Labor and Employment Law

Unions and National Security: Does the NLRB Have Jurisdiction over Privately-Employed Airport Screeners? Should it Decline to Exercise Jurisdiction?

*By John R. Martin**

I. Introduction

After the September 11, 2001 attacks, Congress felt so strongly about airport and airline security that it created a federal agency—the Transportation Security Administration (TSA)—to be in charge of airport screening. All airport screeners must be TSA employees, with the exception of a pilot program operating in five airports where private companies provide the screeners.[1] In January 2003, the head of TSA issued a directive forbidding unions from obtaining monopoly-bargaining power over airport screeners, citing national security concerns.

One of the five airports in the pilot program is the Kansas City International Airport. A union—the International Union, Security, Police & Fire Professionals—recently petitioned the National Labor Relations Board (NLRB) to be certified as the exclusive bargaining representative for private airport screeners there.[2] The NLRB regional director granted the union's petition and conducted a certification election. Before the results of the election were certified, the NLRB granted the employer's request to review the regional director's decision to exercise jurisdiction. *Firstline Transp. Sec., Inc. (Int'l Union, Sec., Police & Fire Prof'ls)*, Case 17-RC-12354, 2005 WL 1564866 (NLRB June 30, 2005) (order granting review).

The NLRB must decide whether it has jurisdiction over private airport screeners and, if so, whether it will exercise jurisdiction over the screeners and certify the union as the exclusive representative (if the union wins the certification election). Because monopoly bargaining for TSA-employed screeners is not permitted due to national security concerns, it would be anomalous, and illogical, to permit monopoly bargaining by a union that represents private screeners who perform the same functions as TSA-employed screeners.

The union has no doubt about the importance of this case for the entire airport security industry. Robert D. Novak reported in a recent column: "Steve Maritas, director of organizing for the Security, Police and Fire Professionals, has said the NLRB ruling regarding the baggage screeners 'could really change a whole industry' and open the door for 'more national security workers to unionize.'"[3]

II. Background

A. Aviation and Transportation Security Act

In November 2001, Congress passed the Aviation and Transportation Security Act (ATSA), which created the Transportation Security Administration within the Department of Transportation.[4] The head of TSA was called the "Under Secretary of Transportation for Security." The Under Secretary is "responsible for day-to-day Federal security screening operations for passenger air transportation and interstate air transportation;" is to "develop standards for the hiring and retention of security screening personnel;" is to "train and test security screening personnel;" and is "responsible for hiring and training personnel to provide security screening at all airports in the United States."[5]

In addition to the screeners employed by TSA, Congress directed the Under Secretary to create a pilot program for screening personnel employed by private screening companies.[6] The private screening personnel must meet all the requirements applicable to TSA-employed screeners.[7] The compensation level of private screeners must at least equal that of TSA-employed screeners.[8] Federal government supervisors must oversee all screening by private screeners.[9]

Legislative history suggests that Congress intended TSA-employed screeners and privately-employed screeners to be treated the same. The House bill directed the TSA to assume total responsibility over airport security screening,[10] but did not mandate that screeners be federal employees. All screening would be "supervised by uniformed Federal personnel" of the TSA.[11] The Under Secretary would "deputize. . .all airport screening personnel as Federal transportation security agents."[12]

The Senate passed a companion bill on October 11, 2001.[13] In this bill, federal employees must carry out all airport screening duties, under the supervision of the Attorney General.[14]

When the Senate bill was sent to the House, the House struck all language that required screeners to be federal employees.[15] The House also inserted language permitting screeners to be employed by private employers.[16]

The House-Senate conference committee considered the Senate bill and the House amendments.[17] The committee agreed that the federal government would be responsible for airport screening.[18] On the issue of privately-employed screeners, the committee reached a compromise that would permit private screeners so long as they worked under the supervision of the TSA.[19]

The ATSA became law on November 19, 2001, providing for TSA-employed screeners while permitting the use of private screeners under certain conditions. The compromise between the House and Senate allowing for private screeners provides no basis to think that Congress intended to permit monopoly bargaining power over private screeners while TSA-employed screeners could not be unionized. All screeners do the same job under TSA's supervision. All screeners carry out security functions.

