Management Training Corporation *and* Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222, Petitioner. Case 27–RC–7473

July 28, 1995

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

On June 15, 1994, the Regional Director for Region 27 administratively dismissed the petition in the above-entitled proceeding finding that under *Res-Care, Inc.*, 280 NLRB 670 (1986), Management Training Corporation (the Employer) does not have sufficient control over the employment conditions of its employees to enable it to engage in meaningful bargaining. Thereafter, in accordance with Section 102.67 of the Rules and Regulations, Teamsters Local 222 (the Petitioner) filed a timely request for review of the Regional Director's decision requesting the Board to reconsider its jurisdictional policy as set forth in *Res-Care.*

The Petitioner's request for review is granted as it raises substantial issues warranting review. In *Res-Care*, the Board held that, in deciding whether it would assert jurisdiction over an employer with close ties to an exempt government entity, it would examine the control over essential terms and conditions of employment retained by both the employer and the exempt entity to determine whether the employer in issue is capable of engaging in meaningful collective bargaining. 280 NLRB at 672. After careful consideration of *Res-Care* and its progeny and for the reasons set forth below, we have decided that the test set forth in *Res-Care* is unworkable and unrealistic. Rather, we think that whether there are sufficient employment matters over which unions and employers can bargain is a question better left to the parties at the bargaining table and, ultimately, to the employee voters in each case.[1]

The Petitioner filed the instant petition seeking to represent all of the Employer's Senior Residential Advisors and Residential Advisors, approximately 125 employees, at the Clearfield Job Corps Center, Clearfield, Utah. The Clearfield Job Corps Center is managed by the Employer pursuant to a contract with the United States Department of Labor (DOL).[2]

The Employer contended that the Board should decline jurisdiction under *Res-Care* because DOL exercises the same degree of control over its employment terms and conditions as DOL exercised over Res-Care's. In support of this contention, the Employer submitted an affidavit from Sam T. Hunter, Executive Vice President, Training Programs, who is responsible for the preparation of proposals, negotiations, and oversight of the Employer's Job Corps contracts with DOL.

According to Hunter's testimony, the Employer, like Res-Care, operates a job corps facility pursuant to a contract with the DOL. In both cases, the employers were required to include in their contract proposals (1) staffing tables listing job classifications and organizational charts as well as labor-grade schedules and salary schedules showing wage ranges, including the minimum and maximum wages for each grade and (2) a description of their personnel policies concerning compensatory time, overtime, severance pay, holidays, vacations, probationary employment, sick leave, raises, and equal employment opportunity. In both instances, the proposed salary structure and fringe benefits had to be supported by a wage and benefit comparability study to assure DOL that the proposals conformed to prevailing wage rates and benefits for persons providing substantially similar services in the area in which the job corps facility was located. In addition, the Employer's contract, like Res-Care's, required that any proposed changes to the approved staffing tables, labor grade schedules, salary schedules, personnel policies, or employee benefits must be submitted to DOL for approval. Both contracts also gave DOL the authority to deny reimbursement for any costs in excess of those allowed in the contract. The contracts further required the employers to follow DOL-approved policies in the hiring, firing, promotion, demotion, or transfer of any employee.

The Petitioner did not submit any evidence to the Regional Director or to the Board in its request for review which directly controverts these facts.[3] Accordingly, in view of the numerous and substantial similarities between this case and *Res-Care*, the Regional Director found *Res-Care* controlling and dismissed the petition.

[1] In its request for review, the Petitioner contends in particular that *Res-Care* is not controlling because (1) *Res-Care* did not consider the Job Training and Partnership Act, 29 U.S.C. § 1501 et seq., which contemplates that private job corps centers may be organized, and (2) the Employer's contract to operate a job corps center is subject to the Service Contract Act, 41 U.S.C. § 351. In light of our decision to overrule *Res-Care*, however, it is unnecessary for us to specifically address these issues.

