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BARGAINING ISSUES:

POST 9/11 WORKPLACE SECURITY

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I. INTRODUCTION

An Administration with a visceral antipathy toward unions and collective bargaining has used the tragedy of September 11, 2001 to suggest that unions are harmful to national security. When in the wake of the tragic events of September 11, 2001 the President declared that we were engaged in a "war on terrorism," the invocation of "war" was intended not merely as rhetoric to motivate a shocked public, but was also to set the stage for obtaining the latitude the courts have uniformly extended to the Executive in wartime. Despite the widespread accolades for the selfless work by so many unionized workers who responded to those events, the risk to civil liberties and the oft-criticized federal workers embodied in granting the Bush Administration a free hand appears obvious and frightening.

This threat to federal workers was soon realized when, shortly thereafter, the Administration announced it was exercising the President's prerogative to remove nearly 500 employees of the Department of Justice from the reach of the Federal Labor-Management Relations Statute on "national security" grounds. The Administration followed this initial action by denying collective bargaining rights to more than 56,000 airline security screeners employed by the Transportation Security Administration and more than 1,000 employees at the National Imagery and Mapping Agency. In addition, when creating the Department of Homeland Security, the Administration denied collective bargaining to all 170,000 employees of the new agency, including the more than 50,000 who had enjoyed union protection for more than half a century. This process of denying employees collective bargaining rights based on national security grounds is continuing in other agencies.

And yet, like the Reagan Administration's response to the strike by the Air Traffic Controllers, the framework for most of the Administration's actions has existed for decades. Although courts have historically suggested a *potential* conflict between national security and collective bargaining (based on the fear that Communist-dominated unions would interfere with the war effort), the Executive Branch, Congress, and the Judiciary were unwilling to presume the worst of unions and collective bargaining; collective bargaining presumed to be compatible with national security.

The Bush Administration operates on the dangerous presumption that, at least for federal employees, collective bargaining and union representation are incompatible with national security. And the Bush Administration takes this position without overtly questioning the patriotism of union officials; rather, it argues that the basic worker rights protected by collective bargaining – seniority, just cause, and a grievance/arbitration procedure – deny the management flexibility necessary to fight a war. The Bush Administration rationale is far more corrosive than the simple "Red baiting" of the World War II and Cold War eras.

Change has come more slowly in the private sector, even in the private sector related to the "military-industrial complex," where, one might expect, the war on terrorism would first affect employee rights. Although both employers and the Administration seem reluctant to place the private sector on "war footing," the threat to employee rights is clearly foreseeable. Here, too, the tools already have a firm basis in existing law.

After briefly summarizing the Bush Administration's pre-September 11 actions, this paper will review the law as it existed before September 11 and the ways the Bush Administration has utilized the available tools and has invented new tools to restrict collective bargaining and worker rights.

II. PRE-SEPTEMBER 11 ASSAULTS ON UNIONS AND WORKER RIGHTS

A. The Executive Order Quartet

Less than a month after taking office, on February 17, 2001, President George W. Bush issued four executive orders assaulting unions, workers, and cooperative labor-management relations. At the time, the Executive Orders were widely regarded as the Administration's payback for labor's active involvement in the 2000 campaign and the follow up effort to assist Vice President Gore's legal battle in the courts. In retrospect, the Executive Orders reveal the Administration's hostility to the labor movement and a disdain for worker rights.

1. Executive Order 13201: *Beck* Notices.[1] President Bush revoked Executive Order 12836,[2] issued by President Clinton on April 13, 1992, and revived Executive Order 12800,[3] issued by President George H. Bush shortly before the 1992 election. Executive Order 13201 requires any contractor with the government to post a notice informing employees that under federal law they cannot be required to join or maintain union membership in order to retain their jobs, and, if they are required to pay periodic dues and initiation fees under a union security agreement, they must be informed of their right to object to use of their payments and to obtain a refund for any union activities not related to collective bargaining, contract administration, and grievance adjustment.

In *UAW-Labor Employment and Training Corp. v. Chao*,[4] a divided panel of the District of Columbia Circuit held that Executive Order 13201 had a "sufficiently close nexus" to the federal government's procurement authority to survive preemption under *Garmon*.[5] The court's decision is one of the most defensive and tortuous decisions produced in this area of law.

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[1] 66 F.R. 11221 (2001): "Notification of Employee Rights Concerning Payment of Union Dues or Fees"

[2] 58 F.R. 7045 (1993).

[3] 57 F.R. 12985 (1992).

[4] 325 F. 3d 360 (D.C. Cir. 2003).

[5] *Building Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959).

2. Executive Order 13202: Project Labor Agreements.[6] President Bush prohibited the federal government and any government construction manager from requiring bidders and contractors to enter into or maintain agreements with labor organizations or to otherwise discriminate against bidders and contractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with labor organizations on construction projects. The Executive Order expressly revoked President Clinton's June 5, 1997 Memorandum, "Use of Project Labor Agreements for Federal Construction Purposes" and President Clinton's Executive Order12836 issued on February 1, 1993,[7] which, in turn, had revoked Executive Order 12818 issued by President George H. Bush on October 23, 1992.[8]

In *Building & Construction Trades Dept. v. Allbaugh (Wilson Bridge)*,[9] the Building Construction and Trades Department challenged the application of Executive Order 13202 to a project labor agreement between the State of Maryland and Parsons Constructors involving a six-year construction project to replace the Wilson Bridge, crossing the Potomac River as part of the "Beltway." Congress had appropriated $1.5 billion in federal financing for this project. The states of Maryland and Virginia were responsible for their sides of the bridge and interchanges. The District Court, relying on both *Garmon* and *Machinists* preemption, enjoined enforcement of the Order. The Court of Appeals reversed, ruling that *Garmon* and *Machinists* preemption applied only when the government was "regulating within a protected zone" and not when it is acting as a proprietor, "interact[ing] with private participants in the marketplace." The court found that the government acted as a proprietor on federally-funded as well as government-owned projects.[10]

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[6]66 F.R. 11225 (2001), *amended by* Executive Order 13208, 66 F.R. 18717 (2001): "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects."

[7]58 F.R. 7045 (1993).

[8]57 F.R. 48713 (1992).

[9]160 F.Supp.2d 90 (D.D.C. 2001) and 172 F.Supp.2d 67 (D.D.C. 2001), *rev'd*, 295 F.3d 28 (D.C. Cir. 2002), *cert. denied,* 154 L. Ed. 2d 912 (2003).

[10]In *Ohio State Building & Construction Trades Council v. Cuyahoga County Board of Commissioners,* 718 N.E.2d 951 (Ohio 2002), the Ohio Supreme Court criticized the D.C. Circuit's *Wilson* decision, finding that the court failed to explain its rationale for distinguishing its statements in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) concerning the probable illegality of President George H. Bush's Executive Order 12818. The Ohio Supreme Court stated that the D.C. Circuit's reasoning that the government had acted in a proprietary rather than regulatory capacity "places the ... cart before the horse" and "assumes that a state acts as a market participant by doing what a private actor may do under the NLRA." *Id.* at 968-969. See *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) ("*Boston*

(continued...)

3. Executive Order 13203: Labor-Management Partnerships.[11] President Bush revoked President Clinton's October 1, 1993 Executive Order 12871[12] which had established a National Partnership Council, required agencies to establish labor-management partnerships, and required negotiations over subjects which the management rights clause of 5 U.S.C. §7106(b)(1) deemed nonnegotiable. President Bush's Executive Order was largely gratuitous; the Clinton Executive Order had intended to improve the internal management of the executive branch without creating any enforceable substantive or procedural rights.

4. Executive Order 13204: Worker Displacement.[13] President Bush rescinded Executive Order 12933,[14] which had required that, with regard to contracts for federal buildings, successive contractors be required to offer a right of first refusal of employment to employees of the prior contractor. President Clinton's Executive Order had assisted in stabilizing the employment of janitors, cleaning personnel, and other service employees.

