

U.S. Corrections Corporation and International Union, United Plant Guard Workers of America (UPWA), Petitioner. Case 9-RC-15704

August 27, 1991

DECISION AND DIRECTION OF ELECTION

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The key issues in this case are: (1) whether the employer, a private corporation which operates a minimum security correctional facility for the Commonwealth of Kentucky, meets the standards of *Res-Care, Inc.*, 280 NLRB 670 (1986), for the assertion of jurisdiction; and, if so, (2) whether the Board should decline to assert jurisdiction as a matter of policy.¹

The Board has reviewed the rulings of the hearing officer made at the hearing and finds that they are free from prejudicial error. They are affirmed.

On the entire record in this case, the Board finds:

The facts are as follows. On December 11, 1985, the Commonwealth of Kentucky (also referred to as the State), awarded the Employer² a 3-year contract for the operation of a 200-bed minimum security correctional facility—the Marion Adjustment Facility (MAC). This contract provided a per diem amount to be paid to the Employer for each inmate.³ The contract contained two 1-year options, both of which were exercised. In 1988, the Employer was awarded a second contract by Kentucky expanding the number of beds to 450. This was later increased to 500 beds.

Enabling legislation permitting Kentucky to contract out the operation of its prisons to private providers was enacted on June 15, 1988.⁴ The legislation specifies financial and personnel requirements. It provides that an annual budget be submitted and that personnel have

the same qualifications and training as the staff in similar positions in facilities operated by the Corrections Cabinet, the State agency which oversees all correctional facilities.⁵ The legislation also specifies (at sec. 197.525(1)) that in any provision “which requires the private provider or adult correctional facility to establish or implement a policy or procedure governing a particular activity or duty, the cabinet shall first approve the policy or procedure before it shall become effective.”

Within 60 days after the execution of the initial contract, the Employer was required to submit to the State a manual setting forth all its policies and procedures. This was to include a written personnel policy, with copies to be given to the employees, specifying at least 15 topics, including an organization chart, benefits, the base for determining salaries, and disciplinary procedures. As part of its response, the Employer submitted a personnel handbook (employee handbook), which included a description of benefits.⁶ The Corrections Cabinet approved the entire policy and procedure manual.⁷

Douglas Sapp, commissioner of the Department of Community Services and Facilities of the Corrections Cabinet, testified that no quantified standards are used to assess any wage or benefit proposal but he considers the impact on quality and morale of the employees, as well as on overall efficiency and effectiveness of the operation. For example, he said, the State has an interest in maintaining a minimal number of holidays, would be concerned that paying only minimum wages would adversely affect the quality of the staff, and, on the other hand, that paying the correctional officers \$40,000 per year might adversely affect funds necessary in other areas.

The Employer constantly reviews its policies and, when it wants to change a policy, it requests approval by the Corrections Cabinet.⁸ Some approvals on minor matters are granted orally.⁹ The record disclosed only a few instances where the Corrections Cabinet has disapproved employer proposals.¹⁰

¹ On May 14, 1990, the Union filed a petition under Sec. 9(a) of the National Labor Relations Act seeking to represent a unit of approximately 55 correctional officers, whom the parties have stipulated are guards. A hearing was held on June 12 and 18, 1990, before Hearing Officer Donald A. Becher. Pursuant to Sec. 102.67 of the National Labor Relations Board Rules and Regulations, and by direction of the Regional Director for Region 9, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer and the Petitioner each filed a brief in support of its position.

The Board has delegated its authority in this proceeding to a three-member panel.

² The Employer is a Kentucky corporation engaged in the operation of private correctional facilities, including the Marion Adjustment Center, in Marion County, Kentucky, at issue here. The parties stipulated that during the preceding year, a representative period, the Employer received in excess of \$50,000 from an entity which itself transacts over \$50,000 worth of business across state lines. We find that the Employer is engaged in commerce within the meaning of the Act. The parties also stipulated that the Union is a labor organization within the meaning of the Act.

³ In submitting its bid for the contract, the Employer specified a per diem amount, which it calculated based on budgeted amounts for all costs associated with the operation of the facility, including food, medical care, utilities, insurance, and labor.

