Res-Care, Inc. *and* Indiana Joint Board, Retail, Wholesale and Department Store Union, AFL–CIO, Petitioner. Case 25–RC–7917

24 June 1986

DECISION ON REVIEW AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS, JOHANSEN, BABSON, AND STEPHENS

On 23 May 1983 the Regional Director for Region 25 issued a Decision and Direction of Election in this proceeding, asserting jurisdiction over the Employer, Res-Care, Inc. (Res-Care) under the test set forth in *National Transportation Service*, 240 NLRB 565 (1979), and relying specifically on *Singer Co.*, 240 NLRB 965 (1979). Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Res-Care filed a timely request for review of the Regional Director's decision, on the grounds that the Regional Director made findings of fact that are clearly erroneous, and that, alternatively, there are compelling reasons for reconsidering the Board's policy in *National Transportation.*

Res-Care contends that its labor relations policy is controlled to such a degree by the United States Department of Labor (DOL) that effective collective bargaining is precluded and that it should be exempt from our jurisdiction under Section 2(2) of the NLRA. We agree that we should decline to assert jurisdiction based on the principles of *National Transportation.*[1] On consideration of the entire record in this case, including the Employer's brief on review, we have decided to dismiss the petition for the reasons stated below.

Pursuant to the Board's procedures, an election was conducted as scheduled on 22 June 1983, and the ballots were impounded pending consideration of the Employer's request for review.[2] By mailgram dated 26 August 1983, the Board granted the Employer's request for review.

In asserting jurisdiction over Res-Care, the Regional Director found under *National Transportation*, supra, that despite certain control by the U.S. Department of Labor over Res-Care's labor relations, the Employer retains sufficient authority over its employees' terms and conditions of employment such that meaningful bargaining is not precluded. Res-Care contends, on the other hand, that because its labor relations policy is controlled to such a degree by DOL, it is precluded from exercising the discretion necessary to bargain effectively with the Petitioner. In this respect, Res-Care maintains this case is distinguishable from *Singer Co.*, supra, in which the Board asserted jurisdiction over a job corps center similar to the facility operated here. In the alternative, Res-Care contends that *Singer* should be overruled. We agree that *Singer* should be overruled and decline to assert jurisdiction over Res-Care based on the principles set forth in *National Transportation*, as clarified below.

Res-Care is a for-profit corporation organized under the laws of the State of Kentucky. It operates residential job corps centers under a contract with DOL, including the facility involved here, the Camp Atterbury Center in Edinburgh, Indiana. When bidding on the contract for operation of the center, in response to DOL's Request for Proposal, Res-Care submits a Technical Proposal, which describes the nonfinancial aspects of the proposed operations, and a Management Proposal, which includes both a proposed line-by-line budget and a description of the financial aspects of the Employer's proposal. Included in these proposals, which constitute Res-Care's bid, are a Staff Manning Table, which lists Res-Care's job classifications; a Labor Grade Schedule; and a Salary Schedule, which sets wage ranges, including minimum and maximum wage rates, for each labor grade. In addition, DOL asks the employer to submit its personnel policies concerning compensatory time, overtime, severance pay, holidays, vacation, probationary employment, sick leave, cost-of-living increases, incentives, and equal employment opportunity, which Res-Care describes in its Technical Proposal.

DOL approves the Staff Manning Table, the Labor Grade Schedule, the Salary Schedule, the 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 DOL for approval. Proposed changes in the Staff Manning

[1] Res-Care and our dissenting colleague both contend that we should base our determination on Sec 2(2) of the Act. We do not agree As the Board stated in *National Transportation*, our inquiry is twofold, i e, "whether the employer itself meets the definition of 'employer' in Section 2(2) of the Act and, if so . . . whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative" Id at 565 It is clear, and no party contends otherwise, that Res-Care itself is not a Federal Government agency, and is thus not exempt from our jurisdiction under Sec 2(2) of the Act It is also clear that Res-Care employs "employees" as that term is defined in Sec 2(3) Our only inquiry, therefore, is whether, in exercising our discretion, we should decline to assert jurisdiction because of the extent to which DOL, an entity exempt from our jurisdiction, controls the employment conditions of Res-Care's employees. We answer that question today in the affirmative on the ground that the policies of the Act would not be effectuated by our assertion of jurisdiction in this case. See *NLRB v Denver Building Trades Council*, 341 U.S. 675, 684 (1951)

[2] The Petitioner had requested an election in a unit limited to the Employer's food service employees, including cooks, a cafeteria warehouseman, and cafeteria general utility workers The parties stipulated to the appropriate unit

Table, Labor Grade Schedule, and Salary Schedule also must be approved by DOL.[3]

The contract between DOL and Res-Care also contains other limitations on the wages that Res-Care can pay its employees. In general, the contract requires wages to be no more than those paid to persons providing similar services in the area where the program is carried out, or in the area of the particular employee's immediately preceding employment, whichever is higher. In addition, Res-Care agrees in the contract not to hire any employee at a wage that is 10 percent or more higher than the wages for his immediately preceding employment. All wage increases, due to merit, change in position, or promotion, are limited to less than 10 percent. Any deviation from these contractual conditions requires a waiver from DOL in each instance.

