement entered into by the parties was sufficient to ensure compliance with the Code. The agreement identified no services that were required to be continued in the event of a work stoppage. The Board ruled under section 87.4(1) that, at the present time, a strike or lockout would not pose an immediate and serious danger to the safety or health of the public and responded to the Minister that, at this point in time, the maintenance of activities agreement entered into by the parties is sufficient to ensure compliance with section 87.4(1).

In another matter concerning Hudson Bay Port Company (the employer) and the Public Service Alliance of Canada (PSAC), the PSAC requested that the Board impose a binding method of dispute resolution on the employer, pursuant to section 87.7(3) or any other Code provision, in order to determine all outstanding issues at the bargaining table. The Board declined to issue an order imposing a binding method of dispute resolution on the parties as it was unable, based on the information before it, to determine whether the employer was, for the purposes of section 87.7(1), an employer in the longshoring and/or navigation and shipping industries. The Board was not satisfied it had jurisdiction under section 87.7(3) to issue a binding arbitration order and it was not able to find other sections of the Code that would authorize the issuance of such an order.

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UNION NOT BOUND BY STATUTORY DUTY OF FAIR REPRESENTATION IN PERIOD AFTER CERTIFICATION BUT PRIOR TO COLLECTIVE AGREEMENT, CIRB RULES

The Canada Industrial Relations Board (CIRB) has

ruled that, in the period after certification takes place but prior to the conclusion of a collective agreement, a union does not owe a statutory duty of fair representation to the members of the bargaining unit. Accordingly, the Board ruled, it has no jurisdiction to hear a complaint about a breach of the union's statutory duty occurring during this time. However, this does not deprive an employee wishing to complain about the union's conduct of a remedy, since, where it is not ousted by the terms of a collective agreement, there remains a common law duty of fair representation which is enforceable through the courts.

On November 29, 2001, probationary First Nations Police Constable Allan McDonald was dismissed from his employment with the Anishinabek Police Service amidst allegations of sexual harassment leveled against him by his fellow trainees during basic training at the Ontario Police College. At the time, his union, the Canadian First Nations Police Association, had been granted certification, but no collective agreement had yet been reached. A collective agreement was subsequently ratified, retroactive to August 18, 2001, but for salary purposes only. On February 12, 2002, McDonald filed a complaint under s.37 of the Canada Labour Code, alleging that the Association had violated its duty of fair representation when he asked for assistance and was told it could do nothing for him. Section 37 states that a "trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

On May 6, 2005, the Board ruled that s.36.1 of the Code - which extends "just cause" protection and access to arbitration to employees in the federal sector whose bargaining agent has been certified but has not yet achieved a first collective agreement - does not go so far as to impose on the bargaining agent a duty of fair representation prior to the effective date of the first collective agreement.

Asserting that "the [limited] meaning of s.36.1 is clear," and that it does not create a collective agreement where none exists, but simply affords employees whose bargaining agent has been certified but has not yet achieved a first collective agreement a limited form of just cause protection and access through the union to arbitration, the Board concluded that it "cannot.... expand the intent of the parties and provide other rights to an employee under the agreement to a period of time when such rights, in the absence of a collective agreement, did not exist."

Ruling that the statutory duty of fair representation in the federal sector was dependent upon the existence of a collective agreement, the Board held: "Since Mr. McDonald's complaint, in the words of the Code, does not relate to his rights under a collective agreement that is applicable to him, he does not have recourse before this Board for an alleged violation of section 37 of the Code."

However, the Board noted that this did not leave McDonald without a remedy against either his employer or the Association. Rather, as there was no collective agreement, McDonald retained the right to pursue a complaint of unjust dismissal under s. 240 of the Code, which applies to any employee in the federal sector who is "not a member of a group of employees subject to a collective agreement." Similarly, he had the right to bring a civil action in respect of his dismissal. Finally, reasoning that the courts had long recognized the existence of a common law duty of fair representation, and that the Code ousts that duty only where a matter arises expressly or inferentially out of a collective agreement, the Board held that McDonald retained the right to pursue his complaint against the Association in the courts.

– LANCASTER HOUSE,
May 19, 2005

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HEALTH CANADA WHISTLEBLOWERS WIN APPLICATION FOR JUDICIAL REVIEW

The federal government's Public Service Integrity Officer failed to properly investigate a complaint by Dr. Shiv Chopra and three other whistleblowers, the Federal Court of Canada has ruled. The civil servants affected claimed that they were fired by Health Canada for expressing legitimate concerns about the use of hormones and antibiotics in the food supply, and particularly about bovine growth hormone.