⁴ “Privatization of Prisons,” Kentucky Revised Statutes 197.500 et seq. The 1985 contract was pursuant to a statute allowing for the private operation of community residential centers. According to the Employer’s vice president, Michael Montgomery, the enabling statute now controls all the Employer’s operations.

⁵ The Corrections Cabinet has two employees stationed at MAC: a clerical employee and a contract administrator/parole officer. The latter monitors all operations to ensure compliance with the contract and is in daily telephone contact with the Corrections Cabinet.

⁶ According to Vice President Michael Montgomery, with the exception of the organization chart and job qualifications and descriptions, the Employer retains its original personnel policies.

⁷ Apparently, the Corrections Cabinet submitted its comments on some of the policies (although not on any of the personnel policies).

⁸ The Corrections Cabinet may discuss aspects of a proposal with the Employer prior to approval and negotiate with the Employer for the modification of the proposal to take care of any problems.

⁹ In addition, on one of the three occasions that the Employer changed health insurance carriers, the change was approved after the fact because of time exigencies. However, Vice President Montgomery testified that on personnel matters this informal procedure would not be followed.

¹⁰ As noted below, the Corrections Cabinet has denied a request by the Employer to reduce staffing. The Corrections Cabinet denied another request to permit the correctional officers to carry firearms when transporting medium and maximum security passengers to other facilities. In addition, on learning that the Employer was allowing its correctional officers to carry night sticks, the Corrections Cabinet directed this practice to stop immediately.

The Employer's current policy statement on "Personnel Salaries," dated June 27, 1988, sets forth the annual base salary structure for seven classifications, one of which is "correction officer" (at \$11,500).¹¹ The statement provides "[t]he President of U.S. Corrections Corporation may, without notice, change the schedule to reflect a higher wage salary." According to the Employer's vice president, Montgomery, it was the Employer's decision to give the correctional officers a 5-percent increase for the first 5 years (not submitted to the State), and then an annual percentage increase identical to the increase in the contract amount received from the State.

The statute and contract require periodic inspections conducted by two departments of the Corrections Cabinet to determine compliance with their provisions.¹² The Department of Community Services conducts 1-day inspections which include a semiannual on-site inspection and an annual review of all policies and procedures. The Department of Adult Institutions conducts a more extensive semiannual, 3-day inspection primarily focused on security but also addressing some personnel matters such as employee staffing and hiring.

The Corrections Cabinet may veto the hire of a new employee if he does not meet the minimum qualifications or pass the background security checks required by the statute and contract.¹³ The Corrections Cabinet rejected a candidate for director of MAC early in 1990 because he did not satisfy the statutory educational requirements. In addition, the contract administrator has effectively challenged the hiring of persons who failed to pass the background check required by the statute.¹⁴ The Employer may seek variances for underqualified persons, subject to the approval of the personnel manager of the Corrections Cabinet.¹⁵

In addition, no state official sits on the Employer's board of directors nor does the State have the authority to select any corporate officers. However, as noted above, the Corrections Cabinet has authority to reject the selection of managers, including the director, who do not meet the statutory and contractual requirements.

¹¹ No maximums are specified.

¹² In addition, the statute (at sec. 197.510(28)) provides that "[t]he cabinet shall generally observe and monitor the operations of the adult correctional facility at least once per week." As noted above, the Corrections Cabinet has an onsite contract monitor stationed at MAC.

¹³ The statute, at sec. 197.510(16), also requires that "[p]ersonnel selection and assignments shall be based on merit," but no evidence was presented that the Corrections Cabinet reviews hires to determine whether the Employer made the best choice among candidates. The Employee Handbook, however, states that "[w]hile all available criteria will be considered for promotions and job reclassifications, merit through job performance shall be the most important criteria."

¹⁴ Although the Employer's vice president Montgomery claimed that the contract administrator could challenge an Employer's hire for any reason, no evidence was offered that any hire had ever been challenged except for failing to meet the minimum qualifications or to pass the background security check.

¹⁵ The Employer has requested a variance at least twice. Neither instance involved a correctional officer.

Further, the correctional officers are not deputized and, unlike the State's correctional officers, do not have peace officer authority.

