1-1-1978

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LABOR RELATIONS LAW IN MONTANA

Emilie Loring*

I. INTRODUCTION

The rights and duties of Montana employers and employees are determined by many state and federal laws, including those relating to safety, wages and hours, anti-discrimination, environmental protection, and licensing. This article discusses the law of labor-management relations. Although a brief discussion of private sector labor law is included, public sector labor law is particularly emphasized.

II. PRIVATE SECTOR LABOR LAW

Labor relations of Montana's\(^1\) private employers, doing a minimum amount of interstate business, are subject to the Labor Management Relations Act (LMRA),\(^2\) administered by the National Labor Relations Board (NLRB). Under the Act, employees, their organizations, or employers may petition the NLRB to hold elections to determine an exclusive bargaining representative.\(^3\) The LMRA also proscribes certain acts termed unfair labor practices, which may be committed by employers or labor organizations.\(^4\)

The statutory jurisdiction of the NLRB extends to all labor disputes "affecting commerce",\(^5\) and coverage does not depend on any particular volume of commerce. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."\(^6\) This broad jurisdiction has burdened the NLRB with an ever-increasing caseload. Initially the Board decided on a case-by-case basis whether to assert jurisdiction. In 1950, however, better to effectuate the purposes of the Act, the Board began to develop a series of jurisdictional standards, expressed in terms of annual dollar minimums, to determine whether it would


1. Montana is part of the NLRB's 19th Region, and a telephone call (426-442-4532) or a note to the NLRB Seattle office (NLRB, Region 19, 29th Floor, Federal Building, 915 Second Avenue, Seattle, WA 98174) brings a prompt response to requests for forms to petition for representation elections or to file unfair labor practice charges.

5. 29 U.S.C. §§ 159(c)(1) and 160(a) (1970).
assert jurisdiction over a particular labor dispute. 7 For example, the Board now may elect to assert jurisdiction over retail enterprises with a gross business of at least $500,000 annually, 8 over nonretail operations with an annual direct or indirect outflow or inflow across state lines of at least $50,000, 9 over newspapers with a gross volume of $200,000 per year, 10 over communication enterprises with a gross volume of at least $100,000, 11 over hotels with a gross annual volume of $500,000, 12 over proprietary hospitals with at least $250,000 annual revenue, 13 and over nursing homes with at least $100,000 annual revenue. 14

Data regarding the number of Montana cases handled by the Seattle NLRB office is as follows: 15

<table>
<thead>
<tr>
<th>TABLE I</th>
<th>July 1, 1974- June 30, 1975</th>
<th>July 1, 1975- June 30, 1976</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair Labor Practice Charges</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Against Employer</td>
<td>87</td>
<td>85</td>
</tr>
<tr>
<td>Against Unions</td>
<td>41</td>
<td>34</td>
</tr>
<tr>
<td>Total Charges</td>
<td>128</td>
<td>119</td>
</tr>
</tbody>
</table>

| Representation Petitions | | |
| Filed by Unions | 60 | 50 |
| Filed by Employers | 11 | 8 |
| Filed by Employees to Decertify a Union | 7 | 15 |
| Total Representation Cases | 78 | 73 |

The NLRB had no information on the numbers of workers involved in these cases or the types of industries affected.

The decrease in the number of Montana cases between fiscal year 1975 and fiscal year 1976 is not typical of the national pattern. According to the NLRB’s General Counsel, nationally representa-

15. Telephone call from Assistant Regional Director Daniel Boyd to Emilie Loring, September 2, 1977.
tion cases increased 1.5% from fiscal year 1976 to fiscal year 1977, and unfair labor practice cases increased 8.1% in the same period. The latter case load had increased 10.4% from 1975 to 1976.16

In Montana, a relatively large percentage of business operations is deemed "small"; hence they are not subject to the jurisdiction of the NLRB. Congress has provided that states and territories may assert jurisdiction over labor disputes when the NLRB has declined to do so.17 Acting on that statutory authorization, many states have adopted "little Taft-Hartley Act" legislation governing labor-management relations in the private sector in circumstances in which an enterprise's volume of business is too small to subject its labor relations to federal jurisdiction.18 Although proposed at various times, such legislation has never been passed by the Montana legislature. Accordingly, there are no laws applicable to labor relations in small Montana enterprises.