B. Privatization

In February 2001, President Bush announced his Competitive Sourcing Initiative, calling on agencies to create a market-based government unafraid of competition, innovation and choice. The Office of Management and Budget revamped the primary tool for achieving this competition, OMB Circular A-76.[15] The revisions would significantly expand the use of public-private competition by eliminating exceptions that have permitted federal agencies to provide services to one another on a sole-source basis under reimbursable fee-for-service agreements and requiring periodic recompetition of commercial activities performed for the government.[16]

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[10](...continued)
Harbor").

[11]66 F.R. 11227 (2001): "Revocation of Executive Order and Presidential Memorandum Concerning Labor-Management Partnerships"

[12]58 F.R. 52201 (1993).

[13]66 F.R. 11228 (2001): "Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts"

[14]62 F.R. 28175 (1994).

[15]*See* 67 F.R. 69769 (2002) and 68 F.R. 48961 (2003).

[16]On September 9, 2003, the House passed the Van Hollen Amendment to the 2004 Transportation, Treasury, and Independent Agencies Appropriations Act, prohibiting OMB from expending funds to implement the revisions to Circular A-76.

The ostensible purpose of the Bush Administration's plan to open up 850,000 federal jobs to private competition is to promote efficiency. Competitive vigor, we are told, will end bureaucratic sloth; costs will go down, and everyone – except for a handful of "overpaid" union members — will be better off. Reform may actually save a few dollars. But no one believes that privatizing much of the federal government – a step that the Administration says it can take without any new legislation – is really motivated by a desire to reduce costs. Privatization is a way to break a stronghold of union power.

III. PRIVATE SECTOR EMPLOYMENT

A. Pre-existing Limits on Collective Bargaining and Employee Rights

1. Collective Bargaining Is Consistent With National Security. World War II presented the first opportunity to consider the relationship between collective bargaining, national security, and loyalty to the employer. Not surprisingly, collective bargaining passed these early tests.

In *NLRB v. Atkins & Co.*,[17] and *NLRB v. Jones & Laughlin Steel Corp.*,[18] a divided Supreme Court concluded that militarized plant guards were statutory "employees" and that collective bargaining "would [not] make them any less loyal to their employer in carrying out their tasks." The Court refused to "assume ... that labor organizations will make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards in the performance of their obligations to their employers." Militarization, the Court concluded, would not change the guards' status unless the Army obtained control over all matters which would form the basis for collective bargaining. The Court noted that the Army's regulations expressly permitted collective bargaining and prohibited activity which would interfere with the guards' military obligations.

Rejecting an employer's assertion that collective bargaining would not be conducive to national security, the NLRB found that there was no conflict between self-organization for the purposes of collective bargaining and employees' faithful performance of their duty. The NLRB expressly refused to

> assume that the [Union] will make demands upon its members so as to decrease their loyalty and efficiency in the performance of their obligations to the United States Government and the Employer. If there is any danger that the patrolmen may not faithfully perform their duties in the interest of national security, the remedy is not in the denial to the patrolmen of their statutory right to organize for purposes of

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[17]331 U.S. 398 (1947). The Court agreed with the NLRB that the guards could not be in the same bargaining unit with the plant's production employees.

[18]331 U.S. 416 (1947).

> collective bargaining. The remedy, if any, lies within the penal laws enacted by Congress for deterring and punishing disloyalty and infidelity concerning the atomic energy process.[19]

We can only hope that the views expressed in these decisions, reflecting the Nation's experience in World War II and expectations for the approaching Cold War, survive the current war on terrorism.

2. The NLRB's Discretionary Jurisdictional Standard. The NLRB has always asserted jurisdiction over private sector employers intimately involved in national security. In 1938, the NLRB asserted jurisdiction over a plant whose sales of submarines to the United States Navy generated between 78% and 96% of the plant's revenue over a three year period. The NLRB found that the employer's unfair labor practices "have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."[20] In 1941, the NLRB asserted jurisdiction over a plant despite the assertion that "the Company is a large industry engaged in national defense whose seizure [in a strike] would paralyze vital manufacturing of war defense products."[21]

Under its National Defense Enterprises jurisdictional standard, the NLRB will assert jurisdiction where a substantial impact on the national defense can be shown, irrespective of whether the employer's operations satisfy any other jurisdictional standard.[22] Applying this standard, the Board has asserted jurisdiction over corporations providing security services at federal facilities;[23] a corporation providing maintenance and operations support to the Marine Corps for combat equipment prepositioned on ships located around the world;[24] a corporation operating a research and

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[19] *General Electric Co.*, 85 NLRB 1316 (1949).

[20] *Electric Boat Company*, 7 NLRB 572, 575-577, 592 (1938).

[21] *Ford Motor Company*, 30 NLRB 985, 987 (1941).

[22] *Ready Mix Concrete Materials, Inc.*, 122 NLRB 318 (1958); *Geronimo Service Co.*, 129 NLRB 366 (1960).

[23] *Unlimited Security, Inc.*, 338 NLRB No. 58 (2002) (FBI building); *Baywatch Security and Investigations*, 337 NLRB No. 70 (2002) (military base); *Security U.S.A.*, 328 NLRB 374 (1999) (NASA facility).

[24] *Steelworkers Local 9292*, 336 NLRB No. 2 (2001).

development facility supporting the national space program;[25] and a corporation providing maintenance services at federal facilities.[26]

During World War II, the NLRB rejected the argument that a private sector federal contractor was not engaged in interstate commerce. The employer operated a Texas ordnance plant (which, along with its equipment, and all material and supplies) was the property of the War Department. The employer was reimbursed by the War Department for expenses incurred in operating the plant; and the bulk of all materials and supplies were purchased by the War Department. The NLRB asserted jurisdiction because a substantial amount of the goods produced at the plant was shipped by the War Department to points outside the State of Texas.[27]

3. The Federal Government's Ability to Limit Private Sector Bargaining. The NLRB has suggested in a post World War II case that it would decline jurisdiction over government contractors at the request of the federal government. In *Fairchild Engine and Airplane Corp.*,[28] the NLRB rejected the employer's argument that a multiplicity of craft bargaining units would lead to jurisdictional disputes between the crafts which could not be settled without the disclosure of sensitive information. The NLRB determined that it could not anticipate such disputes but that if they did arise, under the laws regulating atomic energy, the employer could not and would not be permitted to divulge information the AEC "should deem inimical to the national security." The NLRB asserted that the AEC had assented to collective bargaining among the employees without qualification and "[i]t is only because of this assent that the Board has assumed jurisdiction in this case."

Shortly thereafter, the NLRB refused to find that a private sector employer's employees performing work under contract to the AEC may be denied representation for collective bargaining purposes on the ground that they are AEC employees. However, the NLRB placed the employees performing AEC-related work in a bargaining unit separate from the employees in the employer's commercial operations. The NLRB further provided that any certification resulting from the directed elections of employees will be conditioned upon compliance by certified unions with the AEC's security requirements.[29]

4. Governmental Function or Control Exemption. The National Labor Relations Act has always excluded from its coverage federal and state employees. However, while the Act

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[25] *Aerospace Corporation*, 331 NLRB 561 (2000).

[26] *McDonald Douglas Aerospace Services Co.*, 326 NLRB 1391 (1998).

[27] *Lone Star Defense Corporation*, 63 NLRB 579 (1945).

[28] 88 NLRB 99 (1950).

[29] *General Electric Co.*, 89 NLRB 726 (1950).

exempts "political subdivisions" of a state from the definition of employer, it does not exempt subdivisions of the federal government.[30] Notwithstanding the seemingly straightforward distinction between what is the government and what is not, the NLRB has applied various tests over the years to determine the Board's jurisdiction in this area. After many years of examining the relationships between private entities and government entities and applying a number of different tests to determine whether or not the employer was truly a private employer or the arm of the state or federal government,[31] in *Management Training Corp.,*[32] the NLRB determined that it would assert jurisdiction when the employer meets the statutory definition of "employer" and meets the applicable

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[30]29 U.S.C. §152(2) states, in pertinent part, as follows:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, ...

