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Beyond Bread and Butter: The Political Paradigm of *Management Training*

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> The object of all reform in this essential matter must be the genuine democratization of industry, based upon a full recognition of the right of those who work, in whatever rank, to participate in some organic way in every decision which directly affects their welfare or the part they are to play in industry.[1]

INTRODUCTION

As legislatures transfer public obligations to private entities, and government at all levels attempts to eke out more efficiency through privatization of government functions,[2] an increasing number of employment relationships hang in the balance somewhere between the spheres of public and private. Although growing numbers of private actors perform public functions, neither the National Labor Relations Act ("NLRA" or the "Act"),[3] which accords private employees the right to bargain collectively, nor the Civil Service Reform Act ("CSRA"),[4] which protects public employees in a similar manner, accounts for the labor relations of the "privatized employee."[5]

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1. Woodrow Wilson, Presidential Address Before Congress (May 20, 1919), *in* 58 CONG. REC. 41 (1919).

2. Richard Wolf, *Making Government Someone Else's Business*, USA TODAY, June 22, 1995, at 6A. Elaine Kamarck, who runs the "reinventing government" initiative for Vice President Al Gore, affirmed that privatization is one of the chief strategies for increasing government's efficiency:

> From the post office to weather services to even the space shuttle, a new push is on to give private industry a crack at running services and projects long handled by the federal government. . . .
>
> . . . .
>
> Struggling to shrink both bureaucracy and budget deficits, President Clinton and the GOP Congress have discovered what cities and states long recognized: Public services can be delivered by the private sector.

Wolf also quotes Kamarck as saying that "[e]ach year, there will be more things privatized." *Id.*; *see also* Bill McAllister, *GOP May Give Priority Handling to Privatization of Mail Delivery*, INDIANAPOLIS STAR, Jan. 22, 1995, at A16. Representative Dick Armey, R. Tex., said of Capitol Hill mail delivery: "If private firms can deliver mail faster and cheaper—which they can and do—then we should let them."

3. 29 U.S.C. §§ 151-69 (1994).

4. 5 U.S.C. §§ 1101-1501 (1994).

5. The term "privatized employee" in this Note refers to employees of private entities who perform government functions or who implement public policies. Considering the difficulty with which the National Labor Relations Board (the "Board") and the courts have

The NLRA, enacted in 1935 and modified in 1947, signaled a Congressional belief that increased collective bargaining would provide important economic benefits to individual workers and the nation at large. Legislators sought to bolster sagging wages and promote the flow of commerce by establishing symmetry or equality at the bargaining table.[6] The NLRA was designed to promote economic justice by protecting collective bargaining about "pay, wages, hours and other conditions of employment."[7]

Since the NLRA exempts public employers, including federal, state, county, and municipal governments,[8] the CSRA was passed in 1978 and became the public counterpart to the NLRA. Employees in the federal service are thus guaranteed the right to organize and bargain collectively under the Federal Labor Relations Authority ("FLRA"), an agency patterned after the NLRA.[9] In the wake of legislation protecting federal employees, a "proliferation of comprehensive state statutes" was enacted to protect employees of state and local governments.[10]

For the last fifty years, a third category has fallen somewhere between the spheres of public and private. Where a private employer contracts with the government and receives public funds, the employer's labor relations with its employees often fall outside the scope of either act. The effect of this is the denial of rights enjoyed by counterparts in both sectors. For example, the Social Security Administration could hypothetically allocate some of its "distribution" duties to a private entity. Although the CSRA would protect remaining employees of the Social Security Administration, it would afford no protection to employees of private entities performing the same role as their governmental counterparts. Very often, the NLRB will decline jurisdiction over such relationships as well.

Whether the NLRB has asserted jurisdiction over a privatized labor relationship has depended upon the substantive terms of the contract and how much control the government exerts over the economic provisions of the agreement. In the wake of prevailing wage and benefit requirements for employees,[11] governmentally-imposed requirements comprise much of the substantive framework for labor relations. Thus, some control over employee work conditions remains with the company management and can be the subject of collective bargaining. However, other issues are regulated by the government and are not bargainable. If the government retains control over budgets, wages, benefits, and other economic conditions, such control could arguably hamstring an employer at the bargaining table and limit the possibility for meaningful give and take.

A tension thus arises between the policies of the NLRA that *require* bargaining about all economic terms and conditions of employment, and the provisions of

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considered such employees, it is unsurprising that no commonly-accepted term describes them.

6. NLRA § 1, 29 U.S.C. § 151 (1994).

7. NLRA § 9, 29 U.S.C. § 159 (1994).

8. NLRA § 2(2), 29 U.S.C. § 152(2) (1994).

9. ARCHIBALD COX ET AL., LABOR LAW 100 (11th ed. 1991).

10. *Id.* at 101.

11. Service Contract Labor Standards Act, 41 U.S.C. §§ 351-58 (1994).

government contracts that *prevent* negotiation about certain aspects of the employment relationship. When governments remove economic terms from the bargaining table by imposing strict economic requirements, the parties, in effect, must bargain with one hand tied behind them. Such a dynamic falls far short of the economically-driven, aggressive negotiation envisioned by the drafters of the NLRA.

Until 1995, the Board avoided this dilemma. It simply refrained from asserting jurisdiction over private labor relationships where the government exerted "substantial control" over the economic terms of employment. Since 1947,[12] in fact, the Board has invented, modified, and abandoned a variety of tests in an effort to determine over which cases it would assert jurisdiction in a manner that would avoid or mitigate the problem. Such tests sought to measure whether the government exerts so much control over the labor relationship—and the employer retains so little—that meaningful bargaining with employees is rendered impossible. In such cases, the Board refrained from asserting jurisdiction and the labor relationship was deemed outside the scope of the NLRA. Thus, private employees performing public functions were denied the rights otherwise accorded to employees in both sectors.[13]

Flying in the face of judicially-approved "control" tests and historical reluctance to assert jurisdiction, however, the Board recently sought to put the issue to rest by abandoning such tests and asserting jurisdiction in *all* cases where the employer meets the minimal requirements set forth in section 2(2) of the NLRA.[14] Although the case occurred within the context of a federal Job Corps program, the Board invoked a line of authority that includes entities performing military contracting, private fire fighting, health care, and school busing functions for federal, state, and municipal government. If *Management Training* is upheld, it will have profound implications for a growing number of private labor relationships established for the purpose of performing government functions.