[2] The Job Corps is a Federal employment and training program authorized by the Job Training Partnership Act, 29 U.S.C. § 1501 et seq. Its purpose is to prepare youths and unskilled adults for entry into the labor force and to afford job training to economically disadvantaged individuals. The Employer, under its contract with DOL, operates 14 job corps centers, but only the Clearfield Job Corps Center is involved here.

[3] While the Petitioner claims that no statute or regulation requires that DOL establish or regulate actual wage rates, the Petitioner does not specifically address Hunter's affidavit, which sets out DOL's requirements under its contractual procedure. That evidence shows that DOL requires the Employer to submit, as part of its contract bid, wage and salary ranges with minimum and maximum wages for each salary grade.

Res-Care was an effort by the Board to clarify its prior decision in *National Transportation*,[4] in which it held that the Board would assert jurisdiction over an employer if it met the definition of ''employer'' in Section 2(2) of the Act and if the employer had sufficient control over the employment conditions of its employees to enable it to bargain effectively with a labor organization as their representative. In *Res-Care*, the Board reaffirmed the basic test set forth in *National Transportation*; however, in applying that test, the Board stated that it would not only examine the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations. Applying that rationale, the Board examined the relationship between Res-Care and DOL and determined that meaningful bargaining was not possible.

Central to its determination not to assert jurisdiction was the Board's view that bargaining was meaningful only if the employer retained control over ''the entire package of employee compensation, i.e., wages and fringe benefits.''[5] 280 NLRB at 674. Because the contract between Res-Care and DOL spelled out the precise ranges of wages and benefits that Res-Care's employees would receive, and DOL had the authority to approve those wage ranges and benefit levels as well as any changes thereto, the Board reasoned that Res-Care lacked the ultimate authority to determine economic terms and conditions of employment and thus lacked the ability to engage in meaningful bargaining.[6] In reaching this conclusion, the Board discounted Res-Care's theoretical ability to absorb increases that were not approved by the DOL, noting that Res-Care had not chosen to increase employee compensation from its own funds and that all the money for the job corps program came from DOL. 280 NLRB at 674 fn. 21.

Since then, the Board has summarily declined jurisdiction over job corps centers. *Career Systems Development Corps*, 301 NLRB 436 (1991). The Board has also declined jurisdiction in a handful of non-job corps cases where the facts paralleled those in *Res-Care* in that the employers' contracts also spelled out wage ranges and benefits, and the exempt entity had to approve any changes to the contract. See, for example, *Correctional Medical Systems*, 289 NLRB 810 (1988); *PHP Healthcare Corp.*, 285 NLRB 182 (1987).

In other situations, however, where the factual settings were in many respects quite similar to *Res-Care*, the Board has, at times, asserted jurisdiction and in the process has made some distinctions that are open to question. For example, in *Community Interactions-Bucks County*, 288 NLRB 1029 (1988), the Board asserted jurisdiction even though the governmental entity established a suggested minimum and an absolute maximum salary for each classification, and the actual employee wages and benefits proposed by the employer had to be approved by the exempt entity. The Board did so because the salary range so specified was very broad and thus was sufficient for the Board to find that the employer had enough control over its wages to engage in meaningful bargaining. See also *FKW, Inc.*, 308 NLRB 84 (1992), where the Board asserted jurisdiction because it found that even though the contract specified a wage scale with wage steps for each job classification as well as the specific wage step to be paid the employees in each classification, the employer also had the discretionary use of funds in an incentive pay pool which the employer used to grant employee wage increases. As a result, employees could be paid more than the figures set out in the contractual wage table, and, therefore, the Board found that the employer had a sufficient measure of control over wages to enable it to bargain effectively. In *Community Transit Services*, 290 NLRB 1167 (1988), the Board asserted jurisdiction even though it found the employer had no control over wages, finding instead that it retained considerable control over other economic terms and conditions of employment such as insurance, vacations, holidays, overtime, leave, and the stock ownership plan, as well as all other noneconomic personnel related matters.

