

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

West Coast Water & Trucking, Inc.

Case No. 15-0462-PWH

From a Notice of Withholding of Contract Payments
issued by:

California Department of Transportation

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor West Coast Water & Trucking, Inc. (West Coast) submitted a timely request for review of the Notice of Withholding of Contract Payments (Notice) issued by California Department of Transportation (Caltrans) with respect to the Construction on State Highway I-5 (Project) in San Joaquin County. The Notice determined that \$63,244.33 in unpaid prevailing wages and statutory penalties was due. The Hearing Officer, Ed Kunnes, conducted a Hearing on the Merits on March 30, 2016, and April 18, 2016, in Sacramento, California. Steve Holden appeared for West Coast, and Aleksandra Sachowicz appeared for Caltrans. The parties submitted the matter for decision on April 18, 2016.

The issues for decision are:

- Whether the affected workers performed work covered by Public Works Law subject to payment of prevailing wages.
- Whether the Notice correctly found that West Coast had failed to report and pay the required prevailing wages for all hours worked on the Project by the affected workers.
- Whether Caltrans' assessment of penalties under Labor Code section 1775¹ at the

¹ All further statutory references are to the California Labor Code, unless otherwise indicated.

mitigated rate of \$50.00 constituted an abuse of discretion.

- Whether West Coast failed to pay the required prevailing wage rates for overtime work and therefore was liable for penalties under section 1813.
- Whether the Director should waive liquidated damages because West Coast has demonstrated substantial grounds for appealing the Notice.

The Director finds that West Coast has failed to carry its burden of proving that the basis of the Notice was incorrect. Therefore, the Director issues this Decision affirming the Notice. West Coast has made a timely deposit of the full amount of the Notice pursuant to section 1742.1, subdivision (b), and thus, West Coast is not liable for liquidated damages. Notwithstanding, West Coast demonstrated that it had substantial grounds to believe the assessment or notice to be an error.

FACTS

Caltrans advertised the Project for bid on February 14, 2011, and accepted bids on April 6, 2011. Caltrans awarded the contract to R & L Brosamer, Inc. (R & L Brosamer), and R & L Brosamer subcontracted with West Coast to provide dust control and compaction for the Project. West Coast's employees worked on the Project from approximately October 31, 2011, through May 25, 2014.

Applicable Prevailing Wage Determinations (PWDs): The following applicable PWDs and scopes of work were in effect on the bid advertisement date:

Teamster for Northern California (NC-23-261-1-2009-1): This is the rate used in the Notice for operating water trucks less than 7000 gallons.² Group 2 is the proper classification.

Teamster for Northern California (Special Single Shift Rate) (NC-23-261-1-2009-1A): This is the rate used in the Notice for operating water trucks less than 7000gallons.³

² Throughout the relevant time, the prevailing hourly wage due under the Teamster PWD was \$46.50 comprised of a base rate of \$27.43, fringe benefits totaling \$18.32 and a training fund contribution of \$0.75. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

³ Throughout the relevant period, the prevailing hourly wage due under the Teamster PWD for Special Single Rate was \$48.50 comprised of a base rate of \$29.43, fringe benefits totaling \$18.32 and a training

Group 2 is the proper classification.

The parties had fifteen witnesses testify over the two days of hearings. The witnesses for Caltrans were resident engineers, assistant resident engineers, field inspectors, a volunteer inspector, a West Coast worker and a labor compliance officer. The witnesses for West Coast were its workers, R & L Brosamer employees, and the owner of West Coast. Caltrans and West Coast developed testimony that generally supported, with a few minor contradictions, a complete story of the Project with regard to on-hauling water and dewatering.

Caltrans elicited testimony regarding dewatering that demonstrated workers used water trucks to siphon water where rainwater had accumulated on the Project. The worker(s) disbursed the siphoned water throughout the Project and dumped water offsite. West Coast did not contest that this portion of the work was covered work subject to the prevailing wage. However, West Coast paid \$21.00 as opposed to \$46.50, the teamster rate, for the dewatering. The dewatering amounted to a very small percentage of the overall work performed by West Coast.