B. TSA manages, supervises, and controls private screeners.

The Under Secretary chose Kansas City International Airport (MCI) as one of the five airports for the pilot program.[20] Firstline Transportation Security, Inc. (Firstline) was the screening company chosen to provide screeners to TSA at MCI.[21] TSA directs Firstline's screeners, and the screeners are subject to TSA's policies and guidelines.[22] TSA must certify that each screener applicant meets TSA standards before the applicant is offered employment by TSA.[23]

Every newly hired screener goes through a training process administered by "TAIs"—trainers who are certified by TSA.[24] TSA training managers observe and oversee the training process.[25] If the new employee passes the training process, TSA certifies him or her.[26] TSA managers control, supervise, and oversee private security screeners as the screeners perform their passenger and baggage screening functions.[27] TSA uses Firstline's workforce at TSA's discretion.[28] TSA sets the pay range for Firstline's employees.[29] TSA provides and repairs the equipment used by Firstline's employees in passenger and baggage handling.[30]

C. The Under Secretary denied monopoly-bargaining power.

On January 8, 2003, the Under Secretary issued a memorandum denying unions monopoly-bargaining power over airport screeners.[31] The memorandum reads in full:

> By virtue of the authority vested in the Under Secretary of Transportation for Security in Section 111(d) of the Aviation and Transportation Security Act, Pub. Law No. 107-71, 49 U.S.C. § 44935 Note (2001), I hereby determine that *individuals* carrying out the security screening function under section 44901 of Title 49, United States Code, *in light of their critical national security responsibilities,* shall not, as a term or condition of their employment, be entitled to engage in collective bargaining or be represented for the purpose of engaging in such bargaining by any representative or organization. (emphasis added)

The Federal Labor Relations Authority upheld the Under Secretary's directive, concluding that the ATSA "leaves unfettered discretion to the Under Secretary to determine the terms and conditions of employment for screener personnel in the TSA."[32]

III. The NLRB has no jurisdiction over private screeners.

When the Under Secretary issued the directive in 2003, there were approximately 55,600 screeners employed by TSA serving over 400 U.S. airports.[33] The pilot program using private screeners at MCI and four other airports began in the fall of 2002.[34] The Under Secretary was well aware of these private screeners, yet his memorandum uses language as broad as possible, covering all "individuals" engaged in screening. He did not use the term "federal employees," which would exclude private screeners. Using the authority given to the Under Secretary by ATSA, he prohibited monopoly bargaining power over private screeners, both federally employed and privately employed. The NLRB therefore has no jurisdiction over private screeners.

One could argue that the Under Secretary had no authority under the ATSA to forbid unionization of private screeners. The Under Secretary based his authority on a provision of the ATSA that granted him authority to "employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions."[35] Can private screeners be in "Federal service," or can only federal employees be in "Federal service?"

Reading the ATSA as a whole, it is clear that Congress intended TSA-employed screeners and private screeners to be treated identically, including with regard to monopoly bargaining. They do exactly the same jobs, under the direct control and supervision of TSA managers. They are both in "Federal service," since the federal government took over airport screening as its responsibility. Congress directed the Under Secretary to "provide for the screening of all passengers and property" in the United States.[36]

The Under Secretary is given broad discretion in overseeing the "personnel management system" of TSA.[37] The Conference Report on the bill states: "The Conferees recognize that, in order to ensure that Federal screeners are able to provide the best security possible, the Secretary must be given wide latitude to determine the terms of employment of screeners."[38] The Conference Report thus treats all screeners as "Federal screeners." It would make no sense to give the Under Secretary broad powers over personnel—sufficient power in fact to forbid unionization—and yet not give him the same powers over private screeners.