In analyzing *Res-Care*-type cases, the Board has also developed a distinction between cases in which the contract between the employer and the exempt entity established only a single wage rate, and cases such as *Res-Care*, where the contract established a wage range. Thus, in *Dynaelectron*, 286 NLRB 302 (1987), a Service Contract Act case, although the contract listed employee wage rates and provided that the employer would not be reimbursed for higher wages unless the government contractor approved the wage increase, the Board asserted jurisdiction by focusing on the fact that the wage set forth in the contract was not a minimum-maximum range, as in *Res-Care*, but simply a single minimum wage rate. Consequently, as there was no restriction on the maximum amount of wages the employer could pay, the Board reasoned that the employer was free to compensate its employees at

[4] 240 NLRB 565 (1979).

[5] Although the Board in *Res-Care* paid lipservice to the importance of other personnel-related issues, it clearly held that having the final say with respect to economic matters is a ''fundamental'' requirement for meaningful bargaining and if the employer lacks such control, it cannot engage in effective bargaining. 280 NLRB at 674.

[6] Compare *Long Stretch Youth Home*, 280 NLRB 678 (1986), a companion case to *Res-Care*, in which the Board asserted jurisdiction. There, Long Stretch, not the exempt entity, determined wages, salaries, and fringe benefits and Long Stretch did not have to obtain prior approval to make changes in its personnel policies. Although Long Stretch submitted a proposed budget for approval each year, it did not specify salary ranges or benefit levels, and Long Stretch's actual income and expenses varied significantly from its proposed budget.

whatever level it wished, subject only to the minimums specified in the contract.[7] The fact that the exempt entity might not approve a higher wage rate and thus the employer might not be able to recoup the increase from the government was not deemed a sufficient reason to decline jurisdiction. The Board viewed such a situation as no different from that faced by any private company which operates under a fixed price contract. In contrast, because *Res-Care*'s contract provided for a salary range, it thereby established a minimum and maximum salary which Res-Care could not change without government approval, even with its own money. Thus, as noted above, in *Res-Care*, the Board did not find it significant that there was a ''theoretical'' possibility that the employer could increase wages with its own funds.

As these cases demonstrate, the Board's approach in this area has been far from uniform. In fact, by asserting jurisdiction in situations where the employer's contract sets out wages which must be approved by the exempt entity and where the employer did not have control over the ''entire package of employee compensation,'' our decisions have eroded much of the basis for the *Res-Care* decision. Indeed, in the Service Contract Act cases like *Dynaelectron*, there is clear indication, contrary to *Res-Care*, that an employer is permitted to use its own profits (and would have to if a wage increase is not approved) to fund whatever increased wages it decides to give its employees. Moreover, by finding that the employer could raise wages even though the contract disallows reimbursement unless approved by the exempt entity, it would appear, contrary to *Res-Care*, that the approval aspect of such contracts is merely to prevent the Government from having to pay for increases the employer decides to give, and is not a mechanism to prevent the employer from giving increases.

In view of the varied and confusing approaches in these cases, we have reconsidered *Res-Care* and have decided that jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employee's terms and conditions of employment. Nor should the Board be deciding as a jurisdictional question which terms and conditions of employment are or are not essential to the bargaining process.

In retrospect, we think the emphasis in *Res-Care* on control of economic terms and conditions was an oversimplification 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, recession, low profits, or when economic growth is uncertain or doubtful, economic gains at the bargaining table are minimal at best. Here 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 the Board to declare that bargaining is meaningless unless it includes the entire range of economic issues.

Moreover, it is unrealistic to characterize such topics as disciplinary procedure, including arbitration; strike provisions; management-rights clauses; and employee promotions, evaluations, and transfers as unimportant to the bargaining process. They are matters which have traditionally been fought over by both parties during contract negotiations. To treat them as inconsequential demeans the very bargaining process we are entrusted to protect.