The jurisdictional expansion reflected in *Management Training* may also signal the Board's attempt to change the way we think about unions and labor relations. Never before has the Board recognized that private unions can contribute to labor relations in the absence of economic negotiation. The 1995 decision represents the Board's attempt to renew the NLRA's relevance in American labor relations by replacing or supplementing an economic paradigm with a political model premised upon substantive equality and democratic participation. In this role, the Board becomes an administrative structure that supports communication in the workplace and increased employee participation. The courts would do well to offer a warm reception to this administrative reform.

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12. *See* NLRB v. E.C. Atkins & Co., 331 U.S. 398, 413 (1947) (concluding that although government exerted some control over the employment relationship, employer retained sufficient control over economic terms of employment to render bargaining appropriate under the NLRA).

13. *See infra* part II.

14. Management Training Corp., 317 N.L.R.B. 1355, 1357 (1995) (rejecting view that jurisdiction should be determined on the basis of whether the employer or the government controls most of the employee's terms and conditions of employment).

Part I of this Note discusses the economic concerns that gave rise to the NLRA, the statutory lens through which the Board views industrial relations. Part II traces the historical treatment of labor relationships that are partially controlled by governmental requirements. Part III describes the Board's *Management Training* decision as an important shift in the way we view labor relations. By changing the focus from economic to political participation, the Board emphasizes the importance of worker involvement in all aspects of the employment relationship. Judicial affirmation of this reform would permit meaningful administrative support to modern labor relations, fostering increased employee participation and promoting industrial democracy.

I. ECONOMIC RATIONALE FOR THE NLRA

Management Training is especially noteworthy in light of the Depression-era policies that the NLRA sought to address. Thus, before discussing collective bargaining in the absence of economic negotiation, it is important to consider the economic impetus that gave rise to the Act. Only after exploring the commercial orientation of the NLRA can one understand the implications of altering that paradigm.

The NLRA, sponsored by Senator Robert F. Wagner, clearly emerged as a response to the economic crisis of the mid-1930s. Wagner intended for industrial workers to raise their wages and improve their standard of living. His legislation protected collective bargaining, which he described as a remedy to a host of economic woes:

> When wages sink to low levels, the decline in purchasing power is felt upon the marts of trade. And since collective bargaining is the most powerful single force in maintaining and advancing wage rates, its repudiation is likely to intensify the maldistribution of buying power, thus reducing standards of living, unbalancing the economic structure, and inducing depression with its devastating effect upon the flow of commerce.[15]

The Senate Committee on Education and Labor recommended passage of the Wagner Act and affirmed that wage levels demand as much attention as price levels, "for the exchange of goods depends as much upon the consumer's income as upon the price which he must pay."[16] The report concluded by underscoring the economic benefits of collective bargaining: An analysis of commerce "depends as much upon a floor for wages as upon a ceiling for prices. And in stabilizing wages, no factor plays a more important role than collective bargaining."[17]

In a speech on the Senate floor, Wagner described his proposed legislation as a response to industrial warfare that had stifled the free flow of commerce:

> The bitterness and the heavy cost of economic conflicts between employers and workers in this country constitute a long and tragic story. Between 1915 and 1931 there were 4,856 strikes, involving the surrender of 2,795,000 jobs

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15. 79 CONG. REC. 7572 (1935).
16. S. REP. NO. 573, 74th Cong., 1st Sess. 18 (1935).
17. *Id.* at 18-19.

> and the loss of 72,957,000 working days. At least $1,000,000,000 per year have been wasted because of these controversies.[18]

In recommending the Wagner Act, the Senate Committee on Education and Labor also underscored the nation's labor-related economic problems. In the two years prior to the passage of the Act, more than two million workers had been drawn into strikes and over thirty-two million working-days had been lost because of labor controversies.[19]

Senator Wagner believed that wages and business activity could best be spurred by strict enforcement of the rights to organize under section 7. The provision guarantees employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ."[20]

> [T]he history of the past 2 years makes it clear that failure to maintain a sane balance between wages and industrial returns will be attended by the same fatal consequences as in the past. The rise of business activity to 89 percent of normal in the precode booms of April and July 1933 collapsed after July because no adequate purchasing power had been built up to sustain it. . . .
>
> If the more recent quickening of business activity is not supported by rises in wages, either we shall have to sustain the market indefinitely by huge and continuous public spending or we shall meet the certainty of another collapse.[21]

The Senator reiterated in a radio address that "[t]he upswing of business cannot be maintained indefinitely unless there is a tremendous reduction in unemployment, a sustained rise in purchasing power . . . . It is to these ends that my national labor-relations bill is directed."[22]

In that speech, the bill's author explained the economic benefits of bargaining symmetry. It was perfectly obvious that it would be impossible for employees individually to deal directly with large employers such as United States Steel Corporation. "Nor can one imagine a single huge employer cooperating separately with each of 10,000 to 50,000 workers. Cooperation depends upon the free and untrammeled right of workers to organize for that purpose."[23] In its report recommending the passage of the NLRA, the House Committee on Labor offered a similar rationale for protecting unions. The committee stated that labor organizations represent a "movement by workers to pool their economic strength in a type of labor organization most effective in approximating the economic power of their employers, . . . thereby establishing that 'equality of position between the parties in which liberty of contract begins.'"[24] In its declaration of policy, the committee offered an economic rationale for supporting the bill. "By