Although Res-Care conducts its own hiring, the contract requires Res-Care to submit its selection criteria and hiring procedure to DOL for approval. DOL must approve specifically the hiring of the center director, all senior staff, and supervisors, including all employees who make at least $15,000 a year, and who report directly to the center director. Res-Care must obtain the approval of DOL before it may hire a relative of a current employee. Res-Care also agrees, in its Technical Proposal, to set a hiring goal of 15 graduates of the Atterbury Center each contract year. The contract limits the number of full-time equivalent staff employed under its terms to 208.

DOL compensates Res-Care on a cost-plus-fixed-fee basis. The total contract price, including the fixed fee, is derived from the line-by-line operating budget submitted by Res-Care and approved by DOL. Total staff salaries, wages, and benefits are also listed as a line item in the operating budget, and the figure is broken down in the budget by Res-Care's various operating divisions. The figure is further broken down in an attachment to the budget, which lists a yearly salary and benefit figure for each of Res-Care's job classifications. The totals for staff salaries and benefits are added to the other estimated costs in Res-Care's budget, and to Res-Care's proposed fixed fee, to constitute the proposed contract price for each year of the 2-year contract. Once DOL accepts Res-Care's bid, the proposed figures become the contract price, and are set forth in the final contract.

DOL is not obligated to reimburse Res-Care for costs incurred in excess of the estimated cost set forth in the contract. DOL agrees only to compensate Res-Care for "allowable costs," which are defined as costs allowable in accordance with Federal procurement regulations and the terms of the contract.[4] Payment is made on a monthly basis, but Res-Care periodically submits vouchers to DOL for claimed "allowable costs," including labor costs. DOL has the authority to audit these vouchers, to rule that any cost claimed is "disallowable," and to reduce any monthly contract payment by the amount of the disallowed cost.

DOL Job Corps regulations require contractors to establish labor-management relations in accordance with the National Labor Relations Act, and prohibit the Job Corps from conciliating, mediating, or arbitrating labor disputes between center operators and labor organizations. 20 CFR § 684.120(b)(5). In addition, the contract between DOL and Res-Care requires Res-Care to notify DOL of any actual or potential labor dispute that is delaying or threatens to delay the timely performance of the contract.

At the time of the hearing in this case, Res-Care had a collective-bargaining agreement with Local 512, Retail, Wholesale and Department Store Union, covering a unit of Res-Care's resident advisors and dorm attendants at Camp Atterbury. The collective-bargaining agreement contains a clause which subjects the entire agreement to DOL approval, and which provides that if any item of wages or benefits is deemed not an allowable cost by DOL, then the agreement is automatically amended to conform to DOL requirements by deleting those portions of wages or benefits that are disallowed by DOL. Notably, in response to an inquiry by Res-Care concerning a wage grievance that was pending at the time of the hearing in this case, DOL's regional director, Office of Job Corps, ruled that any salary in excess of the maximum for any labor grade would be considered a disallowable cost, unless DOL grants a specific waiver.

In overseeing Res-Care's management of the job corps program, DOL exercises pervasive operational control.[5] DOL establishes standards and procedures for selection of applicants for corpsmember slots. DOL requires Res-Care to provide

[3] The contract involved here was effective from 15 November 1981 through 14 November 1983 DOL approved revisions in the Employer's Staff Manning Table, Labor Grade Schedule, and Salary Schedule on 12 October 1982 Among other changes, these revisions moved the classification of "cook," one of the petitioned-for positions, from Labor Grade II to Labor Grade III, with a consequent increase in salary range The wage ranges for the petitioned-for employees, according to the Revised Labor Grade and Salary Schedules, are as follows general utility worker (Labor Grade II), from minimum of $3.54/hr. ($7363/yr.) to maximum of $4 55/hr ($9464/yr), and cook and cafeteria warehouseman (Labor Grade III), from minimum of $4 04/hr ($8403/yr) to maximum of $5 25/hr ($10,920/yr)

[4] Reimbursement for costs in addition to those estimated is subject to DOL approval

[5] The regulations for the operation of job corps centers are contained in 20 CFR Part 684

residential supervision, counseling, and support staff for the corpsmembers on a 24-hour-a-day, 7-day-a-week basis. In connection with the work of the petitioned-for food service employees, Res-Care is required by DOL regulations to provide nutritionally well-balanced, good-quality meals in sanitary facilities, using military master menus as guides.[6] Each of Res-Care's operating divisions must submit proposed standard operating procedures, which are reviewed and approved by DOL.