In an April 29 decision, Judge John O'Keefe ruled that Public Service Integrity Officer, Dr. Edward Keyserlingk, denied procedural fairness to the four complainants, one of whom has since died, when he concluded that their allegations of wrongdoing in the approval process for veterinary drugs were unfounded. While the four scientists

had complained about the approval process for several types of drugs, the judge found that Keyserlingk did an analysis of the situation regarding only one type.

"While the PSIO can decide whether a matter fits within the parameters of his jurisdiction, once he decides that it does, he must carry out an investigation of the issues," O'Keefe held. "The issue of the other drugs was clearly before the PSIO and needed to be dealt with." The judge granted the application for judicial review, set aside Keyserlingk's report and sent the matter back to him for reconsideration. The Public Service Integrity Office has stated that it is considering how to proceed and does not know when the new investigation will take place, prompting Chopra, who is now 70 and has no income, to allege: "They are trying to starve us out."

– LANCASTER HOUSE,
May 19, 2005

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NO 60-DAY LIMIT FOR WALKOUTS AFTER STRIKE VOTE, BOARD RULES

The Canada Labour Code does not restrict unions to starting a strike within 60 days after a strike vote has been taken, as long as the union gives legal notice of its strike date before the expiry of that period, the Canada Industrial Relations Board has ruled.

The May 17 ruling by Vice-Chairperson Louise Fecteau was the first time the Board has addressed this question. It was made in response to an application by Canadian National Railway Company for a declaration that the Teamsters Canada Rail Conference could not legally start a strike on May 18 because the 60-day period under s. 87.3(1) of the Code, extended by consent of the parties, ended on May 15. Section 87.3(1) of the Code states: "Unless a lockout not prohibited by this Part has occurred, a trade union may not declare or authorize a strike unless it has, within the previous sixty days, or any longer period that may be agreed to in writing by the trade union and the employee, held a secret ballot vote among the employees in the unit and received the approval of the majority of the employees who voted."

It did not suffice, CN argued, that the union had given notice on May 13 of its intended strike date, because the strike itself would have had to start within the statutory 60-day period after the January 27 strike vote, a period extended by mutual consent only until May 15.

On behalf of the Board, Fecteau ruled that only the strike notice, and not the actual strike, was required to take place during the 60-day period after the strike vote. In so ruling, she based her decision largely on the fact that s.87.3(1) was enacted in response to a recommendation of the 1995 Sims Report reviewing Part I of the Code, and that report had recommended that "strike action should only be legal where a positive strike vote has been taken no longer than sixty days prior to strike notice." Noting that "section 87.3(1) does not state that the strike must occur within the 60-day period," Fecteau asserted that the Board "is not prepared to conclude that the intent of s.87.3(1) was to encourage unions to go on strike during the 60-day period." Indeed, since the purpose of the required notice was to "allow for the orderly shut down of operations and to give the employer a chance to make alternative arrangements," Fecteau ruled that only the notice, not the strike itself, must occur within the 60-day period or this period as extended. She stated: "In many cases, the giving of either a lockout or a strike notice signals the possibility of impending economic sanctions and places increased pressure on the parties to enter into or revise their collective agreement. The Board is of the view that as long as the section 87.2(1) strike notice is given during the 60-day period, or such longer period agreed to by the parties, the union has complied with the Code."

– LANCASTER HOUSE,
June 2, 2005

AROUND THE STATES AND PROVINCES

ALBERTA

COMPENSATING AND RETAINING SENIOR CIVIL SERVANTS IN ALBERTA

A report made public on May 26 states that Alberta's top government officials, on average, are paid 51% less than their counterparts in the federal government, 36% less than those in the broader public service in Alberta, and 14% less than those in comparable provincial governments. The report recommends increases in base salary and vehicle allowances for deputy ministers, and changes to the Bonus Plan design and amounts. The report also recommends that an external compensation committee be struck to review senior compensation periodically, and that compensation of other senior government employees be reviewed.

BRITISH COLUMBIA

B.C. CROWN PROSECUTORS TAKE PROVINCIAL GOVERNMENT TO COURT

British Columbia's Crown prosecutors have filed a $30 million lawsuit against the provincial government, alleging that it acted illegally and unconstitutionally in passing legislation to brush aside a binding arbitration award that awarded them a retroactive pay increase.