Therefore, in *Radio Free Europe/Radio Liberty*, 262 NLRB 549 (1982), the NLRB rejected the employer's claim that because it was totally funded by and responsible to the federal government, it should be exempt from the Act. The NLRB then applied the *National Transportation Service* "right of control" test and determined that the employer had sufficient control over its personnel to warrant NLRB jurisdiction.

[31]*See Res-Care*, 280 NLRB 670 (1986) (NLRB considers the relationship between the employer and the exempt authority to determine whether the exempt agency controls economic terms and conditions of employment to the extent that meaningful collective bargaining is precluded); *National Transportation*, 240 NLRB 565 (1979); *Rural Fire Protection Co.,* 216 NLRB 584 (1975) (the "intimate connection" test).

[32]317 NLRB 1355 (1995), *motion for reconsideration denied*, 320 NLRB 131 (1995) . The NLRB reasoned, in part, that the Service Contract Act, 41 U.S.C. §351, and regulations implementing the Job Training Partnership Act, 20 C.F.R. §684.120(b)(3) and (5), both permit collective bargaining by federal contractors. The majority also recognized that non-economic terms of employment may be the most critical issues, especially in a poor economy.

Member Stephens' concurrence would have adopted a jurisdictional test combining the statutory definitions of "employer" and "employee." He relied upon *NLRB v. Atkins & Co.*, 331 U.S. 398 (1947), which affirmed the Board's assertion of jurisdiction over a weapons manufacturer with respect to its plant guards who were militarized and over which the Department of War exercised certain controls and retained certain authority. Citing *Atkins*, Member Stephens would have determined "whether the putative employer retained a sufficient residual measure of control over the terms and conditions of employment [of the employees] so that they might fairly be described as [its] employees," whether the employer met the statutory "commerce" test, and whether it was a "political subdivision" within *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

monetary jurisdictional standard; the NLRB expressly refused to consider the exempt agency's control over the bargaining relationship and whether the exempt agency might be considered a joint employer. Five Circuits have approved *Management Training Corp.* [33]

5. Privatization and Successorship. Under the NLRB's successorship doctrine, if the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the new employer is the successor and assumes the predecessor's bargaining obligation. The NLRB's inquiry focuses on "substantial continuity" of the employing entity in terms of job situations and expectation of continued representation, measured from the "employees' perspective." In a successorship situation, the alleged successor who hires a majority of its employees from the predecessor in a basically unchanged operation has the heavy burden of proving the historical unit it takes over is inappropriate.[34]

The usual presumptions of majority status inherent in NLRB law apply in successorship situations to ensure stability in collective-bargaining relationships.[35] Such presumptions include

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[33] *NLRB v. YWCA,* 192 F.3d 1111 (8th Cir. 1999*), Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999); *NLRB v. Federal Sec.*, 154 F.3d. 751 (7th Cir. 1998)*; Pikeville United Methodist Hosp. v. USW,* 109 F.3d 1146 (6th Cir.1997); *Teledyne Econ. Dev. v. NLRB*, 108 F.3d 56 (4th Cir. 1997). *YWCA* and *Teledyne* involve private employers contracting with the federal government. Neither case involves a contractor for a defense-type agency or for national security or defense-related work. Note that in *Teledyne*, 108 F.3d at 56 n.1, the court of appeals specifically rejected the argument that the Supreme Court in *Atkins* had prescribed a rule involving the degree of control exercised by an exempt entity over a non-exempt entity and referred to the Board's "considerable discretion" in determining its jurisdiction over non-exempt private entities.

In *Arco Management Corp. v. Bevona*, 215 F.Supp. 2d 407 (S.D.N.Y. 2002), the employer argued that, as the court-appointed receiver of property in possession of the federal government, it was not an employer engaged in interstate commerce within the meaning of 29 U.S.C. §301 and 29 U.S.C. §152(2). At the request of the U.S. Attorney, the NLRB filed a memorandum asserting that "the unambiguous language [of the Act] exempts only the United States itself" and that "a connection with the federal government" provided no exemption from the Act. The court found that it had jurisdiction under §301. Although acknowledging that *National Transportation* and *Management Training Corp.* involved its discretionary, rather than its statutory jurisdiction which the district court asserted that it was applying, the court nonetheless specifically relied on the decisions of the Eighth, Tenth, Sixth, and Fourth Circuits approving *Management Training Corp.*

[34] *Fall River Dyeing Corp. v. N.L.R.B.*, 482 U.S. 27, 41-42 (1987); *NLRB v. Burns Int'l Servs.*, 406 U.S. 272, 278-279 (1972).

[35] *Fall River*, 482 U.S. at 37-39. See also *Saks Fifth Avenue*, 247 NLRB 1047, 1051 and n. 10 (1980), *enf'd*, 634 F.2d 681 (2nd Cir. 1980).

those that flow from voluntary or historical recognition and contractual relationships.[36] A mere diminution in the size of a successor's unit, as compared with that of the predecessor, does not change the nature of the employing entity so as to defeat the employees' expectation in continued representation by their union.[37] As the Seventh Circuit has recognized, "the Board may treat a much-reduced bargaining unit as a miniature of the former unit."[38]

In several cases, the NLRB has held that a private sector employer which assumes the functions of a public sector employer is a successor obligated to bargain with the union which represented the employees when they were government employees. *Community Hospitals of Central California*, 335 NLRB No. 87 (2001); *Lincoln Park Zoological Society*, 322 NLRB 263 (1996), *enf'd*, 116 F.3d 216 (7th Cir. 1997) (private sector employer took over work performed by only 3% of the government bargaining unit);[39] *JMM Operational Services,* 316 NLRB 6 (1995); *Allegheny General Hospital*, 230 NLRB 954 (1977).[40]

6. Union Security and Federal Enclaves. There are three types of legislative jurisdiction, exclusive, concurrent and partial. The type of legislative jurisdiction the federal government possesses over a specific parcel of land directly affects the federal-state relations in that it determines what law will apply. Exclusive legislative jurisdiction applies to those areas where the federal government possesses all legislative authority, with no authority reserved to the state, except the right to serve process resulting from activities or incidents which occurred off the land. Anytime the federal government has been granted exclusive jurisdiction, state "right-to work" laws generally do not apply to the federal enclave.[41] Concurrent legislative jurisdiction applies to property where the state reserved or obtained the right to exercise all legislative authority concurrent with the federal

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[36]*Saks, supra*; *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 721 (1994); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1247 (D.C. Cir. 1994).

[37]*Fall River, supra*, 482 U.S. 27, 46 n. 12 (1987). See also *Zim's IGA Foodliner v. NLRB*, 495 F.2d 1131, 1141 (7th Cir. 1974), *cert. denied*, 419 U.S. 838 (1974); *Hydrolines, Inc.*, 305 NLRB 416, 423 (1991).

[38]*Zim's Foodliner, supra*.

[39]On appeal, the company challenged the Union's majority status, but did not appeal from the NLRB's determination that it was a successive employer. Thus, the court did not "explore[] the ramifications of the public to private transition." 116 F.3d at 220.

[40]In *Allegheny General Hospital*, the NLRB announced that it accords the same effect to elections and certification of state agencies as it does its own, if the state certification is consistent with federal notions of due process.

[41]*Lord v. IBEW Local Union No. 2088*, 646 F.2d 1057 (5th Cir. 1981).

government. In these areas, both state and federal laws (civil and criminal) apply and both sovereigns may exercise their authority, including the state's "right-to-work laws."[42]

7. Contract Bar and Federal Intervention in Bargaining. The NLRB may modify its representation case procedures if the federal government intervenes in collective bargaining. Following the expiration of their collective bargaining agreement, an Air Force prime contractor and the IAM continued to bargain and extended their contract on a day-to-day basis. Although President Kennedy appointed a board to assist the parties in negotiations, the employees rejected the board's and employer's proposal and struck. After the Secretary of Labor intervened, the parties entered into an interim strike settlement agreement and then resolved the dispute in part; employees at one of the two plants in the bargaining unit initially rejected the agreement. Subsequently, a rival union filed a petition seeking an election at the plant which had rejected the agreement. However, while the petition was pending, the employees at the second plant ratified the agreement. Reasoning that the petition was filed after the expiration date of the old agreement and before the execution of the new one, the Regional Director directed an election.