The 1985 contract provided for correctional officer training either directly through the Corrections Cabinet or according to a curriculum approved by that agency. For the first 1-1/2 years of the contract, the Employer opted for training conducted by the Corrections Cabinet. After that, the Employer conducted its own training as approved by the Corrections Cabinet. However, the week of the instant hearing, the Corrections Cabinet informed the Employer that in the future the State would resume all training.¹⁶

Both statute and contract require the Employer to maintain written job descriptions and qualifications. As noted above, job qualifications must correspond with those in adult correctional facilities operated by the Corrections Cabinet and are inspected by that agency.¹⁷ Any proposed change must be submitted to the Corrections Cabinet for approval.¹⁸

Pursuant to both statute and contract provisions, the Employer is required to provide 24-hour-per-day, 7-day-per-week staffing, and that staffing must "be adequate to insure close inmate surveillance and maintenance of security." In addition, the contract provides specific staffing levels, subject to change only on the approval of the Corrections Cabinet.¹⁹ The Employer is, accordingly, required to submit to the Corrections Cabinet for approval shift rosters setting forth the shift hours and number of employees, including their positions and posts, per shift. These rosters are reviewed during inspections.

The Employer argues that under *Res-Care*, supra, and *Long Stretch Youth Homes*, 280 NLRB 678 (1986), it does not possess sufficient control over either essential terms and conditions of employment or labor relations generally to engage in meaningful bargaining. Therefore, it contends the Board should decline to assert jurisdiction.

In *Res-Care* and *Long Stretch*, the Board reaffirmed and refined the principles set forth in *National Transportation Service*, 240 NLRB 565 (1979), for determining whether to assert jurisdiction over an employer providing services to or for an exempt entity. Under *National Transportation Service*, supra, once it is determined that an employer meets the definition of "employer" in Section 2(b) of the Act the inquiry is

¹⁶ Sapp said that the Corrections Cabinet's two most recent contracts required state-conducted training but he did not specify whether these were contracts for the MAC facility.

¹⁷ Montgomery also testified that the Employer could impose higher qualifications than the State, subject to Corrections Cabinet approval.

¹⁸ For instance, the position of "unit manager" has been added. However, no evidence was presented of any changes in the qualifications for correctional officer.

¹⁹ On November 13, 1987, Sapp denied a request by the Employer to reduce staffing. He also ordered the Employer to remedy the current understaffing by three correctional officers which he considered in violation of the contract.

whether the employer retains sufficient control over the employment conditions of its employees to engage in meaningful and effective bargaining with a union. In *Res-Care*, the Board complemented this inquiry by also requiring an examination of the amount of control which is exercised by the exempt entity over the employer, particularly in the areas of wages and fringe benefits. In *Res-Care*, the Board concluded the exempt entity retained the ultimate discretion for setting wage and benefit levels, thus precluding the employer from meaningful bargaining. In contrast, the Board in *Long Stretch* asserted jurisdiction because, although the compensation system to the employer in that case effectively imposed a ceiling on its operating budget, there were no specific limits on employee compensation, i.e., the employer was free to pay either more or less than what the exempt entity suggested in its cost guidelines.

The Employer argues that the instant facts are closer to those in *Res-Care* than those in *Long Stretch*. Thus, it argues that the per diem pay to the Employer for each inmate is the same as a cost-plus-fixed fee amount broken down to a daily rate per inmate. It further argues that because the salary and benefit levels are set by the contract, the Employer has no authority to change them unilaterally and that the State has ultimate approval authority over all policies and procedures, thereby precluding all meaningful bargaining.

The Employer, in its brief, further contends that the Board should decline jurisdiction because the Employer's operations are essentially local in nature and that any labor dispute is unlikely to disrupt interstate commerce.²¹ It asserts "[T]he only real effect of a labor dispute, albeit significant, would be the disruption of the Commonwealth's ability to carry out a function of vital interest only to itself and its citizens."

The Union contends that the facts are closer to those in *Long Stretch* than those in *Res-Care*. The Union argues that the Employer has the final say on wages and benefits because, although the State requires it to have personnel policies on at least 15 topics, the Employer formulates the contents of these policies, including the wage structure.

On the policy issue, the Union argues that Commissioner Sapp testified that the MAC inmates are not a danger to the community. The Union also argues that it represents units of guards at nuclear power plants across the country which present a much greater issue of public safety than that posed here.