The legislation (Bill 21) was introduced on February 28, just 10 days after Arbitrator David Jones awarded Crown prosecutors a 13 percent pay raise, to take effect April 1, 2003. In lieu of the three-year arbitration award, the legislation imposes a four-year contract that provides for no increases in the first three years, and a thirteen percent increase in April 2006, the fourth and final year. The legislation therefore delays by three years the wage increase ordered by the February 18 arbitration award. The Jones award also gave the prosecutors mandatory deduction of union dues, the implementation of a system of bumping and reverse seniority for layoffs, a professional development allowance, and an increase in the number of Crown counsel. All these measures had been recommended in a 2004 report of a Dispute Resolution Panel, which the government refused to accept, agreeing instead to binding arbitration. Arbitrator Jones ruled that the provincial government had rejected the 2004 report without any "reasoned basis" and awarded its terms.

"Just because you make the law does not mean that you are above the law," BCCCA president Michael Van Klaveren said Friday. The lawsuit, unprecedented in Canada, accuses B.C. Attorney-General Geoff Plant and Labour Minister Graham Bruce of bad-faith bargaining, abusing their public offices, intentionally engaging in unlawful conduct and seriously damaging the independence of Crown counsel.

The top salary for B.C. prosecutors is $123,000, compared to $172,000 in Ontario. The provincial government's position is that their pay should be comparable to that of other civil servants in the province, rather than to the income of prosecutors in other Canadian jurisdictions.

– LANCASTER HOUSE,
May 19, 2005

BRITISH COLUMBIA

BC TEACHERS' FEDERATION SUES GORDON CAMPBELL

The British Columbia Teachers' Federation (BCTF) announced on May 26 that it has filed suit in B.C. Supreme Court against Premier Gordon Campbell because of "defamatory statements" he made in a news conference on May 12. Five days before the B.C. provincial election, Mr. Campbell announced a "secret" and "duplicitous plan" by the BCTF "to engineer a school strike ... that would throw our school system into chaos." He went on to say that the BCTF "want an NDP government that will eliminate education as an essential service and allow students to be used as political pawns to advance the BCTF's union interests."

In the election on May 18, the Campbell Liberals were returned to power with 46 seats and 46.03% of the popular vote (down from 77 seats in the previous legislature). The NDP were elected to 33 seats with 41.27% of the popular vote. Labour Minister Graham Bruce was one of seven cabinet ministers defeated in their own ridings.

FLORIDA

FIRST DISTRICT COURT OF APPEAL REVERSES COMMISSION ON SUCCESSORSHIP ISSUE
by Hearing Officer John G. Showalter

In *Florida Public Employees Council 79, AFSCME and United Faculty of Florida v. Florida State University Board of Trustees,* and *Florida Public Employees Council 79, AFSCME v. University of West Florida Board of Trustees,* 29 FPER ¶ 281 (2003), a majority of the Commission held that individual university boards of trustees are not successor employers to the Florida Board of Education (FBOE). The Commission and hearing officers applied *IBEW, Local 323 v. Lake Worth Utilities Authority and City of Lake Worth,* 11 FPER ¶ 16024 (1984), and concluded that there was not substantial continuity between the FBOE and the boards of trustees at FSU and UWF. As a result, in the *FSU* case, the Commission concluded that FSU did not commit an unfair labor practice by ceasing dues deduction and failing to process grievances, and in the *UWF* case, the UWF did not unlawfully cease the collection of union dues for AFSCME.

Commissioner Kossuth dissented. He reasoned that the application of *Lake Worth* to the facts of these cases demonstrated that FSU and UWF were successor employers and had an obligation to maintain the status quo as determined by the collective bargaining agreements.

AFSCME and UFF appealed the Commission's decision to the First District Court of Appeal. On February 14, 2005, the First DCA reversed the Commission and held that the UWF and FSU boards of trustees are successor employers to the FBOE. *United Faculty of Florida and Florida Public Employees Council 79, AFSCME v. Public Employees Relations Commission, Florida State University Board of Trustees, and University of West Florida Board of Trustees,* 30 Fla. L. Weekly D436 (Fla. 1st DCA 2005). The court determined that the Commission failed to properly apply the *Lake Worth* decision to the facts of these cases, and that FSU and UWF are successor employers because they continue to employ a majority, if not all, of the employees the FBOE employed at each institution, doing the same work and the same jobs, at the same locations, under the same immediate supervision, and under essentially the same working conditions as before the change. Therefore, the court remanded the cases for further proceedings consistent with its opinion.

FSU and UWF filed motions for rehearing, rehearing en banc, and certification. The motions were denied.