The NLRB stayed the election, finding that the circumstances presented a "special situation" which "superimpose[d] important considerations relating to national policy upon the considerations the Board is normally called upon to evaluate in determining whether at a given time the need for continuing stability in labor relations outweighs the employees' interest in freedom of choice." Because the petition was not filed until after the intervention efforts of the President and Secretary of Labor and while IAM was attempting to ratify the settlement, the NLRB held that "important considerations affecting the national interest" had to be considered and that the NLRA was not the "sole" instrument of national labor policy. Although the petitioner was willing to accept the IAM agreement, the Board determined that an election would have an unsettling effect and penalize the IAM for cooperating with the Government by surrendering its right to strike. The NLRB denied the petition, explaining that denying protection against representation challenges may discourage unions from cooperating with Presidential requests and that the public interest in stability outweighed the employees' Section 7 rights.[43]

B. Post-September 11 Adjudicatory Actions

As of October 1, 2003, the NLRB has not issued any decisions in which the September 11, 2001 events clearly affected substantive Board law. In part, of course, this is a result of the NLRB's backlog and changes in the Board's composition. There have, however, been a number of decisions, at the Board level, the General Counsel level, and the ALJ level, which indicate the September 11 tragedy will have some impact on the interpretation of the National Labor Relations Act.

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[42] *IAM Local Lodge 2771 v. Dyncorp*, 796 F. Supp. 976 (N.D. Tex. 1991); *Singleton v. IAM District 141*, 397 S.E.2d 856 (Va. 1990).

[43] *Aerojet-General Corp.*, 144 NLRB 368 (1963).

1. Expansion of Unprotected Activity. The NLRB recently held that an employee who sent an e-mail involving reports of anthrax at a company facility did not engage in protected activity because the e-mail contained three assertions made with reckless disregard for the truth or falsity of the assertions, In a separate concurrence, Chairman Battista indicated that in the aftermath of September 11, the anthrax attacks, and the employer's zero-tolerance policy for hoaxes or jokes related to anthrax, he may well have found the employee's comments unprotected "even if they were simply false." Recognizing the timing and context of the employee's e-mail, Member Liebman concluded that the employer's interest in preventing the spread of false information and fear about anthrax contamination outweigh the employee's interest in communicating false information and her own "embellishments ... to coworkers who did not even work at the warehouse in question."[44]

Similarly, the NLRB held that an employee who spoke at public "apprenticeship council" meetings about the safety record of a local iron fabrication company disparaged the company and left him unprotected by the Act. Specifically, the individual attended numerous public town meetings of a local apprenticeship council that was considering approving the company's apprenticeship program. After the company spoke at the meeting and stated that it had an excellent safety record, the individual, on behalf of himself and others, cited numerous OSHA violations of the Company and stated that "putting ironworkers up on steel is like throwing babies into the Merrimack River if they worked for [the company]." Thereafter, the individual applied for a job with the company which refused to hire him because of the statements at the public meeting. The Board assumed (without deciding) that the speech was protected concerted activity. The Board also conceded that the individual was not loud, did not use obscenity, did not engage in threatening conduct. Furthermore, the Board agreed the statements were made at a forum that was appropriate for raising the subject of the company's safety record. Nevertheless, the Board majority decided that

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[44] *Sprint/United Management Co.*, 339 NLRB No. 127 (2003). The ALJ rejected the employer's argument that the employee was not engaging in concerted activity, but found that the employee's activity was unprotected. She applied the test for the dissemination of written materials in *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1105 n.17 (2000), which refer to "deliberate falsity or maliciousness," "knowingly false" statements, statements made with "reckless disregard for their truth or falsity," malicious statements and "defamatory" statements. She concluded that certain of the employee's assertions were made with the knowledge that they were not true and that, although they related to terms and conditions of employment, the unsubstantiated allegations could have escaped to the public and ruined numerous business relationships.

QUERY : Wouldn't it be more appropriate in the case of at least some e-mail messages to apply the "opprobrious," "egregious," "offensive" and "profane" standard applicable to oral outbursts? *Atlantic Steel*, 245 NLRB 814, 816-817 (1979). Shouldn't the portion of the message which is knowingly false also be required to be a "material" or central element of the message?

the speech of the individual constituted "deliberate and outrageous exaggerations" which removed the individual from the protections of the Act.[45]

Although the NLRB long ago held that it would not examine the truth or falsity of statements made in representation campaigns[46] and has not yet abandoned the principle that labor-management confrontations lack the decorum of a tea party,[47] these decisions suggest that to avoid offending the new-found gentility required in labor disputes, all material critical of employers should be bland, unprovocative, ineffective, boring, contain no sarcasm, satire or illustrations. Perhaps criticism of unions will be equally restrained.

Other cases involving potential restrictions on previously protected activity are proceeding through the NLRB's processes. First, in an Advice Memorandum,[48] the General Counsel concluded that armed security guards at various federal office locations engaged in unprotected activity when they struck without providing sufficient advance notice. Although the walkout was coordinated with an AFL-CIO demonstration at a Federal Building protesting President Bush's energy policies, the federal buildings had been placed on heightened security because of the scheduled execution of Timothy McVeigh and a number of bomb threats received at federal offices in the area.

The General Counsel noted the general rules that the Act protects employees from reprisals for striking or joining in a strike without advance notice[49] and that employees are not required to act as an insurer and take every precaution to secure an employer's property for an indefinite period of time.[50] However, the right to strike is not absolute, and Section 7 has been interpreted not to protect

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[45] *American Steel Erectors, Inc.*, 339 NLRB No. 152 (2003). Member Liebman dissented and noted that because of the freewheeling nature of labor speech, the requisite level of misconduct sufficient to remove an individual from the protections of the Act is exceedingly high. Furthermore, Member Liebman pointed out that at the time the individual made the statements at issue, he was not employed by the company and had no duty of loyalty to the company.

[46] *Midland National Life Ins. Co.*, 263 NLRB 127 (1982).

[47] See, e.g., *Tri-County Manufacturing & Assembly, Inc.*, 335 NLRB 210 (2001).

[48] *Paige's Security Services, Inc.*, Case 32-CA-19075-1506-2017, 506-4067-9700, 506-6050-7560 (December 12, 2001).

[49] Citing *Montefiore Hospital and Medical Center*, 243 NLRB 681, 691 (1979), *enf'd in pert. part*, 621 F.2d 510 (2nd Cir. 1980).

[50] Citing *Reynolds & Manley Lumber Co.*, 104 NLRB 824, 828-829 (1953), *enf. denied*, 212 F.2d 155 (5th Cir. 1955). The NLRB has found walkouts protected where employees gave little or no advance notice to their employers, notwithstanding that some foreseeable risk of damage to the (continued...)

concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible.[51] Furthermore, the NLRB has held concerted activity unprotected where employees fail to take reasonable precautions to protect the employer's physical plant, equipment, or products from foreseeable imminent danger due to a sudden cessation of work This "health and safety" exception extends to ordinary rank-and-file employees whose work tasks involve responsibility for the property which might be damaged. Employees who strike in breach of such obligation engage in unprotected activity for which they may be discharged or subjected to other forms of discipline affecting their employment conditions.[52] The NLRB has applied this health and safety exception to require security personnel to give adequate notice prior to a work stoppage.[53] Moreover, actual harm is not required to find a sudden walkout to be unprotected. According to the NLRB, the test for whether the group's work stoppage loses the protection of the Act is not whether their action resulted in actual injury, but whether they failed to prevent such imminent damage as foreseeably would result from their sudden cessation of work.[54] Accordingly, the General Counsel concluded that the striking employees fell within the exceptional group that is required to provide notice before a work stoppage: "As members of the security detail at federal installations, the guards are entrusted with protecting the buildings, federal employees, and members of the public, from danger. Should they suddenly abandon their positions, imminent damage to property and lives could foreseeably result if people intending to cause harm are permitted to enter the buildings."