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18. 79 CONG. REC. 7573 (1935).
19. S. REP. NO. 573, 74th Cong., 1st Sess. 2 (1935).
20. NLRA § 7, 29 U.S.C. § 157 (1994).
21. 79 CONG. REC. 7568 (1935).
22. 79 CONG. REC. 6184 (1935).
23. *Id.*
24. H.R. REP. No. 969, 74th Cong., 1st Sess. 8 (1935).

protecting the right of employees to organize and bargain collectively . . . the bill eliminates many of the most important causes of unrest and strife, and so fosters, protects, and promotes the free flow of commerce . . . ."[25] In addition, the House Labor Committee emphasized the economic force of the bill's proposed remedies. "The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal."[26]

In the NLRA, Senator Wagner proposed a political solution to the nation's economic problems. Indeed, the Act signaled the incorporation of democracy into the sphere of industrial relations. In a manner resembling a democratic polity, the Board would oversee campaigns, conduct secret elections, and protect free and vigorous discussion. Wagner emphasized, however, that there would be no governmental supervision of the substantive contractual terms. The government "does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met."[27] The Senator envisioned a truly democratic process wherein the parties would advance their own agendas independent of governmental paternalism. "In applying the healing balm of an upright, impartial, and peaceful forum to industry and labor it will benefit employers, workers, and the country at large."[28]

Wagner's political *procedure* for democratic decisionmaking in the workplace applied chiefly to bargaining matter of economic *substance*. Consonant with legislative intent, section 9 of the NLRA has an economic orientation and requires parties to bargain collectively about "wages, hours, and other conditions of employment." While parties are free to bargain about non-economic terms such as evaluations, discipline, and flexibility of assignments, the bill clearly sought to protect bargaining about "bread and butter" terms such as wages, hours, pensions, benefits, hiring, and firing. The Supreme Court, in fact, would conclude that without such requisite economic bargaining, the Board may not even assert jurisdiction.[29]

II. THE BOARD'S JURISDICTION: HISTORICAL TREATMENT OF PRIVATIZED LABOR RELATIONSHIPS

The language of the NLRA would suggest that the Board has jurisdiction over any labor relationship except where the employer or employee is excluded under sections 2(2) and 2(3) of the Act. Section 2(2) bars the Board from the public sphere, excluding it from labor relations where the employer consists of the "United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ." Section 2(3) excludes the Board from controversies where the employee is an agricultural laborer, independent contractor, or supervisor.

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25. H.R. REP. No. 1147, 74th Cong., 1st Sess. 8 (1935).
26. H.R. REP. No. 969, 74th Cong., 1st Sess. 21 (1935).
27. 79 CONG. REC. 7571 (1935).
28. 79 CONG. REC. 7573 (1935).
29. *See* NLRB v. E.C. Atkins & Co., 331 U.S. 398, 405 (1947).

Despite the Act's broad language, the Board has grappled for fifty years with the question of when to assert jurisdiction over a private employer who, prohibited by governmental requirements, cannot bargain about various subjects at the bargaining table. Whether the NLRB has asserted jurisdiction over a labor relationship has depended upon the substantive terms of the contract and how much control the government exerts over the economic provisions of the agreement.[30] The Board and the courts have developed a variety of tests to determine whether the Board should assert jurisdiction over such a case.

A. Foundations of the "Control" Test

In *NLRB v. Atkins*,[31] an Indianapolis manufacturer of armor plate entered into a contract with the War Department, and although the employer had already retained the services of six watchmen or guards, the contract with the War Department required that an auxiliary military police force of sixty-four members be established to guard the plants.

In response to a petition to certify the employees as union members, the employer moved to dismiss the petition on the ground that it was not an "employer" and the militarized guards were not "employees" within the meaning of the NLRA.[32] The government enforced the requirement that sixty-four military guards would be hired, and the government ultimately paid their wages through the proceeds of the contract. Therefore, Atkins argued, the government was the employer of the guards. Section 2(2), he contended, excludes governmental employers from the definition of "employer," and thus the Board had no jurisdiction over the controversy. Moreover, he asserted that militarization changed the guard's status as "employees" within the meaning of the Act.[33]

The Supreme Court underscored that the Board has some discretion in the way it interprets the section 2 definitions:

> Congress has not attempted to spell out a detailed or rigid definition of an employee or of an employer. . . . [T]he terms "employee" and "employer" in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.[34]

The Court considered the meaning of the section 2 definitions by determining whether the "militarization is such as to transfer to the Army all the matters over which . . . would form the basis for collective bargaining as contemplated by the

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30. *See, e.g.*, Correctional Medical Sys., 289 N.L.R.B. 810 (1989); PHP Healthcare Corp., 285 N.L.R.B. 182 (1987); Res-Care, Inc., 280 N.L.R.B. 670 (1986), *overruled by* Management Training Corp., 317 N.L.R.B. 1355 (1995).

31. *Atkins*, 331 U.S. at 405.

32. *Id.* at 400.

33. *Id.*

34. *Id.* at 403.

Act."[35] If so, "the guards may lose their status as private employees within the purview of the statute."[36]

Thus, the Court examined the degree to which the private employer exerted control over the employment relationship. The Court acknowledged that the Army retained veto power over employment and dismissal, as well as disciplinary latitude to order suspensions and fines[37] for the purpose of increasing "the authority, efficiency, and responsibility of guard forces."[38] Although the employer had the power to initiate dismissals from the force, such discretion remained subject to the approval of the military.[39] However,

> [The] military plant guard officers were authorized to exercise direct control over the guard forces only in matters relating to military instruction and duties as Auxiliary Military Police. But such orders "will be issued only after consultation with and, if possible, concurrence by the plant management. . . . Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations."[40]

Moreover, the regulations provided that "[b]asically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements."[41] The employer "carried the guards on its regular pay rolls, determined their rate of compensation and paid their wages . . . ."[42]

The Court concluded that the regulations permitted the normal, private employer-employee relationship to remain substantially intact:

> It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. . . . [I]t matters not that [the employer] was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. . . . That relationship may spring as readily from the power to determine the *wages and hours of another, coupled with the obligation to bear the financial burden of those wages* and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker.[43]

Based on an analysis of who controlled the economic terms of the employment relationship, including wages, hours, hiring, and firing, the Court concluded that the guards were not employees of the United States, but of the plant.[44]

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35. *Id.* at 405-06.
36. *Id.*
37. *Id.* at 407, 410.
38. *Id.* at 406.
39. *Id.* at 411.
40. *Id.* at 408 (footnote omitted).
41. *Id.*
42. *Id.* at 411.
43. *Id.* at 413-14 (emphasis added).
44. *Id.* at 412-13.