Strangely, TSA submitted a statement to the NLRB claiming that the January 8, 2003 ban on monopoly bargaining did not apply to private screeners.[39] TSA took no position as to whether the NLRB has jurisdiction over private screeners, or whether the NLRB should decline to exercise jurisdiction. TSA gave no explanation or argument as to why the ban on monopoly bargaining did not apply to private screeners. Why TSA took this position is a mystery. Here is one guess: TSA believes that public-sector unions will pressure Congress and TSA into explicitly permitting monopoly bargaining power over TSA-employed screeners. TSA does not want to further anger unions by opposing unionization of private screeners, when it is, in TSA's view, inevitable that TSA will eventually have to deal with the American Federation of Government Employees or some other union.

IV. If the NLRB decides it could assert jurisdiction, it should decline to do so.

The NLRB has broad discretion whether to exercise jurisdiction over a case. The Supreme Court has written:

> Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.[40]

A. Exercising jurisdiction will damage national security.

TSA's mission is "to prevent terrorist attacks within the United States" and "reduce the vulnerability of the United States to terrorism."[41] The legislative history of the ATSA makes clear that national security was the reason Congress created the Transportation Security Administration.[42] The Under Secretary determined that airport screeners should not be subject to monopoly bargaining "in light of their critical national security responsibilities."[43]

The "national security responsibilities" of TSA-employed screeners and private screeners are the same. The statutory requirements for private screeners are exactly the same as for screeners employed by TSA.[44] Private screening companies must "provide compensation and other benefits to [employees] that are not less than the level of compensation and other benefits provided to [screeners employed by TSA]."[45] It would be just as damaging to national security to permit private screeners to be subject to monopoly bargaining as it would be for TSA-employed screeners.[46] It makes no sense for the 48,000 TSA-employed screeners to be exempt from monopoly bargaining, while the Board grants to a union monopoly-bargaining power over private screeners at the five airports in the pilot program. One NLRB member has recently urged the Board to balance rights under the National Labor Relations Act (NLRA) with legitimate "national security" concerns.[47]

B. The risk of a strike

1. Unions engage in strikes even when strikes are forbidden by law.

The ATSA does not permit striking by airport screeners.[48] Making strikes illegal, however, does not eliminate the danger that a union will strike. Strikes in the public sector, even when they are illegal, are commonplace.

For example, during the 1993-94 school year, 42 teacher strikes kept nearly 215,000 school children in the United States out of class.[49] Teacher strikes were illegal in over half the states where they occurred, but all occurred in states that have monopoly bargaining for teachers.[50] As Albert Shanker, late president of the American Federation of Teachers union, freely admitted: "[A] strike in the public sector is not economic—it is political. . . . One of the greatest reasons for the effectiveness of the public employees' strike is the fact that it is illegal."[51] Mr. Shanker knew that unions and union officials are seldom held to account for ordering strikes and work slow-downs, or threatening such actions, to intimidate elected officials and taxpayers.

2. Public-sector strikes endanger vital public services.

Police union militants in New York City;[52] Prince George's County, Maryland;[53] Wilmington, Delaware;[54] and Pontiac, Michigan,[55] to name but a few, have in recent years threatened or carried out so-called "blue flu" job actions, potentially endangering public safety, as a collective-bargaining tool. The Baltimore police strike of 1974 led to widespread looting, shooting, and rock-throwing.[56] During the Kansas City fire fighters' strike of 1975, strikers set up picket lines around burning buildings.[57]

Then-San Francisco Mayor Joseph Alioto's home was pipe-bombed hours after he warned on television that striking police officers would be fired if they did not return to work.[58] The bomb shattered windows and seriously damaged the front door and porch steps.[59]

Striking fire fighters in Dayton, Ohio, sat idly by while fires destroyed up to twenty-nine (29) buildings throughout the city.[60] Thirty (30) families were left homeless.[61] During a strike in Kansas City, strikers vandalized fire fighting equipment. Fire extinguishers were filled with flammable liquid, oxygen tanks were emptied, and the fuel tanks of trucks were fouled with water.[62]

