ASSOCIATION of LABOR RELATIONS AGENCIES

ALRA Advisor

October 2019

IN THIS ISSUE

ALRA NEWS

ALRA MEMBER UPDATES

ASSOCIATION *of* **LABOR RELATIONS** AGENCIES

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On the Cover: BB Riverboats with Cincinnati Skyline / Photo Credit: Alias Imaging (https://www.barberstock.com/cincinnatiusa)

alra.org

FROM THE PRESIDENT

Scot Beckenbaugh

Greetings from the Midwest. It seems like the Cincinnati conference was so very long ago. We concluded the event by celebrating the extraordinary efforts of those who helped put it together and with the certainty that we were all leaving better informed and better prepared to help our agencies than when we arrived. Few would have predicted the volume of change and challenge that has occurred in those few short months. The arrival of autumn has been accompanied by an auto strike in the U.S., which we know extended beyond the company and union involved. We experience continuing and threatened disputes in healthcare, retail, manufacturing, and the service industries in the private, federal, and public sectors. In Canada, national rail negotiations are set to begin against a background of bargaining conflicts not unlike those encountered in the U.S.

While I remain honored to be selected as the current President of ALRA, I am also humbled by the challenge in the face of coming change and the inevitable conflicts that will confront our member agencies. The challenge for ALRA is to sustain our positive direction while simultaneously enabling us to assist our member agencies in meeting the future service demands they will encounter. Doing so against the current backdrop of constant and inevitable external changes requires that we understand and leverage our foundational strength. Having served on the ALRA Executive Board since 2005, I have seen the organization successfully respond to similar challenging environments. ALRA has long served as a beacon of light for our member agencies during times of change. We have done so by mirroring the values of those agencies. ALRA is an organization that shares "with" and cares "for" the colleagues and the constituents we serve. We are all fortunate to work for agencies whose respective missions remain critically important to the constituencies we serve directly and critically impactful to those who benefit from the successful fulfillment of our mission.

At the closing of the Cincinnati conference, I highlighted some modest goals I have for ALRA this year. We are challenged to expand our membership and maintain our financial health. In order to do so, we should seek to increase the value we provide to those who encounter ALRA. The value can increase by enhancing that which we do while simultaneously exploring new services and service delivery mechanisms. While the annual conference is the single most important service ALRA sponsors for our agencies, it is by no means the sole service. I recognize and value the expansion of technology as a vehicle to provide timely information and skills training to our constituents. Smaller organizations need the skills and exposure to new and innovative methods for service delivery but many lack the resources necessary to access the information. Trying to identify how ALRA can assist our smaller agencies or "resource challenged" larger agencies is an important opportunity we need to explore. At a minimum we should be able to direct them to member agencies who are already leveraging technology, to more efficiently perform administrative functions, increase staff development opportunities, and improve constituent service.

Vancouver is obviously an outstanding location for the 2020 Conference but getting delegates registered and authorized to travel will be a challenge. As we prepare for next year's conference, I am focused on an agenda that will offer each of our member agencies a conference worthy of their time and resources. I know it is important that delegates in attendance leave with relevant information

Incoming President Scot Beckenbaugh giving an award of appreciation to outgoing president Peter Simpson.

and skills directly applicable to the constituents they serve. We should strive to maximize identifiable takeaways for our delegates. In order to meet that expectation, we will need the input from as many of our member agencies and constituents as possible. In mid-October we will gather in New York City to formally begin the planning for the 2020 Conference in Vancouver. Past ALRA Presidents Ginette Brazeau and Marjorie Wittner have graciously agreed to serve as Co-Chairs of the Program Committee and will work closely with Professional Development Committee Co-Chairs Sarah Cudahy and Natalie Zawadowsky. I encourage all member agencies to offer both content and speaker suggestions to our respective co-chairs and to our ALRA Executive Board members who will be participating.

We are here to serve you. Please let us know what we can do better for you now and how we can help you better prepare for tomorrow. Be well.

—Scot Beckenbaugh

MARK YOUR CALENDAR!

69th Annual ALRA Conference
Vancouver, British Columbia, Canada
July 24–28, 2020

Photo Credits: Tourism Vancouver

2019 CONFERENCE RECAP

By Sarah Cudahy, Executive Director, Indiana Education Employment Relations Board

It was great to see many of you in the Queen City this summer! The conference was held at the Cincinnati Westin overlooking Fountain Square. Here are some highlights:

Saturday

- As always, the conference started with the ever-popular ALRAcademy and a reception.
- We watched (well, more accurately, melted) as the Cincinnati Reds beat the St. Louis Cardinals.

Sunday

- We heard about updates in labor law, the impact on labor relations of changing drugs and culture, and a history of Ohio public sector labor from Professor Joseph Slater.
- After roundtables, we took a self-guided tour of Cincinnati. A big thanks to Joe Tansino of the Cincinnati NLRB office for taking the lead on this tour.

Monday (Advocates' Day)

- American Keynote Speaker Steven Greenhouse presented on his new book Beaten Down, Worked Up: The Past, Present, and Future of American Labor.
- Canadian Keynote Speaker Daphne Taras discussed collective voices beyond collective bargaining.
- Panels on strikes, *Janus v. AFSCME*, and health and safety in the workplace rounded out Advocates' Day.
- Our Advocates' Day reception was held at the National Underground Railroad Museum, overlooking the Ohio River. The Underground Railroad exhibit was open to attendees.

Tuesday

- Presentations on the updates in ADR from FMCS U.S. and Canada started the day.
- And introducing . . . the Neutrality Buffet, where attendees selected three different topics to discuss at tables for 30 minutes each. Everything from gender pronouns to best practices in mediation and writing to labor books was discussed.
- A rousing encore to last year's Debaters-style ethics presentation ensued.
- A reception and banquet were held in the Fountain Room at the Cincinnati Westin.

Materials from the conference are available to ALRA members on ALRA's website, alra.org.

Pictured above: (1) John Wirenius, Emily Pantoja, and Allison Dillon; (2) Cincinnati Reds v. St. Louis Cardinals game; (3) Peter Simpson, Mike Sellars, Ginette Brazeau, and Roxanne Rothschild; (4) Kathy Schmidt, Lindsay Foley, and Emily Martin; (5) Steven Greenhouse.

Marjorie Wittner, Sylvie Guilbert, and Catherine Gilbert.

Micki Czerniak, Sidney McBride, and Lynn Morison.

Phil Roberts, Natalie Zawadowsky, and Tim Noonan.

CONFERENCE ATTENDEE PERSPECTIVES

Eva Durham, Mediator, National Mediation Board—This year's conference was outstanding! Repeatedly, my fellow agency mediators and I have verbalized this sentiment to each other. What stands out are both the program and the venue.

The program's use of the roundtable discussion format was engaging. This model allowed for both large group sharing and for more detailed, in-depth conversations at each table. The Neutrality Buffet concept magnified the opportunity to delve into the details on a variety of industry topics. The exchange of experiences at the tables provided a wealth of information, and the small group discussion allowed for greater networking.

The conference selection of speakers and subjects was engaging, informative, and timely as we grapple with the challenges of cannabis use in the workplace and the need to create a more inclusive environment. I have shared the "Tea and Consent" video numerous times as a conversation starter on respect. The simplicity and humor of the video make a tough subject approachable.

Thank you for all the work that went into making a conference that provided outstanding value.

Carrie Ingram, Director of Dispute Resolution, Indiana Education Employment Relations Board—*Flashback to May 20, 2019:* "Welcome to the Indiana Education Employment Relations Board; we are glad to have you. Oh, by the way, we are hosting a conference in two months and we need your help." As I eat the treats brought in for my for my first day at the IEERB, I look at Sarah Cudahy and wonder who she is talking to. Did someone else start today too? Am I in the wrong room? A mix of excitement and fear overcome me as I realize that she is talking to me. "Sure, that sounds great," I say with wide eyes as I meet my colleagues who had already been working to make the 68th annual ALRA conference a complete success.