In fact, successful and effective bargaining already occurs on a large scale in circumstances where economic benefits play a small role, i.e., bargaining 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. Moreover, meaningful bargaining has even occurred in the *Res-Care* context. In those cases where we asserted jurisdiction, bargaining proceeded despite the fact that the employer's ability to respond to union demands was restricted by its contract with the exempt entity. 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, as the Board stated in *Dynaelectron*, 286 NLRB at 304, that burden is no greater than that carried by any contractor operating under a cost-plus-fixed-fee contract.[8] 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.

Res-Care's determination that certain terms and conditions of employment are essential to the employer's ability to effectively bargain also appears inconsistent with Supreme Court precedent. In *NLRB v. American Insurance Co.*,[9] *NLRB v. Insurance Agents' Union*,[10]

[7] See also *Old Dominion Security*, 289 NLRB 81 (1988).

[8] See also Member (then Chairman) Stephens' concurrence in *PHP Healthcare*, 285 NLRB 182, 184 (1987).

[9] 343 U.S. 395 (1952).

[10] 361 U.S. 477 (1960).

and *American Ship Building Co. v. NLRB*,[11] the Supreme Court made it clear that the National Labor Relations Act does not regulate substantive terms with respect to wages and other terms and conditions of employment which are incorporated in a collective-bargaining agreement. 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.[12] Whether a contract should contain a particular provision is ''an issue for determination across the bargaining table, not by the Board.''[13]

In *Res-Care*, by requiring the employer to have control of economic terms before it would 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.

Our *Res-Care* decision also seems to be at odds with Federal legislation governing the relationship between private employers and the governmental agencies with which they contract. As noted, the job corps program involved in the present case is currently conducted under the authority of the Job Training Partnership Act. The regulations implementing that statute provide that the private contractor will develop personnel policies and establish labor management relations in accordance with the provisions of the National Labor Relations Act. 20 C.F.R. Secs. 684.120(b)(3) and (5). It would appear, therefore, that DOL contemplated that employers might be unionized and that employee wages, benefits, and other terms and conditions of employment might be established through the normal process of collective bargaining.

The Service Contract Act,[14] which applies to all contracts in excess of $2,500 entered into for the principal purpose of providing services to the Federal government, more than contemplates collective bargaining. The statute provides that DOL will issue area-wage determinations that set forth the minimum wages and benefits to be provided to employees of service contractors in a particular locality. However, the Service Contract Act also provides that where wages and benefits are established in a collective-bargaining agreement, those rates are to be substituted for the prevailing compensation rates set forth in the wage determinations.[15] This provision was enacted to prevent replacement contractors from underbidding incumbent contractors that have collective-bargaining relationships. Thus, the Act ensures that the wages and benefits of employees working for service contractors under a collective-bargaining agreement would not be reduced with a new service contract but would, at a minimum, be in accordance with rates provided in the contract. In these circumstances, to question whether such contractors are able to engage in meaningful bargaining seems anomalous.

Moreover, judging in each case the employer's ability to bargain about certain specified topics invites lengthy litigation and controversy which the parties and the Board can ill afford. Consequently, to reduce the potential for litigation as much as possible and for the reasons discussed above, we have decided that it is not proper for the Board to decide whether to assert jurisdiction based on the Board's assessment of the quality and/or quantity of factors available for negotiation. 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.[16]

In light of the above, in determining whether the Board should assert jurisdiction, the Board will only consider whether the employer meets the definition of ''employer'' under Section 2(2) of the Act,[17] and whether such employer meets the applicable monetary jurisdictional standards.

Our dissenting colleague asserts that there is an inconsistency in applying the Act's obligation to bargain in good faith to an employer who may hypothetically lack the ability to alter a particular mandatory subject

[11] 380 U.S. 300 (1965).

[12] *American Insurance Co.*, 343 U.S. at 404.

[13] Id. at 409.

[14] 41 U.S.C. § 351.

[15] Sec. 4(c), 41 U.S.C. § 353(c). There are limited exceptions to the rule that collectively bargained rates automatically become the new wage determinations. Thus, Sec. 4(c) contains a proviso that DOL will not adopt rates contained in a collective-bargaining agreement if such wages and benefits are found by the Secretary of Labor to be ''substantially at variance'' with the prevailing wage rates, or if contract negotiations were not at arm's length. See *Dynaelectron*, 286 NLRB 302, 304 (1987).