The Court also considered the policies of the NLRA in upholding the Board's assertion of jurisdiction. It determined that the guards were indistinguishable from ordinary watchmen, and emphasized the guards' economic need for collective bargaining. Without bargaining, they are subject to the unilateral determination by the employer of their wages, hours, seniority, tenure, and other conditions of work. "Individually, they suffer from inequality of bargaining power and their need for collective action parallels that of other employees. From any economic or statutory standpoint, the Board would be warranted in treating them as employees."[45]

Moreover, the Supreme Court gave great deference to the Board's assertion of jurisdiction. It endorsed the Board as "well acquainted with the important and complex considerations inherent in the situation. The responsibility of representing the public interest in such matters and of reaching a judgment after giving due weight to all the relevant factors lay primarily with the Board."[46] The NLRB, in performing its delegated function of defining and applying these terms, "must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. . . . It is free to take account of the more relevant economic and statutory considerations."[47]

Atkins stands for the proposition that the Board may assert jurisdiction over labor relationships even when the private employer retains only qualified control over employment terms as a result of governmental restrictions. The case also demonstrates that the Board's assertion of jurisdiction requires a balancing calculus for determining the degree of employer control over economic terms of employment.

B. Introduction and Abandonment of the "Intimate Connection" Test

In *Herbert Harvey*[48] the notion of an "intimate connections" test first arose. There the D.C. Circuit faced the question whether one joint employer must bargain with the union when the Board has no jurisdiction over the other joint employer.[49] Harvey was a private employer that supervised the maintenance of the World Bank building. That company was a joint employer with the World Bank, an exempt institution. In his concurring opinion Judge McGowan suggested that the Board consider the *relationship* between the services being performed and the purposes of the exempt institution. He emphasized that the same policy reasons apply whether the employer is an exempt institution or a private entity contracting for the exempt institution. The Board should exempt the latter "not because the [private] employer is not a true employer but because

45. *Id.* at 404.
46. *Id.* at 414.
47. *Id.* at 403.
48. Herbert Harvey, Inc. v. NLRB, 385 F.2d 684 (D.C. Cir. 1967).
49. *Id.* at 685-86.

what he is doing is of such a nature that the institution would be exempted if it were doing the same thing through its own employees."[50]

Thus, on remand, the Board developed a two-prong test comprised of the *Atkins* governmental control test and an "intimate connection" test. Applying the first prong, the Board acknowledged that the maintenance company retained complete control over economic terms of employment. As a private employer, Harvey had the right to "determine wage rates, to set hours of work, to discharge or hire or otherwise to exercise authority over the conditions of employment."[51] Since the control test had been met, the Board explained the second prong, the "intimate connection" test:

> [T]he assertion of jurisdiction over a contractor providing services for an institution exempted from the process of the Act is dependent upon the relationship of the services performed to the . . . functions of the institution. Where the services are intimately connected with the . . . operations of the institution, the Board has found that the contractor shares the exemption; on the other hand, where the services are not essential to such operations the Board has found that the contractor is not exempt and asserts jurisdiction over the contractor's activities. By so doing the Board is enabled to strike a balance between the congressional policy of excluding the noncommercial charitable and educational activities of institutions and the policy of the statute to encourage collective bargaining—one of the fundamental purposes of the Act.[52]

Thus, if Harvey's services are intimately connected with the banking operations of the World Bank, the Board would find that Harvey shares the exemption, but where Harvey's services are not essential to such operations, the Board's jurisdiction extends to the contractor (Harvey).[53] The Board concluded that Harvey and the World Bank were not intimately connected. The World Bank is an international investment institution engaged in making or guaranteeing loans for productive reconstruction and development projects. The respondent's employees, however, are engaged exclusively in the operation and maintenance of the building in which the World Bank is located. The custodial duties performed by Harvey's employees have no connection to the functions of the World Bank as an investment institution.[54] Since the employer retained control and was not intimately connected with the World Bank, the Board asserted jurisdiction over the building maintenance company and extended the protections of the NLRA to its employees.

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50. *Id.* at 686.

51. Herbert Harvey, Inc., 171 N.L.R.B. 238, 239 (1968).

52. *Id.* at 239-40 (citation omitted).

53. The Board often refers to the entity exerting control over the employer as an "exempt institution" because it does not fall within the purview of the NLRA. The "exempt entity" usually refers to an arm of the government which may not be able to be considered literally governmental, but is nonetheless excluded under § 2(2)—the governmental exclusion. Where precision permits and clarity requires, I will refer to exempt entities as "the government" and to nonexempt entities as "private employers."

54. *Herbert Harvey*, 171 N.L.R.B. at 240-41.