DOL's project manager performs an annual onsite review of Res-Care's operations, as well as random onsite inspections.[7] After such reviews and inspections, Res-Care is given a period of time, typically 60 days, in which to correct a finding of "non-compliance."

In *National Transportation Service*, supra, 240 NLRB 565, the Board abandoned the "intimate connection" test for determining whether to assert jurisdiction over an employer with close ties to an exempt government entity. The Board held that it no longer would examine the relationship between the purposes of the exempt institution and the services provided by the nonexempt employer to determine whether the employer's operations are intimately related to an exempt government function.[8] Instead, the inquiry would be whether the employer itself met the definition of an "employer" in Section 2(2) of the Act and, if so, whether the employer retained sufficient control over the employment conditions of its employees to enable it to engage in "effective" or "meaningful" bargaining with a labor organization.

In reviewing *National Transportation* and its progeny, we find that the Board has not set forth a clear or consistent explanation of the elements of effective or meaningful bargaining. In particular, the decisions have failed to define (a) those areas of an employer's labor relations that are sufficiently important that the employer cannot bargain meaningfully if the exempt entity removes or severely restricts the employer's discretion, and (b) the circumstances under which the government entity will be deemed to have removed or severely restricted such discretion.

Since we perceive a lack of clarity in *National Transportation*, and since parties in numerous other cases now pending have urged the Board to overrule *National Transportation* and to return to an "intimate connection" standard or to adopt other tests, we have chosen to reexamine the issue. After careful consideration, the Board has decided to reaffirm the basic test set forth in *National Transportation* for determining whether assertion of jurisdiction over an employer providing services to or for an exempt entity is warranted. In applying that test, however, we will examine closely not only 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, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining.

In reaffirming the *National Transportation* test, we again reject the "intimate connection" standard, under which jurisdiction was withheld if the private employer performed functions that were intimately related to allegedly traditional government functions of the exempt entity.[9] As we stated in *National Transportation*, the "intimate connection" standard was without basis in the statute or its legislative history, and proved to be vague because it was difficult to determine with confidence or certainty precisely what activities constituted traditional government functions.[10]

In asserting jurisdiction over Res-Care, the Regional Director relied on *Singer Co.*, supra, 240 NLRB 965, in which the Board took jurisdiction over a job corps center operated under contract with DOL virtually identical to the one here.[11] It is our view, however, that in *Singer*, the Board did not give adequate weight to the scope and degree of control exercised by DOL over the employer's labor relations.

Singer relied on three major factors in finding that the employer could engage in meaningful bargaining: (1) the employer could negotiate with a labor organization regarding its bid proposals; (2) the employer alone was responsible for hiring, firing, promotions, demotions, and transfers; and (3) the employer actually established the terms and conditions of employment for its employees, subject to "outer boundaries" regarding wages and

[6] See 20 CFR § 684 81

[7] The project manager conducted 10–12 such onsite inspections during a 12-month period between 1982 and 1983

[8] We concluded that there was nothing in the legislative history of Sec 14(c)(1) of the Act disclosing "any congressional intent that the Board 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" 240 NLRB at 565

[9] See, e g , *Rural Fire Protection Co* , 216 NLRB 584 (1975)

[10] In an entirely different context, the Supreme Court recently expressed similar concern with the difficulties inherent in determining traditional government functions *Garcia v San Antonio Metropolitan Transit Authority*, 105 S Ct 1005 (1985)

Member Dennis finds it unnecessary to rely on *Garcia* She would not in any way link the Board's *National Transportation* doctrine with a difficult issue of federalism that has sharply split the Supreme Court twice in the last decade and may well do so again, according to the *Garcia* dissenters

[11] *Singer* was reaffirmed in *Management & Training Corp* , 265 NLRB 1152 (1982), and *Teledyne Economic Development Co* , 265 NLRB 1216 (1982), decided the same day

other matters set by DOL in the contract between DOL and the employer. Id. at 966. This analysis, however, assessed the extent of control retained by the employer in isolation, placed no weight on the job corps employer's lack of a final say concerning the primary economic aspects of its relationship with its employees—the setting of wages and benefits—and understated the degree of economic control possessed by DOL.