Without exception, the workers obtained water from hydrants on adjacent surface streets. R & L Brosamer arranged for meters on the hydrants. California Water Service Company, a public water utility, billed R & L Brosamer based on the meters. Depending on traffic and depending on the location along the stretch of highway on which they worked, the workers took anywhere from an hour to twenty minutes to make a full circle from exiting empty to returning full. At times, two trucks worked in tandem. There were some outlying time estimates but the half hour to forty-five minute range was generally the period in which the workers were replenishing their water supply and returning to the construction site. This testimony, however, did not discriminate between the time spent driving on Highway 5 as opposed to the time spent driving on the adjacent surface street.

Witnesses for West Coast testified to a general estimate of ten minutes to unload the water from the truck when the worker performed water grading, compaction or dust control. Notwithstanding, Caltrans' Daily Reports showed the truckers on the job site for

fund contribution of \$0.75. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

blocks of time up to 8 hours. No doubt there were moments on the jobsite when the trucks were stationary to spray water on an area surrounding a pipe or to load a buffalo, which supplied water to the crusher but these appeared to be incidental to the main work of water grading, compaction and dust control. It is unlikely the truckers were regularly on the jobsite for 8-hour stretches but it seems equally improbable that the truckers were only on the jobsite for ten-minute intervals. Overall, the testimony paints an image of water trucks constantly in motion circling from the work site to the nearest hydrant.

The workers would hook up the truck to the hydrant, fill the truck with approximately 3700 gallons of water, drive the truck to the construction site, and spray the water as directed by the prime contractor and return to fill up at the hydrant. The drivers rarely stepped out of their trucks on the jobsite to hook up hoses or spray water. They mostly drove the water truck near the slope of the highway or over the unfinished roadway while flipping switches to activate various outside nozzles that would supply water to control dust or to compact the soil or aggregate subbase or to water grade.

At practically every point of the on-hauling work, the workers used water to achieve compaction, dust either control or grading.

The Notice: Caltrans served the Notice on West Coast on September 9, 2015. Caltrans found that West Coast failed to pay the required prevailing wages, including the required prevailing wage rate for overtime. Caltrans found a total of \$48,744.33 in underpaid prevailing wages, including \$7,123.99 in unpaid training fund contributions. Caltrans assessed penalties under section 1775 of \$50.00 per violation for 221 violations, totaling \$11,050.00. Caltrans determined penalties at the rate of \$50.00 per violation based on numerous letters Caltrans sent to West Coast detailing the violation. Caltrans requested that the Director increase the penalties to the maximum rate; however, Caltrans failed to reflect the maximum rate on its Notice. It would violate due process to increase the penalties after the Hearing on Merits began. Nor is this a case, which warrants the maximum penalty as detailed below. In addition, Caltrans assessed penalties under section 1813 for 138 overtime violations, at the statutory rate of \$25.00 per violation, totaling \$3,450.00.

The parties stipulated that West Coast deposited the full amount of the Notice with the Department of Industrial Relations with a request to hold the deposit in escrow pending administrative and judicial review. Even if the parties had not stipulated to the deposit, the Director for the reasons stated below would find that West Coast was not subject to liquidated damages because it demonstrated substantial grounds for appealing the Notice.

The parties' stipulated facts are set forth as follows:

1. Caltrans timely served the Notice.
2. West Coast timely filed the Request for Review.
3. West Coast deposited the amount of the Notice with DIR.

Prior to the Hearing on the Merits, West Coast filed a motion to exclude the evidence of Caltrans based on an allegation that Caltrans failed to provide timely notice of opportunity to review evidence. By an order dated February 3, 2016, the Hearing Officer found that Caltrans provided timely notice of opportunity to review evidence and denied West Coast's motion to exclude evidence.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 [citations omitted]
(Lusardi).)

A Labor Compliance Program like Caltrans enforces prevailing wage requirements for the benefit of not only workers but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a); *Lusardi, supra* at p. 985.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who they paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if the affected contractor does not deposit the full amount shown owed on the Notice of Withholding within sixty days following its service under section 1771.6.

When Caltrans determines that a violation of the prevailing wage laws has occurred, Caltrans issues a written Notice of Withholding pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect.”

West Coast Was Required To Pay The Prevailing Rate For Teamster;
The Work Performed On The Project Was Covered Work Subject To
The Prevailing Wage.

1. The Teamster Prevailing Wage Rate.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers. If there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9; *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director

determines these rates and publishes general wage determinations, such as Teamster for Northern California (NC-23-261-1-2009-1), to inform all interested parties and the public of the applicable wage rates for the “craft, classification and type of work” employed in public works. (§ 1773.) Contractors and subcontractors have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 (*Ericsson*).)

