

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: April 20, 2004

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
PORTLAND DISTRICT, PORTLAND
OREGON

Respondent

and

Case No. SF-CA-04-0066

UNITED POWER TRADES UNION

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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|---|------------------------|
| DEPARTMENT OF THE ARMY U.S. ARMY CORPS OF ENGINEERS PORTLAND DISTRICT, PORTLAND OREGON Respondent | |
| and UNITED POWER TRADES UNION Charging Party | Case No. SF-CA-04-0066 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **May 21, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: April 20, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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| DEPARTMENT OF THE ARMY U.S. ARMY CORPS OF ENGINEERS PORTLAND DISTRICT, PORTLAND OREGON Respondent | |
| and UNITED POWER TRADES UNION Charging Party | Case No. SF-CA-04-0066 |

Amita Baman Tracy
Stefanie Arthur
For the General Counsel

James Herald
For the Respondent

Travis Brock
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On September 4, 2003, and October 28, 2003, the United Power Trades Organization (Union) filed unfair labor practice charges against the Department of the Army, U.S. Army Corps of Engineers, Portland District, Portland, Oregon (Respondent). On November 26, 2003, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (Authority) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in which it was alleged that the Respondent committed unfair labor practices in violation of § 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute by refusing to provide the Union with certain information that it had requested.

A hearing was held in Portland, Oregon on January 29, 2004.¹ The parties were represented by counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence, the demeanor of witnesses and the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that the Respondent unlawfully refused to provide the Union with a copy of relevant portions of an investigative report (report) regarding, among other subjects, alleged nepotism at the Dalles-John Day Project, which is a site to which bargaining unit employees are assigned. According to the General Counsel, the report requested by the Union meets all of the criteria for disclosure: it is normally maintained by the Respondent in the regular course of business, it is reasonably available and it is necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. In its request for the report, the Union described a particularized need as well as the reason that the report was necessary for the Union to carry out its representational function.

The General Counsel further maintains that the report is not "guidance, advice, counsel or training provided for management officials or supervisors, related to collective bargaining" within the meaning of § 7114(b)(4)(C) of the Statute. Furthermore, the Respondent failed to raise any anti-disclosure interest such as would justify its refusal to provide the Union with a copy of the report. The General Counsel argues that, if the Respondent felt that the report was exempt from disclosure, it should have submitted it to the Administrative Law Judge for an *in camera* inspection.

The Respondent maintains that the Union has no particularized need for the report because it was prepared in response to the Union's concerns about the hiring of the son of one of the Respondent's managers, whereas the Union's

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Prior to the submission of opening statements and the introduction of evidence the General Counsel moved to amend the complaint to reflect the withdrawal of the unfair labor practice charge which had been filed on September 4, 2003, and which had been designated as Case No. SF-CA-03-0776. The Respondent did not oppose the motion and it was granted with the proviso that the Respondent need not amend its Answer. The General Counsel submitted an Amended Complaint with his post-hearing brief.

purported need for the report arises out of a grievance regarding the alleged role played by the same manager in recommending the promotion of his son.

The Respondent also contends that the Union's purported need for the report is based upon its mistaken impression that an agency's hiring of a relative of a current employee is inherently improper. Therefore, the grievance upon which the Union based its request for the report is invalid and there is no valid basis for the Union's request for information.

According to the Respondent, it fulfilled its obligations to the Union by providing it with a written statement that the investigating officer had concluded that there had been no unlawful nepotism at the Dalles-John Day Project. When the Union submitted its written request for a copy of the report, it stated that it needed the information in order to evaluate the grievance which it had submitted in 2003. The Union did not comply with the Respondent's request that it provide further details in support of its alleged need for the report. The Respondent therefore maintains that the Union's statement of a particularized need is inadequate since nothing in the report could possibly aid the Union in its evaluation and prosecution of the grievance.

Finally, the Respondent argues that it has a legitimate interest in keeping the report confidential in view of the fact that the investigator promised confidentiality to a number of witnesses and that the report addresses personnel matters for which the Union has no legitimate need.

Findings of Fact

The pertinent facts, as set forth below, are undisputed.