Although not required by law to do so, many "small" employers have recognized a union as the collective bargaining representative of their employees and have negotiated contracts covering those employees. Once a contract has been negotiated, it is enforceable through the grievance and arbitration machinery provided by the terms of the contract or through the courts. If a "small" employer, however, refuses to recognize a union, there is no administrative machinery which employees may utilize to demand an election in order to gain recognition of a unit. Similarly, if an employer discriminates against an employee,19 perhaps, for example, discharging him or her for union activity, no administrative recourse is available to the employee. Neither does an employer have any administrative remedy against a union engaging in action which would be adjudged an unfair labor practice if committed within the jurisdiction of the NLRB.20

III. Labor Relations and Health Care Facilities

A. The Nurses' Employment Practices Act

In 1969 the Montana legislature, for the first time, adopted an

act applying to labor relations. That act, the Nurses' Employment Practices Act,\(^1\) applies to registered and licensed practical nurses\(^2\) in all health care facilities, whether operated publicly or privately.\(^3\) The Act proscribes certain "improper employment practices" which may be committed by a health care facility,\(^4\) but contains no prescriptions against activities engaged in by individual nurses or their organizations. The Act makes strikes at a health care facility unlawful if a strike is in effect at another health care facility within a radius of 150 miles.\(^5\) This is presently the only statutory restriction on any Montana public employees' right to strike.

Originally the Board of Health was charged with determining appropriate bargaining units\(^6\) and conducting representation elections,\(^7\) and was given authority to institute proceedings to restrain the commission of improper employment practices.\(^8\) The Board of Health had little experience or expertise in the area of labor relations, and executive reorganization in 1971 effected a transfer of the functions authorized by the Nurses' Employment Practices Act from the Board to the Department of Labor and Industry.\(^9\)

The Act declares that if a majority of nursing employees assign bargaining rights to an employee organization, it is considered the representative,\(^10\) and no election is necessary. If there is less than majority authorization, but at least thirty percent of the employees authorize an organization to represent them, an election may be requested.\(^11\) The Act also provides that an election may be held if more than one employee organization claims to represent employees in that unit.\(^12\)

Inc. v. State Board of Health,\textsuperscript{33} has reached the Montana supreme court. In \textit{St. John's}, the hospital had asked the Board of Health for a “redetermination of the representative, if any, designated to represent” the nurses.\textsuperscript{34} The Board granted the request, and asked the hospital for a list of the nurses employed between April 1, 1970, and March 31, 1971; it also asked the Montana Nurses' Association for a list of the nurses who had executed new assignments of bargaining rights to the Association. The hospital listed seventeen employees; the Association's list indicated that nine of those same employees, a majority, had assigned it their bargaining rights. The Board of Health then told the Association it would consider only assignments of bargaining rights dated March 31, 1971, or later. One of the reassignments, the only one in dispute, was signed by a nurse on April 22, 1971, although she had left the employ of the hospital on April 5, 1971. Her original assignment of bargaining rights, which had never been withdrawn, had been made on December 2, 1970, a date on which she in fact was employed. The Board, which included that nurse's assignment in the majority of nine, determined that the Nurses' Association was the duly designated representative for purposes of collective bargaining.\textsuperscript{35}

The hospital appealed the decision to the district court, which affirmed the Board's redetermination. Because the disputed assignment had been made by a nurse who was employed during the period from April 1, 1970, to March 31, 1971, it was properly included as among the nine assignments giving the Association a majority. The date of the disputed assignment was of no consequence to the court, which deemed the Board's requirement of new authorization “an over-exercise of caution”,\textsuperscript{36} for the Association already held executed, non-revoked assignments from a majority of the employees. The supreme court affirmed the judgment of the district court.\textsuperscript{37}

\textbf{B. Applicable Federal Law}

Congress amended the LMRA in 1974 to include private health care institutions such as hospitals, convalescent or nursing homes, health clinics, and the like.\textsuperscript{38} Under the doctrine of federal preemption, such institutions and all their employees, including registered