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[50](...continued)
employer's property or operation existed. *Federal Security, Inc.*, 318 NLRB 413, 421 (1995), *enf. denied*, 154 F.3d 751 (7th Cir. 1998); *Columbia Portland Cement Co.*, 294 NLRB 410, 422 (1989), *modified on other grounds*, 915 F.2d 253 (6th Cir. 1990) (strike protected where employees gave less than 30 minutes notice, notwithstanding damage to equipment); *Montefiore Hospital*, *supra* (no advance notice prior to sympathy strike by doctors involved in direct patient care).

[51]Citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

[52]Citing *Marshall Car Wheel and Foundry Co.*, 107 NLRB 314, 315 (1953), *enf. denied*, 218 F.2d 409 (7th Cir. 1955); *Reynolds & Manley Lumber Company, Inc.*, *supra*.

[53]*Federal Security, Inc.*, *supra*. The NLRB has upheld employer discipline and discharge of striking employees where employees failed to take reasonable measures to prevent injury to the health and safety of others. *General Chemical*, 290 NLRB 76, 83 (1988) (employees did not shut down equipment or notify supervisor regarding status of chemical process prior to walkout); *Carnegie-Illinois Steel Corp.*, 84 NLRB 851, 853 (1949) (supervisors on sympathy strike refused to cooperate with other supervisors to prevent damage to steel furnaces), *enf. denied*, 196 F.2d 459 (7th Cir. 1952).

[54]Citing *Vencare Ancillary Services, Inc.*, 334 NLRB No. 119, 10 (2001); *General Chemical Corp.*, 290 NLRB 76, 83 (1988); *Youth Consultation Service*, 205 NLRB 82, 86 (1973).

Second, an Administrative Law Judge has rejected the employer's rationale that its October 2001 adoption of a rule prohibiting off-duty employees from visiting the plant was related to employees' concerns involving terrorism following the September 11 attacks on the World Trade Center and the Pentagon. The ALJ found that the rule was motivated by anti-union animus rather than safety concerns.[55]

Third, although an employer cannot exclude union representatives from engaging in protected activity on public property, an Administrative Law Judge concluded that activity on public property could infringe on the employer's private property rights, for example, by creating a potentially dangerous traffic condition. Although the complaint failed to allege a denial of access or the discriminatory enforcement of a no-solicitation, no-distribution rule, the Judge found that permitting solicitations for Girl Scout cookies and for victims of the World Trade Center were "isolated 'beneficent acts'" permitted under Board law which did not require the employer to grant equal access to a union.[56] As employers become more conscious of threats to plant property, we can expect them to seek the right to restrict access not only to the employer's property but also to nearby public property.

Fourth, an Administrative Law Judge found that permitting employees to wear American flag pins or small red, white, and blue ribbons as a symbol of unity and expression of grief after the events of September 11 did not compromise the employer's policy requiring prescribed uniforms, name tags, and the lack of adornments other than a single button of prescribed size.[57]

2. Guards. A divided NLRB refused to disqualify a union from representing a unit of statutory guards because the union also represented public sector police, its bylaws permit private-sector non-guards to be associate members, and it solicits contributions from private sector employers. The majority found no "conflict of interest" based either in the Union's bylaws (which apparently permit non-guard membership) or in the possibility that public sector police members may investigate the guards. Dissenting Member Cowen would have remanded the case to the Regional Director for further hearing regarding petitioner's fund raising and membership practices.[58]

3. Union Access. In *Peck/Jones Constr. Co.*,[59] the NLRB held than an employer did not violate Section 8(a)(1) by denying two union business agents access to its construction site at Los

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[55]*Airtech, Inc.*, 2002 NLRB LEXIS 388 (August 26, 2002).

[56]*Super Foodtown, Inc.*, 2002 NLRB LEXIS 498 (October 10, 2002). *See Price Chopper,* 325 NLRB 186 (1997); *Hammary Mfg. Corp.,* 265 NLRB 57 n.4 (1982)

[57]*KSL Claremont*, 2003 NLRB LEXIS 297 (June 6, 2003).

[58]*Guardian Armored Assets*, 337 NLRB No. 90 (2002).

[59]338 NLRB No. 4 (2002).

Angeles International Airport. The union representatives failed to follow the sign-in rule which was not inconsistent with the contractual provision permitting union access which "will in no way interfere with the men during the working hours unless permission is granted by the individual employer." In his concurring opinion, Member Cowen noted that this case, which arose prior to September 11 should not "be read as any view how the Board will evaluate union access questions arising under the Federally mandated heightened security restrictions" currently in place in airports.[60]

C. Taft-Hartley Injunctive Relief

The Taft-Hartley Act has long permitted the federal government to seek to enjoin strikes or threatened strikes which "affect[] an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and ... imperil the national health or safety ...."[61] Utilizing this authority, on October 7, 2002, President Bush issued Executive Order 13275[62] convening a Board of Inquiry to examine a lockout at the West Coast ports. The government then sought and obtained a preliminary injunction against the lockout and strike. The District Court concluded, in part, that the lockout disrupted "the transport of essential military cargo" and interfered with the "global war on terrorism."[63]

IV. EMPLOYEE RIGHTS AND NATIONAL SECURITY

A. Private Sector Security Clearance

Private sector employees in a wide variety of industries will now share the burdens of employees in the trucking industry. Trucking companies have routinely discharged employees who were banned from a customer's property. Arbitrators and arbitration panels would find that the employer lacked just cause to discharge and that the customer's claims lacked merit. But because the customer was not a party to the collective bargaining agreement, the customer could not be compelled to rescind its ban. Unless the employer could be persuaded to find another route, the driver was out of luck, and out of a job.

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[60]Member Cowen would also have found that the agents' attempts to gain admittance to the site by calling to employees was inconsistent with the contract because it interfered with the men during their working hours. He also disagreed with any implication that a general contractor's maintenance and/or enforcement of any rule inconsistent with a subcontractor's collective bargaining agreement is unlawful and disagreed with any prior cases supporting that proposition.

[61]29 U.S.C. §178(a)(i) and (ii).

[62]67 F.R. 62869 (2002).

[63]*United States v. Pacific Maritime Association*, 229 F.Supp.2d 1008 (N.D. Cal. 2002).

Security clearance and site access clearance disputes extend the trucking access problem to every industry involved with national defense, national security, transportation, and public utilities. One can reasonably foresee employers and/or governments requiring clearance in the food and chemical industries.

Executive Order 10865[64] and Department of Defense Directive 5220.6[65] establish the Defense Industrial Personnel Security Clearance Review Program to implement procedures for granting and suspending security clearance for the employees of employers contracting for services with the federal government.[66] The private sector employer is notified of the need for a determination or a decision to revoke the employee's security clearance; the employee has the burden of appealing any adverse governmental decision and must affirmatively prove that the grant or continuance of his or her security clearance is "clearly consistent with the national interest."

The Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001[67] places additional restrictions on the Defense Department's grant or renewal of security clearances. New restrictions disqualify (1) persons convicted in either state or federal courts and sentenced to more than one year (regardless of the amount of time actually served); (2) persons discharged or dismissed from the Armed Forces under dishonorable conditions; (3) persons who are currently unlawful users or addicted to controlled substances, as defined by 21 U.S.C. §802; and (4) those who are mentally incompetent. The Secretary of Defense or of the particular agency may waive the new limitations, which apply retroactively (*i.e.*, even if a condition involving one of the four limitations was previously known and favorably resolved, it is relevant if a new periodic reinvestigation or request for investigation is made).[68]

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[64]"Safeguarding Classified Information Within Industry," 25 F.R. 1583 (February 24, 1960)

[65]DOD Directives and Records Division, Communications and Directives Directorate, (latest edition, April 9, 1999).