1. The Respondent is an "agency" as defined in § 7103 (a) (3) of the Statute.

2. The Union is a "labor organization" as defined in § 7103(a) (4) of the Statute and is the exclusive representative of a unit of Respondent's employees which is suitable for collective bargaining. That unit includes employees who are assigned to Respondent's Portland District, which includes the Dalles-John Day Project.²

²

The Dalles-John Day Project consists of two dams on the Columbia River.

3. In December of 2001, Travis Brock, the President of the Union, met with Colonel Randall J. Butler, then Commander of the Portland District. Brock had requested the meeting so that he could inform Butler of complaints that he had received from bargaining unit members concerning nepotism at the Dalles-John Day Project. A number of students had been hired noncompetitively through the Student Career Experience Program. Several of the students were the children of managers and certain bargaining unit members felt that their hiring was inappropriate.³ Butler told Brock that he would consider the matter and would advise him of how he would address the issues which Brock had raised.

4. By e-mail dated January 14, 2002 (Jt. Ex. 1), Butler provided Brock with a copy of a memorandum to Major Stephen J. Ward by which Ward was appointed as an investigating officer to conduct an informal investigation into complaints concerning "hiring, release of information, and vehicle usage at The Dalles-John Day Project." Among the issues to be addressed in the investigation was:

b. The family relationships that exist among the employees at The Dalles-John Day Project including whether the hiring, supervision or performance on the jobs have been unduly influenced by said family relationships in violation of any laws, regulations, or policy in place and relating to nepotism in federal employment.

5. By letter of April 23, 2002 (Jt. Ex. 2), Butler informed Brock that:

The intent of my letter is to inform you of the investigation results, the actions I am taking and the outcome I am looking for. First, I did not intend to give you a copy of the investigation and its conclusions. I agreed to do an investigation and inform you of its outcome and any actions that I might take as a result of the investigation. (Emphasis in original.)

Butler went on to state that the investigating officer had presented him with his findings and recommendations on or about February 12, 2002. According to Butler, "The packet was very extensive and it took me sometime [sic] to review the entire file." The investigating officer had concluded that there was no merit to any of the four allegations described in the memorandum of appointment which

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It is undisputed that relatives of Union members were also hired under the same program.

accompanied Butler's e-mail to Brock of January 14, 2002. Accordingly, Butler did not plan to take any disciplinary action. However, the investigating officer had

. . . described the work environment at the project as one lacking trust, with poor communication and evidencing an overall power struggle between management and the union.

Butler informed Brock that he had held informal "listening sessions" with employees at the project and would use the services of the Federal Mediation and Conciliation Service to correct the problems. The process would take at least one year and would include the participation of Union representatives.

6. On September 14, 2003, the Union initiated a grievance (Jt. Ex. 3) in which it was alleged that Rod Ontiveros, the Chief of Maintenance at the Dalles Dam and the Chairman of the Dalles/John Day Power Plant Training Committee, was the senior rater of his son, Ronnie Ontiveros. It was further alleged that Rod Ontiveros was in a position to recommend his son for promotion. According to the Union, this situation was in violation of 5 U.S.C. § 3110(b)⁴ and of certain regulations.

7. By letter of September 22, 2003 (Jt. Ex. 4), from Larry L. Ferres, the Union's Shop Steward for the John Day Project, to Kathleen Dooney Foster, the Labor Relations Specialist for the Portland District, the Union requested that the Respondent provide ten pieces of information, including the portion of the report which concerns the issue regarding family relationships at the Dalles-John Day Project and their effect on hiring, supervision and performance.⁵ The stated purpose for this request was the grievance of September 14, 2003, and reports that Ronnie Ontiveros was not required to rotate through all of the craft crews as is required of all other trainees. According to Ferres' letter, "This would show favoritism based on nepotism." Ferres further stated that:

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The cited portion of the statute prohibits public officials from influencing the employment or advancement of relatives in the agencies in which the public officials are serving or over which they exercise control. The statute does not contain an outright prohibition against the employment of the relatives of public officials in such agencies.

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See Finding of Fact 4.

The Union has depended upon statements made by bargaining unit members concerning the nepotism in the Power Plant Training Program and the Prohibited Personnel Practices that continue to occur there. We need to review any documents that would prove or disprove these allegations or impact our grievance and any settlement efforts or arbitration efforts. We need to view these documents so we can come to our own conclusions.