Sarah will likely contest my memory of my first day with the IEERB, and I have to admit that her memory is likely more accurate than mine. Those of you that know Sarah will also know that she's a planner that would never spring something like this on me without warning. Despite that, in my first few weeks of working for the IEERB, I felt a little overwhelmed about helping to host an international conference, but the excitement of the event quickly took over.

On the first day of the conference, I knew that I was going to be busy welcoming ALRA members and speakers to the conference. What I didn't know was the intellectual stimulation that was also expected of me. I was so focused on hosting with my famous Hoosier Hospitality that I forgot that I was also there to learn.

My mindset quickly changed as I attended the ALRAcademy. I was met with speakers who had intimidating backgrounds. When I looked past the titles of these impressive government

servants, I saw people who truly wanted me to learn. I quickly became fascinated with the Neutrality Project. It gave me insight into my role in a neutral state agency. In applying concepts from the Neutrality Project, we were faced with real-life experiences and were asked how to tackle difficult situations. There was no judgment and no wrong answer. The only thing one could do wrong was to not think critically about a solution.

The rest of the week was much like the first day, with a whirlwind of welcoming ALRA members and speakers and learning more about labor law in a neutral state agency. On the last day, I enjoyed my favorite part of the conference, the Neutrality Buffet. This concept was new to ALRA. The risks associated with presenting a novel idea are sometimes daunting, but any dismay disappeared when the tables were set. For everyone who has enjoyed eating dessert before the main course, this would be your cup of tea.

The buffet had three courses: appetizers, entrees, and dessert. Each course lasted 30 minutes. There were eleven tables to choose from during each course. Each table had topics prepared by expert chefs. There were six to eight seats at each table. There were no reservations. This setup provided attendees with an opportunity to test their palate with new sustenance. I decided to partake in dessert during the appetizer course as I consumed my comfort food—*Best Practices in Decision Writing*. After feeling the euphoria of my favorite dessert, I moved on to *What's the Latest on Pronouns?* followed by *Telephone Electronic Voting (TEV): Going Beyond the Ballot Box*. I found the conversation at each table to be authentic with knowledge shared freely in these small settings. At the end of the buffet, my brain was full, and I was happy with my choice of tables. To be honest, I was particularly pleased that I started my buffet with dessert!

Jacob May, Director of Compliance, Indiana Education Employment Relations Board—As a first time attendee, and a newcomer to labor law in general, I arrived at the 2019 ALRA conference with great anticipation. The conference really exceeded my expectations, both in terms of content and the comradery. The Neutrality Buffet was a particular highlight and gave me an opportunity to learn a great deal about labor environments very different from my own, in a setting that was both inviting and interactive. Gaining insight into the challenges faced by neutrals in other jurisdictions and the skills they use to tackle those challenges has provided me with new tools and tactics to use at my own agency. As a whole, the conference was a fun and rewarding experience, and I can't wait to attend again next year!

John Wirenius.

Joe Tansino, Kathy Schmidt, MaryLou Hanley, Phil Hanley, and Marilyn Sayan.

Joe Slater, Matt Greer, Sarah Cudahy, Emily Martin, and Lynn Morison.

Josie Bautista and Eileen Hennessey.

Eileen Hennessey, Marjorie Wittner, Sarah Cudahy, Lucie Morneault, and Emily Martin.

Tracey O'Brien, Lucie Morneault, Julie Beauchesne, and Athan Hadjis.

Cheri Spicer, Case Administrator, Indiana Education Employment Relations Board—To be honest I was intimidated to attend the 2019 ALRA Conference. I had only been working with Sarah Cudahy for the past two years to put this conference together! In the weeks, hours, and minutes until the start of the conference, I was panic stricken! What could I bring or learn at this conference? After all, my background is not in labor law and I am just a paralegal! I was intimidated by the titles and biographies as I put together program guides.

Pulling up to the hotel I had butterflies in my stomach. Firstly, because I just left my capable husband with three kids that I have not been away from since they were born (I really felt for him). And secondly, the sheer panic of how I would be perceived. I have no title! No impressive background!

I swallowed my fear and charged in with loads of conference materials to unpack from the trunk of the van. I was in complete shock to find people with various backgrounds all coming together. Not one person made me feel insignificant. Still, there was the thought, *what can I learn from this*, still lingering in the back of my mind. *Will most of this go over my head? Will I have any idea what they are talking about?* These fears were put to rest quickly.

The ALRAcademy gave me a chance to meet other new attendees and laid the foundation of what I was to expect in the next couple of days. This session made me feel the most at ease. I felt well prepared with the knowledge needed to endure the next couple of days. I met many newcomers that were in the same boat as me—and that is a good thing!

There were so many great topics and knowledgeable speakers at the conference that it saddened me not to be able to attend all of the sessions! I do, however, have a few favorite moments and sessions that stand out to me!

I cannot speak more highly about the Implicit Bias Session on Advocates' Day presented by Preshuslee Thompson. Ms. Thompson is a dynamic and engaging speaker with a very thought-provoking topic. I, as well, truly enjoyed the Neutrality Buffet and sitting in on the first-ever ALRA Book Club offered by Marjorie Wittner and Tim Noonan. It was a great pleasure to meet them both.

And let us not forget the Reds Game! Oh, Midwest summers! I, in all my wisdom, forgot to pack shorts and therefore melted while watching the game! I felt a sense of relief when the sun went down. Go figure that I will pack SPF 85 sunblock but not shorts. We joke in the office of the IEERB how much I like warm weather but, ladies and gentlemen, I found my boiling point!

All in all, my fears were unwarranted and I was accepted by and learned from many talented and friendly individuals. I hope someday to return to a future conference. ■

INTRODUCING THE ALRA BOOK CLUB

By Marjorie Wittner, Chair, Massachussetts Commonwealth Employment Relations Board

On Tuesday, July 23, 2019, approximately thirty delegates participated in the first ALRA Book Club. Armed with a list of "Good Labor Reads" that moderators Tim Noonan and Marjorie Wittner had prepared ahead of time, delegates shared their thoughts on the books and movies that have influenced and informed their professional lives. The discussion was lively and wide-ranging. Recommendations included classic treatises like *Getting to Yes*, books on Canadian and U.S. labor history (most of which Tim had read), some surprises (*Harry Potter*?), and primers on mediation and decision writing.

The full post-conference list with brief descriptions is available on the members-only section of the ALRA website. You can also find a condensed version here.

We'd like to update the list periodically, so if there's a book or movie you'd like to recommend, please let Tim or Marjorie know. Happy reading!

"Good Labor Reads"

Based upon recommendations from ALRA's Executive Board, 2019 Cincinnati Conference Delegates, and Labor Relations Practitioners

Books or films with an asterisk (*) were recommended by delegates who participated in the ALRA Book Club at the 2019 conference.

U.S. Labor History Books

Toil and Trouble: A History of American Labor, Thomas Brooks (1964).

And the Wolf Finally Came: The Decline of the American Steel Industry, John Hoerr (1988).

We Can't Eat Prestige: The Women Who Organized Harvard, John Hoerr (1997).

The Jungle, Upton Sinclair (1906).

The Turbulent Years: A History of the American Worker 1933-1941, Irving Bernstein (1969).

Collision Course, Joseph McCartin (2011).

The Brothers Reuther and the Story of the UAW, Victor Reuther (1976).

More Than They Bargained For, Jason Stein and Patrick Morley (2013).

Going Down the Jericho Road, Michael Honey (2007).

The Roosevelt I Knew, Frances Perkins (1946).

Eugene V. Debs, Citizen and Socialist, Nick Salvatore (1982).

Between Management and Labor: Oral Histories of Arbitration, Clara H. Friedman (1995).

Death in the Haymarket: A Story of Chicago, the First Labor Movement and the Bombing that Divided Gilded Age America, James Green (2007).*

The Teacher Wars: A History of America's Most Embattled Profession, Dana Goldstein (2015).*

The Union of Their Dreams, Power, Hope and Struggle in Cesar Chavez's Farm Workers Movement, Marian Pawel (2010).*

A Whole Different Ball Game: The Inside Story of the Baseball Revolution, Marvin Miller (2004).*

Clarence Darrow for the Defense, Irving Stone (1971).*

Rising from the Rails: Pullman Porters and the Making of the Black Middle Class, Larry Tye (2005).