During a 23-day strike by Chicago fire fighters and paramedics, more than 20 people died in fires[63]—an extraordinary number for a relatively short period. In one fire alone, three children and two adults died as a fire station near their home remained unmanned.[64]

3. A strike by a private screeners union would be especially harmful.

A strike by a private-screeners union would, at a minimum, cause a major disruption to airlines and travelers. At worst, a strike by a private-screeners union could threaten national security. The government would be faced with a terrible choice: (1) reduce air travel, and therefore economic activity, until new screeners could be trained and placed; or, (2) reduce the efficacy of screening procedures and thereby increase the chance of terrorism.

C. The risk of a terrorist-infiltrated union

In the 1930s, 1940s, and 1950s, many unions in the United States were infiltrated, controlled, or even headed by members of the Communist Party.[65] A congressional subcommittee that included then-Congressman John F. Kennedy received testimony that:

> Communists had infiltrated into the ranks of labor unions and that their activities constitute a grave menace to the industrial peace of the United States. . . . [T]hey ultimately seek to destroy our capitalistic system and to overthrow our form of government by force and violence. To this end they encourage sit-down and slow-down strikes, mass picketing, goon squads, and violence.[66]

The most alarming example of union domination by the Communist Party was the strike in 1941 by United Auto Workers Local 248 at the Allis-Chalmers Manufacturing Company in Milwaukee.[67] The Supreme Court wrote: "Congress heard testimony that the strike had been called solely in obedience to Party orders for the purpose of starting the 'snowballing of strikes' in defense plants."[68] Congress responded to these findings by including Section 9(h) in the Taft-Hartley Act. Section 9(h), which was later repealed, required each union official to file an affidavit with the NLRB declaring that he was not a Communist and did not seek the violent or illegal overthrow of the United States government.[69]

If a union is granted exclusive representation of private airport screeners, there is a similar risk that the union hierarchy will be infiltrated by a terrorist agent or that the union will be controlled by someone working with terrorists.[70] The terrorist could then use his influence with the union to make it easier for a terrorist colleague to board a plane or to get a bomb through baggage

screening.[71] Or the terrorist could more indirectly weaken national security, by organizing a strike or work slow-down. The NLRB should avoid this national-security risk by declining jurisdiction over privately-employed airport screeners.

V. If the NLRB does not decline jurisdiction for national security reasons, it should overrule *Management Training Corp.* and re-institute the "government control" test or the "intimate connection" test.

Section 2(2) of the NLRA exempts from Board jurisdiction "the United States or any wholly owned Government corporation, . . .or any State or political subdivision thereof."[72] Historically, the NLRB declined jurisdiction over governmental contractors if the government had effective control over the terms and conditions of employment of the contractor's employees.

A. The intimate connection test

Before 1979, the NLRB used the intimate connection test when deciding whether to assert jurisdiction over private employers who had contracted with exempt governmental entities.[73] The intimate connection test had two prongs. First, does the "exempt employer exercise[] substantial control over the services and labor relations of the nonexempt contractor, so that the latter is left without sufficient autonomy over working conditions to enable it to bargain efficaciously with the union?"[74] If the answer was "yes," the Board would decline jurisdiction. If the answer was "no," the NLRB would examine "the relationship of the services performed to the exempted functions of the institution to whom they were provided."[75] If the contractor provided services to the governmental employer which related directly to the governmental purpose, the NLRB would decline to assert jurisdiction.[76]

B. The governmental control test

In 1979, the NLRB abandoned the intimate connection test in favor of the governmental control test.[77] The NLRB concluded that the first prong of the intimate connection test—"whether the employer would be able to bargain effectively about the terms and conditions of employment of its employees—is by itself the appropriate standard for determining whether to assert jurisdiction."[78] The NLRB criticized "intimate connection" as too vague to be workable.[79]