\textsuperscript{34}. Id. at 407, 506 P.2d at 1378-79.
\textsuperscript{35}. Id. at 407-08, 506 P.2d at 1378-79. Recognition of the representative may be had without an employee election, pursuant to R.C.M. 1947, § 41-2205 (Supp. 1977).
\textsuperscript{36}. Id. at 411, 506 P.2d at 1380-81.
\textsuperscript{37}. Id. at 411, 506 P.2d at 1381.
and licensed practical nurses, are now subject to the LMRA rather than the state act. The NLRB has conducted elections at several Montana health care institutions, certifying the organization winning a majority of the votes as the exclusive representative of the employees for collective bargaining purposes. Unfair labor practice charges, including allegations, sustained by the NLRB, that union hospital employees had been discriminated against by their employer, have also been handled. Because the NLRB's jurisdictional yardsticks are $100,000 annual gross revenue for nursing homes, and $250,000 for private non-profit hospitals, health clinics, and other health care institutions, a number of small, private health care facilities in Montana remain subject to the state Nurses' Employment Practices Act, if they employ either registered or licensed practical nurses.

Strikes at private health care facilities are restricted by the LMRA to the extent that a labor organization may not strike without giving the employer and Federal Mediation and Conciliation Service ten-day notice of such action. Moreover, ninety-day notice of intent to terminate or modify a collective bargaining contract must be given by the employer or union to the other. The NLRB had taken the position that these notice requirements applied to any labor dispute at the premises of a health care facility, including, for example, a dispute between construction trades and a contractor building an addition to the facility. Within the last year, however, a federal court has reversed the Board, holding that the notice requirement applies only to concerted activity on behalf of employees of the health care institution itself.

IV. PUBLIC SECTOR LABOR LAW IN MONTANA

A. Background

In recent years, labor relations law in the public sector has developed greatly, both nationwide and in Montana. It has been determined that public employees have a constitutional right, under the first amendment, to organize and join labor unions. No
constitutional duty, however, compels a public employer to bargain; accordingly, some state courts have held that there must be specific authorizing legislation before a public employer may engage in collective bargaining. 48

Ten years ago no Montana laws specifically authorized public employees to organize or required public employers to bargain with employee organizations. Nevertheless, many public employers in Montana did recognize and bargain with organizations of their employees. Many cities, counties, school districts, fire and police departments had entered into formal written agreements, informal oral agreements, memoranda of understanding, or other arrangements with employee organizations. In the spirit of Montana's long tradition of organization in the mines and woods, many public employers and employees did not agree that "[t]o tolerate or recognize any combination of civil employees . . . is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our government is founded." 49

B. Teachers

In 1971, two years after enactment of the Nurses' Employment Practices Act, the Montana legislature adopted the Professional Negotiations Act for Teachers, 50 which applied to school districts and their professional employees. That Act provided for selection of an exclusive representative by teachers, established a duty to bargain on certain matters and to "meet and confer" on others, and provided impasse resolution procedures. It defined and prohibited certain unfair labor practices; teacher strikes, for example, were deemed unfair labor practices, and a striking teacher was obliged by the Act to forfeit salary for every day of a strike. No administrative agency was given authority to enforce the provisions of the Act, and court action offered the only remedy for alleged unfair labor practices. Collective bargaining between school boards and teacher organizations was encouraged. Although Montana had not yet adopted the 1972 constitution and the "open meeting" law, 51 the legislature anticipated problems in this area, and provided that meetings of school boards, in which bargaining proposals were discussed, were to be closed, while actual negotiations between the parties might be open to the public. In practice, however, negotia-

49. Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943).
50. R.C.M. 1947, §§ 75-6115 to 6128, repealed by Ch. 117 § 3, Laws of Montana (1975).
tion sessions usually are closed to the public; they are not "meetings" of a public body, and so are not subject to "open meeting" provisions.

Because no administrative agency was empowered to enforce the Professional Negotiations Act, an employer, employee or organization which believed an unfair labor practice, as defined in the Act, had been committed, had to bring its complaint directly in district court. This was done by the Billings Education Association, when it sought an injunction to prevent the school board from issuing individual contracts to teachers before agreement had been reached on a master contract for the approaching academic year. The district court denied the injunction, and the state supreme court denied the BEA's application for a writ to set aside the order of the district court. A vigorous dissent accused the majority of stripping the Professional Negotiations Act of its meaning.

In 1975 the legislature repealed the Professional Negotiations Act for Teachers, and made teachers subject to the Public Employees Collective Bargaining Act. The latter Act was amended to prohibit school districts from bargaining collectively on any matter not set forth in the statute.