The DOL provisions under which Res-Care's wages and benefits are set establish to our satisfaction that DOL controls the primary economic terms and conditions of employment. Thus, although wage and benefit levels for each job classification are set initially in the Employer's operating budget, the budget must be approved by DOL and, once approved, becomes the basis for the contract price. DOL must approve wage ranges, including a maximum wage for each job classification, as well as the substantive terms of several employee benefits, including sick leave pay, vacation accrual, and the number of paid holidays. The Employer also must obtain DOL's approval before making changes in these approved wage and benefit levels. If the Employer attempts to pay a higher wage than the maximum approved by DOL, or attempts to grant a benefit that is more costly than the one approved by DOL, DOL retains the discretion to reject the added expenditure as a "disallowable cost" and to reduce the Employer's monthly contract payment. In every sense, it is DOL, not Res-Care, which retains ultimate discretion for setting wage and benefit levels of the job corps center,[12] and thus effectively precludes Res-Care from engaging in meaningful collective bargaining.

In *NLRB v. Chicago Youth Centers*, 616 F.2d 1028 (1980), and *Lutheran Welfare Services v. NLRB*, 607 F.2d 777 (1979), the Seventh Circuit Court of Appeals refused to uphold the Board's assertion of jurisdiction over employers that operated child care facilities under the Federal Day Care and Headstart programs. The court noted in *Lutheran Welfare Services* that the Federal Government empowered the city agency that contracted for the administration of these programs to establish standards governing salaries, salary increases, travel and per diem allowances, and other employee benefits.[13] All the employees were classified and their salaries set according to local agency policy. In addition, the employers were required to obtain agency approval before hiring or promoting employees, granting wage or merit increases, paying fringe benefits, or setting working hours. We agree with the Seventh Circuit that the setting of wage and benefit standards by the exempt entity is the type of control over essential economic terms of employment that precludes meaningful bargaining.[14]

The Tenth Circuit also reversed the Board's assertion of jurisdiction in *Board of Trustees of Memorial Hospital v. NLRB*, 624 F.2d 177 (1980), based largely on the fact that the exempt entity retained discretion to approve specific wage and benefit levels. The employer submitted to the board of trustees, an exempt political subdivision, semiannual reports regarding salary ranges for each job classification and annual recommendations on wage rates and fringe benefits for each position. The exempt entity approved the employer's proposed wage rates, fringe benefits, and staffing levels. In addition, the employer certified that it would not deviate from the authorized wage and benefit ranges without the exempt entity's approval. Id. at 181. In these circumstances, the court found that the exempt entity retained such control over employment relations that the employer could not engage in meaningful collective bargaining.

As in *Singer Co.*, supra, 240 NLRB 965, in this case the Employer alone is responsible for hiring,[15] firing, promotions,[16] demotions, and transfers. In addition, the Employer in this case has final au-

[12] The Board has held that a requirement of government approval for payment of wages beyond a specified maximum, or for changes in agreed-upon employee benefit plans is an indication of substantial control of labor relations by an exempt entity *ARA Services*, 221 NLRB 64 at fn 7 and 65 fn 11 (1975) Although the Board there concluded that the employer shared the statutory exemption of the county because the county was a joint employer of the employer's employees, we do not rely on the Board's joint employer analysis We do not require a finding that the exempt entity is a joint employer in order to withhold the assertion of jurisdiction

[13] Id at 778

[14] Although both *Lutheran Welfare Services* and *Chicago Youth Centers* held that the Board should not have asserted jurisdiction because the exempt entity was a joint employer, we do not adopt that analysis See fn 12, supra.

The process by which the city agency controlled wages in *Chicago Youth Centers* differs from the control exercised by DOL in this case in one main respect As described in the Board's decision in *Catholic Bishop of Chicago*, 235 NLRB 776 (1978), involving the same Model Cities agency and the same programs as *Chicago Youth Centers*, the city agency set the salary and benefit guidelines itself before the employers drew up their budgets The employers then submitted proposed wage and benefit packages for agency approval, and the agency would generally only approve the employers' proposals if they came within the agency guidelines In this case, on the other hand, DOL approves wage ranges and benefit levels that are proposed by Res-Care In all the cases, however, the government entity ultimately approves wage and benefit levels proposed by the private employer, and thus reserves to itself the ultimate discretion to determine these economic terms of employment

[15] Although Res-Care has the final authority on hiring for all nonsupervisory positions, it must submit its selection criteria and hiring procedure to DOL for approval, and DOL must approve Res-Care's selections for center director, senior staff, and supervisors

[16] The Employer's authority is somewhat restricted with regard to promotions, since DOL must approve any wage increase of 10 percent or more

thority over grievances.[17] We agree with those circuit court decisions, however, 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.[18] 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 fringe benefits, meaningful bargaining is not possible.[19] We view our differences with our dissenting colleague as being more of degree than of substance. All agree that bargaining can occur within a corridor of bargaining subjects, but one's view of whether that bargaining is meaningful under the National Labor Relations Act turns, in part at least, on the narrowness of the corridor. 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. Our view of this record convinces us that this fundamental requirement for meaningful bargaining is lacking here.