[66]The Executive Order and Directive apply not only to the various defense agencies, but also most, if not all other federal agencies, including, the Departments of Agriculture, Commerce, Interior, Justice, Labor, State, Transportation, Treasury, and Homeland Security, and the Environmental Protection Agency, Federal Emergency Management Agency, Federal Reserve System, General Accounting Office, General Services Administration, National Aeronautics and Space Administration, National Science Foundation, Small Business Administration, United States Arms Control and Disarmament Agency, United States International Trade Commission, and the United States Trade Representative.

[67]The restrictions are codified at 10 U.S.C. §986.

[68]*See* DOHA Operating Instruction No. 64, Processing Procedures for Cases Subject to 10 U.S.C. 986, dated July 10, 2001

A number of cases demonstrate the difficulty in challenging the loss of security clearance. First, in *Cafeteria & Restaurant Workers v. McElroy*,[69] the Supreme Court held that the due process clause does not entitle a cook who had been prohibited from working at a cafeteria on a naval gun factory because of her loss of security clearance to be informed of the specific grounds for her exclusion and a hearing to refute them. The four dissenters emphasized that "in the common understanding of the public with whom [the cook] must hereafter live and work, the term 'security risk' carries a much more sinister meaning" than a discharge for cause.

Second, in *U.S. v. Robel*,[70] the Court invalidated a statute making it a felony for a member of the Communist Party to work in a private sector defense facility. A divided Court concluded that the prohibition was an unconstitutional, overly broad infringement of the First Amendment right of association without any requirement that the individual employee be a security threat or even an "active" Party member. Of particular significance to our current debate, the majority stated as follows:

> Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties – the freedom of association – which makes the defense of the Nation worthwhile.

The Court specifically declined to balance national security and First Amendment interests, reasoning that both interests are equally "substantial" and that Congress bears the responsibility to ensure national security without conflicting with individual rights.

Third, a federal employee who is removed "for cause" may appeal to the Merit Systems Protection Board ("MSPB"), which reviews the discharge for procedural and substantive flaws, including the merits of the discharge.[71] A federal employee who is subject to summary removal based on national security concerns may not appeal to the MSPB, but has certain procedural protections afforded by agency review.[72] In *Department of the Navy v. Egan*,[73] the Supreme Court held that the MSPB lacked authority to review the merits of a "for cause" discharge based on the

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[69]367 U.S. 886 (1961).

[70]389 U.S. 258 (1967).

[71]5 U.S.C. §§7511-7514.

[72]5 U.S.C. §§7512(A), 7532.

[73]484 U.S. 518 (1988).

denial of a security clearance. The Court found it irrelevant that the Navy had not chosen the non-reviewable procedure; despite the Navy's choice of procedure, MSPB review was limited to ensuring that the employee has been provided his basic procedural due process rights.[74]

Finally, in *Public Service Electric & Gas Co. v. IBEW Local 94*,[75] a district court held that in an arbitration determining whether the employer had just cause for discharge, the union could not challenge the denial of site access privileges to a nuclear facility; thus, even if the discharge were not for just cause, the union could not secure reinstatement. The court first found that the applicable Nuclear Regulatory Commission regulations did not prevent the arbitration of site access issues pursuant to a grievance/arbitration provision in a collective bargaining agreement.[76] Despite acknowledging the federal policy favoring the arbitration of labor disputes and the presumption of arbitrability, the court held that the employer had not agreed to arbitrate site access issues, which were not expressly mentioned in the contract and which were not within the union's "zone of protected interests." Finally, the court determined that "in the instant matter which concerns the unique and critical issue of the safety of the public at large regarding nuclear power plants, the Court deems it necessary and appropriate that both [the employer and union] expressly agree to submit site access issues to arbitration and that this be specifically provided in the CBA."

Although *PSG&E* conflicts with the presumption of arbitrability and with decisions of other courts, the decision is based upon the language of the parties' grievance and arbitration clause. The lesson is clear: to ensure the arbitration of national security issues, unions must negotiate broad grievance provisions expressly reserving the right to arbitrate security and access disputes.

B. Public Sector Security Clearance

Executive Order 10450, "Security Requirements for Government Employment,"[77] governs the substantive determination of a grant, denial, or suspension of a government employee's security clearance, and thereby, his or her access to classified documents as well as areas or sites where classified information is available. and the governing procedures.

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[74]*See also Roach v. Department of the Army*, 82 MSPR 464 (1999), *aff'd*, 53 Fed. App. 922 (Fed. Cir. 2002) (when Congress expanded the definition of prohibited personnel practices to protect employees from agency retaliation for exercising whistleblowing rights, it did not make the denial, revocation, or suspension of a security clearance actionable as an IRA appeal or as an affirmative defense claim in an adverse action appeal.).

[75]140 F.Supp.2d 384 (D.N.J. 2001), *aff'd*, 27 Fed. Appx. 127 (3rd Cir. 2002).

[76]In fact, the regulations specifically contemplated the use of arbitration to permit employees to appeal the suspension or denial of access to nuclear power plants. 10 C.F.R. §§73.45(a)(4) and (e) and 73.56.

[77]18 F.R. 2489 (1953).

The Whistleblowing Protection Act's definition of "agency" excludes certain specifically listed agencies and, "as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities."[78] In *Czarkowski v. Department of the Navy*,[79] the Merit Systems Protection Board held that the Department of the Navy's Office of Special Projects is an excluded unit, even though it had not been excluded by the President under 5 U.S.C. 7103, on the basis that Executive Order 12,333[80] authorized the Secretary of Defense to use components of the Department of the Navy to carry out foreign intelligence and counterintelligence activities, and gave him the authority to issue "such appropriate directives and procedures as are necessary to implement this Order." Although the employee argued that the agency failed to show that it has the statutorily-required Presidential determination, the MSPB found that the employee, not the agency, bears the burden of proof. Most peculiarly, the MSPB accepted the agency's conditional offer of proof (accessible only to those with the correct security clearances – the employee's counsel, but not the employee) that one of its offices is engaged in foreign intelligence or counterintelligence.[81]

C. Surveillance and Privacy

The installation and use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining has been found analogous to physical examinations, drug/alcohol testing requirements, and polygraph testing. In furtherance of its bargaining request, the union is entitled to information concerning any existing cameras unilaterally installed by the employer; the employer

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[78] 5 U.S.C. §2302(a)(2)(C)(ii).

[79] 2003 MSPB LEXIS 368 (2003).

[80] "US Intelligence Activities," 46 F.R. 59941 (1981).

[81] *Czarkowski* distinguished *Lewark v. Department of Defense*, 91 MSPR 252 (2002), as based on the absence of evidence that the Secretary of Defense had made the required determination. In *Lewark*, the MSPB found that while the statute excluded from coverage agencies "as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities" (as well as the FBI, CIA, DIA, NIMA and NSA), no such specific determination that the agency had an intelligence or counterintelligence function had been made. The Board specifically rejected the agency's argument that E.O. 12,333 (1981) was a basis for such determination. *Lewark* did note that pursuant to prior judicial decisions, the head of an Executive agency, without specific delegation of authority, may "serve as the President's alter ego and make determinations assigned by statute to the President that directly relate to the agency's work." The composition of the MSPB changed between the issuance of the two decisions. Compare *Law v. U.S.*, 11 F.3d 1061, 1066-67 (Fed. Cir. 1993); *U.S. v. Fletcher,* 148 U.S. 84, 90-91 (1893); and *U.S. V. Farden*, 99 U.S. 10, 19 (1878) and 3 U.S.C. §302 with statutes prohibiting the delegation of Presidential authority, such as 18 U.S.C. §207(k)(4) and 22 U.S.C. §2799aa-1(b)(8).

may request bargaining over a confidentiality agreement.[82] The same principles would support the right to bargain over an employer's access to "private" employee e-mails.