C. Public Employees Collective Bargaining Act

The Montana Public Employees Collective Bargaining Act, adopted by the Montana legislature in 1973, was modeled on the federal LMRA. It represented the state's first comprehensive legislation relating to labor relations, and affected the majority of public employees, including those employed by, inter alia, the state, cities, counties, public corporations, and housing authorities. At the time of enactment, both the university system and the public school system, the latter then covered by its own act, were excluded from coverage; however, the university was included in 1974, and public schools in 1975. Except for registered nurses in public health care facilities and professional engineers and engineers in training, the Act now covers all of Montana's non-management public employees. The definition of "employee" in the Act excludes elected offi-

52. State ex rel. Billings Education Ass'n v. District Court, 166 Mont. 1, 531 P.2d 685 (1974).
53. Id. at 3-7, 531 P.2d at 686-88 (Bennett, D.J., dissenting).
59. R.C.M. 1947, §§ 75-6115 to 6128, repealed by Ch. 117 § 3, Laws of Montana (1975).
cials, persons directly appointed by the governor, supervisory employees, management officials, members of any state board or commission who serve the state intermittently, school district clerks, school administrators, registered professional nurses performing services for health care facilities, professional engineers and engineers in training. Thus, some, who may be public employees for other purposes, are not protected by the collective bargaining statutes.

The Collective Bargaining Act provides a mechanism for the election of an exclusive representative for purposes of collective bargaining, and makes unlawful, as unfair labor practices, certain behavior of public employers and labor organizations.

1. Board of Personnel Appeals

The Act is administered by the Board of Personnel Appeals (hereinafter the Board or BPA), a five-member board appointed by the governor. The Board is assigned to the Department of Labor and Industry for administrative purposes only. Two members represent management; two represent employees or employee organizations; and one, who represents a "neutral" position, is generally referred to as the "public" member.

The Board has a professional staff including an executive secretary, an attorney and four hearing examiner-mediators. In addition to making full use of that staff, the Board occasionally contracts with attorneys to conduct hearings or write briefs on its behalf. As mandated by statute, the BPA has adopted rules and regulations under the Montana Administrative Procedure Act.

2. Elections

The Board provides forms for employees or labor organizations to request representation or decertification elections, but it has not yet adopted rules or drafted forms for employers to request elections. A petition requesting a representation election must be accompanied by authorization cards signed by thirty percent of the

67. R.C.M. 1947, §§ 82-4201 to 4225 (Supp. 1977). Rules and regulations of the Board of Personnel Appeals, which are germane to this discussion, are found in the Administrative Rules of Montana [hereinafter cited as A.R.M.] 24-3.8(1)-O800 to 24-3.8(30)-S8370(4).
employees in the proposed unit showing their desire for organization. 68

Upon the filing of a request for an election, the Board must notify the employer, 69 who has five days to file a counterpetition if he disagrees with the appropriateness of the proposed unit. 70 Other labor organizations may intervene within twenty days. 71 If necessary, the Board holds a hearing to determine the appropriateness of the unit. 72 In making that determination, the Board is instructed, by statute, to consider community of interest, wages, hours, fringe benefits and other working conditions, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees. 73

After determining an appropriate bargaining unit, the Board schedules an election. Elections, which must be by secret ballot, 74 are conducted by an agent of the Board. 75 Employees who were in the unit at the time the petition was filed are eligible to vote. 76 Those who in the meantime have voluntarily terminated their employment are excluded. 77 In situations in which final determination of the appropriate unit becomes prolonged, possibly because of court challenge, a significant number of people who are employed on the date of the election will not be eligible to vote. The procedure in effect in Montana differs from that used by the NLRB, which permits voting by employees who were on the payroll on a specific date, usually within a few weeks prior to the election. If a labor organization receives a majority of the votes cast at the election, it is certified by the Board as the exclusive representative for purposes of collective bargaining. 78 If more than two organizations appear on the ballot, and no one receives a majority, a run-off election between the two choices receiving the most votes is held. 79

68. A.R.M. 24-3.8(10)-S8020(3)(e).
69. A.R.M. 24-3.8(10)-S8020(3)(f).
70. A.R.M. 24-3.8(10)-S8030(4)(a), (b).
72. A.R.M. 24-3.8(10)-S8089(11).
74. A.R.M. 24-3.8(18)-S8170(3).
75. A.R.M. 24-3.8(18)-S8150(1).
76. A.R.M. 24-3.8(18)-S8180(4)(a).
77. Id.
78. R.C.M. 1947, § 59-1606(3) (Supp. 1977); A.R.M. 24-3.8(18)-S8240(10); A.R.M. 24-3.8(22)-S8270(1)(a).
3. Mediation and Fact Finding