The Board later refined and reaffirmed the governmental control test in *Res-Care, Inc.*[80] The Board distinguished between a "core group" of bargaining subjects, which is limited to "wages and fringe benefits," and other bargaining subjects, such as hiring, firing, promotions, demotions, transfers, and grievances.[81] If the contractor does not have final say over wages and fringe benefits, then meaningful collective bargaining by the contractor is not possible, and the Board will decline to exercise jurisdiction.[82]

C. Management Training Corp.

In 1995, the NLRB overturned the governmental control test in *Management Training Corp. (Teamsters Local 222)*.[83] The Board would now assert jurisdiction over any contractor that "meets the definition of 'employer' under Section 2(2) of the Act. . .and. . .meets the applicable monetary jurisdictional standards."[84] Whether the contractor could engage in meaningful bargaining with its employees was no longer a factor the Board would consider.[85] The Board explained:

> The Employer in question must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act. In our view, it is for the parties to determine whether bargaining is possible with respect to other matters and, in the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under those circumstances.[86]

D. Returning to the governmental control or intimate connection test

The airport-screener case amply demonstrates why the Board should overturn *Management Training Corp.* and re-institute the governmental control test. TSA controls nearly every term and condition of employment for Firstline's employees. TSA sets the compensation range for Firstline employees,[87] which is the key factor under *Res-Care, Inc.* Moreover, TSA supervises, manages, and oversees every aspect of the employee's working day.[88] TSA provides and repairs the equipment used by Firstline's employees in passenger and baggage handling.[89] TSA must approve any applicant before Firstline may hire the applicant as a screener.[90]

Thus, it is clear that Firstline cannot engage in meaningful collective bargaining with the union, and that TSA controls the private screeners' terms and conditions of employment. It is hard to imagine what terms Firstline and the union would negotiate, except that the union would demand and in all likelihood win a compulsory unionism clause, forcing non-union members to pay union fees.[91] Because it makes little sense to certify a union as exclusive bargaining agent when there is nothing meaningful over which to bargain, the Board should overrule *Management Training Corp.* and decline to exercise jurisdiction over privately-employed airport screeners.

It is also clear that the private screeners provide a service that is intimately connected with TSA's purpose. TSA's purpose is to screen airport passengers and baggage, and private screeners do the same job as TSA-employed screeners. Private airport screeners are analogous to the private fire fighters in *Rural Fire Protection Co.*, in which the Board declined to assert jurisdiction.[92] The Board wrote: "[I]t plainly appears that the Employer's firefighting services furnished to the city of Scottsdale, utilizing fire stations and major firefighting equipment owned and maintained by the city, are intimately related to Scottsdale's municipal purposes."[93] The Board should decline to exercise jurisdiction over a private screening company whose services are so intimately connected with an exempt entity. Moreover, the Board should be especially hesitant to assert jurisdiction over a contractor when that contractor provides the same service as the contracting federal agency whose mission is to protect national security.

VI. Conclusion

It is inconsistent and illogical to prevent monopoly bargaining power over TSA-employed screeners while permitting monopoly bargaining power over privately-employed screeners performing the same national security functions. TSA seemingly prohibited monopoly bargaining for all screeners in its January 8, 2003 directive, and it has given no reason for later contending that its directive does not apply to private screeners. For the sake of

national security and rational policymaking, the NLRB should either decide that it has no jurisdiction over private airport screeners, or decline jurisdiction under its broad discretion.

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Footnotes

[1] As of November 19, 2004, airports could apply to TSA to use privately-employed screeners. The five airports in the pilot program and two other, regional airports are the only airports to have applied so far.

[2] When a union is certified as the exclusive bargaining agent under the National Labor Relations Act ("NLRA"), the company must bargain with the union. *See* 29 U.S.C. § 158 (a)(5) (unfair labor practice for company to refuse to bargain with certified union). The union acts as bargaining agent for all employees in the bargaining unit, regardless of union membership or nonmembership and regardless of whether the individual employee voted for the union. *See id.* § 159(a). In states that do not have a Right to Work law, the union may bargain for, and almost always wins, the right to collect union dues from employees. The employee cannot be forced to pay for union costs unrelated to collective bargaining, such as political spending. *See* Communications Workers v. Beck, 487 U.S. 735 (1988).