American-Made: The Enduring Legacy of the WPA - When FDR Put the Nation to Work, Nick Taylor (2008).

The Woman Behind the New Deal: The Life of Francis Perkins, FDR's Secretary of Labor and His Moral Conscience, Kirsten Downey (2009).

The UAW and the Heyday of American Liberalism, 1945-1968, Kevin Boyle (1995).

State of the Union: A Century of American Labor, Nelson Lichtenstein (2002, Revised and Expanded, 2013).

Canadian Labour History Books

Unjust by Design: Canada's Administrative Justice System, Ron Ellis, (2013).

When the State Trembled: How A.J Andrews and the Citizen's Committee Broke the Winnipeg General Strike, Second Ed., Reinhold Kramer and Tom Mitchell (2010).

Magnificent Fight: The Winnipeg General Strike, Dennis Lewycky (2019).

My Union, My Life, Jean-Claude Parrot (2005).

Labor, Class, and Politics in the 21st Century

Janesville: An American Story, Amy Goldstein (2017).

Heartland: A Memoir of Working Hard and Being Broke in the Richest County on Earth, Sarah Smarsh (2018).

Temp: How American Work, American Business, and the American Dream Became Temporary, Louis Hyman (2018).

Mediation, Negotiation, and Workplace Strategies

What They Don't Teach You at Harvard Business School, Notes from a Street-Smart Executive, Mark H. McCormack (1986).

How to Argue with a Cat, A Human's Guide to the Art of Persuasion, Jay Heinrichs (2018).

A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System, Richard E. Walton and Robert B. McKersie (1965, reissued 1991).

Getting to Yes: Negotiating Agreement without Giving In, Roger Fisher and William Ury (1981, 2011).*

Left of Boom: Putting Proactive Engagement to Work, Phillip B. Wilson (2014).

BrainFishing: A Practice Guide to Questioning Skills, Gary T. Furlong and Jim Harrison (2019).

The Conflict Resolution Toolbox: Models and Maps for Analyzing, Diagnosing and Resolving Conflict, Gary T. Furlong (2005).*

Resolving Conflicts at Work; Mediating Dangerously; The Crossroads of Conflict, Kenneth Cloke (2000; 2001; 2006).*

The Dynamic of Conflict, A Guide to Engagement and Intervention, Bernard Mayer (2012).*

The Making of a Mediator, Developing Artistry in Practice, Michael D. Lang (2000).*

Everyday Negotiation: Navigating the Hidden Agendas in Bargaining, Deborah M. Kolb, Judith Williams (2012).*

Investigations, Hearings, and Decision Writing

Managing High Conflict People in Court, Bill Eddy (2008).

High Conflict People in Legal Disputes, 2nd Edition, Bill Eddy (2016).

Writing Reasons: A Handbook for Judges, Fourth Edition, Edward Berry (2015).

Legal Writing in Plain English, Second Edition: A Text with Exercises (Chicago Guides to Writing, Editing and Publishing), Bryan A. Garner, (2013).

Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing, 3rd Edition, Stephen V. Armstrong and Timothy P. Terrell (2009).

Labor in Fiction Books and Movies

The Grapes of Wrath, John Steinbeck (1939).

Harry Potter and the Goblet of Fire, J.K. Rowling. Humorous yet thought-provoking subplot involving "S.P.E.W.," the Society for the Promotion of Elfish Welfare, which was founded by Hermione Granger to address her concerns over the gross mistreatment of house elves. Not all the house elves appreciate her efforts.

Click Clack Moo: Cows that Type, Doreen Cronin and Betsy Lewin (2003) (children's book). Cows unhappy with the conditions on their farm organize for better terms and conditions of employment.

Newsies, Disney movie (1992) and Broadway musical (2011), Alan Menken (music), Jack Feldman (lyrics), Harvey Fierstein (book). Based on the real-life story of the New York City newsboys strike of 1899. Characters include Joseph Pulitzer, publisher of the New York World, and President Theodore Roosevelt, whose support for the newsboys led to a settlement.

Final Offer, 1985 documentary film.

American Dream, 1992 documentary film.

The Last Truck: Closing of a GM Plant, 2009 HBO Films documentary.

American Factory, 2019 Netflix release (sequel to The Last Truck).

Harlan County, USA, 1976 documentary film.*

Twelve Angry Men, 1957 film.*

Moneyball, 2011 film.*

Norma Rae, 1979 film.

Made in Daghenham, 2011 movie.*

North Country, 2005 fictionalized account of the first major sexual harassment lawsuit in the U.S., *Jenson v. Eveleth Mines*.*

Books by Current and Former ALRA Conference Speakers

The Fissured Workplace, David Weil (2014) (Speaker at 2015 Conference).

The Big Squeeze: Tough Times for the American Worker, Steven Greenhouse (2009) (Speaker at 2011 and 2019 Conferences).

Beaten Down, Worked Up, The Past, Present, and Future of American Labor, Steven Greenhouse (2019) (Speaker at 2011 and 2019 Conferences).

Shaping the Future of Work: What Future Worker, Business, Government, and Education Leaders Need to Do for All to Prosper, Thomas A. Kochan (2016) (Speaker at 2017 Conference).

The Fight for $15, David Rolf (2016) (Speaker at 2017 Conference).

Hard Bargains, My Life on the Line, Bob White (1987) (Speaker at 2001 Conference).

Industrial Relations Systems, John Dunlop (1958) (Speaker at 1994 Conference).

Can Unions Survive? – The Rejuvenation of the American Labor Movement, Charles Craver (1993) (Speaker at 1993 Conference).

The Deindustrialization of America, Barry Bluestone (1982) (Speaker at 1994 Conference).

A Primer on American Labor Law (2004) and Agenda for Reform: The Future of Employment Relationships and the Law (1993), William Gould IV (Speaker at 1993, 1995, and 2002 Conferences).

Which Side Are You On? Thomas Geoghegan (1991) (Speaker at 1995 Conference).

Working, Studs Terkel (1972) (Speaker at 1995 Conference).

Public Workers: Government Employee Unions, the Law, and the State, 1900–1962, Joseph Slater (2004) (Speaker at 2019 Conference).

Strikes

Red State Revolt: The Teachers' Strike Wave and Working-Class Politics, Eric Blanc (2019).

55 Strong: Inside the West Virginia Teachers' Strike, Edited by Elizabeth Catte, Emily Hilliard, and Jessica Salfia (2019).

A History of America in Ten Strikes, Erik Loomis (2018). ■

PROFESSIONAL DEVELOPMENT UPDATE

By Sarah Cudahy, Vice President of Professional Development

Education Grants

This year, three ALRA members made use of the education grants to attend the Cincinnati conference. Here's what two of them had to say:

Don't forget about these grants for Vancouver in 2020—the deadline is June 1!

> The best part about ALRA was being surrounded by people who understand what I do and speak the same work language. While there are variations in how our agencies' services are delivered, the goal is all the same—fostering positive labor relations and issuing sound labor relations policy. The programming dealt head on with the latest issues impacting those goals.

—Christine Lucarelli-Carneiro, General Counsel, New Jersey Public Employment Relations Commission

> As a recipient of an education grant, I had the great fortune of attending the 2019 ALRA conference in Cincinnati, Ohio. As a newly hired hearing officer for the Commonwealth of Massachusetts' Department of Labor Relations, the ALRA conference was a great opportunity to expand my labor relations skill set. The ALRA conference provided a well-rounded education on a number of labor relations topics and skills such as mediation and legal writing as a neutral. In addition to the presentations, the ALRA conference was also great opportunity to speak with, and learn from, labor relations neutrals from all over the U.S. and Canada. I cannot thank ALRA enough for the opportunity to attend the conference. I hope to attend another conference in the future.

—Meghan Ventrella, Hearing Officer/Counsel II, Commonwealth of Massachusetts Department of Labor Relations

Continuing Legal Education Credit

We have reached out to all of you who submitted your CLE forms. If you need any materials for your jurisdiction to get credit, please email scudahy@ieerb.in.gov.