The collective bargaining process itself is a matter between the employer and the labor organization, and, as long as both sides bargain in good faith, is not subject to state regulation.80 If the parties are unable to reach agreement, however, the Act provides impasse procedures. The Act requires the parties to request mediation, either if agreement has not been reached after a reasonable period of negotiation or if a dispute still exists on the date of expiration of a prior collective bargaining agreement.81 In practice, if resolution seems probable, parties often ignore this requirement. On the other hand, if a strike or real deadlock appears imminent, the parties usually do request mediation. Upon petition, the Board supplies a mediator to assist the parties in reaching an agreement.82 Costs of mediation are borne by the Board.

If mediation is unsuccessful, the parties may request fact finding.83 Too, the Board itself may initiate fact finding.84 In this process, the Board submits to the parties a list of names of five possible fact finders. The parties alternately strike two names; the remaining name is that of the person designated as the fact finder.85 The fact finder then meets with the parties and makes written findings of facts and recommendations for resolution of the dispute.86 There is no requirement that either party accept the fact finder’s recommendations.

The fact finder may make his report public five days after it is submitted to the parties; if the dispute is not settled, he must make it public fifteen days after such submission.87 These provisions indicate the legislature believed that pressure brought to bear upon the parties as a result of the publicity of the report would encourage the parties to accept the report or work out the dispute between themselves. Whether or not the dispute is resolved, costs of fact finding are split three ways among the Board, the employer and the union.88

Unlike public employee collective bargaining legislation in

82. A.R.M. 24-3.8(30)-S8350(2).
85. R.C.M. 1947, § 59-1614(3) (Supp. 1977). Note that A.R.M. 24-3.8(30)-S8360(3)(b), (c) mandates that the Board submit seven rather than five names to the parties to the dispute.
some other states,\textsuperscript{89} Montana law does not require that parties refrain from strikes or lockouts during mediation or fact finding.

4. \textit{Unfair Labor Practices}

Another aspect of the Act relates to unfair labor practices.\textsuperscript{90} Certain acts which may be done by employers or labor organizations are unlawful. This forbidden behavior is set forth in language quite similar, where it is not identical, to language proscribing unfair labor practices in the private sector under the LMRA.\textsuperscript{91}

The Montana Act prohibits a public employer from interfering with the rights of employees both to join organizations of their own choosing and to bargain collectively, from dominating or assisting a labor organization, from discriminating against employees to encourage or discourage union membership, from discriminating against employees who make use of the Act, and from refusing to bargain collectively in good faith with an exclusive employee representative.\textsuperscript{92}

In a corresponding fashion, the Act prohibits a labor organization from restraining or coercing employees in the exercise of their guaranteed rights, from restraining a public employer in the selection of its representative for collective bargaining, from refusing to bargain collectively in good faith with a public employer, if the organization has been designated as the exclusive representative of employees, and from using agency shop fees as contributions to state or local political candidates or parties.\textsuperscript{93}

If an employee, group of employees, labor organization or public employer believes an unfair labor practice has been committed, a written complaint may be filed with the Board of Personnel Appeals.\textsuperscript{94} (Forms, which are simple to complete, are available for this purpose. Unlike comparable NLRB forms, the state ones must be notarized.) The State Act requires that such complaints be filed within six months of the alleged unfair labor practice;\textsuperscript{95} the NLRB provides an identical period of limitation.\textsuperscript{96} The BPA serves a copy of a timely filed complaint on the party named as defendant, after which such party has ten days in which to file an answer.\textsuperscript{97} The