[16] We do, however, continue to find, as in *Res-Care*, 280 NLRB at 673 fns. 12 and 14, that we will not employ a joint employer analysis to determine jurisdiction. Whether the private employer and the exempt entity are joint employers is irrelevant. The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control. See *Herbert Harvey, Inc.*, 171 NLRB 238 (1968). The holding in *Ohio Inns, Inc.*, 205 NLRB 528 (1973), that it would not effectuate the policies of the Act to assert jurisdiction over a private employer because the state is a joint employer is hereby overruled.

[17] Sec. 2(2) excludes from the term ''employer'' both Federal and state governmental entities as well as ''political subdivisions thereof.'' There is no evidence or allegation, however, that the Employer is exempt from the Board's jurisdiction on this basis. Compare *Concordia Electric Cooperative*, 315 NLRB 752 (1994); *Northampton Center for Children and Families*, 257 NLRB 870 (1981).

of bargaining. We disagree. Because of commercial relationships with other parties, an inability to pay due to financial constraints, and competitive considerations which circumscribe the ability of the employer to grant particular demands, the fact is that employers are frequently confronted with demands concerning matters which they cannot control as a practical matter or because they have made a contractual relationship with private parties or public entities. If the Board were to examine in a representation case the question of its jurisdiction as well as the question of whether an employer commits unfair labor practices on issues arising out of that employer's arrangements entered into with other parties or other factors that make it impracticable for the employer to grant demands generally, we would open up extensive and unnecessary avenues for new litigation.

We find it unnecessary to consider specifically the circumstances under which the Board would or would not find that an employer had committed an unfair labor practice by failing to bargain over a matter asserted to be beyond the employer's control, as it is well settled that such issues are not relevant to the Board's jurisdiction. See, e.g., *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1229 (5th Cir.), cert. denied 422 U.S. 1047 (1975), where the court agreed with the Board that, in determining whether certain individuals were employees subject to the Board's jurisdiction, ''[w]e need not speculate about the mechanics of the bargaining process or the form that an agreement ultimately might take. These matters depend upon what each party offers and what each is able to secure in the way of concessions from the other.'' Thus, without question, an employer's voluntary decision to contract away some of its authority over terms and conditions of employment should not be determinative of the Board's jurisdiction.

Without passing on the hypothetical bargaining situation cited by the dissent, we would note, however, that the Board has never held that a certification of representative obligates an employer to bargain concerning all mandatory subjects of bargaining regardless of the existence of circumstances of the type set forth above. Cf. *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987) (no violation where changes in working conditions specifically mandated by OSHA rules). Accordingly, our dissenting colleague's general concerns in this regard are premature at the least.

Our dissenting colleague also suggests that our decision today may expose employers to strikes over economic terms which the employer, again hypothetically, lacks the practical ability to alter. Congress, however, has already found that granting employees the rights of self-organization and collective bargaining will ''encourage[] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions'' and will decrease ''strikes and other forms of industrial strife or unrest.'' 29 U.S.C. § 151. Accordingly, any assumption that these rights should be withheld from any statutory employees of a statutory employer to prevent strikes, or because they may be abused by the employees, would be fundamentally inconsistent with our statute's animating principles. We further note that our colleague cites no case in which the Act has been construed to prohibit otherwise lawful strikes solely on the grounds that the employer has no practical ability to change the employment condition in dispute.

Our dissenting colleague states that there is a ''serious question as to whether the Board should be expanding its jurisdiction at a time when its resources are severely limited.'' This completely misapprehends the basis of our holding. The problem with the existing *Res-Care* standard is that it invites litigation and unnecessarily wastes the Board's resources. With the standard announced today, we conserve our resources by establishing a clear standard and a consequent disincentive to resort to Section 9 proceedings and attendant litigation. Again, the point is not in how many cases the Board will assert jurisdiction—but that convoluted and necessarily wasteful litigation will no longer take place over this issue.