Looking Ahead to 2020

Have a topic you want addressed or a skill you would like to hone? Let us know! ■

Don't forget—ALRA is on Twitter! Follow us (better yet—like and retweet) @LaborAgencies!

ALRA WEBSITE

ALRA continues to improve its website to benefit member agencies. In particular, efforts are in progress to make the members-only section of the website more robust. The materials for the 2019 annual conference are now available in the conference portion of the members-only section.

The members-only section also allows member agencies to post information or ask questions of other ALRA members. Member agency contacts will be notified via email of a new post or inquiry and may post responses. This will facilitate increased resource sharing among member agencies—long a hallmark of ALRA.

To access the members-only section of the website, you will need your agency's username and password. Each agency contact on file should have this information. If that information has been misplaced or the contact on file is no longer with your agency, contact Mike Sellars at mike.sellars@perc.wa.gov.

Instructions on how to change your agency password and post to the members-only section will be posted on the website and sent to each member agency contact at the end of October.

Finally, much of the member information on the website is out of date. ALRA relies on member agencies to identify any changes. Please review your agency's information and send any updates to Mike Sellars at mike.sellars@perc.wa.gov. ■

ALRARCHIVES

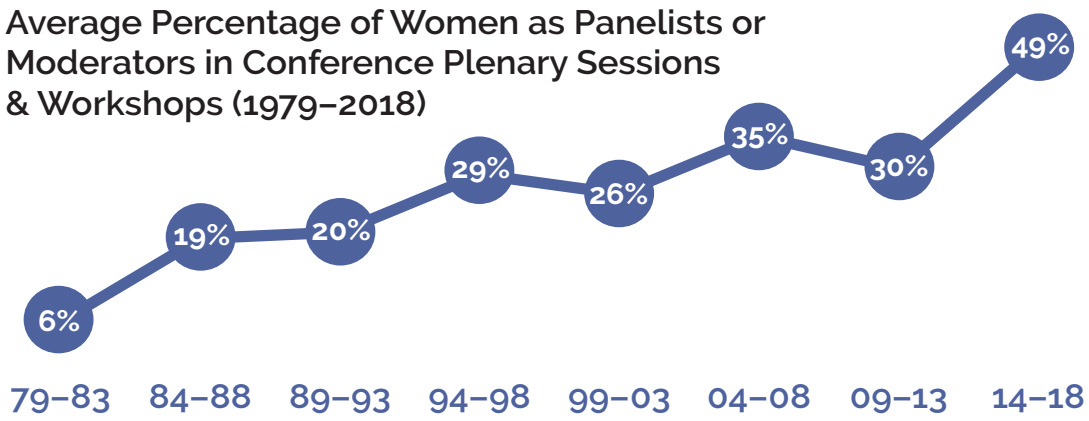
The Transformation of Women's Involvement in ALRA

By Tim Noonan, Executive Director, Vermont Labor Relations Board

Several books I have read recently have addressed the life and accomplishments of a person who was a pioneer for women given her substantial contributions to protective labor legislation: Frances Perkins. When President Franklin Roosevelt appointed Perkins as Secretary of Labor in 1933, she became the first woman appointed to a Cabinet position in the history of the United States. She accepted the position only after receiving President Roosevelt's assurance that he would support her in enacting federal laws that provided for, among other things, a 40-hour workweek, a minimum wage, a ban on child labor, federal aid for unemployment relief, and Social Security. Once appointed, she became the moving force behind New Deal measures that addressed these issues. These laws are still in place more than three-quarters of a century later.

The extraordinary accomplishments of Perkins in a male-dominated era brought to mind how the involvement of women in ALRA has dramatically transformed since I began my career in the labor relations field in the late 1970s. ALRA had one woman president from its inception in 1952 to 1985. **Mabel Leslie** of the New York State Board of Mediation was selected as the 9th ALRA President in 1960. It would be another 25 years before another woman—**Janet Caraway** of the California Public Employment Relations Board—served in this role as the 34th ALRA President.

A review of agendas for ALRA conferences beginning in 1979 also indicates the paucity of women involved in ALRA during the first half of its history. During the period 1979 to 1983, the percentage of women as panelists or moderators in conference plenary sessions and workshops was approximately six percent. The few women who were involved in the conferences may not be the subject of biographies like Frances



Perkins, but they were pioneers for women in their own right within ALRA.

Notable women involved in conferences from 1979 through 1983 include Commissioner Joan Dolan of the Massachusetts Labor Relations Commission, who subsequently launched a lengthy career as a leading arbitrator; Ann Moriarty, long-serving Executive Secretary of the Massachusetts Labor Relations Commission and a moving force behind the creation of the New England Consortium of State Labor Relations Agencies; and Muriel Gibbons, Assistant Director of Public Employment Relations Services (PERS). As detailed in an earlier *ALRArchives* article, PERS had a close connection to ALRA. During this period, it undertook many new and creative efforts: team reviews of ALRA member agencies, the beginning of the development of agency guidelines and standards, publication of the treatise *Portrait of a Process: Collective Negotiations in Public Employment*, and numerous other projects.

During the next five years, 1984 to 1988, the involvement of women in ALRA conferences substantially increased, although still at a proportionately low level—19 percent. As indicated above, there was one woman elected ALRA President during this period, Janet Caraway of California.

Women participation was relatively stable and averaged 20 percent during the succeeding five years, 1989 to 1993. One woman assumed the ALRA presidency during this time. Diane Zaar Cochran, Chairperson of the Massachusetts Board of Conciliation and Arbitration, became President in 1989.

The 1994 ALRA conference in Boston was notable in that it was the first time that women participation in the conference program exceeded 30 percent. The percentage of women as panelists or moderators in plenary sessions and workshops was 32 percent. Interestingly, this percentage would not be exceeded for another 10 years. This conference ushered in a five-year period, from 1994 to 1998, that saw the percentage of women participation averaging 29 percent. One woman moved into the ALRA President role during this period: Jacalyn Zimmerman of the Illinois Labor Relations Board in 1996.

The substantial increase in women participation experienced in the 1994 to 1998 period was not matched and actually decreased to an average of 26 percent during the period 1999 to 2003. However, for the first time, there were two women selected as ALRA President during a five-year period: Pamela Talkin of the U.S. Congressional Office of Compliance in 1998 and Julie Hughes of the Illinois Educational Labor Relations Board in 2001.

The period 2004 to 2008 experienced a significant upsurge in women participation on conference programs, which averaged 35 percent. An unprecedented three women assumed the ALRA presidency during this period: Jaye Bailey of the Connecticut State Board of

Labor Relations in 2005; **Marilyn Glenn Sayan**, Chairperson of the Washington State Public Employment Relations Commission, in 2006; and **Elizabeth MacPherson**, Chairperson of the Canada Industrial Relations Board, in 2007. MacPherson was the first woman from Canada to become ALRA President.

The years 2009 to 2013 experienced a decrease in participation of women on ALRA conference programs, which dropped to an average of 30 percent. There were two women selected as ALRA President during this period: **Mary Johnson** of the National Mediation Board in 2009 and **Sheri King** of the Federal Mediation and Conciliation Service Canada in 2011.

The subsequent five-year period, 2014 to 2018, saw the most dramatic increase in participation of women on ALRA conference programs in ALRA history. The percentage of women as panelists or moderators in conference plenary sessions and workshops averaged 49 percent. Three women moved into the ALRA presidency during this period: **Patricia Sims** of the National Mediation Board in 2015; **Ginette Brazeau**, Chairperson of the Canada Industrial Relations Board, in 2016; and **Marjorie Wittner**, Chairperson of the Massachusetts Commonwealth Employment Relations Board, in 2017.