We find that the facts in this case warrant declining to assert jurisdiction. Thus, DOL must approve the initial amounts for wages and benefits that Res-Care proposes in its budget, as well as wage ranges and benefit levels proposed by Res-Care;[20] and retains ultimate discretion to approve or disapprove any change in wage rates, benefit levels, or personnel policies.[21]

When an employer like Res-Care lacks the ultimate authority to determine primary terms and conditions of employment, such as wage and benefit levels, it lacks the ability to engage in the necessary "give and take" which is a central requirement of good-faith bargaining, and which makes bargaining meaningful.[22]

In view of the above, we find that Res-Care does not possess sufficient control over the employment conditions of its employees to enable it to engage in meaningful collective bargaining with a labor organization. Accordingly, we conclude that it would not effectuate the purposes and policies of the Act to assert jurisdiction, and we shall dismiss the petition.[23]

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[17] Although the Employer claims that its employees have the right to appeal discharges and disciplinary actions to DOL, the Employer's personnel handbook makes clear that the final decision on grievances rests with the Employer's center director The only appeal the employees have to DOL is for equal employment opportunity (EEO) complaints

[18] *Jefferson County Community Center v NLRB*, 732 F.2d 122, 127 (10th Cir 1984), *R W. Harmon & Sons, Inc v. NLRB*, 664 F 2d 248, 251 (10th Cir 1981). See also *NLRB v E C. Atkins & Co*, 331 U S 398, 413 (1947), finding that collective bargaining was possible between an employer and its employee guards despite the Federal militarization of the guards, on the grounds that the employer retained final authority to determine the "most important incidents of the employer-employees [sic] relationship "

[19] Cf *Jefferson County Community Center v NLRB*, supra, 732 F 2d at 127 (jurisdiction asserted where employer concedes that employer has "final decision-making authority" over essential terms and conditions of employment, including wages and fringe benefits), *NLRB v Austin Developmental Center*, 606 F 2d 785, 789 fn 8 (7th Cir 1979) (jurisdiction asserted where neither exempt government entity "specifically limits [employer's] employee compensation expenditures.")

[20] Res-Care is even limited in the wage rates it may initially propose by DOL's requirements that wages be based on area standards and not exceed by 10 percent or more what the employees received in their former positions

[21] Although theoretically Res-Care could increase the compensation of employees from its own funds, it has chosen not to do so. As a practical matter DOL provides all the funds for the job corps program, including funds for employee compensation, through its cost reimbursement payments to Res-Care As DOL retains the ultimate discretion to determine wages and benefits, Res-Care's theoretical ability to absorb increases that are not approved by DOL does not affect our determination See *NLRB v. Chicago Youth Centers*, 616 F 2d 1028, 1029 (7th Cir 1980).

[22] In declining to assert jurisdiction, we specifically do not rely on the pervasive operational controls exerted by DOL over Res-Care in matters other than those pertaining to labor relations Many agencies perform a general review of the budgets of the private employers with whom they contract for services in order to assure that expenditures allocated to the required services are reasonable See, e g , *Long Stretch Youth Home*, 280 NLRB 678 (Chairman Dotson dissenting on other grounds), *D. T Watson Home for Crippled Children*, 242 NLRB 1368, 1369 (1979) Such a review, however, without more, does not sufficiently deprive the employer of ultimate control over essential terms and conditions of employment to preclude it from engaging in meaningful bargaining Id at 1369–1370, see *Golden Day Schools v NLRB*, 644 F 2d 834, 836 (9th Cir 1981)

In this case, unlike in *Long Stretch Youth Home*, supra, the Employer's proposed budget, including the projected figures for employee compensation expenses, is the basis for the compensation Res-Care receives from DOL Thus, DOL's review and approval of Res-Care's budget does have an impact on the economic terms and conditions of Res-Care's employees to the extent that the budget, in conjunction with the wage ranges and benefit levels approved by DOL, helps to determine the maximum amounts DOL will reimburse Res-Care for employee compensation It is these direct limits on employee compensation that constitute control of employment relations, and not the fact that DOL places an effective ceiling on such expenditures by limiting Res-Care's total budget Cf *Long Stretch Youth Home*, supra, fn 14, see also *Truman Medical Center v. NLRB*, 641 F 2d 570, 574 (8th Cir 1981), *NLRB v Austin Developmental Center*, 606 F 2d 785, 789 fn 8 (7th Cir 1979) For reasons stated in the *Long Stretch* dissent, Chairman Dotson does not view the differences between that case and this with respect to budget and compensation as justifying the assertion of jurisdiction in *Long Stretch*