The date on which the awarding body advertises for bids is the applicable prevailing wage rate. (§ 1773.2; *Ericsson, supra*.) Section 1773.2 requires the body that awards the contract specify the prevailing wage rates in the call for bids or alternatively inform prospective bidders that the rates are on file in the body’s principal office and post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) In the absence of a timely petition under section 1773.4, West Coast was bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass’n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.)

Section 1773.5 and related regulations set forth procedures through which any interested party may petition the Director to determine whether a specific type of work awarded or undertaken by a political subdivision is a public work. “The Director also has the authority to give opinions as to whether “a specific project or type of work” requires compliance with the Prevailing Wage Law.” (*State Bldg. and Const. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 295, *as modified on denial of reh'g* (May 16, 2008).)

2. The Material Supplier Exemption Is Inapplicable.

Both parties argued as though the case raised an on-hauling issue. (*O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434 (*Sansone*); *Williams v.*

SnSands Corporation (2007) 156 Cal.App.4th 742 (*Williams*); Case No. 04-0117-PWH, *Kern Asphalt Paving & Sealing Co., Inc.*, April 10, 2008 (*Kern Asphalt Paving*); Case No. 04-0180-PWH, *Triple E Trucking*, November 17, 2008 (*Triple E Trucking*.) The California appellate courts and DIR have analyzed these on-hauling cases to determine whether employers rightfully classified truckers as bona fide material suppliers. (*Ibid.*) Bona fide material suppliers are entitled to the material supplier exemption whereby the work is deemed uncovered and thus is not subject to payment of the prevailing wage. (*Ibid.*) However, none of the on-hauling cases in California involved water trucks or bringing water to a construction site. (*Ibid.*)

Sansone speaks of the material which is “immediately utilized on the improvement,” “immediately used on the improvement” and as an “integrated aspect of the flow process of construction” as belying a truly independent material supplier entitled to the material supplier exemption. (*O.G. Sansone Co. v. Department of Transportation, supra*, at p. 444.) *Williams* interprets these phrases to mean that, “a truly independent materials supplier . . . does not himself immediately and directly incorporate the hauled material into the ongoing public works project.” (*Williams v. SnSands Corporation, supra*, at p. 752.) The terminology that “the material was immediately incorporated” into the project has become the touchstone of later cases involving on-hauling. (Case No. 04-0117-PWH; *Kern Asphalt Paving & Sealing Co., Inc., supra*, p. 11; Case No. 04-0180-PWH, *Triple E Trucking, supra*, p. 2.)

The definition of “incorporate” from the Webster’s Dictionary is “1 to combine or join with something already formed; make part of another thing; include; embody 2 to bring together into a single whole; merge.” (Webster’s New World Dict. (3d college ed. 1991) p. 684.) The written decisions analyzing on-hauling have done so for materials incorporated into the project. (*O.G. Sansone Co. v. Department of Transportation, supra*, at p. 339, [“incorporation of approximately 126,000 cubic yards of Class 3 aggregate subbase in to the construction project”]; *Williams v. SnSands Corp., supra*, at p. 744, [“hauling of materials for construction projects, including rock, sand, gravel, dirt, and related materials”]; Case No. 04-0117-PWH, *Kern Asphalt Paving & Sealing Co., Inc., supra*, at p. 2, [“Kern Asphalt instead had to obtain asphalt and base materials from Granite Construction”]; Case No. 04-0180-PWH, *Triple E Trucking, supra*, at p. 2

[“Bowman contracted with Vulcan Materials to provide base material (in the form of aggregate) and asphalt for the Project.”].)

Water is the distinction between this case and the California cases that have addressed on-hauling and the material supplier exemption. Distributing water to suppress dust, for compaction and for grading does not incorporate the water into the project (i.e. upon completion, there is no remaining water). Rather, the contractor is using water as an agent to achieve a specific task required by the contract. This indicates the larger point that the contractor does not hire water trucks to supply water but rather to provide the services of dust suppression, compaction and grading. This unique role of water trucks therefore does not constitute hauling as a material supply service but rather serves its own important function in the construction of roads and other development where dust suppression, compaction and/or grading is required. Hence, all work performed to achieve dust suppression, compaction and/or grading on a public work will be subject to the prevailing wage for the classification of the work performed.