The dramatic transformation of involvement of women in ALRA is demonstrated by this experience of the last 40 years:

- an average 49 percent participation of women in ALRA conference programs from 2014 to 2018, compared to a 6 percent average from 1979 to 1983; and
- 13 women elected as ALRA presidents during the past 34 years, compared to only one woman during the preceding 33 years of ALRA history. ■

ALRA MEMBER UPDATES

UNITED STATES

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NATIONAL LABOR RELATIONS BOARD

National Labor Relations Board Members: Chairman John F. Ring, Lauren McFerran, William J. Emanuel, and Marvin E. Kaplan

NLRB Proposed Rulemaking

The National Labor Relations Board (NLRB or Board) has issued notices of proposed rulemaking on several topics, including to establish the standard for determining joint-employer status under the National Labor Relations Act (NLRA), to determine whether students who perform services at private colleges or universities in connection with their studies are "employees" within the meaning of Section 2(3) of the NLRA (29 U.S.C. 153(3)), and to revise the representation election regulations located at 29 CFR part 103, with a specific focus on revisions of the Board's current election bar policies. In addition, the Board has announced that it will engage in rulemaking to establish the standards under the NLRA for access to an employer's private property.

NLRB Invites Briefing Regarding NLRA Protection for Profane or Offensive Statements

The NLRB has requested briefing on whether the Board should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature. The Board seeks public input on whether to adhere to, modify, or overrule the standard applied in previous cases in which extremely profane or racially offensive language was judged not to lose the protection of the NLRA. Specifically, the notice and invitation to file briefs seeks comments relating to the following cases: *Plaza Auto Center*, 360 NLRB 972 (2014), *Pier Sixty, LLC*, 362 NLRB 505 (2015), and *Cooper Tire*, 363 NLRB No. 194 (2016). Briefs in response to this notice are due to be filed with the Board no later than November 4, 2019.

About the invitation for briefing, Chairman John F. Ring stated: "The Board's request for briefing on this important topic reflects its long-standing practice of seeking input from interested parties when the Board believes it can benefit from such briefing. We look forward to considering the views of all interested parties."

Chairman Ring was joined by Members Marvin E. Kaplan and William J. Emanuel in inviting the filing of briefs. Member Lauren McFerran dissented.

Notable NLRB Decisions

Briad Wenco, LLC d/b/a Wendy's Restaurant, 368 NLRB No. 72 (09/11/2019)

The Board unanimously found that the respondent's mandatory arbitration agreements do not violate Section 8(a)(1) under the analytical

framework set forth in *The Boeing Company*, 365 NLRB No. 154 (2017), because, when reasonably interpreted, they do not potentially interfere with employees' right to access the Board and its processes. The Board concluded that, although the agreements provide that "[a]ny claim, controversy or dispute" shall be resolved through binding arbitration, they contained effective "savings clause" language by also providing that nothing in them is to be construed to prohibit the filing of any charge or participating in any proceeding conducted by an administrative agency, including the Board. The Board determined that the "savings clause" language in the agreements is unconditional and sufficiently prominent so that the agreements could not be reasonably interpreted to prohibit employees from filing Board charges or participating in Board proceedings in any manner, whether acting individually or in concert with coworkers. In addition, the Board found that the agreements in this case are factually distinguishable from those in which the pre-*Boeing* Board found "savings clause" language, in context, to be confusing, ambiguous, or otherwise insufficient, without passing on whether those cases were correctly decided.

MV Transportation, Inc., 368 NLRB No. 66 (09/10/2019)

On a stipulated record, the full Board considered whether the Respondent violated Section 8(a)(5) and (1) of the NLRA by implementing five work policies without first bargaining with the union, including the respondent's argument that this unilateral action was permitted by the parties' collective bargaining agreement. In doing so, the majority (Chairman Ring and Members Kaplan and Emanuel) abandoned the "clear and unmistakable waiver" standard, which the Board had applied when considering arguments like the respondent's. Under the clear and unmistakable standard, an employer's unilateral action violated the NLRA unless a contractual provision, granting an employer the right to act unilaterally, unequivocally and specifically referred to the type of employer action at issue. *See Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). In agreement with the D.C. Circuit, *see NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), and other courts of appeals, the majority adopted the "contract coverage" standard. Under that standard, the Board will examine the plain language of the collective bargaining agreement, applying ordinary principles of contact law, to determine whether action taken by an employer is within the compass or scope of contractual language granting the employer the right to act unilaterally. Accordingly, where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5). If the contract coverage standard is not met, the Board will continue to apply its traditional waiver analysis to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change. Among other reasons, the majority held that the contract coverage standard is more consistent with the purposes of the NLRA than is the waiver standard because contract coverage (i) encourages parties to foresee and resolve potential labor-management issues through comprehensive collective bargaining; (ii) will end the Board's practice of selectively applying exacting scrutiny to contractual provisions that vest in employers the right to act unilaterally; (iii) will end the Board's practice of sitting in judgment on the substantive terms of a collective bargaining agreement, a practice contrary to Supreme Court law; (iv) ensures the Board's interpretation of contractual language remains within its limited authority to do so; and (v) discourages forum shopping by applying the same standard that arbitrators apply, thus channeling unilateral change disputes into grievance arbitration, as Congress intended. The majority noted that its decision resolves a conflict with several courts of appeals, in particular, the D.C. Circuit, where the waiver standard has become indefensible and unenforceable. The majority explained that while the Supreme Court has stated that it does not disapprove of the waiver standard, the Court did so in deference to the Board's expertise and experience. The Board's subsequent experience and subsequent court decisions, the majority argued, now supports adopting the contract coverage standard. Applying the contract

coverage standard retroactively, the majority found that each of the respondent's work policies (concerning the addition of light duty work assignments and the setting of disciplinary standards for safety, schedule adherence, security sweeps/breaches, and driving) falls within the compass or scope of language in the collective bargaining agreement that granted the respondent the right to assign employees, to discipline employees, and to issue reasonable rules and policies related to employee discipline. Accordingly, the majority found that the respondent did not violate the NLRA by unilaterally implementing these work policies.

Dissenting, Member McFerran disagreed with the majority's decision to abandon the clear and unmistakable waiver standard. Member McFerran faulted the majority for overruling the Board's many-decades-long adherence to the waiver standard without notice or public participation. She argued that the waiver standard is consistent with the NLRA because it favors collective bargaining concerning changes in working conditions that might precipitate labor disputes while the contract coverage standard will destabilize labor relations by making it easier for employers to unilaterally change employees' terms and conditions of employment. She further argued that the contract coverage standard cannot be squared with Supreme Court law endorsing the Board's waiver standard, faulted the majority for deferring to the current view of the D.C. Circuit in an area where it is the court that should have deferred to the Board, and noted that multiple courts of appeals have applied the waiver standard. Member McFerran argued that the contract coverage standard will diminish the likelihood of parties reaching collective bargaining agreements because employers will seek broadly worded provisions granting them the right to unilaterally act and unions will decide that they are better off resting entirely on the statutory right to bargain created by the NLRA. She added that this outcome will be amplified by the Board's decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), which permits employers to continue a past practice of making unilateral changes authorized by contractual provisions, even after the collective bargaining agreement expires. Finally, Member McFerran disagreed with the majority's retroactive application of the contract coverage standard because, among other reasons, it would be unjust to unions that previously thought they were assured the right to bargain over matters not explicitly waived. Applying the waiver standard, contrary to her colleagues, Member McFerran would find that the respondent violated the NLRA by unilaterally implementing its policies concerning safety, schedule adherence, and security sweeps/breaches. Member McFerran agreed with her colleagues the respondent did not violate the NLRA by implementing its light duty work assignments and driving policies. The full Board also considered whether the respondent, within the meaning of Section 8(d) of the NLRA, violated Section 8(a)(5) and (1) by implementing five additional work policies on the basis that those policies modified the parties' collective bargaining agreement without the Union's consent. Applying the "sound arguable basis" standard, *see Bath Iron Works Corp.*, 345 NLRB 499 (2005), the Board found that the respondent unlawfully implemented bereavement pay, licensing reimbursement, and required extra assignments policies. The Board found that the respondent did not violate the NLRA by implementing operator log-in and customer service policies.