\begin{itemize}
  \item \textsuperscript{89} See, e.g., HAW. REV. STAT. § 89-12; MINN. STAT. § 179.64; 43 PA. CONS. STAT. ANN. § 1101.1002.
  \item \textsuperscript{90} R.C.M. 1947, § 59-1605 (Supp. 1977).
  \item \textsuperscript{91} Unfair labor practices are proscribed under the LMRA, 29 U.S.C. § 158(a), (b) (1970).
  \item \textsuperscript{92} R.C.M. 1947, § 59-1605(1) (Supp. 1977).
  \item \textsuperscript{93} R.C.M. 1947, § 59-1605(2) (Supp. 1977).
  \item \textsuperscript{94} R.C.M. 1947, § 59-1607(1) (Supp. 1977); A.R.M. 24-3.8(26)-S8280(1)(a).
  \item \textsuperscript{95} R.C.M. 1947, § 59-1607(2) (Supp. 1977); A.R.M. 24-3.8(26)-S8280(1)(a).
  \item \textsuperscript{96} 29 U.S.C. § 160(b) (1970).
  \item \textsuperscript{97} R.C.M. 1947, § 59-1607(1) (Supp. 1977); A.R.M. 24-3.8(26)-S8280(1)(b); A.R.M. 24-
Board then sets the matter for hearing, during the conduct of which the Board is not bound by the rules of evidence prevailing in the courts. Each side presents its evidence, the introduction of which may be, and often is, protested. All witnesses are subject to cross examination. Throughout the hearing, the complaining party assumes the burden of proving the charges.

The state procedure is a dramatic departure from the handling of unfair labor practices by the NLRB. Once an unfair labor practice "charge" is filed with the NLRB, a Board agent is sent out to investigate the matter. He or she talks with representatives of both sides who consent to do so, takes statements, examines documents and makes a recommendation to the Regional Director. If the NLRB then decides that an unfair labor practice probably has been committed, the agency prepares the "complaint", which may vary significantly from the details alleged in the "charge". From that point, the NLRB, through its General Counsel, rather than the charging party who originally brought the matter to the attention of the federal agency, is responsible for putting on the case.

Labor organizations which, within the jurisdiction of the NLRB, bring unfair labor practice charges against public employers, as opposed to private employers, are obliged to assume more responsibility and incur greater expenses. Many Montana unions are not staffed to provide this sophisticated level of service to their members. Consequently, attorneys have been used more frequently by unions in proceedings under Montana's Public Employees Collective Bargaining Act than is usual under the LMRA.


Employee organizations are legitimately concerned with issues of union security. By law, once a particular organization wins an election, it is the exclusive representative of all employees in the bargaining unit and, as such, cannot discriminate among them on the basis of membership or non-membership in the union. Because the union negotiates for all employees in the bargaining unit, any gains achieved, including wage increases, fringe benefits, and the like, apply to all. Hence, "free riders", those who accept these gains but do not pay union dues, are unpopular with union leadership and many union members.

Certain union security provisions have been developed to deal with the problem of "free riders". A closed shop—one in which a
person must belong to the union before being hired by an employer—has been unlawful in the private sector since 1947,100 and is presumably impermissible in the public sector in Montana. Union shop clauses—those requiring employees to join the union within a certain period, usually thirty days after hiring, and to remain members for the life of the contract—are legal under LMRA.101 An agency shop requires employees, who choose not to join the union, to pay it a fee for representing them in collective bargaining, handling grievances, and the like. Agency shop is specifically permitted for Montana public employees.102 A maintenance of membership clause, which requires those employees who join the union to remain members, may be coupled with a requirement that all new employees join the union. None of these provisions is required by law, in either the private or the public sector; each must be obtained, if at all, by collective bargaining with the employer.

A 1974 informal opinion by then Attorney General Robert Woodahl declared that a union shop provision would be unlawful.

Under Section 59-1605(1)(c) . . . a public employer cannot discriminate in hiring by forcing prospective employees to join a union. Therefore it would be an unfair labor practice for a public employer to enter into an agreement containing a closed or union shop provision.103

A subsequent court challenge of a union shop provision has been inconclusive. Missoula County entered into a union shop agreement with several unions, including locals of the Teamsters, Operating Engineers, and Laborers. The County then brought an action in district court to have that clause invalidated.104 Because the parties compromised, resulting in dismissal of the suit, there has been no judicial determination of the validity of a union shop clause in Montana.

6. Judicial Review of Board Decisions

Several decisions of the BPA, which is subject to the Montana Administrative Procedure Act,105 have been appealed to the state's
district courts. As a result of these appeals, an important distinction is developing between the LMRA and the Montana Public Employees Collective Bargaining Act in the area of appealability of unit determination decisions made by the two administering agencies. NLRB representation decisions are not appealable to federal courts, except in very limited circumstances.\footnote{See, e.g., A.F. of L. v. NLRB, 308 U.S. 401 (1940).} If a union disagrees with a unit determination, however, it can decline to appear on the ballot. If an employer disagrees, and the union wins an election, then, by refusing to bargain with the certified union, the employer can obtain judicial review. Once the employer refuses to bargain, the union may file an unfair labor practice charge, protesting the employer's refusal to bargain in good faith. If the NLRB determines that the employer is guilty of refusing to bargain with the certified representative in a unit found appropriate by the Board, the employer may appeal.