The first question is whether the Employer retains sufficient control over the terms and conditions of employment to engage in meaningful bargaining. We con-

clude that the Employer has retained this level of control.

Of prime significance is the control exercised over wages and benefits.²¹ It is true that the State exercises approval authority over the Employer's wages and benefits proposals. However, not only has the State approved the proposals without modification but also the salary policy it has approved leaves the Employer discretion in determining the level of wages. Thus, the salary policy provides only a base salary for each classification, which base the Employer is given discretion "without notice" to increase. In addition, the policy allows the Employer to determine annual increases, which it has done, without the State's specific approval.²²

Also, although the Employer submits a line-item budget each year, the line-items are no more specific than the cumulative total of "salaries" and "personnel costs/benefits," respectively, for the whole facility. Further, according to the State, any concern it has relative to the level of wages and benefits is no more specific than its concern with the overall morale and general efficiency of operations. These factors indicate that the Employer could effectively bargain about wages and benefits without disrupting its contractual relationship with the State.²³

While the State has authority to approve all policies and procedures, this authority has largely been exercised in a general oversight manner.²⁴ The personnel

²¹ See *Res-Care*, supra at 674. But see *Community Transit Services*, 290 NLRB 1167, 1169-1170 (1988) (even where state strictly controlled wages, meaningful bargaining was not precluded on other terms and conditions).

²² Cf. *Res-Care*, supra, where the salary schedule set minimum and maximum wage rates for each labor grade and wage increases were limited to 10 percent.

²³ See *Career Systems Development Corp.*, 301 NLRB 367 (1991), in which the Board asserted jurisdiction over an employer that retained, inter alia, substantial discretion over wages and benefits "as illustrated by the instances of state approval of increased funds for salaries and fringes without requiring information as to the distribution of the additional funds." The Board distinguished this from the State's "final, practical say over wages and benefits" in *Res-Care* (e.g., where ranges, with maximums, were specified). The Board further stated that the employer need not be free of all constraints for meaningful bargaining and in distinguishing *Res-Care* "[t]he difference between the degree of controls is critical." Id. The Board concluded that a State's general oversight as to whether salaries consume too much of a budget did not preclude bargaining. This contrasts with the cases the Employer cites, *PHP Healthcare Corp.*, 285 NLRB 182, 185 (1987), and *Correctional Medical Systems*, 289 NLRB 810 (1988), in which jurisdiction was declined where the States, respectively, directly controlled minimum, maximum, and steps on compensation, or wage ranges, benefits levels, and the total budget.

²⁴ Cf. *Correctional Medical Systems*, supra at 811-813 (1988), in which jurisdiction was declined although the warden did not exercise his authority to veto changes in the employer's personnel manual. However, the employer's bid had to include the line-item budget for fringe benefit costs per hour for each job classification. See also *R. W. Harmon & Sons, Inc.*, 297 NLRB 562, 563 (1990), in which an employer was found not to have relinquished control where the review by the exempt entity is routine.

We, therefore, find unconvincing our dissenting colleague's reliance on *Ohio Inns*, 205 NLRB 528 (1973). In that case, the State actually exercised such extensive control over aspects of labor relations that the Board found it to be a joint employer with the employees' immediate employer; and the Board relied not only on contract language, but also on evidence at the hearing (not fully described) regarding a requirement that collective-bargaining agree-

²⁰ The Employer cites, inter alia, *Hialeah Race Course*, 125 NLRB 388 (1959), noting that part of the Board's rationale for declining jurisdiction over the horseracing industry was that it is subject to detailed state regulation which could be extended to include labor relations. The Employer argues that a similar level of state regulation exists here.

policies submitted for the original contract were approved without comment and these policies with limited exceptions have not been revised. Further, the State's monitoring of compliance with the statute and contract is limited to whether the Employer's personnel actions are in compliance with the contract and do not amount to independent assessments of the personnel actions. New hires are reviewed to make sure that the employees have passed background security checks and meet minimal qualifications. However, there is no evidence that they were reviewed as to whether the Employer made the best choice among candidates.⁵ These factors also indicate that the Employer could effectively bargain about personnel matters without the State's authority precluding the Employer and the Union from reaching agreements.