The Board also applied the two-prong test in *Rural Fire Protection Co.*[55] The employer, a private Arizona corporation, provided fire suppression, fire prevention, fire investigation, security, first aid, rescue, and ambulance services to the city of Scottsdale. The contract with the city council required the employer to provide reasonable and customary fire protection to the city. Since much of the major equipment in the fire station was owned by the city, the parties agreed that certain equipment would remain within the city limits at all times, except in cases of emergency. The employer agreed to recruit and hire a crew of thirty full-time fire fighters from the ranks of city residents and maintain a reserve force of part-time fire fighters who respond when needed. The contract specified the number of personnel to be utilized, the number of hours required, and the number of employees that must respond to certain calls. The employer was responsible for hiring, supervision, discipline, and discharge of employees. It provided its own pension plan and health and life insurance, and contributed toward workman's compensation for the employees. The city was obligated to pay a fixed sum to the employer for its services.[56]

In *Rural Fire*, both the control analysis and the intimate connection test were important. The degree of control exercised by the exempt institution may be a determinative factor but where it is not, the intimate connection test is applied. Where the control exercised over the nonexempt employer is not substantial, so that the employer is capable of bargaining with the union over "wages, hours, and other conditions of employment," the focus is on the nature of the relationship between the private employer and the government.[57]

The Board framed the issue as whether to assert jurisdiction over an employer who provides fire fighting services to a municipality. It noted that the city of Scottsdale is not an employer under the Act. Applying the two-prong test, the Board accepted that the employer had sufficient control over economic conditions of employment, but underscored the intimate connection between the employer's services and the governmental function. "[T]he Employer's firefighting services . . . are intimately related to Scottsdale's municipal purposes. . . . [T]he firefighting service herein is itself an essential municipal function which Scottsdale, instead of performing directly with its own employees, delegated to the Employer to perform on its behalf."[58] It follows that with regard to the employees who perform the services for Scottsdale, the Employer shares the city's exemption from the Board's jurisdiction.[59]

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55. Rural Fire Protection Co., 216 N.L.R.B. 584 (1975).

56. *Id.*

57. *Id.* at 586.

58. *Id.*

59. *Id.* at 586-87. The Board compared the case with other "intimate connection" precedents. *See, e.g.*, Current Construction Corp., 209 N.L.R.B. 718 (1974) (employer who provided tree service for city shares exemption); Wackenhut Corp., 203 N.L.R.B. 86 (1973) (employer providing guard services to city college shares exemption); Inter-County Blood Banks, 165 N.L.R.B. 252 (1967) (employer providing bloodbank services to exempt hospital shares exemption).

In *National Transportation Service*[60] the Board dismissed the "intimate connection" prong as unworkable and returned to the control test as the dispositive criterion. In that case, the employer, who was involved in the busing of public school children, contested the Board's jurisdiction over labor relations with his employees. In a prior representation proceeding the Board had declined to assert jurisdiction because the busing of public school children was "intimately related" to public education, a government function. However, in the later proceeding the court reasserted its jurisdiction by rejecting the "intimate connection" test. The Board explained its rationale for abandoning the intimate connection test:

> We are . . . unaware of any valid policy consideration requiring or warranting our adherence to the "intimate connection" test. . . . We see no need to examine the relationship between an employer and an exempt entity for which it performs services for some abstract "intimate connection" which has no bearing on the employer's ability to bargain effectively with a labor organization . . . . Accordingly, we conclude that the "right of control" test provides a more objective, precise, and definitive standard for determining discretionary jurisdictional issues than the "intimate connection" test.[61]

The Board thus returned to the control test alone for determining "whether the employer would be able to bargain effectively about the terms and conditions of employment of its employees."[62] While the school districts for which the private entity provides bus services designate the arrival and departure times of the buses, the "school districts exercise no appreciable control over Respondent's employees with regard to hiring, firing, supervision, discipline, work assignments, or the conferring of benefits."[63] After enumerating such economic terms of employment, the Board concluded that the employer retained sufficient control over the employees to enable them to engage in meaningful bargaining over conditions of employment, and therefore asserted jurisdiction.

The dissent in *National Transportation* responded that "it would also not be in the best national interest for this Board to assert jurisdiction over employers who . . . are nonetheless so closely related to exempt entities that the policy considerations underlying the . . . exemption also apply to them."[64] The same

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60. National Transp. Serv., 240 N.L.R.B. 565 (1979).

61. *Id.* at 566 (citation omitted).

62. *Id.* at 565.

63. *Id.* at 566.

64. *Id.* at 567 n.12 (dissenting opinion). The Board expressed disagreement about which provision empowers the Board with discretion to decline jurisdiction. The majority in *National Transportation* pointed to § 14(c)(1) of the NLRA for authority to establish or abandon a test for declining jurisdiction. That provision permits the Board to decline to assert jurisdiction where the effect of a labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. Moreover, the Board justified its abandonment of the "intimate connection" test by pointing to an absence of "congressional intent" in § 14 for the Board to decline to assert jurisdiction "over any employer solely because of the relationship between services it provides to an exempt entity and the purposes of such entity." *Id.* at 565 (citation omitted).

The dissent disagreed that the Board's past refusal to assert jurisdiction over such employers derives from § 14(c)(1). Instead, dissenting members Murphy and Penello argued that such

policy considerations that justify excluding government employees from performing such services likewise warrant exempting these categories of private employees from its scope.[65] Since nearly all public employees are forbidden to strike, private employees who perform essential government services that are intimately related to exempt government functions should be treated as public employees, and excluded from the purview of the Act. Despite the dissent's vigorous focus upon intimate connections, *National Transportation* has come to stand for the proposition that a singular analysis of the employer's degree of control will be dispositive for determining whether the Board will assert its jurisdiction.

C. Further Development of the Control Test

In response to criticism that *National Transportation* provided little clarity and in a reexamination of the "intimate connection" standard, the Board in *Res-Care, Inc.*[66] reaffirmed the basic control test set forth in *National Transportation.* In applying that test, however, it examined not only the control retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations.[67]

Res-Care, a for-profit employer, operated a residential Job Corps center in Edinburgh, Indiana, under a contract with the Department of Labor ("DOL"). The Job Corps is a federal employment and training program authorized by the Job Training Partnership Act.[68] It prepares youth and unskilled adults for entry into the labor force and provides job training to economically disadvantaged individuals. Res-Care hires employees, in accordance with rigid DOL regulations, to foster the vocational development of such youth and unskilled adults.