Under the Montana Administrative Procedure Act, all final decisions of administrative agencies are appealable.\footnote{R.C.M. 1947, § 82-4216(1)(a) (Supp. 1977).} Employers have appealed BPA determinations of an appropriate bargaining unit into district court\footnote{See, e.g., In the Matter of U.D. #11-1976, No. 41317 and No. 41320, First Judicial District, State of Montana, in and for the County of Lewis and Clark; City of Great Falls v. Board of Personnel Appeals, No. 83051C, Eighth Judicial District, State of Montana, in and for the County of Cascade.} on the theory that such a determination is a "final" decision. On the other hand, it is the position of the BPA that an election should be held in the unit which the Board has determined is appropriate; then, if a labor organization wins the election and is certified as the exclusive representative, the certification order could be appealed. If no union wins the election, the question of the appropriateness of the bargaining unit is moot. By permitting appeal of the unit determination decision, district courts may be compelled unnecessarily to review an interim administrative ruling. This problem has not yet reached the Montana supreme court.

7. Problems in and Approaches to Labor Law Research

Research of state labor law is made difficult because BPA decisions have not been published. Since July, 1973, when the Act became effective, the Board has made numerous decisions regarding appropriate bargaining units and employer and union unfair labor practices. Reports of these decisions are available to the public, but, because they have not been published, they are not easily accessible. If, for example, one is faced with a situation in which a public
employee claims he has been discriminated against because of union activity, it is not possible to ask the Board of Personnel Appeals for copies of all decisions involving such a claim. If, however, one happens to know of the Ravalli County case in which a public employer was ordered to reinstate certain discharged employees discriminated against because of union activity, a copy of that specific decision may be secured.109

Many representation petitions are processed, and elections held, with little dispute. If a union seeks to represent a county road department, for example, both parties may agree who should and who should not be included.110 Other representation petitions, however, raise matters of serious disagreement between the parties. For example, if a union seeks to represent city employees, are library employees properly in the unit?111 Should both elementary and secondary teachers be in the same unit?112 Is a statewide unit of a particular department appropriate, or can employees in different geographical divisions seek independent representation?113 Should a law school114 or an engineering school115 be included in a university unit? Once the Board makes decisions on such matters, copies of the decisions should be readily available to guide other public employers and employees in subsequent matters.

The author of a Montana Law Review comment on this Act took the position that "... decisional law developed over the years for private industry labor-management relations is not well suited for use in the public sector."116 In practice, however, private sector decisional law is frequently applied in Montana's public sector. The language of the Labor Management Relations Act, administered by the NLRB, and that of the Montana Public Employees Collective Bargaining Act is very similar. Where state statutory language is identical or very similar to that found in the LMRA, "[i]t is probably safe to assume that these statutes were intentionally designed to incorporate by reference private sector precedents."117 Although NLRB decisions are not controlling on the state agency, they are usually considered, and may well be persuasive, in circumstances in which the BPA is asked to make a decision regarding an appropri-
ate bargaining unit or the existence of an unfair labor practice.\textsuperscript{118} Briefs, drafted by both labor and management counsel, and addressed to the Board, and BPA decisions are apt to cite extensively to NLRB precedents.

This approach was given judicial sanction by the state supreme court in \textit{State Department of Highways v. Public Employees Craft Council}.\textsuperscript{119} The Craft Council, comprised of five unions, called upon the Montana highway maintenance employees to strike, following an impasse at the bargaining table. A district court granted the highway department’s request for a temporary restraining order prohibiting the strike. The Craft Council immediately filed a motion to dismiss, which was granted, and the temporary restraining order was dissolved. The highway department appealed, and unanimously affirming, the Montana supreme court determined there was but one issue: Did the district court err in determining that the maintenance employees of the Montana Department of Highways have the right to strike under Montana’s Public Employees Collective Bargaining Act?\textsuperscript{20}