INDIANA

Governor Daniels of Indiana has canceled union contracts covering 25,000 state employees ending a 15 year policy of three previous governors which gave collective bargaining rights to public employees. He justified his actions by stating that rescinding the state's union contracts would make it easier for him to boost the pay of child welfare caseworkers and high-performing state empoyees. Reaction from the state employees has been "mixed" according to the reporter.

MISSOURI

JEFFERSON CITY – Gov. Matt Blunt's first official acts derailed an attempt to collect union dues from some state workers, shut down the state's office in Washington, D.C., and froze the state's purchases of new cell phones, cars and office space.

In his first full day on the job, Blunt, a Republican, signed three executive orders. He said they fulfilled promises that he made during his campaign last year to undo his predecessor's effort to grant collective bargaining rights to public employees and to cut state spending.

"Taxpayers should not be bound by collective bargaining agreements," Blunt said, as he signed a document that rescinded an executive order that Holden issued in June 2001. That order, which never was fully put into effect, would have permitted the collection of fees to support collective bargaining for state workers. Blunt's undoing of the agreement will affect about 9,000 state workers.

"I believed all along that Gov. Holden went too far when he issued the executive order," said Jerry Hunter, a lawyer who had been director of the state Department of Labor under Gov. John Ashcroft.

Before Holden's executive order, state employees had the power to "meet and confer" with state managers. They could form their own labor organizations and collect dues from their members. But they couldn't compel everyone represented in the bargaining unit to pay

dues to support the negotiations as many labor unions can do.

Holden's order allowed for labor agreements in which "service fees" could be collected from all those in the bargaining unit, whether they wanted to be in the union organization or not. These fees were about two-thirds of the amount of the dues, and could only be collected if a majority of those involved in the unit agreed to include them in their contract with the state.

About 9,000 workers represented by the American Federation of State, County and Municipal Employees and Service Employees International Union had tried to start the fee collection process. They represent patient care workers in state mental hospitals, craft and maintenance workers in nine state agencies, and some probation and parole workers. Blunt's move effectively blocked any further attempts to collect the fees.

"The decision to join or not join a service union, political party or other organization should be left up to the individual," Blunt said. "No such organization has the right to take money out of the pockets of state workers without their proper consent."

Unions still can represent government employees under Blunt's policy change, but they are no longer required to reach binding contract agreements through the collective bargaining process. Blunt also suggested the union contracts struck under Holden's administration were unenforceable under state law, because they had not been approved by the Legislature.

Blunt said his action applied only to state workers. He said he did not support "right to work" laws, which allow for the collection of union dues only from private sector workers who volunteer them.

Ken Jacob, executive director of AFSCME Local 72, said Blunt was distorting how the state workers' contracts would be applied. He said no employees pay fees unless a majority approves.

– ST. LOUIS DISPATCH

NEW JERSEY

Acting Governor Codey has signed into law the Uniform Mediation Act. Assembly Bill No. 841.

According to the Sponsors' Statement and the Assembly Judiciary Committee Statement, the act is intended to protect all individuals who choose to resolve their disputes through court-ordered mediation or voluntary mediation where the parties and mediator expect that mediation communications will be privileged against disclosure. The act, however, does not apply to mediations conducted by PERC. Section 3b specifically provides:

b. The act shall not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship or to any mediation conducted by the Public Employment Relations Commission or the State Board of mediation;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the act applies to a mediation arising out of a dispute that has been filed with a court or an administrative agency other than the Public Employment Relations Commission or the State Board of Mediation....

The Assembly Judiciary Committee Statement adds: "This bill would explicitly exempt from its coverage mediation conducted by the Public Employment Relations Commission or the State Board of Mediation pursuant to the regulations of these labor relations agencies." In both the case of the Uniform Arbitration Act adopted two years ago and the case of the Uniform Mediation Act, the Legislature heeded the call of the labor relations community to exempt labor relations processes from the bills and to leave such processes to the well-developed body of statutes, regulations, and case law providing the appropriate safeguards.

ONTARIO

JUDGE APPOINTS MEDIATOR IN STELCO RESTRUCTURING

The ongoing Stelco saga has taken several new turns. The judge overseeing the insolvent steelmaker's restructuring

has appointed a mediator. Both the Ontario government and union leaders have rejected Stelco's approach to its pension deficit proposed in a restructuring plan confidentially released to stakeholders. The largest United Steelworkers of America local at Stelco, Local 1005 in Hamilton, has refused to participate voluntarily in the mediation talks that started May 24, while the newly-appointed mediator has decided against compelling its involvement. And just a week after announcing that record first quarter profits will enable it to pay bonuses to its white collar and production employees, the currently financially thriving company says that softening market conditions are forcing it to rethink financial projections for 2005 that its scheduled to release shortly..