The Regional Director found, based on the testimony of Executive Vice President Hunter, that the Employer is a for-profit Delaware corporation engaged in the operation of a job corps center in Clearfield, Utah. The Regional Director further found that the Employer received at least $500,000 in gross revenue during the past 12 months and received at least $50,000 in goods or services directly from outside the State of Utah as well as shipped goods or furnished services in the same amount directly outside the State. Accordingly, we find that the Employer is engaged in commerce within the meaning of the Act.

Based on the foregoing, the Regional Director's administrative dismissal of the instant petition is reversed. Therefore, we shall reinstate the petition and remand the case to the Regional Director for further appropriate action.

ORDER

The petition in Case 27–RC–7473 is reinstated and remanded to the Regional Director for further appropriate action.

MEMBER STEPHENS, concurring.

I agree that we should assert jurisdiction over the Employer in this case, and I join my colleagues in overruling *Res-Care*, 280 NLRB 670 (1986), a case in which I dissented. I write separately because my analy-

sis of the jurisdictional issue differs somewhat from that of the majority.

As in my concurring/dissenting opinion in *Res-Care*, 280 NLRB at 675, I take my guidance from the Supreme Court's opinion in *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398 (1947), which affirmed the Board's assertion of jurisdiction over a weapons manufacturing employer with respect to its plant guards, most of whom had been recruited pursuant to a requirement of the U.S. War Department that it hire a specified number of guards who would serve as civilian auxiliaries to the military police. The Court viewed the issue as implicating the Board's jurisdiction as specified in Section 2(2) and (3) of the Act, which define ''employee'' and ''employer.'' Id. at 403. It considered the Federal regulations under which the guards were employed and determined that the Board was not without ''warrant in law or in fact in concluding that respondent [the private company] retained 'a sufficient residual measure of control over the terms and conditions of employment of the guards' so that they might fairly be described as employees of respondent.'' Id. at 412–413, quoting *E. C. Atkins & Co.*, 56 NLRB 1056, 1057 (1944). In elaborating upon this notion of control, the Court observed:

> [I]t matters not that respondent 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. In other words, where the conditions of the relation[ship] are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present. *N.L.R.B. v. Hearst Publications*, [322 U.S. 111, 129 (1944)].

As my colleagues in the majority note, this concept of ''control'' was employed by the Board in *National Transportation*, 240 NLRB 565 (1979), and essentially reaffirmed in *Res-Care*, supra. I note that it has also been invoked by many of the reviewing courts in recent years in cases in which a question was raised whether, in light of an employer's link to an indisputably exempt government entity, the Board possessed jurisdiction over the employment relationship between that employer and the employees affected by the exercise of jurisdiction.[1]

I would not abandon this concept of control, i.e., when we confront a question like that raised by the Employer to the Regional Director in this case, I would, as did the Board and the Court in *E. C. Atkins*, look to see whether the putative employer ''retained 'a sufficient residual measure of control over the terms and conditions of employment of the guards' so that they might fairly be described as employees of respondent.'' In determining how much control is ''sufficient,'' however, I would not draw the line where the Board majority in *Res-Care* drew it. I agree that even when there are rigid external constraints on wages, there may be still much to bargain over. Hence, I would find that we may properly assert jurisdiction over an employer if it has control over at least some terms and conditions of employment, as that phrase is intended in Section 8(d) of the Act, if it meets our commerce tests, and if it does not establish that it is a ''political subdivision'' under Section 2(2) of the Act as construed in *NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600 (1971).

Under these standards, we should assert jurisdiction over the Employer here. The Employer in this case contends that it is like the employer in *Res-Care*, and I find here, as I did there, that there is a sufficiently meaningful measure of control within the established wage ranges, and in noneconomic terms and conditions to warrant our exercise of jurisdiction.

MEMBER COHEN, dissenting.