The letter also contains the following statement of the uses to which the Union would put the requested information:

The Union anticipates that the documents, records and report requested would support the allegations of nepotism and the violations sited [sic] in the grievance. Analyzing the documents, records, and report ourselves will enable us to better evaluate the validity of [the] grievance as it will moves [sic] through the grievance steps. In addition, it may help us reach a settlement in the above-mentioned grievance. Or it may show other violations of our CBA; law or regulations for which we will need to seek remedies.

Ferres' letter concludes with the following statement of the connection between its proposed use of the information and its representational responsibilities:

As the exclusive bargaining agent for all personnel of the bargaining unit, the Union has a representational responsibility to its members to enforce personnel law[,] rules[,] regulations and the CBA and to settle any grievances on the best terms possible while being fair to all bargaining unit members. In addition, it's the Union's lawful duty to represent the interests of all employees in the unit it represents. Settling grievances or pursuing them with all available data in the best manner possible is the Union's responsibility. We need this data and report to fulfill our responsibilities.

8. By letter dated October 15, 2003 (Jt. Ex. 5), Foster responded to Ferres' request for information. Nine of the ten requested items were either provided to the Union or were identified as being nonexistent. However, Foster stated that the Union's request for the portion of the investigative report concerning nepotism, "does not meet the standard for the production of this report." Foster gave the following reasons for the Respondent's position:

a. The Union had not identified a particularized need for the information inasmuch as the investigative report deals with events which occurred in or before February of 2002. The Union was already aware of family members who were hired during that time. While a report about those events might be "at the most, relevant or useful", it is not required for the Union to represent its members.

b. Any grievance based upon the facts set forth in the investigative report would be untimely. The current grievance would be untimely to the extent that it is based upon actions which are alleged to have occurred prior to July of 2003.⁶

c. The Respondent initiated the investigation in response to the Union's contention that the matters to be investigated were grievable or otherwise actionable. Therefore, even if the Union had stated a particularized need, the investigative report is not subject to disclosure because it constitutes advice, guidance and counsel for management officials relating to collective bargaining.

9. The Union has pursued the grievance on nepotism through the third step (GC Ex. 2 through 7).

Discussion and Analysis

The Legal Framework

The right of a union to receive information from an agency arises out of § 7114(b)(4) of the Statute, according to which the duty of an agency to bargain in good faith includes the obligation to furnish to an exclusive bargaining agent, upon request, and to the extent not prohibited by law, information

- (A) which is normally maintained by the agency in the regular course of business;
- (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

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Neither party submitted evidence concerning time limits for the submission of grievances.

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining

In *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 669 (1995) (*IRS*) the Authority held that, in order for a union to invoke the right to receive information under § 7114(b)(4) of the Statute, it must establish a particularized need for the information. In order to show a particularized need the union must articulate with specificity why it needs the information, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute. The union's responsibility for articulation requires more than a conclusory statement in order that the agency can make a reasoned judgment as to its obligation to disclose. However, in stating its particularized need, the union is not required to describe the nature of the agency's alleged misapplication or violation of policy, procedure, law or regulation, *Health Care Financing Administration*, 56 FLRA 156, 159, 162 (2000).

According to *IRS*, once the union shows a particularized need, the agency, in order to fulfill its obligations under the Statute, must either produce the requested information or establish a countervailing nondisclosure interest in a nonconclusory manner. The agency must state its nondisclosure interests at or near the time of the union's request for information, *Internal Revenue Service, Austin District Office, Austin, Texas*, 51 FLRA 1166, 1180, n.14 (1996) (*IRS Austin*).

The Respondent does not deny that the investigative report is kept in the ordinary course of business and that it is reasonably available. Therefore, the issues to be addressed are whether the Union articulated a particularized need for the report and, if so, whether the Respondent then stated a legitimate nondisclosure interest.