We do not give weight to DOL's control over such items as the nature of the services to be performed by Res-Care, eligibility requirements for service recipients, procedures and standards for serving foods, the standard operating procedures of each operating division, or other operational matters relating to management of the job corps program See *Denver Volunteers of America v NLRB*, 732 F 2d 769, 774 (10th Cir 1984)

Moreover, the fact that Res-Care already has a collective-bargaining relationship with a labor organization representing another unit is not determinative of the jurisdictional issue Indeed, this bargaining relationship underscores DOL's control, and Res-Care's limited authority to bargain in this case the collective-bargaining agreement by its terms subjects the entire agreement to DOL approval Wages and benefits negotiated in the agreement remain subject to the levels established by DOL, and the agreement specifically provides that it shall be amended automatically regarding wages or benefits disallowed by DOL See *Board of Trustees of Memorial Hospital v NLRB*, 624 F 2d 177, 186–187 (10th Cir 1980), *Ohio Inns*, 205 NLRB 528, 529 fn 3 (1973)

[23] We overrule, to the extent they are inconsistent with today's decision, *Management & Training Corp*, supra, 265 NLRB 1152, *Teledyne Economic Development Co*, supra, 265 NLRB 1216, and *Singer Co*, supra, 240 NLRB 965

ORDER

The petition is dismissed.

MEMBER STEPHENS, concurring and dissenting.

I agree with the majority that the basic "control" test of *National Transportation Service*, 240 NLRB 565 (1979), and not the "intimate connection" test, is the proper standard for determining whether we have jurisdiction over a particular employment relationship in cases in which the putative employer and employees are working under a contract with an entity that is exempt pursuant to Section 2(2) of the Act. I also agree that in making this determination, we should not focus entirely on the relationship between the contractor-employer and its employees and ignore the control over labor relations matters that is retained and exercised by the exempt entity. I disagree, however, with the manner in which the majority has refined and applied the test here. In my view, the majority has exaggerated the significance of powers possessed by the Department of Labor (DOL)—the exempt entity in this case—and it has thereby created a precedent for permitting government authority that is purely theoretical and unlikely to be exercised to compel the exclusion from our processes of employment relationships in which meaningful collective bargaining could take place.

To begin with, I believe that we are presented with a question of our jurisdiction under the statute and not simply a question whether, in the exercise of our unquestioned statutory authority, we choose either to exert or to decline jurisdiction. This has not always been clear, and the confusion over whether statutory or discretionary standards were in issue has perhaps impeded analysis.[1] Like the Supreme Court in *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 403–404 (1947), we are construing the definitions of "employer" and "employee" in Section 2(2) and (3) of the Act (id. at 403–404), but this comes down to a judgment whether the "employment situation" is such that, notwithstanding certain constraints imposed by an entity exempt from the category of covered employers, the "situation" is amenable to "the process of collective bargaining" as "contemplated by the Act" (id. at 413–414). If we conclude that Congress did not intend to withhold the Act's statutory protections from a given employment relationship, it is not for us to impose any additional discretionary test reflecting a higher standard for "meaningful bargaining" under which the parties enjoy an ideal freedom from third-party economic constraints.[2]

In making the inquiry, the majority has properly considered both the phase in which the collective-bargaining agreement is negotiated and the subsequent phase in which it is administered, since contract administration and labor-management relations during the term of an agreement are as much a matter of collective bargaining as the initial negotiation. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967); *Conley v. Gibson*, 355 U.S. 41, 46 (1957). In each case, however, the majority has exaggerated the degree to which DOL stands as an impediment to real bargaining. To be sure, DOL, as a government contracting agency, reviews and approves the operations of the contractor, including aspects of its employment practices. But, in my view, that reservation of authority, without more, is an insufficient basis for denying jurisdiction.[3]