In sum, after examining the degree of control exercised by the Employer as well as by the Commonwealth of Kentucky over the Employer's labor relations, we conclude that the record amply demonstrates that the Employer retains sufficient control over its employees' terms and conditions of employment to engage in meaningful bargaining.

Next, we address whether the Board should decline to assert jurisdiction over a minimum security facility as a matter of policy. First, we reject the Employer's contention that jurisdiction should be declined because the Employer's operations are essentially local in nature, like horseracing. Consistent with its approach announced in *National Transportation*, supra, the Board has rejected the local-in-character test as a viable standard for jurisdictional purposes.²⁶ In addition, the reasons the Board in its discretion declined to assert jurisdiction over horseracing were specific to that industry.²⁷ Section 14(c)(1) requires that the Board assert jurisdiction where it would have asserted jurisdiction under the standard prevailing on August 1, 1959. However, as the Board noted in *Hialeah Race Course*,²⁸ because of the Board's policy of not asserting jurisdiction over horseracing, it had no jurisdictional standard for horseracing on August 1, 1959.²⁹ This is not true for nonretail employers, such as the Employer, and the Employer has met the applicable monetary standard for asserting jurisdiction.³⁰

ments had been approved by the State before they could become "effective." Id. at 528-529.

²⁵ See *Correctional Medical Systems*, 299 NLRB 654, 656 (1990), in which the Board found that where the state control is exercised largely for security reasons, the employer may still retain sufficient control to bargain meaningfully. The Board also noted that per-inmate compensation is an indicia of employer control. Id. at 656.

²⁶ *Soy City Bus Services*, 249 NLRB 1169, 1170 (1980).

²⁷ *Hialeah Race Course*, supra at 390-391. See also NLRB Rules and Regulations, Sec. 103.3.

²⁸ Supra at 390.

²⁹ Ibid.

³⁰ Fn. 2, above.

Second, there is an insufficient basis to decline to assert jurisdiction on the basis of public safety. Commissioner Sapp, the state official responsible for overseeing the contract with the Employer, testified that the inmates are not a danger to the public.³¹ MAC has no guard towers, perimeter fences, or any other type of perimeter control device. The only "perimeter" controls are the patrolling correctional officers, who do not carry weapons of any kind and are not peace officers with any power to arrest. The correctional officers closely supervise the inmates, take frequent censuses, and regularly search inmates and their belongings. The inmates are controlled by the sanctions of losing their minimum security status and thereby being transferred to a higher security facility, loss of "good time" for parole purposes, and loss of parole. Based on the above, the record does not show that concerns with public safety warrant declining to assert jurisdiction. In addition, the Union correctly notes that the Board has asserted jurisdiction over other employers where security concerns exist.³²

Based on the foregoing, we find that no policy concern with public safety warrants our declining to assert jurisdiction over the Employer.

In view of the foregoing, we shall direct an election by secret ballot in the following unit found appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time correction officers employed at the Employer's Marion Adjustment Center at St. Mary, Kentucky, but excluding all office clerical employees, health care employees, social service employees, maintenance employees, food service employees, teachers, instructors, unit managers, sergeants, deputy director, business manager, professionals, and all other supervisors as defined in the the National Labor Relations Act, as amended.

[Direction of Election omitted from publication.]

³¹ The Employer's vice president, Montgomery testified that "about the only criteria" are that the inmates cannot be convicted of sex offenses and must be within 4 years of either their initial hearing before the parole board or the end of their sentence. He stated that Kentucky prefers "there not be crimes of violence in their record but we have a good number of those." This includes inmates convicted of assault. Montgomery, however, did not dispute Sapp's assertion that the inmates placed in the Employer's facility are not a danger to the public.

³² See *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398 (1947) (jurisdiction upheld over plant guards in defense plant who were civilian auxiliaries to the military police); and *Old Dominion Security*, 289 NLRB 81 (1988), and *Champlain Security Services*, 243 NLRB 755 (1979) (security services provided for the United States Coast Guard and U.S. Navy, respectively).

We note that the Board has recently asserted jurisdiction over a juvenile correctional facility although without specifically addressing the policy issue. *Career Systems Development Corp.*, supra. It has also, after applying the *Res-Care* factors to two employers providing medical services to correctional facilities, respectively asserted and declined to assert jurisdiction. *Correctional Medical Systems*, 299 NLRB 654 (1990); *Correctional Medical Systems*, supra, 289 NLRB 810 (1988).