On May 19, Judge James Farley approved a Stelco motion for the appointment of former judge George Adams to mediate talks involving representatives of bondholders, production workers, salaried employees, retirees and other creditors in pursuit of an acceptable restructuring plan.

At the same time, Farley dismissed union motions that would have required Stelco to give Brascan's Tricap Management information enabling it to conduct due diligence for a possible financing offer, and that would have allowed resubmission of a bid by Island Energy Partnership, a joint venture of Sherritt International and the Ontario Teachers' Pension Fund. The bids were encouraged by groups representing Stelco employees and retirees, but the company has already rejected approaches from both entities because they favoured union interests over those of other stakeholders.

Meanwhile, United Steelworkers of America officials condemned an element of Stelco's confidential restructuring plan that would reportedly freeze negotiation of any improvements in pension benefits for employees until January, 2016. "It's pretty outrageous and doesn't look good," said Rolf Gerstenberger, president of the union's Local 1005, which represents the largest employee group. For its part, the Ontario government said that the company's restructuring plan is unacceptable because it lacks a sufficient up-front payment and subsequent schedule of payments to adequately address Stelco's $1.3 billion pension solvency deficit.

Later, Gerstenberger said that his local will not participate in the mediation because "mediation is supposed to be for parties that have a dispute. We don't have a dispute with anybody. We have a contract with Stelco." Addressing the company's pension solvency deficit is not a matter for mediation, Gerstenberger said, because "the pension funding is the law" and "we expect Stelco to abide by the law and the government to uphold the law."

Amid all the continuing controversy, Stelco announced on May 16 that it will pay bonuses of $1,690 each to 1,380 salaried staff and production workers at its Nanticoke operations, while 850 salaried employees in Hamilton will get $1,254 each, for a total of $3.45 million. The company says it will pay a similar bonus to 2,980 production workers in Hamilton, amounting to another $3.74 million, if talks with the union succeed in correcting a flawed formula in the current contract. Although it is insolvent, the company is currently enjoying strong profits due to high steel prices. Judge Farley has warned, however, that steel prices will eventually drop and Stelco cannot survive in its current form. Less than a week after Farley's warning, Stelco's court-appointed monitor reported that "spot market conditions in the steel industry have softened considerably in recent weeks," causing the company to update its financial projections that in March called for 2005 operating earnings of $350 million to $400 million.

– LANCASTER HOUSE,
June 2, 2005

ONTARIO

ONTARIO EMPLOYMENT STANDARDS ACT PROHIBITS WITHHOLDING ATTENDANCE BONUS FROM WORKERS WHO TAKE EMERGENCY LEAVES

The Facts:

Since the 1970s, employees of Fleetwood Canada Inc., a manufacturer of travel trailers in Lindsay, Ontario, received a weekly attendance bonus if they maintained perfect attendance during the week. Consistent with its purpose of discouraging only certain types of absences, the bonus plan listed a number of exceptions, allowing employees to participate in the bonus plan even if they were absent due to bereavement leave, vacation, industrial injuries, jury duty, statutory holidays, pre-arranged medical or legal appointments, religious or military commitments, and medical emergencies. The bonuses were calculated based on the actual hours worked, and if

an employee was disqualified from receiving the bonus during a week, his or her share was distributed among the other eligible employees.

In December 2000, the Ontario government amended the Ontario Employment Standards Act, 2000 (ESA). Under the Act's new s.50, employees of companies with 50 or more workers are entitled to up to ten days off per year in unpaid "emergency leave" for (1) a personal illness, injury or medical emergency; (2) a death, illness, injury or medical emergency involving an immediate family member, or (3) an "urgent matter that concerns" an immediate family member.

However, Fleetwood refused to include such absences in the attendance bonus plan's exceptions, with the result that any employee taking an "emergency leave" under s.50 was disentitled from participating in the bonus plan that week.

The Union of Needletrades, Industrial and Textile Employees, Local 1381 launched a grievance, accusing the employer of violating the ESA's no-reprisal provisions.