An employee's right to privacy in the workplace depends upon the reasonableness of the expectation. For example, the surreptitious videotaping of models in their makeshift dressing room violated their reasonable expectation of privacy.[83] Because a psychologist employed by a state hospital had a reasonable expectation of privacy in his desk and files, any search of his office by his employer must be reasonable under all the circumstances whether engaged in for non-investigatory work-related purposes or to investigate allegations of work-related misconduct.[84] But a civilian engineer employed by Navy had no reasonable expectation of privacy in contents of his desk given the tight security maintained by his employer.[85] And employees cannot expect privacy in production areas of a plant.[86]

V. FEDERAL SECTOR EMPLOYMENT

A. Pre-existing Statutory Limits on Collective Bargaining

The Civil Service Reform Act of 1978 revised and codified the federal personnel system and, for the first time, provided federal employees with statutory labor-management relations and

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[82] *National Steel Corporation v. NLRB*, 324 F. 3d 928 (7th Cir. 2003); *Colgate-Palmolive Co.*, 323 NLRB 515 (1997).

[83] *Doe v. BPS Guard Services, Inc.*, 945 F.2d 1422 (8th Cir. 1991). See also *Hawaii v. Bonnell*, 856 P.2d 1265 (Haw. 1993) (hidden video camera in employee break room violated employees' right to privacy). But see *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176 (7th Cir. 1993) (video camera in storage and locker room to observe employees in those areas and to detect possible thief held least intrusive means to achieve proper business objective).

[84] *Ortega v. O'Connor*, 480 U.S. 709 (1987).

[85] *Schoengerdt v. United States*, 944 F.2d 483 (9th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992). See also *O'Brien v. KTIV Television*, 868 F. Supp. 1146 (N. D. Iowa 1994), *aff'd in rel part, rev'd on other grounds*, 64 F.3d 1188 (8th Cir. 1995) (employee's invasion of privacy claim for search of desk was rejected where employee's desk was not locked and contained information used by other employees).

[86] *Barksdale v. IBM*, 620 F. Supp 1380 (W.D.N.C. 1985), *aff'd w/o opinion*, 1 IER 560 (4th Cir. 1986) (observation of production activity to detect errors held not to violate employee privacy rights).

collective bargaining rights.[87] Nonetheless the statute provided the ability to exclude or limit the collective bargaining rights of employees in a number of ways.

1. Intelligence and National Security Agencies. The Federal Service Labor-Management Relations Statute specifically excludes a small number of agencies from its coverage[88] and authorizes the President to exclude certain agencies upon determining that the agency "performs intelligence or national security work" and that the statute "cannot be applied to that agency ... in a manner consistent with national security requirements and considerations."[89] Prior to September 11, the courts had already upheld this Presidential authority. In *AFGE, Int'l. Council of U.S. Marshals Service Locals, 210 v. Reagan*,[90] the court upheld the President's authority to exclude certain subdivisions of the U.S. Marshals Service from collective bargaining, finding that Executive Orders have a presumption of regularity and that, because Section 7103 did not require written findings in an exempting order, a court could not add that requirement.

Similarly, before September 11, other agency-particular statutes also restricted collective bargaining on the basis of national security concerns. For example, the National Imagery and Mapping Agency Act of 1996[91] permits the Director of the National Imagery and Mapping Agency (NIMA) to determine

> that the responsibilities of a position within a collective bargaining unit should be modified to include intelligence, counterintelligence, investigative, or security duties not previously assigned to that position and that the performance of the newly assigned duties directly affects the national security of the United States, then, upon such a modification of the responsibilities of that position, the position shall cease to be covered by the collective bargaining unit and the employee in that position shall cease to be entitled to representation by a labor organization accorded exclusive recognition for that collective bargaining unit.

The Director's determination is not subject to administrative or judicial review.

Utilizing this authority, on January 28, 2003, NIMA's Director determined that that after the September 11 terrorist attacks, all of the agency's workers had intelligence, investigative or security duties that collective bargaining rights could compromise. He terminated the collective

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[87] 5 U.S.C. §7100 *et seq.*

[88] 5 U.S.C. §7103(a)(3).

[89] 5 U.S.C. §7103(b).

[90] 870 F.2d 723 (D.C. Cir. 1989).

[91] 10 U.S.C. §461(c).

bargaining rights of two AFGE locals which had represented approximately 1,000 employees of NIMA and its predecessor agencies for over 20 years. Private contractor employees at the same location under the same supervisors and performing the same duties are currently still entitled to union representation.

2. FLRA Appropriate Unit Determinations. The Federal Labor Relations Authority (FLRA), the equivalent to the National Labor Relations Board for federal sector labor-management relations, has the exclusive authority to determine appropriate bargaining units, including the authority to exclude employees "engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or ... primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity."[92]

3. Management Rights and Internal Security Practices. The Statute also excludes certain "management rights" from collective bargaining. Significantly, the Statute declares that "nothing in this chapter shall affect the authority of any management official of any agency- (1) to determine the mission, budget, organization, number of employees, *and internal security practices of the agency* ..."[93] Under this provision, management's right to determine its internal security practices includes the right to determine the policies and practices that are necessary to safeguard its operations, personnel, and physical property against internal and external risk. Where an agency demonstrates a link or a reasonable connection between its goal of safeguarding its personnel, property, or operations and its practice or decision designed to implement that goal, a proposal that interferes with or negates the agency's practice or decision affects the agency's management rights.

This broad proscription is ameliorated somewhat by the following subsection which authorizes negotiations regarding both "procedures" management will observe when exercising any authority under the Section and "appropriate arrangements for employees adversely affected by the exercise" of management's authority under the Section.[94] Based on this provision, even before September 11 and the current Bush Administration, the FLRA found the vast majority of union proposals addressing searches, interrogations and inspections non-negotiable.[95]

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[92] 5 U.S.C. §7112(b)(6) and (7).

[93] 5 U.S.C. §7106(a)(1) (emphasis supplied).

[94] 5 U.S.C. §7106(b)(2) & (3).

[95] *Department of the Air Force, Scott AFB*, 16 FLRA 361 (1984). But see, *National Federation of Federal Employees, Local 2050 and Environmental Protection Agency*, 39 FLRA No. 70 (1990).

B. Post-September 11 Actions Affecting Federal Sector Collective Bargaining

1. National Security. In *Social Security Administration v. AFGE*, 58 FLRA No. 42 (2002), the FLRA requested the parties and the public to address two questions involving the issue of "national security" as defined in Section 7112(b)(6)[96] and the seminal case, *Dept. of Energy, Oak Ridge Operations*:[97] (1) whether and how the security work performed by certain electronics technicians and private security specialist positions within the Office of Protective Security Services, Division of Security Program Services of the Social Security Administration involves "national security" as defined in *Oak Ridge;* and (2) if such work does involve national security, does it "directly affect" national security as defined in *Oak Ridge*, and, if so, how?

Although the Office provides security oversight, including 24-hour security for all SSA facilities, the disputed positions do not require security clearance. The duties of the disputed positions included conducting site surveys of SSA offices nationwide to make recommendations concerning the design of security systems as well as writing and implementing security action plans, emergency plans and administrative manuals relating to security measures. The incumbents had access to security reviews and incident reports for SSA facilities nationwide and were responsible for designing, analyzing and monitoring the security of, and access to, SSA's database and physical facilities. They also participated in the design, installation and implementation of comprehensive security measures at sensitive SSA facilities. In addition to access to the security systems, the employees also have the ability to adjust such systems.

The Department of Justice, in an *amicus* brief signed by a "Terrorist Litigation Counsel," asserted that the United States (not merely the Agency), proposed expanding the definition of "national security" to include

> ... those activities of the government related to protecting and preserving against or from espionage, sabotage, subversion, foreign aggression, terrorism, or any other

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[96] 5 U.S.C. §7112(b)(6).

[97] 4 FLRA 644 (1980). In ruling on the eligibility of employees alleged to be "engaged in security work which directly affects national security," the FLRA defined "security work" to "include the design, analysis, or monitoring of security systems and procedures" and to exclude "work involving mere access to or use of sensitive information." Because "labor organizations and collective bargaining in the civil service have been determined by the Congress to be 'in the public interest,'" the FLRA narrowly defined the "national security" exception to include

> only those sensitive activities of the government that are directly related to the protection and preservation of the military, economic, and the productive strength of the United States, including the security of the Government in domestic and foreign affairs, against or from any espionage, sabotage, subversion, foreign aggression, and any other illegal acts which adversely affect the national defense.