The Boeing Company, 368 NLRB No. 67 (09/09/2019)

The Board (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting) concluded that the petitioned-for unit limited to only two job classifications within an aircraft production line was inappropriate for collective bargaining. In reaching this conclusion, the Board clarified that its recent return to the traditional community-of-interest standard in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), contemplated a three-step analysis for determining whether the petitioned-for unit is appropriate. The Board will (1) evaluate whether the members of the petitioned-for unit share a community of interest with each other, (2) ascertain whether the employees excluded from the unit have meaningfully distinct interests

in the context of collective bargaining that outweigh similarities with unit members, and (3) consider guidelines the Board has established for appropriate unit configurations in specific industries. Applying this three-step analysis to the facts before it, the Board reasoned that the employees in the petitioned-for unit both did not share an internal community of interest and did not have sufficiently distinct interests from those of excluded employees, and it found no guidelines specific to the employer's industry.

Member McFerran, dissenting, would have found the petitioned-for unit appropriate. She disagreed with the second step of her colleague's legal framework and would have found the facts warranted concluding that the members of the bargaining unit did share an internal community of interest and had interests sufficiently distinct from excluded employees.

Kroger Mid-Atlantic, 368 NLRB No. 64 (09/06/2019)

A Board majority (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting) overruled *Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001), and similar cases based on its view that these cases improperly stretched the *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105 (1956) discrimination exception well beyond its accepted meaning in a manner that finds no support in Supreme Court precedent or the policies of the NLRA. The majority observed that *Sandusky Mall* and its progeny have been roundly rejected by the federal courts of appeals, and that courts have consistently limited the *Babcock* discrimination exception to situations where an employer ejects union agents seeking to engage in activities similar in nature to activities the employer permitted other nonemployees to engage in on its property. The majority further stated that in a pre-*Sandusky Mall* case, *Jean Country*, 291 NLRB 11, 12 fn. 3 (1988), which was never relevantly overruled, the Board itself limited *Babcock*'s discrimination exception the same way. The majority also pointed to other factors that, in its view, warranted reconsideration of the Board's approach to the discrimination exception, as embodied in *Sandusky Mall* and related cases. The majority stated that under the standard it was adopting, to establish that a denial of access to nonemployee union agents was unlawful under the *Babcock* discrimination exception, the General Counsel must prove that an employer denied access to other nonemployee union agents while allowing access to other nonemployees for activities similar in nature to those in which the union agents sought to engage. The majority further stated that consistent with this standard, an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities. Also, the majority observed that an employer may ban nonemployee access for union organization activities if it also bans comparable organizational activities by groups other than unions. The majority stated that its approach is consistent with the policies of the NLRA, while at the same time giving due recognition to an employer's property right to exclude nonemployees. The majority, applying the above-described standard to the allegation before it, reversed the administrative law judge's finding of a violation (which was based on her application of *Sandusky Mall* and related cases) and dismissed the complaint. The majority explained that the General Counsel did not show that the respondent has ever permitted any nonemployees, whether affiliated with a union or not, to engage in protest activities on its premises comparable to the boycott solicitation at issue in this case.

Dissenting, Member McFerran argued that the judge properly found a violation based on precedent that spanned decades. She argued that the majority, repeating errors the majority made in *UPMC*, 368 NLRB No. 2 (2019), incorrectly reached out to decide an issue that was not required to resolve the case. In this regard, she asserted that the judge made a motive-based determination that easily supports finding a violation here, making it unnecessary to reach the disparate-treatment issue. She also argued that the majority again

reversed precedent on a major labor-law issue without providing notice to the public and inviting briefing. Regarding the merits of the majority's decision, she asserted that the majority's decision to reverse precedent was wrong and impermissible under Supreme Court law. She asserted that the majority's approach contradicted the understanding of discrimination reflected in *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949) and in more than 70 years' worth of Board decisions; misconstrued the meaning of discrimination within the framework of Section 8(a)(1); and radically narrowed the scope of the discrimination exception. Member McFerran additionally argued that although the federal courts of appeals are divided about the Board's interpretation of the *Babcock* discrimination exception, a majority of the Circuits that have addressed the issue have approved the Board's approach. In Member McFerran's view, the majority's decision to change the Board's approach is flawed because it permits employers to treat union representatives as distinct based on their supposed "boycott and protest activities" as opposed to their actual conduct: solicitation of customers. She stated that the majority's approach, which cannot be squared with Supreme Court precedent or statutory policy, creates a license for an employer to permit almost any third-party activity on its property but union solicitation and distribution.

Velox Express, Inc., 368 NLRB No. 61 (08/29/2019)

The full Board unanimously adopted the administrative law judge's conclusion that the respondent failed to establish that its drivers are independent contractors. In adopting the judge's conclusion, the Board applied *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), which issued subsequent to the judge's decision. Additionally, the Board unanimously adopted the judge's conclusion that the respondent violated Section 8(a)(1) by discharging an individual driver for raising protected group complaints about the respondent's treatment of the drivers as employees instead of independent contractors. A full Board majority consisting of Chairman Ring and Members Kaplan and Emanuel reversed the judge and dismissed the allegation that the respondent independently violated Section 8(a)(1) by misclassifying its drivers as independent contractors. The majority held that an employer's misclassification of its employees as independent contractors, standing alone, does not violate the NLRA. The majority explained that an employer's communication to its workers of its legal opinion that they are independent contractors does not, in and of itself, inherently threaten that those employees are subject to termination or other adverse action if they exercise their Section 7 rights or that it would be futile for them to engage in union or other protected activities. The majority found that communication of that legal opinion is therefore privileged by Section 8(c) even if the employer is ultimately mistaken. Additionally, the majority rejected the argument that even if a misclassification, standing alone, does not violate the NLRA, the respondent's misclassification became coercive when the respondent unlawfully discharged a misclassified driver for engaging in protected activity. The majority acknowledged that the unlawful discharge may chill the other drivers from engaging in protected activity but did not believe that the creation of a new misclassification violation was necessary because the Board has long used its notice-posting remedy to dispel the chilling effect of unfair labor practices. The majority did not accept that in any circumstances, an employer's misclassification itself will become unlawful because of other related conduct by the employer, stating that if the General Counsel determines that related conduct is unlawful, then he should allege it as a violation of the NLRA, and the Board will remedy it accordingly if it agrees. Finally, the majority declined to order the respondent to reclassify its drivers as part of the remedy for its unlawful discharge. The majority noted that the extraordinary remedy of reclassification is not routinely ordered in cases involving misclassified employees and found, once again, that the Board's traditional notice-posting remedy would be sufficient to dissipate fully the coercive effects of the unlawful discharge.

Dissenting in part, Member McFerran would have adopted the judge's conclusion that

the respondent independently violated Section 8(a)(1) by misclassifying its drivers as independent contractors. She argued that it was unnecessary for the Board to decide whether an employer's misclassification of its employees as independent contractors, standing alone, violated the NLRA for two reasons. First, by discharging a misclassified driver for engaging in protected activity, the respondent applied the misclassification to interfere with Section 7 activity, rendering the misclassification itself unlawful. Second, to fully remedy the unlawful discharge, the Board needed to order the respondent to reclassify all of its misclassified drivers. If it had been necessary to decide the stand-alone misclassification issue, Member McFerran would have held that a misclassification, standing alone, violates Section 8(a)(1) because when an employer communicates to its employees that it has classified them as independent contractors, the employees would reasonably believe that exercising their Section 7 rights would be futile or would lead to adverse employer action.

Cordua Restaurants, Inc., 368 NLRB No. 43 (08/14/2019)

In this supplemental decision, the Board unanimously adopted the administrative law judge's conclusions that the respondent violated Section 8(a)(1) by discharging an employee for engaging in protected concerted activity and by maintaining a no-solicitation rule. The Board also adopted the judge's dismissal of the complaint allegation that the respondent violated Section 8(a)(1) by discharging a second employee, and the Board reversed the judge's finding that the respondent violated Section 8(a)(1) by discharging a third employee. The Board severed the allegations that the respondent violated Section 8(a)(1) by maintaining additional rules and issued a Notice to Show Cause why those allegations should not be remanded to a judge for further consideration in light of *Boeing Co.*, 365 NLRB No. 154 (2017). Considering two important issues of first impression following the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), a full Board majority consisting of Chairman Ring and Members Kaplan and Emanuel held that the NLRA does not prohibit employers from promulgating mandatory arbitration agreements in response to employees opting in to collective action or from threatening employees with discharge for failing to sign mandatory arbitration agreements. Therefore, the majority reversed the judge's findings that the respondent violated Section 8(a)(1) by promulgating a revised arbitration agreement in response to employees opting in to a collective action and by its statements to employees who expressed concerns about the agreement.