The Arguments:

The union argued that employees who took ESA emergency leaves should still be allowed to collect the attendance bonus, prorated to reflect the number of days they actually worked, if they otherwise maintained perfect attendance in a week. The union argued that, by not allowing employees who took ESA emergency leaves to participate in the attendance bonus plan, the employer penalized workers for taking emergency leaves and discouraged workers from exercising their rights under the ESA. Therefore, the union argued, the employer's practice contravened s.74(1) of the ESA, which states: "No employer ... shall intimidate, dismiss, or otherwise penalize an employee ... because the employee ... exercises or attempts to exercise a right under this Act."

The employer maintained that excluding workers from participating in the bonus plan for weeks in which they took ESA emergency leaves did not violate the ESA or the collective agreement, because the arbitral jurisprudence allowed employers to withhold "work-driven benefits" from employees who were absent. In addition, relying on Arbitrator Michel Picher's award in Canadian Union of Public Employees, Local 2380 v. City of Barrie (1994), 40 L.A.C. (4th) 168, the employer maintained that disqualification from participating in the attendance bonus plan was not a "penalty" within the meaning of s.74(1) of the ESA. Since entitlement to the attendance bonus did not arise until an employee worked the full week, the employer submitted, participating in the plan was not a pre-existing right such that its denial constituted a penalty for the purposes of ESA, s.74(1).

The Decision:

Arbitrator Paula Knopf allowed the grievance, ruling that by disentitling workers from participating in the bonus plan if they took ESA emergency leave days, the employer had penalized workers for exercising their statutory rights, contrary to s.74(1) of the ESA.

Although Knopf agreed with the company that "an employer is allowed to tie work-driven benefits to work performance," she distinguished the arbitral case-law holding that withholding a work-driven benefit from an absent employee does not constitute discrimination, stating: "[I]n the case at hand, the question is not discrimination or unequal treatment." Rather, "the sole question is whether a penalty is being imposed within the meaning of the Employment Standards Act when the employee takes an Emergency Leave Day." Furthermore, she observed, the union was not "claiming for a work-driven benefit" in this case. Knopf noted that perfect attendance was not "an absolute requirement" for participation in the attendance bonus plan, because employees could be absent for any of 11 enumerated reasons and still qualify. Therefore, Knopf ruled, although the employer was "correct that the Bonus Plan creates no accrued right to a bonus until an employee works a full week," the employees' did have "a right to participate in the bonus plan" that was lost once they took emergency leave.

In addition, noting that the bonus plan was "a positive reinforcement device... designed to discourage absences for any reasons other than the list of exceptions," Knopf held that it "must also be seen as a scheme designed to discourage employees from being absent due to Emergency Leave Days under the Act." Therefore, Knopf held, "employees in this bargaining unit do suffer a penalty if they take the Emergency Leave Days" in that they lose their entitlement to the attendance bonus. Observing that "[a] financial disincentive is a persuasive one," Knopf concluded: "The way the Bonus Plan is now administered, employees are being penalized as a result of their exercise of statutory rights. As such the Bonus Plan is being operated in violation of section 74(1) of the Employment Standards Act."

In the result, Knopf allowed the grievance, and ordered the employer to compensate the affected employees for "any lost compensation due to them," and to amend the bonus plan's terms to bring it in line with the ESA.

Comment:

In this case, the employer relied on a long line of arbitral authorities which have held that employers may withhold certain employment benefits from workers who are absent from the workplace on disability, pregnancy and parental, or sick leave. See the Ontario Court of Appeal's decision in O.N.A v. Orillia Soldiers Memorial Hospital (1999), 169 D.L.R. (4th) 489, leave to appeal to the Supreme Court denied [1999] S.C.C.A. No. 118 (QL) (reviewed in Lancaster's Human Rights and Workplace Privacy Reporter, January/February, 1999). If the benefit in question is an "earned benefit," i.e. "an additional form of compensation in exchange for work," the Court ruled, it is not discriminatory for the employer to base entitlement on active service. In other words, requiring work in exchange for compensation, including these "earned benefits," is a bona fide occupational requirement.

In her reasons, Arbitrator Knopf held that these cases were simply not relevant to the issue before her, because the analogy between disability, parental and sick leaves and emergency leaves was "neither applicable [n]or appropriate to the case at hand." Emphasizing that the union in this case was "not asking for monies to be paid for days not worked" but only "relief from a disentitlement to the bonus if an Emergency Leave Day is taken," Knopf explained: "Therein lies the distinction between this case and the discrimination cases. The claims in the discrimination cases cited by the employer were to a work-driven benefit on the basis that an employee's absence was due to a protected status. Those cases simply held that the Human Rights Code and its protections could not be used to assert a work-driven benefit while the employee is absent."