The Act guarantees public employees certain rights, including the right to engage in “concerted activities” for the purpose of collective bargaining.\textsuperscript{121} The federal Labor Management Relations Act employs the same language in delineating rights of employees in the private sector.\textsuperscript{122} Therefore, the court looked at some forty years of federal interpretation of that language, which consistently determined that “concerted activities” includes strikes.\textsuperscript{123}

[The highway department] may wish that the statute read otherwise, but this Court is not at liberty to amend our statutes. (Citation omitted.) This Court concludes that Montana’s legislature meant the phrase “concerted activities” to have a meaning identical to that found in analogous statutes of other jurisdictions. To hold otherwise would flaunt a cardinal principle of statutory construction.\textsuperscript{124}

The court also considered important the fact that the legislature had restricted or banned strikes by nurses and teachers. Consequently, said the court, had the legislature wished to limit the right

\textsuperscript{118} See, e.g., Local 2390, American Federation of State, County and Municipal Employees v. City of Billings, --- Mont. ---, 555 P.2d 507, 508 (1976).

\textsuperscript{119} 165 Mont. 349, 529 P.2d 785 (1974).

\textsuperscript{120} Id. at 351, 529 P.2d at 786.


\textsuperscript{124} Id. at 354, 529 P.2d at 788.
to strike of other public employees, it could have expressly done so.\textsuperscript{125}

V. POLICE AND FIRE FIGHTERS

The Metropolitan Police Law\textsuperscript{126} addresses some matters which are frequently included in collective bargaining agreements, including the presentation and trial of charges against policemen,\textsuperscript{127} minimum wages,\textsuperscript{128} sick pay,\textsuperscript{129} and overtime compensation.\textsuperscript{130} The Act does not mention collective bargaining \textit{per se}, and does not restrict strikes or other forms of concerted activity. The Public Employees Collective Bargaining Act is deemed to cover the labor relations of police, as well as other public employees. Covered, for example, were the strike of the police in Billings, the serious threat of such action in Great Falls, and unfair labor practice charges on behalf of police organizations, prepared or actually filed against city governments for alleged discrimination against police for engaging in statutorily protected activity.

Similarly, some matters of employment relations of fire fighters are dealt with in the general laws.\textsuperscript{131} The law requires, for example, layoff of firemen in reverse order of seniority,\textsuperscript{132} sets forth procedural protections for firemen in case of suspension or discharge,\textsuperscript{133} and discusses fringe benefits, including pensions,\textsuperscript{134} and minimum wages.\textsuperscript{135} There are no statutory restrictions on economic action by firemen. As with police, the law does not mention labor relations or collective bargaining; such matters, therefore, also are subject to the Public Employees Collective Bargaining Act.

VI. CONCLUSION

Labor-management relations in Montana are governed by both federal and state law. The LMRA and cases decided under it are controlling in those circumstances in which the federal jurisdictional standards have been met. Where not controlling, they nonetheless may be persuasive in making determinations within the scope of the Montana Public Employees Collective Bargaining Act.

\textsuperscript{125} Id. at 355, 529 P.2d at 788.
\textsuperscript{126} R.C.M. 1947, §§ 11-1801 to 1892.
\textsuperscript{127} R.C.M. 1947, § 11-1806.
\textsuperscript{128} R.C.M. 1947, § 11-1832 (Supp. 1977).
\textsuperscript{129} R.C.M. 1947, § 11-1822.
\textsuperscript{130} R.C.M. 1947, § 11-1832.2 (Supp. 1977).
\textsuperscript{131} R.C.M. 1947, §§ 11-1901 to 1941.
\textsuperscript{132} R.C.M. 1947, § 11-1904.
\textsuperscript{133} R.C.M. 1947, § 11-1903.
\textsuperscript{135} R.C.M. 1947, § 41-2303.1 (Supp. 1977).
The Montana Act, administered by the Board of Personnel Appeals, will control if a public employer is involved. Although the Act applies to public sector law, certain public employees are also within the scope of other statutory provisos. Nurses, for example, are under the jurisdiction of the Nurses' Employment Practices Act, and police, under the Metropolitan Police Law; firefighters, too, are covered by other statutes.

Some labor-management problems and concerns are not within the jurisdictional confines of either federal or state law. Montana presently has no statutory scheme within which to solve private sector labor problems. Because of that lack, many of Montana's labor-related difficulties do not admit of judicial resolution within the field of labor law.