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would decline to assert jurisdiction over the Employer in this case. The Board stated in *Res-Care, Inc.*, 280 NLRB 670, 674 (1986), 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 [footnote omitted].” I conclude that the contract between the Employer and the Commonwealth of Kentucky substantially restricts this Employer’s discretion with respect to employees’ terms and conditions of employment and, therefore, precludes the Employer from engaging in meaningful collective bargaining with the Petitioner.

The record shows that the Employer has a contract with the Commonwealth of Kentucky to operate a minimum security correctional facility known as the Marion Adjustment Center in St. Mary, Kentucky. The Employer has operated the prison since January 1986 on 117 acres of land that formerly served as a college site. There are presently about 500 inmates at the correctional facility and the Commonwealth reimburses the Employer on a per diem basis for each inmate housed there.

The Employer has approximately 115 employees at the prison, including about 55 correction officers. The facility has no guard towers or any other type of perimeter control device. The patrolling correction officers, who carry no weapons of any kind, are the only “perimeter” control that exists for the minimum security prisoners. The Petitioner seeks to represent all the Employer’s full-time and part-time corrections officers who are defined as guards by Section 9(b)(3) of the Act.

The Corrections Cabinet is the state agency which oversees the Employer’s contract with the Commonwealth. There is a probation officer employed by the Corrections Cabinet who works at the Marion prison site and who reports any problems with operations there to higher officials based at the state capital in Frankfort, Kentucky. The Corrections Cabinet has to approve all the Employer’s operating procedures and policies. Further, the Employer annually submits a line-item budget which the Corrections Cabinet must approve. Although the Employer’s capacity to set wage ranges and initial salaries for employees is governed only by the applicable minimum wage law, the Corrections Cabinet exercises approval authority over the Employer’s cumulative total of salaries and benefits which are two separate line items in the annual budget. The record shows that, aside from certain annual wage

increases provided for in the Employer’s original contract that the Commonwealth has previously endorsed, the Corrections Cabinet must approve any changes in employees’ economic terms and conditions of employment that the Employer confers during the fiscal year.

Based on the authority of the Corrections Cabinet to approve cumulative wages and benefits for the Employer’s employees, as well as any adjustments to them that the Employer subsequently makes, I conclude that the Employer does not retain the final authority over the critical areas of wages and fringe benefits. Thus, I find that the Employer in this case clearly lacks the discretion necessary to engage in meaningful collective bargaining. This is not, therefore, a case in which the employer retains nearly total control over employee compensation.¹ In this situation, by contrast, it is the Corrections Cabinet, the governmental entity, which maintains control over virtually every action the Employer takes in operating the correctional facility. Moreover, my colleagues have failed to establish that the Corrections Cabinet’s approval authority over economic items is merely a formality. The evidence shows, in fact, that in several cases the Corrections Cabinet has mandated changes in the Employer’s operations when they differed from designated procedures.

Additionally, I emphasize that the Corrections Cabinet’s approval authority over the Employer’s general policies and procedures necessarily requires that any negotiation or collective-bargaining agreement that the Employer might enter into covering its corrections officers be subject to the Commonwealth’s ratification. When a governmental entity exempt from the Board’s jurisdiction has the right of disapproval over a collective-bargaining agreement entered into by an employer, the Board will not assert jurisdiction over the Employer in that context. See *Res-Care, Inc.*, supra at 674 fn. 22; *Ohio Inns*, 205 NLRB 528, 529 at fn. 3 (1973).

Because its contract with the Commonwealth places substantial limitations on the Employer’s capacity to determine any terms and conditions of employment, and particularly those economic in nature, for the employees that the Petitioner seeks to represent here, I conclude that it would not effectuate the purposes and policies of the Act to assert jurisdiction over the Employer.² Accordingly, I would reverse the Regional Director’s Decision and Direction of Election and dismiss the petition.

¹ Compare *Correctional Medical Systems*, 299 NLRB 654 (1990), where I joined three other Board members in asserting jurisdiction over the employer.

² See also my dissents in *Career Systems Development Corp.*, 301 NLRB 434 (1991); and *R. W. Harmon & Sons*, 297 NLRB 562 (1990).