[3] Robert D. Novak, *Estate Tax Politics*, Sept. 2, 2005, *available at* http://www.theconservativevoice.com/articles/article.html?id=7981.

[4] TSA was subsequently moved to the Department of Homeland Security (DHS). *See* 6 U.S.C. § 203. The head of TSA is now known as the Assistant Secretary of Homeland Security for TSA. For sake of clarity, this article will refer to the head of TSA as the "Under Secretary."

[5] 49 U.S.C. § 114(e).

[6] *See id.* §§ 44919, 44920.

[7] *See id.* § 44919(f).

[8] *Id.*

[9] *Id.* § 44920(e).

[10] Airport Security Federalization Act of 2001, H.R. 3150, 107th Cong. § 102 (2001).

[11] *Id.*

[12] *Id.*

[13] Aviation Security Act, S. 1447, 107th Cong. (2001).

[14] *Id.* § 108.

[15] Brief of Amicus Curiae the Honorable Dick Armey at 4, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 5 ("Former Leader Armey was instrumental in orchestrating this compromise, and in doing so, communicated the intent that the private screeners be considered the same as TSA employed screeners for purposes of collective bargaining.").

[20] Decision & Direction of Election at 4, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB Region 17, May 27, 2005).

[21] Employer's Request for Review of Regional Director's Decision at 3, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 3-4.

[28] *Id.* at 3.

[29] *Id.* at 4.

[30] *Id.*

[31] Jt. Ex. 1, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[32] *United States Dep't of Homeland Sec*. (Am. Fed'n of Gov't Employees), 59 F.L.R.A. 423, 430 (2003) (citing 49 U.S.C. § 44935 Note (Pub. L. No. 107-71, § 111(d), 115 Stat. 620 (2001))).

[33] Transportation Security Administration, Screener Rightsizing Fact Sheet (Sept. 29, 2003), *available at* http://www.tsa.gov/public/display?theme=44&content=711 (last visited Sept. 7, 2005). TSA downsized to approximately 48,000 screeners on September 25, 2003. *Id.*

[34] Randolph Heaster, *Attempt to organize post-9/11 spins into national test case*, Kansas City Star, Aug. 30, 2005, at D1.

[35] 49 U.S.C. § 44935 Note (Pub. L. No. 107-71, § 111(d), 115 Stat. 620 (2001)) (emphasis added).

[36] *Id.* § 44901(a).

[37] *Id.* § 114(n).

[38] Conference Report on S. 1447, Aviation and Transportation Security Act, 147 Cong. Rec. H8262-01, H8278 (2001).

[39] Statement of the Transportation Security Administration, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[40] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951); *see also* Pikeville United Methodist Hosp. v. United Steelworkers, 109 F.3d 1146, 1151 (6th Cir. 1997) ("It is true that in some instances, the NLRB may, in its own discretion, choose not to exercise the jurisdiction that it may otherwise invoke."). One court explained:

> [I]t is clear that the Board has the broadest jurisdictional authority possible under the Constitution, and that it may, but need not, decline jurisdiction in certain cases in exercise of its discretion. Thus, the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's sound discretion. In the absence of extraordinary circumstances, or abuses of that discretion, such a discriminatory exercise of jurisdictional discretion by the Board is not subject to review by the Federal courts.

San Juan Racing Ass'n v. Lab. Relations Bd., 532 F. Supp. 51, 53 (D.P.R. 1982) (citations omitted).

[41] *United States Dep't of Homeland Sec*. (Am. Fed'n of Gov't Employees), 59 F.L.R.A. 423, 424 (2003).