In order to secure a contract with the DOL, Res-Care must submit an abundant collection of extensive proposals and policy statements. Res-Care makes bids to the DOL in a proposal that describes the nonfinancial aspects of the proposed operations. The proposal includes both a line-by-line budget and a description of the financial aspects of the employer's proposal including a staff manning table listing Res-Care's job classifications, a labor grade schedule, and a salary

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cases share the *statutory* exemption of a governmental body from NLRB jurisdiction, and therefore the Board is prohibited from asserting jurisdiction. The argument is grounded upon an administrative interpretation of the statutory definition of employer, § 2(2). If government employees are exempt from the Board's jurisdiction, then private employees performing the same roles are statutorily exempt as well because the same policy considerations apply to them.

The majority position is supported in Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 773-74 (D.C. Cir. 1967), but others have viewed the control test as an essentially statutory standard. *E.g.*, Denver Post of the Nat. Soc. v. NLRB, 732 F.2d 769, 774 (10th Cir. 1984); NLRB v. Austin Dev. Ctr., 606 F.2d 785, 789 (7th Cir. 1979); NLRB v. Pope Maintenance Corp., 573 F.2d 898, 902 (5th Cir. 1978).

65. National Transp. Serv., 240 N.L.R.B. 565, 568 (1979).

66. 280 N.L.R.B. 670 (1986).

67. *Id.* at 672.

68. 29 U.S.C. §§ 1501-06 (1994).

schedule which sets minimum and maximum wage rates for each labor grade.[69] The DOL approves the staff manning table, the labor grade schedule, the salary schedule, personnel policies, and the designated employee benefits when it awards the contract to the employer. The contract specifically provides that any proposed changes in the approved wage ranges or fringe benefit plans must be submitted to the DOL for approval. Proposed changes in the staff manning table, labor grade schedule, and salary schedule must also be approved by the DOL.[70]

The contract between the DOL and Res-Care contains other limitations on the wages that Res-Care can pay to its employees. The contract requires wages to be no more than those paid to persons providing similar services in the area where the program is conducted, or in the area of the particular employee's previous employment, whichever is higher. In addition, Res-Care agrees in the contract not to hire employees at wage levels exceeding 110% of the wages from their preceding employment. All wage increases, due to merit, change in position, or promotion, are limited to less than ten percent. Any deviation from these conditions requires a waiver from the DOL in each instance.[71]

Although Res-Care conducts its own hiring, the contract requires Res-Care to submit its selection criteria and hiring procedure to the DOL for approval. DOL must approve the hiring of the center director and employees who make at least $15,000 per year and who report directly to the center director. Res-Care also agrees to set a hiring goal of fifteen graduates of the Job Corps center each contract year. The contract limits the number of full-time equivalent staff employed under its terms to 208.[72]

The Board stressed that it would examine not only the amount of control retained by the employer but also control exercised by the exempt entity, to determine whether the employer is capable of engaging in meaningful collective bargaining.[73] After a lengthy examination of the entire contract, the Board's holding hinged on the economic terms of employment. "In every sense, it is DOL, not Res-Care, which retains ultimate discretion for setting wage and benefit levels of the job corps center, and thus effectively precludes Res-Care from engaging in meaningful collective bargaining."[74]

While the Board offered a token acknowledgment of the importance of non-economic issues, it held that for purposes of the control test, economic terms are the core of the employment relationship and will in themselves be dispositive:

> We agree with those circuit court decisions . . . that have recognized the existence of a core group of "basic bargaining subjects," and have held that if an employer retains control over decisions affecting those subjects, meaningful bargaining is possible. Conversely, therefore, if the employer does not have ultimate authority over these subjects, we would find that meaningful bargaining is precluded. Without denigrating the importance of other personnel-related issues, *we hold that if an employer does not have the final say on the entire package of employee compensation, i.e., wages and*

69. *Res-Care*, 280 N.L.R.B. at 670-71.
70. *Id.*
71. *Id.* at 671.
72. *Id.*
73. *Id.* at 672.
74. *Id.* at 673 (footnote omitted).

> *fringe benefits, meaningful bargaining is not possible.* . . . In our view the ability of an employer to have the final, practical say regarding wages and benefits, and the *union's practical ability to affect the employer's decision by resort to economic action is fundamental.*[75]

Thus, when an employer like Res-Care lacks the ultimate authority to determine economic terms of employment, such as wage and benefit levels, it lacks the ability to engage in the necessary "give and take" that makes bargaining meaningful.[76] To buttress its refusal to assert jurisdiction, the Board noted judicial approval of the control test, as well as three prior cases in which the court of appeals used the control test to overturn the Board's assertion of jurisdiction.[77]

III. FROM ECONOMIC TO POLITICAL PARTICIPATION

After *Res-Care*, the Board summarily declined jurisdiction over Job Corps centers.[78] The Board also declined jurisdiction in a number of non-Job Corps cases in which the employers' contracts specified wage ranges and benefits, and the exempt entity had to approve any changes to the contract.[79] Private employees performing publicly subsidized functions continued to be denied the right to organize and bargain collectively.

A. Management Training

In *Management Training*,[80] a 1995 Job Corps case having many of the same facts as *Res-Care*, the Board eliminated the fifty-year-old control test and resolved to assert jurisdiction whenever the statutory definition of "employer" is met:

> [W]e think the emphasis in *Res-Care* on control of economic terms and conditions was an over-simplification of the bargaining process. While economic terms are certainly important aspects of the employment relationship, they are not the only subjects sought to be negotiated at the bargaining table. Indeed, monetary terms may not necessarily be the most critical issues between the parties. In times of downsizing . . . the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like. Consequently, in those circumstances, it may be that the parties' primary interest is in the noneconomic area. It was shortsighted, therefore, for

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75. *Id.* at 674 (footnotes omitted) (emphasis added).

76. *Id.*

77. *See id.* at 673. The Board cited Board of Trustees of Memorial Hosp. v. NLRB, 624 F.2d 177 (10th Cir. 1980); NLRB v. Chicago Youth Ctrs., 616 F.2d 1028 (7th Cir. 1980); and Lutheran Welfare Servs. v. NLRB, 607 F.2d 777 (7th Cir. 1979).