Dissenting, Member McFerran would have affirmed the judge's conclusions that the respondent violated Section 8(a)(1) by promulgating a revised arbitration agreement in response to employees' protected concerted activity and by threatening employees with reprisals for raising concerns regarding the agreement.

Johnson Controls, 368 NLRB No. 20, 10-CA-151843

A Board majority (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting) adopted the administrative law judge's conclusion that the respondent did not violate Section 8(a)(5) by withdrawing recognition and dismissed the complaint. Further, the majority modified the Board's anticipatory withdrawal doctrine under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), in two respects. First, the "reasonable period of time" prior to contract expiration within which recognition may be anticipatorily withdrawn is now defined as no more than 90 days before the parties' contract expires. Second, once an employer announces that it is withdrawing recognition anticipatorily, the incumbent union may file, within 45 days from the date of that announcement, an election petition (and a rival union may intervene in that representation case based on a sufficient showing of interest). If such a petition is timely filed, the incumbent union's (or rival union's) representative status following contract expiration will be determined through a Board-conducted secret-ballot election. If no such petition is timely filed, the employer may rely on the disaffection evidence

to affect withdrawal. That evidence—assuming it establishes actual loss of majority status—will be dispositive of the union's lack of majority status at the time of actual withdrawal; and the withdrawal of recognition will be lawful assuming no other grounds exist to find it unlawful. Thus, the majority overruled *Levitz Furniture*, and its progeny, insofar as an incumbent union could previously defeat an employer's withdrawal of recognition in an unfair labor practice proceeding with evidence that it reacquired majority status in the interim between anticipatory and actual withdrawal.

The majority's new framework resolves questions concerning representational preference without reliance on "dual signers" signatures. Under prior precedent, and the Board's "last in time" rule, a union could show reacquired majority status, notwithstanding prior disaffection evidence showing that it had lost that status, upon reliance on "dual signers" signatures. Such employees sign both an anti-union petition and, subsequently, a union authorization card or pro-union counter-petition, and the Board relied on the later signed card to find that the union had reacquired majority status. Thus, an employee's disaffection signature was automatically invalidated by his or her subsequent reauthorization signature. Parties sometimes sought to ascertain dual signers' representational wishes by asking them, at unfair labor practice hearings, what their sentiments were on the date recognition was withdrawn. Here, the judge allowed such questions and relied on the testimony of four dual signers to find actual loss of majority status notwithstanding the union's documentary evidence to the contrary. The majority refused to endorse this practice and instead held that a Board-conducted secret ballot election was the preferred means for resolving this question concerning representation. In affirming the judge's dismissal of the complaint, the majority did not consider dual signers' testimony about their true sentiments concerning representation on the date recognition was withdrawn, or testimony concerning the sentiments of other employees who did not sign the disaffection petition.

Dissenting, Member McFerran would find that the respondent violated Section 8(a)(5) by withdrawing recognition where it failed to carry its *Levitz* burden to prove that, at the time it withdrew recognition, the union had lost majority support, and would not have overruled the Board's anticipatory withdrawal precedent. To the extent that she would consider modifying *Levitz*, she would prohibit employers from unilaterally withdrawing recognition and instead require them to seek Board elections whenever they are otherwise free to challenge the union's majority status.

Charge filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and its affiliated Local Union No. 3066. Administrative Law Judge Keltner W. Locke issued his decision on February 16, 2016. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

Prime Healthcare Paradise Valley, LLC, 368 NLRB No. 10 (06/18/2019)

On remand from the D.C. Circuit Court, the Board found that the respondent's Mediation and Arbitration Agreement restricts access to the Board and its processes and violates Section 8(a)(1) under the analytical framework set forth in *The Boeing Company*, 365 NLRB No. 154 (2017). The Board held that agreements that restrict employees' access to the Board and its processes violate Section 8(a)(1) and set forth a rationale for that holding based in the NLRA and Supreme Court precedent. The Board then applied the *Boeing* balancing standard to the respondent's agreement and found the nature and extent of its interference with Section 7 rights to be profound and that no legitimate employer interests justified or could justify a restriction on Board charge filing. Thus, the Board placed provisions that make arbitration the exclusive forum for the resolution of all claims in *Boeing* Category 3. The Board also addressed and disposed of certain arguments advanced by the respondent, including its contention that the case was mooted by its non-Board settlement with one of the charging parties and that an

order requiring the respondent to rescind the agreement is "grossly overbroad."

UPMC and its Subsidiary, UPMC Presbyterian Shadyside, Single Employer, d/b/a UPMC Presbyterian Hospital, 368 NLRB No. 2 (06/14/2019)

The Board unanimously adopted the administrative law judge's conclusion that the respondent, UPMC, violated Section 8(a)(1) by requiring employees who were meeting with union organizers in the public cafeteria to produce their identification. The Board also unanimously adopted the judge's conclusion that the respondent did not engage in unlawful surveillance of the employees who were meeting with the organizers in the cafeteria. Regarding the issue of union access to the cafeteria, a Board majority (Chairman Ring and Members Kaplan and Emanuel) overruled *Ameron Automotive Centers*, 265 NLRB 511 (1982); *Montgomery Ward & Co., Inc.*, 256 NLRB 800 (1981), *enforced*, 692 F.2d 1115 (7th Cir. 1982); and their progeny to the extent those cases held that nonemployee union organizers could not be denied access to cafeterias that are open to the public if the organizers used the facility in a manner consistent with its intended use and are not disruptive. Instead, the majority found that, absent discrimination, an employer does not have a duty to permit the use of its public cafeteria by nonemployees for promotional or organizational activity. Applying the new standard, the majority found that UPMC did not discriminate by removing from the cafeteria the union organizers, who were engaged in blatant promotional activity, because the evidence showed that UPMC had previously prohibited nonemployee third-party organizations from soliciting and distributing in its cafeteria. Thus, the majority found that the employer did not violate the NLRA by requiring the organizers to leave the cafeteria.

Dissenting, Member McFerran argued that the Board threw its judicially approved longstanding precedent against discrimination into doubt by permitting the employer to expel union representatives from a hospital cafeteria that is open to the public based entirely on their union affiliation. Member McFerran argued that such action is discrimination in its clearest form. She also argued that the Board's holding cannot be reconciled with the understanding of discrimination reflected by Supreme Court precedent. Finally, Member McFerran argued that, because the employer did not apply a no-solicitation/no-distribution policy in expelling the union organizers from the cafeteria, the Board erred by using this case to overturn *Montgomery Ward*, above.

Ridgewood Health Care Center and Ridgewood Health Services, Inc., a single employer, 367 NLRB No. 110 (04/02/2019)

The Board unanimously affirmed the administrative law judge's conclusions that the respondents (1) violated Sections 8(a)(3) and 8(a)(1) by discriminatorily refusing to hire four employee applicants in order to suppress the number of former employees of their predecessor below a majority of those hired; (2) were therefore a legal successor to the predecessor employer with a bargaining obligation to the incumbent union; and, accordingly, (3) violated Sections 8(a)(5) and 8(a)(1) by refusing to recognize and bargain with the union. The Board found it unnecessary to reach the judge's alternative rationale that the respondents were a "perfectly clear" successor based on promises that they would hire 99.9 percent of the predecessor's employees without clearly and concurrently announcing new terms and conditions of employment. Similarly, the Board found it unnecessary to reach the judge's third rationale for finding successorship—that the 19 employees hired into the newly created job classification of helping hands should not be included in the unit for majority status purposes. However, a Board majority (Chairman Ring and Members Kaplan and Emanuel) concluded that no *Love's Barbeque* remedy was warranted, i.e., the respondents did not violate Section 8(a)(5) and (1) by setting initial terms and conditions of employment upon assuming the predecessor's operations notwithstanding the discriminatory hiring violations. The majority overruled precedent that had extended the *Love's Barbeque* remedy beyond its historical application to include situations in which,

absent hiring discrimination, an employer would have planned to retain a sufficient number of predecessor employees to make it evident that an incumbent union's majority status would continue. The majority held that the *Love's Barbeque* remedy applies exclusively to situations in which an ordinary successor employer's hiring discrimination created such uncertainty as to make it impossible to determine whether the employer would have hired all or substantially all of the predecessor employees absent that discrimination.