[42] *See* Alex C. Hallett, Note, *An Argument for the Denial of Collective-Bargaining Rights of Federal Airport Security Screeners*, 72 Geo. Wash. L. Rev. 834, 852-54 (2004) (discussing legislative history of ATSA). Hallett writes:

> The pervasive feeling of Congress at the time of passage was that national security was the paramount concern. The national-security function of the airport screeners under the new TSA was compared to the functions of the Capitol Police, the Secret Service, and the FBI. . . .

Id. at 852.

[43] Jt. Ex. 1, *Firstline Transp. Sec., Inc.*, Case 17-RC-12354 (NLRB).

[44] *See* 49 U.S.C. § 44919(f) (private screening employees must "meet all the requirements" applicable to TSA screeners).

[45] *Id.*

[46] *See* discussion *infra* (regarding problems of public-sector strikes).

[47] *ITT Indus., Inc*. (UAW), 341 N.L.R.B. No. 118, at *9, 2004 WL 1099004 (2004) (Battista, Chairman, dissenting).

[48] 49 U.S.C. § 44935(I).

[49] *Teacher Strikes 1993-1994: A Survey of Activity*, Gov't Union Critique, July 29, 1994, at 1-3.

[50] *State Public Sector Bargaining Statutes*, Gov't Union Critique, Aug. 13, 1993, at 5-7.

[51] Albert L. Shanker, *Why teachers need the right to strike*, Monthly Lab. Rev., Vol. 96, No. 9, at 50 (Sept. 1973).

[52] Dan Janison, *NYPD Adds to Ranks*, Newsday, Aug. 19, 2004, at A3.

[53] Jamie Stockwell, *'Blue Flu' Could Hit Prince George's*, Wash. Post, Aug. 7, 2001, at B1.

[54] Press Release, Office of Mayor James M. Baker, "Blue Flu" Update (July 13, 2004), *available at* http://www.ci.wilmington.de.us/mayorpress/2004/0713_bluefluupdate.htm.

[55] Korie Wilkins, *Blue flu bug bites Pontiac*, Daily Oakland Press, July 16, 2005, *available at* http://www.theoaklandpress.com/stories/071605/loc_20050716003.shtml.

[56] Ralph de Toledano, The Municipal Doomsday Machine 38 (Jameson Books 1976) (1975).

[57] *Id.* at 53.

[58] Randolph H. Boehm & Dan C. Heldman, Public Employees, Unions, and the Erosion of Civic Trust 150-51 (Greenwood Publishing Group 1982).

[59] Andrew H. Malcolm, *Emergency Called in San Francisco; Firemen Join Strike*, N.Y. Times, Aug. 21, 1975, at 1, 28.

[60] Editorial, *Firemen in Ohio Wrong*, Omaha World-Herald, Aug. 14, 1977.

[61] *Id.*

[62] *Arson, Sabotage Burden Makeshift Fire Crews*, Kansas City Star, Oct. 4, 1975.

[63] *Judge Lowers Union Fines—Except One*, San Diego Daily Transcript, Mar. 17, 1980.

[64] Nathaniel Sheppard, Jr., *Fires Kill 7 persons in Chicago*, N.Y. Times, Mar. 6, 1980, at A16.

[65] *See, e.g.*, American Communication Ass'n v. Douds, 339 U.S. 382, 388-89 (1950) (summarizing congressional findings of Communist control of labor unions). In that era, Communists "managed to infiltrate the highest command posts of the CIO." Howard Kimeldorf, Reds or Rackets? 9 (Univ of California Pr 1988). Communists played a "big role" in the United Auto Workers. Bert Cochran, Labor and Communism 108 (Princeton: University Press 1977). In the "most momentous single strike in American labor history"—the 1936 nationwide strike against General Motors and its suppliers—"Communists were prominent in the conduct of the strike. . . ." *Id.* at 119-22. During World War II, Communists retained control of eighteen international unions affiliated with the CIO, including the United Electrical Workers (UE), the two maritime unions, the New York-based transport workers, and the fur and leather union. *Id.* at 208. In fact, Communists controlled the UE until the 1960s. *Id.* at 295-96. Between March and November 1941, there were nine Communist-led-strike disputes certified to the National Defense Mediation Board. *Id.* at 165. And there were eight Communist-threatened-strike disputes certified to the Board during the same time period. *Id.* at 166. The West Coast's International Longshoremen's and Warehousemen's Union (ILWU) was a strong bastion of Communist unionism. Kimeldorf, *supra* at 5. The ILWU was "'one of the great successes of the Communist Party in establishing a native working-class base. . .approximat[ing] the Leninist image.'" *Id.* (citation omitted).