Simply put, the employees in this case did not get paid any extra money for hours that they did not actually work. They won only the same right to take a prorated share of the attendance bonus plan money, based on the hours that they actually did work, that they would have enjoyed had ESA emergency leaves been included in the bonus plan's exceptions. As noted by the union, this approach is consistent with the Ontario Ministry of Labour's Policy Interpretation Manual Regarding the Employment Standards Act, 2000, which states: "Where an employer awards a bonus to employees for perfect attendance ... an employee taking a pregnancy, parental, emergency and family medical leave should not be disqualified from the bonus. Such disqualification would likely be found to be a penalty for having taken the leave, and, consequently, a violation of s. 74 of the Act."

– LANCASTER HOUSE,
May 27, 2005

QUEBEC

QUEBEC TRIBUNAL REFUSES TO ORDER WAL-MART REOPENING

The Quebec Labour Relations Board has rejected a union request to order retail giant Wal-Mart to reopen the store in Jonquiere that it closed late last month amid union attempts to achieve a first collective agreement.

In a May 11 decision, Board Vice-Chair Pierre Flageole ruled that the motion by the United Food and Commercial Workers Union has no basis in law because of the Supreme Court's decision in IATSE, Local 56 v. Societe de la Place des Arts de Montreal, [2004] 1 S.C.R. 43 which affirmed that, as he put it, "an employer retains the right to close down its business, whatever may be the reasons."

In that Place des Arts decision, Flageole pointed out, the Supreme Court adopted as its own the statement of a lower court judge in City Buick Pontiac (Montreal) inc. v. Roy, [1981] T.T. 22 that "[i]n our free enterprise system, there is no legislation to oblige an employer to remain in business...even if the cessation is based on socially reprehensible considerations. What is prohibited is to dismiss employees engaged in union activities, not to definitively close a business because one does not want to deal with a union or because a union cannot be broken, even if the secondary effect of this is employee dismissal."

The only basis for issuing an order to reopen a closed business would be if the closing was not genuine but only a ruse, Flageole stated, and there was absolutely no indication of this in Wal-Mart's case.

– LANCASTER HOUSE,
May 19, 2005

NLRB CASES

Listed below are NLRB cases of significance that issued between October 2004 and April 2005. Copies of these decisions are available on the NLRB website www.nlrb.gov.

Pavilion at Crossing Pointe

344 NLRB No. 73

Discussion of whether a laid-off employee had a "reasonable expectation of recall in the near future."

Hotel Employees and Restaurant Employees

344 NLRB No. 70

Discussion of whether, if a discriminatee is forced into a higher income tax bracket as a result of receiving backpay in a lump sum, the respondent should be required to compensate the discriminatee for the higher tax liability incurred.

Spartech Corporation

344 NLRB No. 72

Discussion of the test for when an employer statement creates an unlawful impression of surveillance.

Stanford Hotel

344 NLRB No. 69

Discussion of whether an employee lost the protection of the Act when he cursed at his general manager for threatening to discharge the employee if he did not declare himself ineligible for union representation.

Aramark Services, Inc.

344 NLRB No. 68

Discussion of Board deferral to arbitration decisions under Olin Corp., 268 NLRB 573 (1984), and a situation in which an employee, while engaged in protected activity, can lose protection by engaging in conduct the arbitrator finds to be "harassment" of other employees.

National Specialties Installations, Inc.

344 NLRB No. 2

Discussion of whether the judge properly declined to draw an adverse evidentiary inference against a party that failed to produce documents relevant to its case during the hearing.

TXU Electric Company

343 NLRB No. 132

Discussion of whether an employer violates Section 8(a)(5) by changing a term or condition of employment that involves a discrete, annually occurring event scheduled to recur during the course of contract negotiations.

Ark Las Vegas Restaurant

343 NLRB No. 126

Discussion of whether the Respondent's work rules prohibiting employees from reporting to the Respondent's property more than 30 minutes before a shift is to start or staying on more than 30 minutes after a shift ends and from returning to the Respondent's premises, other than as a guest, during unscheduled hours violated Section 8(a)(1) of the Act.

Washington Fruit and Produce Company

343 NLRB No. 125

Discussion of whether the Respondent violated the Act by videotaping its employees where the Respondent had a reasonable basis to expect that misconduct might occur during a rally on its property. The case is also of interest for its overruling of an election objection based on the provision of inaccurate employee addresses on the Excelsior list, where only 10 percent of the addresses were incorrect.