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[1] In *National Transportation Service*, the Board described the "control" test as a standard for determining "discretionary jurisdictional issues" (240 NLRB at 566), and it thereby echoed the court in *Herbert Harvey, Inc. v. NLRB*, 424 F 2d 770, 773–774 (D.C. Cir 1969), a case decided a decade earlier But others have viewed the control test as an essentially statutory standard E g , *Denver Volunteers of America v NLRB*, 732 F 2d 769, 774 (10th Cir 1984), *NLRB v. Austin Developmental Center*, 606 F 2d 785, 789 (7th Cir 1979), *NLRB v Pope Maintenance Corp* , 573 F 2d 898, 902 (5th Cir 1978), Kiss, *The Effect of National League of Cities on the Political Subdivision Exemption of the NLRA*, 32 Lab L J 786, 792–793 (1981) The latter seems the better view, although I do not agree with those courts that a joint employer analysis is mandatory As explained below, it is consistent with the Supreme Court's approach in *NLRB v E. C. Atkins & Co* , 331 U S 398 (1947) Furthermore, as the dissenters in *National Transportation Service* correctly pointed out (240 NLRB at 567 fn 12), the attempt by the majority in that case to suggest that past refusals to assert jurisdiction had been based on the Board's authority under Sec 14(c)(1) to decline jurisdiction in certain cases over employers who meet the Act's broad Commerce Clause standard (id at 565) rather than on the construction and application of the Sec 2(2) exemption is not supported by an examination of the cases See, e g., *Teledyne Economic Development Co* , 223 NLRB 1040 (1976), *Ohio Inns*, 205 NLRB 528 (1973); *Servomation Mathias Pa., Inc* , 200 NLRB 1063 (1972)

It may be, however, that my dispute with my colleagues is little more than semantic I do not presume to deny that, as the Supreme Court stated in *NLRB v Denver Building Trades Council*, 341 U S. 675, 684 (1951) (dictum) "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case " It is simply that, in my view, a decision—under the control test—that bargaining between employees and an employer under contract with an exempt entity is not "meaningful" reflects a judgment either that the putative employer is little more than an agent of the entity exempt under Sec 2(2) (and, hence, exempt itself) or that, given the insubstantial control over labor relations left in the nonexempt entity, "the process of collective bargaining . as contemplated by the Act" is inappropriate and the necessary employee-employer relationship is not present *NLRB v E. C Atkins & Co* , supra, 331 U S at 413–414. To my mind, these are judgments concerning the reach of the Act in light of its policies—judgments that will be binding on the courts so long as they are reasonable. See *Bayside Enterprises v NLRB*, 429 U S 298, 303–304 and fn 14 (1977) (Board's construction of the term "agricultural laborer" accepted as a reasonable interpretation of the statute)

[2] This is not to say that a different basis for declining jurisdiction in certain cases could never exist

[3] In early decisions, the Board confirmed its jurisdiction over government contractors See, e g , *Great Southern Chemical Corp* , 96 NLRB 1013, 1014 (1951), *American Smelting & Refining Co* , 92 NLRB 1451, 1452 (1951), *National Food Corp* , 88 NLRB 1500, 1501 (1950), *Monsanto Chemical Co.*, 76 NLRB 767, 769 (1948) In each case, the fact that the employer's authority over working conditions was subject to review and approval by the Federal Government did not defeat the employer's effective control over the day-to-day employment practices See also *NLRB v Pope Maintenance Corp.*, supra, 573 F 2d 898

The job corps program involved in the present case exists by virtue of a Federal program that originated in 1964 and is currently conducted under the authority of the Job Training Partnership Act, Pub. L. 97-300, 96 Stat. 1322, 29 U.S.C. § 1501, 1691 et seq.[4] That program contemplates that job corps centers may be run either by the Federal Government directly or by private contractors. 29 U.S.C. § 1697. Although general goals are specified concerning what is to be achieved in training the clients (enrollees) served by the program, the statute does not address the standards to govern the working conditions of a private contractor's employees. Thus, there is no counterpart of the provision in Model Cities legislation that troubled the Seventh Circuit in *Lutheran Welfare Services v. NLRB*, 607 F.2d 777, 778 (7th Cir. 1979), a provision in which Congress required the government agency charged with administering Headstart programs to adopt both for itself and others running Headstart centers "rules designed to establish specific standards governing salaries, salary increases, travel and per diem allowances, and other employee benefits." 42 U.S.C. § 2928f(a) (1976).