Dissenting, Member McFerran would have continued the Board's application of the *Love's Barbeque* remedy to situations in which a successor employer's workforce would be composed of a majority of represented predecessor employees absent the successor's hiring discrimination against predecessor employees.

Alstate Maintenance LLC, 367 NLRB No. 68 (01/11/2019)

The Board (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting) adopted the administrative law judge's conclusion that the respondent did not violate Section 8(a)(1) by discharging an employee for engaging in alleged protected concerted activity where an airport skycap remarked about previously not receiving a tip for a similar baggage-handling job, and dismissed the complaint in its entirety. In dismissing the complaint, the majority reversed *WorldMark by Wyndham*, 356 NLRB 765 (2011), finding that *WorldMark* had deviated from longstanding precedent on protected concerted activity by blurring the distinction between protected group action and unprotected individual action. The Board further held that even if the activity was concerted, it was not protected as it was not aimed at improving a term or condition of employment within the respondent's control.

Dissenting, Member McFerran would find that the respondent violated Section 8(a)(1) by discharging the employee for his protected concerted activity and would not have overruled *WorldMark*. She would find that the employee's complaint constituted an attempt to initiate a group objection over tips, and thus the employee was engaged in concerted activity for the mutual aid and protection of fellow employees. ■

NATIONAL MEDIATION BOARD

NMB Publishes Final Rule to Simplify Decertification; Eliminate Need for Straw Man

On July 26, 2019, the National Mediation Board (NMB) published a Final Rule to allow a straightforward process to decertify representation. With this rule, employees seeking to decertify a current union will be able to go through the same process that employees seeking to gain representation go through. NMB Chairman Linda Puchala dissented.

Under the final rule, employees may now submit authorization cards stating the intention to no longer be represented by their union. If cards are submitted representing the intent of at least 50% of the employee group to decertify, the Board will authorize an election with the current representative and "no union," along with a write-in option. Additionally, the two-year election bar currently applied following a successful representation election will similarly be applied to a successful decertification election.

The new rule replaces the "straw man" process previously used by some applicants. Under the "straw man" process, employees would submit authorization cards seeking representation by an individual employee who was listed by name. If "straw man" cards were submitted representing at least 50% of the employee group, an election was directed allowing employees to vote for

their current representative, the "straw man," no union, or a write-in option. In order to decertify, a majority of those voting must vote for either "no union" or for the "straw man" who, once certified, could disclaim interest.

The final rule is available here: https://www.federalregister.gov/documents/2019/07/26/2019-15926/decertification-of-representatives

Additional Background:

- The NMB published the Notice of Proposed Rulemaking on January 31, 2019. It may be viewed here: https://www.federalregister.gov/documents/2019/01/31/2019-00406/decertification-of-representatives
- Public comments were invited on all aspects of the proposed rule and are viewable on the NMB website here: https://nmb.gov/NMB_Application/index.php/comments/
- A hearing on the proposed rule was held on March 28, 2019. The transcript of that hearing is viewable on the NMB website here: https://nmb.gov/NMB_Application/wp-content/uploads/2019/04/Meeting_PDFTran.pdf

Puchala Assumes NMB Chairmanship

The NMB is pleased to announce that Ms. Linda A. Puchala has been named Chairman of the National Mediation Board, effective July 1, 2019. Mr. Gerald Fauth III and Ms. Kyle Fortson remain as Members of the Board.

Ms. Linda Puchala was first confirmed as Member of the National Mediation Board by the United States Senate on May 21, 2009. Ms. Puchala served as Chairman from May 2009 through June 30, 2009; July 1, 2011, through June 30, 2012; July 1, 2013, through June 30, 2014; and from July 1, 2016, through June 30, 2017. Her most recent Senate confirmation came on November 2, 2017.

Prior to becoming a Member, Ms. Puchala served 10 years at the NMB as a Mediator, a Sr. Mediator (ADR), and the Associate Director of Alternative Dispute Resolution Services. Ms. Puchala's prior labor relations experience includes work as International President of the Association of Flight Attendants-CWA, AFL-CIO and Staff Director, Michigan State Employees Association, AFSCME, AFL-CIO. ■

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Michigan Creates New Labor Department

Effective August 11, 2019, a newly formed Michigan Department of Labor and Economic Opportunity (LEO) began as a result of an executive order issued by Michigan Governor Gretchen Whitmer. The new department, headed by Director Jeff Donofrio, houses many state agencies that, as he describes, "[collectively seek] to close opportunity gaps and help people, businesses and communities reach their full potential."

The LEO department comprises various agencies, commissions, and bureaus that include Employment Relations (MERC and Wage & Hour Division), Unemployment Insurance Agency, Worker's Compensation, Workforce Development, Michigan Occupational Safety and Health Administration, Michigan Strategic Fund, State Land Bank Authority, and more. Prior to his appointment as LEO Director, Donofrio served in related roles including his most recent position with the City of Detroit as Executive Director of Detroit's Workforce Development program. In that position he was responsible for the creation and implementation of methods to increase employment opportunities and household incomes for Detroit residents. The LEO website can be easily accessed at www.michigan.gov/leo

for more details and information regarding the department's composition and mission.

MERC Case Updates

In *Chesterfield Township -and- AFSCME Council 25*, Case No. UC17 I-010 (issued March 29, 2019), a Petition for Unit Clarification was granted. The Commission found that the position of Finance Director should be excluded from the bargaining unit because the position was an executive position and its inclusion in any bargaining unit was inappropriate. The Commission noted that it has consistently found as executives those individuals who have an overall responsibility for a public employer's financial affairs, especially when they have a significant role in formulating collective bargaining policy.

In *Plymouth-Canton Community Schools -and- Plymouth-Canton Education Office Personnel Local 6172, AFT Michigan -and- Lisa A. Faur*, Case Nos. C17 K-101 & CU17 K-034 (issued April 3, 2019), an unfair labor practice was not found. The Commission held that the charging party failed to provide any factually supported allegation against the union which, if proven, would establish that it violated the Public Employment Relations Act by deciding not to arbitrate the charging party's grievance. The Commission also held that the charging party failed to establish a breach of the collective bargaining agreement by the employer and the mere fact that an employer discharges an employee does not establish a violation of the collective bargaining agreement. Finally, the Commission noted that the administrative law judge (ALJ) did not err by failing to conduct an evidentiary hearing because Commission Rule 165 authorizes the ALJ to summarily dispose of a case.

In *Wayne State University -and- American Association of University Professors, AFT, Local 6075*, Case No. C17 H-073 (issued June 5, 2019), an unfair labor practice was not found. The Commission held that the ALJ erred by concluding that the respondent violated § 10(1)(a) of the Act. The charging party's contention that the University Associate Vice President made a statement in a Management-Union meeting that constituted an unlawful threat was not supported by substantial evidence. An employer's remarks must be analyzed in light of the context in which they occurred to determine whether they constitute an implied or express threat. The Associate Vice President's statement that she could require employees to attend recruiting events was not a threat which interfered with the § 9 rights of employees. At most, it was a prediction of what would happen if employees chose not to volunteer for the events. There was no dispute that the collective bargaining agreement allowed the employer to assign an employee to cover an event when no employee volunteered to cover the event. ■

69th Annual ALRA Conference
Vancouver, British Columbia, Canada
July 24–28, 2020

We hope to see you in Vancouver!

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