Shaw's Supermarkets

343 NLRB No. 105

Discussion of whether a hearing must be held on the Employer's petition, which was filed in response to the Union's demand for recognition based on an alleged "after-acquired" store clause.

Harborside Healthcare, Inc.

343 NLRB No. 100

Discussion of the circumstances under which the prounion activity of a supervisor will be held to constitute objectionable conduct, such that a new election is warranted.

Central Telehone

343 NLRB No. 99

Discussion of whether notes that an employer prepared during the course of its investigation into alleged misconduct by union officers/employees were protected from disclosure under the attorney work product doctrine.

Pennsylvania Academy of the Fine Arts

343 NLRB No. 93

Discussion of whether artist's models employed by an art academy are independent contractors or statutory employees under the Act.

Crown Bolt, Inc.

343 NLRB No. 86

Discussion of whether threats of plant closure are to be rebuttably presumed disseminated. The Board finds that they are not, overruling springs Industries, 332 NLRB 40 (2000), but prospectively only.

Sofitel San Francisco Bay

343 NLRB No. 82

Discussion of whether the distribution of an altered sample election ballot misled voters into believing that the Board favored the Union in the election.

Champion Home Builders

343 NLRB No. 77

Discussion of whether the Respondent's state court lawsuit seeking a restraining order against a discharged employee was preempted upon the issuance of the General Counsel's complaint alleging that the employee had been unlawfully discharged.

Oakwood Care Center and N&W Agency, Inc.

343 NLRB No. 76

Discussion of whether a unit that combines the employees of a user employer and employees jointly employed by the user employer and a supplier employer constitutes an employer unit under Section 9(b).

Lutheran Heritage Village – Livonia

343 NLRB No. 75

Discussion of whether an employer's maintenance of a rule prohibiting "abusive or profane language" is lawful, contrary to the Board's previous holding in Adtranz, ABB Daimler-Benz Transportation, N.A., Inc., 331 NLRB 291 (2000).

Allied Mechanical, Inc.

343 NLRB No. 74

Discussion of the circumstances in which an employer that permits nonwork-related postings but does not permit union postings will violate Section 8(a)(1) of the Act.

Bunting Bearing Corp.

343 NLRB No. 64

Discussion of a Respondent's implementation of a partial lockout of its nonprobationary unit employees, while allowing its probationary unit employees to work, was lawful because the decision was based solely on the probationary/nonprobationary status of the unit employees rather than on their union membership (only the locked out nonprobationary employees were union members.

Suburban Journals of Greater St. Louis

343 NLRB No. 24

Discussion of whether the Employer made an objectionable promise of benefits when its human resources manager held luncheon meetings individually with each unit employee and gave each an outline of its unrepresented employees' benefits, including a comparison of how much the employee paid for insurance and how much unrepresented employees paid for equivalent coverage.

Wonder Bread

343 NLRB No. 14

Discussion of the circumstances under which the Board will defer to the parties' contractual grievance-arbitration procedures under Collyer Insulated Wire, 192 NLRB 837 (1971) and United Technologies Corp., 268 NLRB 557 (1984).

Midwest Generation, EME, LLC

343 NLRB No. 12

Discussion of whether the Respondent's partial lockout of only workers who stayed with the strike for its duration – but not locking out nonstrikers and crossovers – was lawful.

Chartwells

342 NLRB No. 121

Discussion of how the evidence failed to prove the elements required to establish an unlawful "Hobson's choice" constructive discharge.

The Courier-Journal, A Division of Gannett Kentucky Limited Partnership

342 NLRB No. 113

Discussion of whether unilateral changes by the Employer to the health insurance contributions of represented employees did not violate Section 8(a)(5) because the Employer acted in a manner consistent with a long-established past practice of treating represented employees the same as unrepresented employees.

Sonoma Health Care Center

342 NLRB No. 93

Discussion of the standard to be applied in assessing Board agent misconduct in election cases and the application of the standard to the facts of the case.

Velocity Express, Inc.

342 NLRB No. 87

Discussion of an appropriate method for calculating the backpay of a discriminatee who incurs employment-related expenses both prior to discharge and during the backpay period.

IBM Corporation

341 NLRB No. 148

Discussion of whether the Weingarten right extends to a workplace where the employees are not represented by a union.

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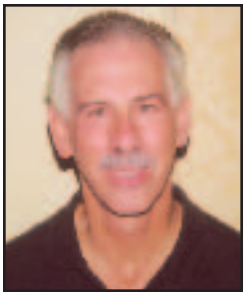

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