Neither is there any such provision in the implementing regulations issued by the Secretary of Labor. Rather, it appears that DOL contemplated that a unionized employer would establish employee compensation and other working conditions through the normal process of collective bargaining and, after an agreement was reached, that agreement would be submitted as part of the technical and management proposals that constitute the would-be contractor's bid. This is the only sense one can make out of the "Administrative Provisions" of the regulations, which call upon a private contractor's "Center Director" to "develop and maintain personnel management policies, including plans for hiring, supervision, and evaluation of staff" and to establish "labor management relations in accordance with . . . the provisions of the National Labor Relations Act." 20 C.F.R. §§ 684.120(b)(3) and (5). Cf. *NLRB v. E. C. Atkins & Co.*, supra, 331 U.S. 398, 415 (noting that the War Department's regulations "acknowledged the feasibility of recognizing collective bargaining rights" of the guards). That DOL has authority to scrutinize the terms of the bargaining agreement in deciding whether to accept the bid proposals no more renders the prior bargaining meaningless than the authority of a bankruptcy court to scrutinize an agreement reached by a debtor-in-possession and a labor organization places that bargaining beyond the pale of the Act.[5] Of course, if there were evidence that DOL was an active presence at the bargaining table, intruding itself into the bargaining process, a different conclusion should be drawn. But I see no evidence in this case that that has occurred or that it is contemplated by the statutory scheme. Indeed, the evidence does not even indicate that DOL customarily requires significant changes in the agreement the parties have reached.[6]

As for the majority's reliance on certain standards applicable to initial wage levels (supra at 13 fn. 20), the standards referred to are not significantly different from the comparability standards that the court in *NLRB v. St. Louis Comprehensive Neighborhood Health Center*, 633 F.2d 1268, 1271 (8th Cir. 1980), found inadequate as a basis for establishing that meaningful bargaining was impossible. In this regard, we should not lose sight of the fact that Government contractors typically feel the pinch of cost thresholds imposed by the prevailing wage laws[7] and the cost ceilings imposed by the Government's desire to obtain goods and services at a competitive price. Within the range set by these economic forces, bargaining is possible.

Finally, concerning the bargaining process during the administration of the contract, the majority concedes that Res-Care "has final authority over grievances"; but it makes much of the fact that if the parties contemplate departing from the agreed-upon wage and benefit levels, they need a "waiver" from DOL in order for the additional expense to be regarded as an "allowable cost," i.e., one that DOL itself will pay as part of the contract price. This surely cannot bear the weight the majority assigns to it. First, even in a bargaining relationship with no link at all to the Government or another exempt entity, Section 8(d) of the Act provides that neither party need consent to—or even consider—any modification of the agreement, so

[4] The same program was previously authorized under the Economic Opportunity Act of 1964, Pub L. 88-452, §§ 101-109, 78 Stat 508, 508-511 (repealed 1981) and the Comprehensive Employment and Training Act of 1973, Pub L. 93-203, Title IV, 87 Stat 839, 863-874 (repealed 1982).

[5] See *NLRB v Bildisco & Bildisco*, 465 U S. 513, 534 (1984) (debtor-in-possession in a Chapter 11 reorganization proceeding remains obligated to bargain over a contract with unit employees) See also 11 U S.C. § 1113 (Congress' response to *Bildisco*), specifying procedural requirements for modifying a collective-bargaining agreement to which a debtor-in-possession is a party

[6] For example, Ralph S Coffman, Res-Care's vice president of administration, testified that, as part of the bidding process to obtain the job corps contract, Res-Care would have to submit the collective-bargaining agreement to DOL for review. Coffman conceded on cross-examination, however, that he had no knowledge as to whether DOL had ever participated in the negotiations of the collective-bargaining agreement (Tr 83). Moreover, he conceded that he had no knowledge as to whether DOL had "ever overruled anything within the confines of [the] labor agreement" (Tr 99)

[7] Davis-Bacon Act, 40 U S.C §§ 276a-276a-5, Service Contract Act, 41 U S C §§ 351-358

bargaining on changes in the contract is hardly essential to meaningful bargaining under the Act. Second, if a contractor wishes to hire an employee at a wage above the contract level and the collective-bargaining representative agrees to it, the fact that DOL would not pay the additional expense does not bar the contractor from going ahead at its own cost. Undoubtedly Government agencies scrutinize cost increases under most cost-plus-fixed-fee contracts to determine whether they will bear the expense, yet the majority does not suggest that it is reading all employees working under such contracts out of the Act.

In sum, even assuming that collective bargaining can never be meaningful if wages and benefits are not on the table—a proposition I am not entirely convinced is correct—the record here simply does not establish that DOL exerted such control over the wages and benefits of the Res-Care employees represented by the Petitioner that no meaningful bargaining can take place. Res-Care has successfully negotiated two collective-bargaining agreements already and, if the employees in the appropriate unit select the Petitioner as their representative, I see no reason why Res-Care should not be obligated to bargain for another agreement. Accordingly, I would find that the Section 2(2) exemption for the United States does not bar our exercise of jurisdiction and would affirm the decision of the Regional Director.