The Union's Statement of Particularized Need Was Sufficient

The Respondent's position, as stated in Foster's letter of October 15, 2003, to Ferres, as well as the Respondent's post-hearing brief, is that the Union could not possibly have had a particularized need for the report because its request was based upon two invalid premises, *i.e.*, that the hiring of the children of managers was invalid and that the

report was necessary to its prosecution of the nepotism grievance which the Union initiated in 2003.

An examination of Ferres' letter of September 22, 2003, to Foster, indicates that the Respondent has taken an excessively limited view of the Union's statement of particularized need. Contrary to the Respondent's characterization, Ferres' letter states that the Union's need for the report is based, not only on the grievance, but on, "the allegation raised to us that Ronnie Ontiveros is receiving preferential treatment by not being required to rotate through the craft crews in accordance with the Regional Hydropower Trainee Program Agreement." Ferres went on to state that:

The Union has depended upon statements made by bargaining unit members concerning the nepotism in the Power Plant Training Program and the Prohibited Personnel Practices that continue to occur there. *We need to review any documents that would prove or disprove these allegations or impact our grievance and any settlement efforts or arbitration efforts. We need to view these documents so we can come to our own conclusions.* (Emphasis supplied.)

The Respondent's position is also inconsistent with Butler's statement of the scope of the investigation as set forth in his memorandum to Ward (Jt. Ex. 1). Ward was directed to conduct a general inquiry into the family relationships among the employees at The Dalles-John Day Project as well as whether "hiring, supervision or performance on the jobs have been unduly influenced by said family relationships in violation of any laws, regulations, or policy." That language indicates that Ward had been assigned to conduct a general inquiry into nepotism and that his assignment was broader in scope than the concerns which Brock had originally expressed to Butler.

In summary, neither the Union's statement of particularized need nor the scope of Butler's instructions to Ward were limited to an individual grievance, to a specific incident or to particular employees. The Union's statement of a particularized need, as set forth in Ferres' letter of September 22, 2003 (Jt. Ex. 4), is both detailed and nonconclusory. It sets forth the reason that it needed the report, the uses to which it would put the report and the nexus between those uses and the Union's statutory responsibilities. That information was sufficient to allow the Respondent to make an informed response. Therefore, the

Union met the standards for a statement of particularized need which were established by the Authority in *IRS*.⁷

The Respondent Did Not State a Legitimate Nondisclosure Interest

For the reasons set forth above, I have determined that the Union's statement of particularized need was sufficient to have obligated the Respondent to produce the requested information in the absence of a countervailing nondisclosure interest. The only nondisclosure interest articulated by the Respondent is contained in the last paragraph of the second page of Foster's letter of October 15, 2003 (Jt. Ex. 5).

In her letter Foster asserts that the report constitutes advice, guidance and counsel for management officials relating to collective bargaining. The stated rationale for this position is that "part of the reason the District investigated the issues" was that the Union suggested "that the matters to be investigated were grievable or otherwise actionable."⁸

In its post-hearing brief, the Respondent relies on the holding of the Authority in *National Labor Relations Board*, 38 FLRA 506 (1993) (NLRB), *vacated and remanded on other grounds sub nom. N.L.R.B. v. Federal Labor Relations Authority*, 952 F.2d 523 (D.C. Cir. 1992) in support of the

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Even if the Union's statement of particularized need had been linked solely to the nepotism grievance, it still would have been sufficient in spite of the Respondent's assertion that claims based on incidents prior to the date of the report are time-barred. The merits of an actual or prospective grievance play no part in determining whether an agency is required to produce requested information. All issues pertaining to contractual interpretation are to be determined by the Arbitrator rather than by the Authority, *Internal Revenue Service, Washington, DC and Internal Revenue Service, Omaha District, Omaha, Nebraska*, 25 FLRA 181, 185 (1987).

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In its post-hearing brief the Respondent has, for the first time, introduced the additional issue of the confidentiality of witnesses. That issue will not be considered since it was not raised at or around the time of the Union's request for the report, *IRS Austin*.

proposition that it need not disclose the report. The Respondent's reliance is misplaced. In *NLRB* the Authority construed "collective bargaining" as referring to the process of bargaining as opposed to the substantive issues over which the bargaining occurs, 38 FLRA at 519. The application of that distinction is fatal to the Respondent's position. Ward was not tasked with the responsibility of recommending a strategy for the Respondent to follow in dealing with the Union. His assignment was limited to the substantive issue of nepotism. While Ward's findings as to that issue might affect the Respondent's bargaining strategy, those findings are distinct from recommendations concerning the process of collective bargaining. To the extent that the report does contain advice, guidance and counsel for management officials relating to collective bargaining, those portions of the report may be sanitized.