My colleagues have radically changed extant law concerning the exercise of Board jurisdiction over government contractors. There is no warrant for such a change. I therefore dissent.

The issue is whether the Board should assert jurisdiction over an employer who does business with a Government agency, in circumstances where the Government agency exercises effective control over the wages and benefits of the employer's employees. In *Res-Care*, 280 NLRB 670 (1986), the Board declined to assert jurisdiction in such circumstances. The Board adopted the sensible view that it would not assert jurisdiction to create a collective-bargaining obligation if the employer, who would be subject to that obligation, lacks control over essential terms and conditions of employment, e.g., wages and benefits. In essence, if these essential terms and conditions of employment are factually outside the realm of bargaining, there is no point in compelling such bargaining.

[1] See, for example, *Mayflower Contract Services v. NLRB*, 982 F.2d 1221, 1225 (8th Cir. 1993); *NLRB v. Parents and Friends of the Specialized Living Center*, 879 F.2d 1442, 1449–1453 (7th Cir. 1989); *Jefferson County Community Center v. NLRB*, 732 F.2d 122, 126–127 (10th Cir. 1984); *Zapex Corp. v. NLRB*, 621 F.2d 328, 332–333 (9th Cir. 1980).

The Board's view made eminently good sense. In addition, it was prompted by judicial decisions of equally good sense.[1]

My colleagues have now changed all of this. Even worse, they replace it with a doctrine that has virtually no limitation. That is, they do not return to the ''intimate connection'' test under which jurisdiction was denied if the employer performed functions that were intimately related to a traditional governmental function.[2] Nor does the majority return to the *National Transportation*[3] test that preceded *Res-Care.* Instead, my colleagues assert jurisdiction more broadly than any of these cases. They will assert jurisdiction without reference to the nature of the employer's business or the employer's ability to control terms and conditions of employment. In their view, if the employer is an ''employer'' under Section 2(2) of the Act, and if the employer meets monetary jurisdictional standards, that is enough to warrant the exercise of jurisdiction. Thus, for example, if the governmental agency controls all economic terms and most of the noneconomic terms, and the employer controls only a handful of noneconomic terms, my colleagues would nonetheless assert jurisdiction over the employer.

In support of this dramatic change of law, my colleagues argue as follows: If employees wish to be represented by a union with respect to these limited noneconomic terms, the Board should back them up with a Section 9 certification and an 8(a)(5) duty to bargain.

In my view, there is a serious question as to whether the Board should be expanding its jurisdiction at a time when its resources are severely limited. My colleagues argue that their approach will conserve resources. Concededly, litigation over the jurisdictional issue may well be reduced, in that my colleagues would simply assert jurisdiction without regard to whether the employer controls essential terms and conditions of employment. My colleagues ignore the more salient point, however, that there will be more cases because jurisdiction is now asserted over a broader range of employers. In sum, litigation of one issue (jurisdiction) has become simpler, but litigation over all other issues has become more extensive because of the sheer increase in the number of cases that must be considered.

Without regard to the issue of resources, however, the approach of my colleagues is seriously flawed. The Act does not, of course, provide for a limited Section 9 certification. A Section 9 certification gives a union the right to bargain about *all* mandatory terms and conditions of employment. If a union, pursuant to the certification, seeks to venture into an economic area, and the employer has no control over this matter, my colleagues are confronted with a serious dilemma. If they enforce the certification and Section 8(a)(5), they will order the employer to bargain concerning matters over which it has no control. If they decline to order the employer to bargain, they do violence to Sections 9 and 8(a)(5), both of which require bargaining over all mandatory subjects.

Similarly, if the union strikes to secure better economic terms, my colleagues are again on the horns of a dilemma. If they protect the strike, they expose the employer to a work stoppage concerning matters over which it has no control. If they condemn the strike as unprotected or unlawful, they do violence to Sections 7 and 13, both of which protect the right to strike for better economic terms.