[66] Irving G. McCann, Why the Taft-Hartley Law? 114 (New York, Committee for Constitutional Government 1950) (quoting the subcommittee report).

[67] "Local 248 of the UAW, which conducted the Allis-Chalmers strike, was Communist-oriented from its early inception to 1947,

and a dominant force in both the Milwaukee and Wisconsin CIO. It was, therefore, a major Communist operation whose influence radiated out well beyond its immediate confines." COCHRAN, *supra* note 65, at 166. In another important strike from 1941—at North American Aviation in Los Angeles—"Communists dominated the leadership" of the UAW local. *Id.* at 177. The strike did not end until President Roosevelt ordered government seizure of the plant, and 2,500 Army troops "moved in with fixed bayonets to disperse the picket lines and open the plant." *Id.* at 179.

[68] *Douds*, 339 U.S. at 385.

[69] *See id.* at 386.

[70] The federal government is concerned about Islamic extremists penetrating American institutions. For example, Senator Kyl expressed concern that "there have been an increasing number of instances in which Wahhabists have successfully penetrated key U.S. institutions, such as the military and our prison system." *Terrorist Recruitment and Infiltration in the United States: Prisons and Military as an Operational Base: Hearing Before the Senate Subcommittee on Terrorism, Technology, and Homeland Security*, 109th Cong. (2003) (statement of Sen. John Kyl, Subcommittee Chairman), 2003 WL 22333480.

[71] TSA has had to fire at least two Islamic-terrorism supporters from its ranks of baggage screeners. Debbie Schlussel, *Pro-Terror Rapper*, Frontpagemag.com, July 25, 2005, *available at* http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=18887. It is an open question whether TSA would be able to terminate immediately a unionized private screener.

[72] 29 U.S.C. § 152(2).

[73] *See National Transp. Serv., Inc.* (Truck Drivers & Helpers Local Union 728), 240 N.L.R.B. 565, 565-66 (1979) (discussing and overruling intimate connection test).

[74] *Rural Fire Prot. Co.*, 216 N.L.R.B. 584, 585 (1975).

[75] *Id.* at 586.

[76] *Id.*

[77] *See National Transp. Serv., Inc.*, 240 N.L.R.B. 565.

[78] *Id.* at 565.

[79] *Id.* at 566.

[80] 280 N.L.R.B. 670 (1986).

[81] *Res-Care, Inc.*, 280 N.L.R.B. at 673-74.

[82] *Id.* at 674.

[83] 317 N.L.R.B. 1355 (1995).

[84] *Management Training Corp.*, 317 N.L.R.B. at 1358.

[85] *Id.*

[86] *Id.*

[87] Employer's Request for Review of Regional Director's Decision at 4; *see also* 49 U.S.C. § 44919(f) (private employer must provide compensation and other benefits equal to that of TSA-employed screeners).

[88] Employer's Request for Review of Regional Director's Decision at 3-4.

[89] *Id.* at 4.

[90] *Id.* at 3.

[91] Kansas City International Airport is located in Missouri, which is not a Right to Work state. Missouri permits compulsory union-fee clauses in collective bargaining agreements. Kansas, a Right to Work state, forbids compulsory union-fee clauses. Kan. Const. art. 15, § 12.

[92] 216 N.L.R.B. 584 (1975).

[93] *Id.* at 586.