Additionally, West Coast performed dewatering of flooded areas on the Project where rainwater had accumulated. The testimony, without contradiction, confirmed that the dewatering was necessary to achieve compaction and to continue other contracted work on the Project. (*Williams v. SnSands Corp. supra*, at p. 752.) There appears little or no argument disputing that the dewatering was covered work subject to the prevailing wage law.

Consequently, because West Coast did not pay the prevailing wages specified for Teamster, and the scope of work-provisions for that classification encompassed water trucks, it violated its statutory obligation to pay prevailing wages.

Caltrans' Penalty Assessment Under Section 1775 Is Appropriate.

Section 1775, subdivision (a) states in relevant part:

(a)(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract

by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than forty dollars (\$40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) The penalty may not be less than eighty dollars (\$80) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars (\$120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[4]

(C) If the amount due under this section is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to this section.

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

(E) The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

⁴ Section 1777.1, subdivision (e) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or deliberately refuses to comply with its provisions."

The Director's review of the Labor Commissioner's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ..." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

At the Hearing on the Merits, Caltrans moved to amend the Notice to increase the penalty rate from \$50.00 to the statutory maximum of \$200.00 per violation. The Hearing Officer denied the motion, finding that it would violate West Coast's due process rights to raise the penalty rate at the Hearing on the Merits without prior notice. Notwithstanding, West Coast has not shown an abuse of discretion at the mitigated rate assessed and, accordingly, the Director affirms the assessment of penalties at the rate of \$50.00 for 221 violations.

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project.

Section 1813 states, in pertinent part, as follows:

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ...

Section 1815 states in full as follows:

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant

to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.

The record establishes that West Coast violated section 1815 by paying less than the required prevailing overtime wage rate for 138 overtime violations, at the statutory rate of \$25.00 per violation, totaling \$3,450.00. Unlike section 1775 above, section 1813 does not give Caltrans any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the Director affirms the assessment of penalties under section 1813, as assessed, for \$3,450.00 for 138 violations.

West Coast Is Not Liable For Liquidated Damages.

Section 1742.1, subdivision (a) provides in pertinent part as follows:

After 60 days following the service of . . . a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the . . . notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the . . . notice with respect to a portion of the unpaid wages covered by the . . . notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Section 1742.1, subdivision (b), however, provides a safe harbor from liquidated damages when the full amount of the Notice is deposited with the Department, providing:

Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the . . . notice, including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the . . . notice, for the department to hold in escrow pending administrative and judicial review. The department shall release such funds, plus any interest earned, at the conclusion of all administrative and judicial review to the persons or entities who are found to be entitled to such funds.

The stipulation on the record shows that West Coast made a timely deposit of the full amount of the Notice pursuant to section 1742.1, subdivision (b). Accordingly, West Coast has no liability for liquidated damages on the Project. Additionally, West Coast demonstrated that it had substantial grounds for appealing the Notice due to the uncertainty of the law as concerns water trucks.

FINDINGS AND ORDER

1. Affected subcontractor West Coast Water & Trucking, Inc. filed a timely Request for Review of the Notice of Withholding of Contract Payments issued by California Department of Transportation with respect to the Project.

2. West Coast failed to pay its workers the required prevailing wages for the disputed work. The portions of the Notice reclassifying workers to Teamster for that work, and the associated penalties assessed under sections 1775 and 1813, are therefore affirmed. West Coast underpaid its workers in the aggregate amount of \$48,744.33 for their work on the Project.

3. Caltrans did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$50.00 per violation, and the resulting total penalty of \$11,005.00, as assessed, for 221 violations is affirmed.

4. Penalties under section 1813 at the rate of \$25.00 per violation are due for 138 violations on the Project, for a total of \$3,450.00 in penalties.

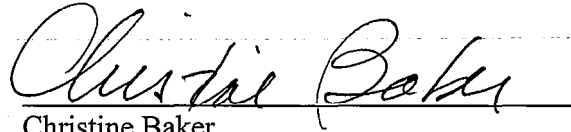
5. The amounts found remaining due in the Notice as affirmed by this Decision are as follows:

Wages Due:	\$48,744.33
Penalties under section 1775, subdivision (a):	\$11,050.00
Penalties under section 1813:	\$3,450.00
TOTAL:	\$63,244.33

The Notice of Withholding of Contract Payments is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a notice of Findings, which shall be served with this Decision on the parties.

Dated:

6/24/2016



Christine Baker
Director of Industrial Relations