The Union is Entitled to the Requested Information

In stating that the report would, at the most, be "relevant or useful" to the Union, Foster was echoing the language of the Authority in *IRS* that, in establishing a particularized need, the Union must go beyond a showing that the report would be relevant or useful, but must establish that it is "required in order for the union adequately to represent its members", 50 FLRA at 669.

The Respondent maintains that the Union's request was insufficient because there was no showing that the report was necessary. Contrary to the Respondent's assertions, the Authority has made it clear that a union is not to be held to a rigid standard in establishing a particularized need. As stated in *IRS*:

. . . a request need not be so specific as . . . to require a union to reveal its strategies or compromise the identity of potential grievants *Moreover, the degree of specificity required of a union must take into account the fact that, in many cases, . . . a union will not be aware of the contents of a requested document. (Id. at 670, n.13; emphasis supplied.)*

A finding as to whether an agency has improperly withheld requested information from a union is to be made by determining whether the union has established a particularized need and, if so, whether the agency's countervailing interest, if any, outweighs the union's need. As the Authority has emphasized, this analytic approach "is

not intended to impose an insurmountable burden on a party requesting information." 50 FLRA at 671.

The Respondent argues that, if it is compelled to produce the report, the Union will be encouraged to submit legally deficient grievances in order to obtain access to information for which it has no legitimate need (footnote 4 to Respondent's post-hearing brief). The simple answer to that argument is that, as indicated in *IRS* and its progeny, the interests of unions and agencies are to be balanced on a case by case basis. Suffice it to say that the Union's statement of particularized need in this case has been found to outweigh the conclusory nondisclosure statement of the Respondent.

In applying the analytical approach of *IRS*, I have, for the reasons stated herein, determined that the Respondent's statement of its nondisclosure interest does not outweigh the Union's statement of particularized need. Accordingly, I have concluded that the Respondent committed an unfair labor practice in violation of § 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with the portions of the report concerning nepotism as is required under § 7114(d)(4) of the Statute. I therefore recommend that the Authority adopt the following Order:

ORDER

Accordingly, I recommend that the Authority adopt the following Order:

IT IS HEREBY ORDERED, pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), that the Department of the Army, U.S. Army Corps of Engineers, Portland District, Portland, Oregon, shall:

1. Cease and desist from:

(a) Failing and refusing to provide the United Power Trades Organization (Union) with a copy of the portions of the 2002 AR 15-6 report concerning nepotism at the Dalles-John Day Project, including all relevant testimony, evidence and reports.

(b) In any like or related manner, interfering with, restraining or coercing its bargaining unit employees in the exercise of the rights assured them under the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide the United Power Trades Organization with a copy of the portions of the 2002 AR 15-6 report concerning nepotism at the Dalles-John Day Project, including all relevant testimony, evidence and reports.

(b) Post the attached Notice for 60 days at its facilities in the Portland District on forms to be furnished by the Authority. The Notice is to be signed by the Commander of the Portland District and is to be posted at all locations in the Portland District where employees represented by the Union are assigned, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the San Francisco Region of the Authority in writing,

within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, April 20, 2004.

Paul B. Lang
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Army, U.S. Army Corps of Engineers, Portland District, Portland, Oregon has violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the United Power Trades Organization with a copy of the portions of the 2002 AR 15-6 report concerning nepotism at the Dalles-John Day Project, including all relevant testimony, evidence and reports.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce bargaining unit employees in the exercise of the rights assured them under the Federal Service Labor-Management Relations Statute.

WE WILL provide the United Power Trades Organization with a copy of the portions of the 2002 AR 15-6 report concerning nepotism at the Dalles-John Day Project, including all relevant testimony, evidence and reports.

(Agency)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: 415-356-5002.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. SF-CA-04-0066 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

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3888

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Dated: April 20, 2004
Washington, DC