Res-Care sought to avoid these difficulties. If the Government agency had effective control over economic terms and conditions of employment, the Board would not assert jurisdiction. If the employer had such control, the Board would assert jurisdiction. I would adhere to that approach.

My colleagues have not resolved the aforementioned dilemmas. Instead, they seek to avoid them. Their first effort in this regard is to say that the dilemmas are hypothetical. As they phrase it, I am speaking of ''an employer who may hypothetically lack the ability to alter a particular mandatory subject of bargaining.'' The fact is that I am speaking of the Employer in this very case, an employer who lacks control over essential terms and conditions of employment. If the Employer had such control, there would be no jurisdictional issue in this case.

My colleagues also suggest that an employer's lack of control over essential terms is ''not relevant to the Board's jurisdiction.'' The case of *NLRB v. Deaton,* 502 F.2d 1221, 1229, is clearly inapposite. The issue in that case was whether certain drivers were independent contractors or employees. The Board and the court found employee status in light of the significant control exercised by the employer over the drivers. By contrast, in the instant case, the Employer lacks control.

Finally, my colleagues point out that the practice of good-faith collective bargaining can lead to a decrease in strikes. They also observe that the right to strike is a fundamental part of the Act. Of course, both propositions are true, but neither solves the dilemma in these cases. That dilemma is posed by asserting jurisdiction in situations where the employer does not control the terms and conditions which are the subject of the strike.

[1] *NLRB v. Chicago Youth Centers*, 616 F.2d 1028 (1980); *Lutheran Welfare Services v. NLRB*, 607 F.2d 777 (1979); *Board of Trustees of Memorial Hospital v. NLRB*, 624 F.2d 177 (1980). *NLRB v. E. C. Atkins*, 331 U.S. 398 (1947), is consistent with the approach. As would have been the case under *Res-Care*, jurisdiction was asserted over an employer who controlled wages and hours.

[2] *Rural Fire Protection*, 216 NLRB 584 (1975).

[3] 240 NLRB 565 (1979).

In sum, try as they might, my colleagues cannot avoid the difficulties engendered by their assertion of jurisdiction. These difficulties have been avoided in the past by the nonassertion of jurisdiction in *Res-Care* circumstances. They are squarely presented now that *Res-Care* is overruled.

I also note that the *Res-Care* doctrine has not led to a wholesale abandonment of NLRB jurisdiction. Since *Res-Care* and its companion case (*Long Stretch Youth Home*, 280 NLRB 678 (1986)), the Board has issued 36 published decisions concerning the issue. In 31 of them, the Board asserted jurisdiction. In only five of them did the Board decline jurisdiction.

Concededly, one can argue that *Res-Care* has not been consistently applied in all cases. Assuming arguendo that this is so, however, this is still not a basis for abandoning the doctrine. The Board should simply apply the doctrine more carefully and consistently.

My colleagues argue that *Res-Care* involves the Board in the impermissible function of judging the merit of collective-bargaining proposals. The argument has no basis. *Res-Care* does not involve the Board in that function. Rather, it simply accepts the fact that, under some governmental contracts, some matters are not subject to the control of the employer. The Board does not pass on the wisdom of having these matters outside the employer's control, nor does it judge the merit of proposals within the employer's control.

My colleagues also contend that the Employer herein is in the same position as any company which faces financial constraints imposed on it by virtue of the purchase price paid by those with whom it does business. I believe that my colleagues have missed an essential point. The Government in this case does not simply constrain the Employer by the limits of the purchase price. Rather, the Government dictates the terms and conditions of employment of the Employer's employees.

Finally, I recognize that the problem posed by the instant case is a difficult one. Where a governmental agency controls some of the terms and conditions of employment of the contractor's employees, there are tensions that arise under the NLRA. *Res-Care* represents the Board's judicially approved approach to this difficult problem. My colleagues have now abandoned the doctrine, and they have replaced it with one that is more sweeping than any prior one. Their approach will cause more problems than it solves. I therefore believe that it is misguided.

Based on the above, I would follow *Res-Care* and would not assert jurisdiction in this case.