> illegal act that would undermine: (1) the continuity of government, (2) the military, economic, and productive strength of the United States, including the security of the Government in domestic and foreign affairs, and (3) critical infrastructure (including but not limited to financial payment systems, telecommunications, and "cyber" infrastructures.)[98]

Justice argued that the *Oak Ridge* formulation is "outdated" and inadequate" and has been overtaken by recent Executive Orders and statutes intended to expand those concepts to include "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[99] Justice also argued that "information can be 'sensitive' though not classified."[100]

On September 12, 2003, in *Social Security Administration v. AFGE (SSA II)*, 59 FLRA No. 26 (2003), the FLRA overruled its Regional Director and excluded the positions from the bargaining unit. Although it rejected the Justice brief as untimely and reaffirmed the *Oak Ridge* definition of "national security" and its definition of "directly affect[ing]" national security,[101] the FLRA expanded those terms by taking into account executive orders and statutes that had been promulgated since the passage of the FLMRS.[102] Explaining that one in six Americans receives a social security benefit, that 98 per cent of all workers are in jobs covered by social security, and that social security benefits comprise "5 per cent of the Nation's total economic input," the FLRA concluded that the disputed security duties "directly related to the protection and preservation of the economic and productive strength of the United States."

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[98]Justice *Amicus* Brief at 13.

[99]*Id.* at 10.

[100]*Id.* at 11.

[101]In *Oak Ridge*, the FLRA defined "directly affects" as "a straight bearing or unbroken connection that produces a material influence or alteration."

[102]The FLRA cited (1) Executive Order 13138 (64 F.R. 53879 (1999)), which expressed concern over the debilitating impact on the defense or economic security of the United States if "certain national infrastructures" such as the social security system were incapacitated or destroyed; (2) the Congressional findings in the Critical Infrastructure Protection Act, 42 U.S.C. §5195c(b) that "[t]he information revolution has transformed the conduct of business and operations of government as well as the infrastructure relied upon for the defense and national security of the United States"; and (3) the Homeland Security Act, Pub.L. 107-296, §891 (2002), asserting the role of the federal government in collecting, creating, managing and protecting classified and sensitive, but unclassified, information to enhance homeland security.

In *SSA II*, the FLRA explained that neither the absence nor presence of a security classification for a particular position was conclusive, and that it would consider such factors on a case-by-case basis with the designation of a position as "sensitive" as a "significant factor." Each Agency will have to decide whether, and how, to utilize *SSA II*. Because the *SSA* decisions arose from AFGE's petition to clarify its bargaining unit, the FLRA decision is not subject to judicial review.[103]

2. Internal Security Matters. In *NTEU and Dept. of Treasury, US Customs Service*,[104] the FLRA found nonnegotiable as an internal security matter a union proposal which would have preserved the ability of employee's workstations to be located anywhere in the 11,000 square floor feet of office space on each floor. The Agency successfully argued that its ability to require the location of specific employees within their branches at the office would permit them to ensure "swift and safe evacuation," a concern raised by the destruction of their facilities at the World Trade Center and a subsequent evacuation in a Washington, D.C. facility. Member Pope, the lone remaining Clinton appointee, rejected the Agency's position, but would have found the Union proposal negotiable only at the Agency's election because it concerned the means and methods of performing work.

3. Presidential Actions. On January 7, 2002, President Bush exercised his authority under Section 7103(b) to prevent 500 Department of Justice employees in U.S. Attorneys' Offices and the Criminal Division from organizing and engaging in collective bargaining. Although these employees had been covered by the Federal Labor-Management Relations Statute and had been represented by two unions for more than a decade without incident, the President determined that continued representation was inconsistent with "national security" because a primary function of the DOJ subdivision was "intelligence, counterintelligence, investigative, or national security work." There was no determination that the employees who had heretofore enjoyed union representation were, themselves, engaged in such activities.[105]

C. Statutory Limits on Collective Bargaining and Employee Rights

1. Homeland Security Act. Effective January 24, 2003, the Homeland Security Department became the employer of 170,000 employees in 22 federal agencies. More than 30,000 of the relocated employees are/were represented by AFGE.[106] Although the HSA guarantees whistleblower appeal rights, it permits the Secretary to issue agency-specific regulations governing

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[103] 5 U.S.C. §7123(b).

[104] 58 FLRA No. 164 (2003).

[105] 67 F.R. 1601 (2002).

[106] Pub.L. 107-296 (2002).

the appeal rights involving disciplinary and other actions of DHS employees.[107] Collective bargaining agreements existing at the time of enactment remain effective "unless amended, modified, superseded, terminated, set aside or revoked in accordance with law."[108] To allow sufficient personnel flexibility to fight the war on terrorism, the Act authorizes the Department to, *inter alia*, establish its own system of labor-management-relations without regard to rights protected by the Federal Labor Relations Authority and the Merit Systems Protection Board.[109] To enact these provisions, the Bush Administration challenged the patriotism of Senators and Representatives who sought to protect the employment security and collective bargaining rights of these federal employees.

Other Departments, including the Department of Defense, are enviously seeking similar authority.

2. Port and Maritime Security Act. Prior to September 11, Congress was considering legislation focused on crime, cargo theft, and smuggling. After September 11, the bill was drastically expanded to address the threat of terrorism at America's seaports. The Act directs the Department of Transportation to develop secure areas in ports and to limit access to security-sensitive areas through background checks conducted by the Department of Justice and the issuance of biometric transportation security identification cards (to persons not deemed a "security risk"), to restrict firearms and other weapons, to develop an evacuation plan, and to conduct background checks of employees working in security-sensitive areas. The Coast Guard will screen, inspect, and clear the containerized cargoes of ocean-going vessels.[110]

A truck drivers making deliveries and pickups at ports may be deemed a "security risk" and disqualified if, within the past seven years, he has been convicted of a felony that leads the Secretary of Transportation to believe that he could be a terrorism risk or might cause a severe transportation security incident or, within the past five years has been released from prison for committing such a felony. The Secretary may also waive such disqualifications. Finally, the Secretary must develop an appeal procedure.

3. Aviation and Transportation Security Act. The congressional debates preceding the adoption of the Aviation and Transportation Security Act primarily concerned the desirability of federalizing airport screeners in the newly created Transportation Security Administration. Congress

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[107]Pub.L. 107-296, §§841, 883 (2002).

[108]Pub.L. 107-296, §1512(a)(1) (2002).

[109]Pub.L. 107-296, §§841-842 (2002).

[110]Pub.L. 107-295 (2002).

directed the TSA to adopt the personnel system in place at the Federal Aviation Administration,[111] which expressly incorporates the provisions of Title 5 relating to labor-management relations.[112] These include the right to form, join, and assist a labor organization and the right to bargain collectively.

However, on January 8, 2003, the Undersecretary of Transportation issued a directive prohibiting TSA employees from engaging in collective bargaining and being represented for such purpose. AFGE immediately filed suit to overturn the directive. Although it dismissed the lawsuit challenging the directive and remanded the case to the FLRA for an initial determination, the District Court permitted the severing and refiling of a First Amendment case on behalf of a probationary employee who was the chief union organizer.[113]

4. The Patriot Act. The only direct reference in Patriot Act I concerning labor issues is the removal of the authority of the Border Patrol and the Immigration and Naturalization Service to pay an employee overtime in excess of $30,000 in calendar year 2001.[114]

[111]Pub.L. 107-71, §101(a), 49 U.S.C. §114(n).

[112]49 U.S.C. §40122(g)(2)(C).

[113]*AFGE v. Loy*, 2003 U.S. Dist. LEXIS 15750 (D.D.C. 2003).

[114]Public Law107-56, 115 Stat. 272 (2001).