78. Career Sys. Dev. Corp., 301 N.L.R.B. 436, *granting summary judgment*, 305 N.L.R.B. No. 16 (1991), *enforcement granted*, 975 F.2d 99 (3d Cir. 1992).

79. *See, e.g.*, Correctional Medical Sys., 289 N.L.R.B. 810 (1988); PHP Healthcare Corp., 285 N.L.R.B. 182 (1987).

80. Management Training Corp., 317 N.L.R.B. 1355 (1995).

> the Board to declare that bargaining is meaningless unless it includes the entire range of economic issues.[81]

The Board called it "demeaning" to the bargaining process to treat personnel, discipline, evaluations, flexibility of assignments, and other non-economic issues as inconsequential.[82]

"[S]uccessful and effective bargaining already occurs on a large scale . . . under the Federal Services Labor Management Relations Statute, 5 U.S.C. § 7101 et seq., as well as public sector bargaining on the state and local level."[83] The Board concluded that bargaining could be meaningful for *Management Training* as well:

> The fact that some matters have to be approved by the contracting government agency does not mean that bargaining is meaningless; there are, after all, proposals to be drafted—if not in the extant contract, then in future ones—as well as other matters to be negotiated which do not require contractual approval. Even if the Government rejects a negotiated wage increase and the employer has to fund the increase out of its own profits . . . that burden is no greater than that carried by any contractor operating under a cost-plus-fixed-fee contract. Nor does the fact that the employer has limited economic resources with which to grant the union's requests mean that there is not sufficient room for give and take in the bargaining process; profit margins are frequently narrow.[84]

In removing the economic bargaining requirements, the Board suggested that all remaining employment conditions be the product of democratic participation. "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."[85]

Although the Board's new approach contravenes decades of judicially approved control test precedent, including *Atkins* which recognizes a need for analyzing economic terms retained by the employer, the majority invoked the authority of two landmark Supreme Court cases[86] which held that the National Labor Relations Act does not regulate substantive terms of employment contracts. *Insurance Agents' International Union* and *American National Insurance* stand for the proposition that the government will not intrude upon the matters of bargaining substance. "Thus, the Court stated that 'the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment' on the terms of a contract. Whether a contract should contain a particular provision is 'an issue for determination across the bargaining table, not by the Board.'"[87]

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81. *Id.* at 1357.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 1358.
86. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).
87. *Management Training*, 317 N.L.R.B. at 1358 (footnote omitted) (quoting *American Nat'l Ins. Co.*, 343 U.S. at 404, 409).

By encouraging the parties to bargain over whatever terms they deem important, the Board changes the focus from economic to democratic participation:

> In *Res-Care*, by requiring the employer to have control of economic terms before it could assert jurisdiction, the Board seems to have made a judgment, either directly or indirectly, that not only were certain contract terms of higher priority than others, but that such terms must be a part of contract negotiations. This, we think, amounts to the Board's entrance into the substantive aspects of the bargaining process which is not permitted under the authority cited above.[88]

The Board will no longer decide which issues are important enough to merit employee voice through collective bargaining, but will encourage worker involvement in all areas of the labor relationship. Whether the employer is involved in school busing, fire fighting, or an administrative function, and whether the exempt entity is federal, state, or municipal, the broad language of *Management Training* suggests that all employees of privatization enterprises will gain bargaining rights. In contrast to the overwhelmingly economic role assigned to collective bargaining during the enactment of the NLRA and the cases that followed, the Board has assigned a new role to collective bargaining, whereby negotiation becomes a vehicle for political participation. By asserting its jurisdiction and protecting collective bargaining, the Board promotes the democratization of the privatized workplace, and removes a growing number of employees from the bargaining vacuum between public and private.

B. Implications of Management Training

Although *Management Training* will carry little precedential weight outside the context of privatized employment relationships, the decision is in keeping with both academic and industrial movements toward democratization of the workplace. As the first case to stand for the proposition that unions have an important role to play exclusive of "bread and butter" bargaining, *Management Training* speaks volumes about the way we think about unions and industrial relations. It means that employees have a political right to participate in the decisions that affect their work.

Even as the very basis of Board jurisdiction has remained primarily economic, labor scholars have long cloaked labor relations in the garb of political jargon.[89] Richard B. Freeman and James L. Medoff, for example, have suggested that societies utilize two basic mechanisms for dealing with social or economic problems, an economic approach and a political approach:

> The first is the classic market mechanism of exit-and-entry, in which individuals respond to a divergence between desired and actual social conditions by exercising freedom of choice or mobility: the dissatisfied

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88. *Id.*

89. Indeed even Senator Wagner peppered his Senate floor speeches with passing references to the promotion of "freedom and dignity," and casting off the "shackles of political despotism." 79 CONG. REC. 7565 (1935).

> consumer switches products; . . . the unhappy couple divorces. In the labor market, exit is synonymous with quitting . . . .
>
> The second mode of adjustment is the political mechanism . . . termed "voice." "Voice" refers to the use of direct communication to bring actual and desired conditions closer together. It means talking about problems: complaining to the store about a poor product rather than taking business elsewhere; . . . discussing marital problems rather than going directly to the divorce court. In a political context, "voice" refers to participation in the democratic process, through voting, discussion, bargaining, and the like.[90]

In order to illustrate "voice" response, Medoff and Freeman offered the example of a citizen concerned about the quality of schools in a given locality. Instead of exiting from a poor school district, "[t]he voice solution would involve political action to improve the school system through school board elections, Parent Teacher Association meetings, and other channels of communication."[91]

In the employment arena, the authors have contended that "voice" means discussing with an employer conditions that ought to be changed rather than quitting the job. In modern industrial relations, a union is the vehicle for collective voice; it provides workers with a political means of communicating with management.[92] The "voice" model applies equally well to non-economic terms such as discipline, evaluations, and transfers as it does to the "wages, hours, and conditions of employment" terms envisioned by Depression-era supporters of the NLRA. In this manner, collective bargaining provides a democratic forum where employees can participate in the resolution of the issues of their choosing.

In his book, *Governing the Workplace*, Paul C. Weiler has discussed the economic and political roles of collective bargaining.[93] Although his views represent a fairly radical departure from the current model of labor relations, including mandatory unions for all employees, his political theory of collective bargaining gains a great deal of force within the context of privatized labor relations whereby employees may bargain over non-economic terms:

> The economic view supposes that collective employee action is no more than a technique through which workers can pool their bargaining power to extract better wages and benefits from their employer. . . . Certainly the economic factor has been a prime motivation for both union representation and legal regulation. But . . . there is much more to life in the workplace than these bread-and-butter concerns. In the contemporary employment relationship, management is able to wield real power about a host of issues in the workers' lives. . . . Just as is true in the school context, in which a dissatisfied citizen cannot easily move to a different community or school system, the worker who has committed himself to a career with a particular firm can advance a strong moral claim to some meaningful voice about the exercise of managerial power, with its far-reaching impact on his stake in the firm.[94]

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90. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 7-8 (1984).
91. *Id.* at 8.
92. *Id.*
93. PAUL C. WEILER, GOVERNING THE WORKPLACE (1990).
94. *Id.* at 283.

Weiler has underscored the need for a "basic level of internal participation in a specified range of decisions,"[95] and focuses upon "[t]he deeper political values served by employee participation."[96] For Weiler, democratic participation should be guaranteed "as a matter of moral right and legal principle, rather than be left to individual workers to struggle for by themselves, with the inevitable disparities and gaps left by that process."[97] The theme of democratic governance echoes throughout Weiler's writing. For him, it is a universal principle having as much force in the workplace as it does in the nation at large. The principle remains unaltered whether the focus is upon pensions or personnel, wages or work schedules.

Although Weiler envisions a complete restructuring of industrial relations, he focuses many of his reforms around democratization of the chain of command. One important aim for Weiler includes the development of "an in-house, bottom-up system of employee representation which acknowledge[s] that the work force as a whole ha[s] a common stake in the human resource policies and other programs of the employer, whatever the specific responsibilities and status enjoyed by any one occupational category."[98] Weiler presents a clear inversion of the traditional pyramidal chain of command.

In an era "when business was more predictable and stable, companies organized themselves in vertical structures to take advantage of specialized experts."[99] Theoretically, dramatic increases in the division of labor would result in increased expertise and quality. Each worker could be a master technician of a specific task. The benefits to the traditional model are obvious: "Everyone has a place, and everyone understands his or her task. . . . [However,] such organizations make it difficult for anyone to understand the task of the company as a whole and how to relate his or her work to it."[100]

Industry has started toward the democratization of the workplace. Many industries have abandoned the traditional pyramidal chain of command and adopted a "bottom-up" structure to maximize "voice" within the workforce and profits at year's end. For many businesses, day-to-day activities are managed by teams of managers and employees alike. Workers evaluate one another regardless of their position in the company.[101]

"This ongoing transformation of the workplace requires a high level of commitment and understanding from front-line workers that is inconsistent" with a more traditional management style.[102] "Senior managers must relinquish control, something rare in the absence of a guillotine or a voting booth."[103] Under

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95. *Id.* at 282.

96. *Id.* at 283.

97. *Id.* at 282-83.

98. *Id.* at 285.

99. John A. Byrne, *The Horizontal Corporation,* BUS. WK., Dec. 20, 1993, at 76, 78 ("Horizontal" refers to the chain of command.).

100. *Id.* at 78-79.

101. *Id.* at 79.

102. Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA,* 69 N.Y.U. L. REV. 125, 137 (1994).

103. Editorial, *Farewell to the Pyramid Chart,* BUS. WK., Dec. 20, 1993, at 122.

the newer scheme, companies encourage workers to become involved in troubleshooting and decisionmaking. "Workers cannot be treated as passive recipients of management dictates if they are at the same time expected to learn new tasks and skills, rotate among work assignments, interact with engineers, customers, and suppliers, and supervise themselves."[104] As opposed to the top-down leadership inherent in a pyramidal structure, "horizontal corporations" grant workers decisionmaking powers over matters that directly involve their work.

In the wake of academic and industrial calls for employee involvement, the NLRB appears to have accepted the concept of the employee "voter booth." Employees have a political right to participate in the workplace decisions that affect them, and employers reap economic and political benefits from increased worker involvement. William B. Gould IV, now Chairman of the NLRB and author of the *Management Training* decision, has written extensively about fostering organized communication between employees and employers. He concludes his 1993 book[105] by affirming that "[a] civilized society provides for a voice. The challenge of the 1990s, and into the next century, is to devise policies and laws through which workers and management, with mutual self-respect and civility, can institutionalize their inevitable interdependence."[106] Under Gould's leadership, it is clear the Board has transformed collective bargaining, long considered an exclusively economic tool, into something political as well. His *Management Training* decision represents an important administrative reform of the NLRA.

CONCLUSION

Unlike prior decisions, *Management Training* extends bargaining rights to employees who have no economic stake in the collective bargaining process. On one level, the decision expands NLRB jurisdiction to include privatized employees in a manner that accords them the same bargaining benefits that their counterparts in the private and public sectors have long enjoyed. On a more philosophical level, the *Management Training* decision alters, or at least supplements, the very justification for labor law. Collective bargaining is not merely about a stream of commerce or standard of living. It is not simply about bread and butter. Instead, the affirmation of broad employee involvement reflects deep political values of substantive equality, industrial liberty, and democratic voice.

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104. Estreicher, *supra* note 102, at 137.
105. WILLIAM B. GOULD IV, AGENDA FOR REFORM (1993).
106. *Id.* at 264.