Airborne Freight Company d/b/a Airborne Express, and its Joint Employers, Current Carrier Corporation, Agents Transportation Service and Expressman Courier Service Inc. ***and*** **Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251, a/w International Brotherhood of Teamsters, AFL–CIO**

Airborne Freight Company d/b/a Airborne Express, and its Joint Employer Enterprise Express, Inc. a/k/a NFW, Inc. d/b/a Enterprise Express, Inc. ***and*** **Teamsters Local 344, affiliated with the International Brotherhood of Teamsters, AFL–CIO.** Cases 1–CA–32742 and 1–CA–32767

November 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On September 13, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The Charging Parties, the General Counsel, and the Respondent filed exceptions and supporting briefs, the General Counsel filed an answering brief to the Respondent's exceptions, the Respondent filed a brief in opposition to the General Counsel's and Charging Parties' exceptions, and the Charging Parties filed a brief in reply to the Respondent's opposition brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order and substitute the attached notice.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Professional Delivery Services, Inc., Cranston, Rhode Island, its officers, agents, successors, and assigns shall take the action set forth in the Order.

MEMBER LIEBMAN, concurring.

This case illustrates the sharp limits of the Board's joint-employer doctrine, which may prevent employees from bargaining with the company that, as a practical matter, determines the terms and conditions of their employment. I agree with my colleagues that Respondent Airborne is not a joint employer with the local carriers, under the Board's current, narrow standard. But I question that standard, which has evolved without a full explanation of why it was chosen, without careful exploration of possible alternatives (including approaches that were silently abandoned), and without a clear acknowledgment of the consequences.

After decades of taking a broader approach, the Board has focused since the mid-1980s on the putative joint employer's "indicia of control" over another employer's employees, specifically whether the "employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *Laerco Transportation*, 269 NLRB 324, 325 (1984). The Board's decisions, moreover, have required that the joint employer's control over these matters be direct and immediate. E.g., *TLI, Inc.*, 271 NLRB 798 (1984), enfd. 772 F.2d 894 (3d Cir. 1985). The result may defeat the purposes of the Act, for reasons that I will explain. Given the growing practice in today's economy of contracting out essential functions, I hope that the

[1] The Respondent argued before the judge that, under the holdings of *Alaska Roughnecks & Drillers Assn. v. NLRB*, 555 F.3d 732 (9th Cir. 1977), and *Central Transport, Inc. v. NLRB*, 997 F.2d 1180 (7th Cir. 1993), it could not be found to have an obligation to bargain with the Union. In both cases, the courts held that an employer could not be held to have an obligation to bargain with the union when the employer was not named on the election petition and did not participate in the representation proceedings. The judge found, as to the Wisconsin cases, that it was unnecessary to pass on this argument based on his finding that Airborne was not a joint employer with the contractors. The Respondent excepts with regard to both the Rhode Island and Wisconsin cases. In light of our findings that Airborne is not a joint employer with any of the contractors in either Rhode Island or Wisconsin, we likewise find it unnecessary to pass on the Respondent's alternative argument in both sets of cases. Member Cowen agrees with his colleagues that it is not necessary to pass on Respondent's alternative arguments, but he notes that he agrees with the decisions of the courts in *Alaska Roughnecks* and *Central Transport*, supra.

We reject Member Liebman's suggestion that the Board should revisit its standard for determining joint employer status. Simply put, the Board's test for determining whether two separate entities should be considered to be joint employers with respect to a specific group of employees has been a matter of settled law for approximately 20 years. In determining whether a joint employer relationship exists under this test, the Board analyzes whether putative joint employers share or codetermine those matters governing essential terms and conditions of employment. See, e.g., *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1432 (5th Cir. 1991); *NLRB v. Browning-Ferris Industry*, 691 F.2d 1117, 1124 (3d Cir. 1982); *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985). The essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate. *TLI, Inc.*, 271 NLRB at 798–799.

Thus, approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint employer's *indirect* control over matters relating to the employment relationship. See, e.g., *Floyd Epperson*, 202 NLRB 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974); *Jewel Smokeless Coal Corp.*, 170 NLRB 392, 393 (1968). We would not disturb settled law.

Finally, we also reject Member Liebman's invitation to reconsider *Plumbers Local 447 (Malbaff)*, 172 NLRB 128 (1968), and its progeny.

[2] We have substituted a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

Board soon will revisit the joint-employer doctrine, as the General Counsel has urged us to do here.[1]

In the past, the Board was prepared to find joint-employer status in cases where the putative joint-employer exercised "indirect control" over the contractor's wages and discipline;[2] in cases where the respondent had contractual authority to control some employment conditions, even if that authority was not exercised;[3] in cases where "industrial realties" made one company a "necessary party to meaningful collective bargaining," even though it played no role in hiring, firing, or directing employees;[4] and in cases where the respondent "was the ultimate source of any wage increases for [the contractor's] employees that might be negotiated with a union."[5] This case presents an analogous situation, but the Board's current approach forecloses a joint-employer finding.

Today, increased competition drives businesses to become more flexible, adopting strategies that seek to maintain leaner product inventories and shorter product lifecycles, relying on "just in time" delivery of goods and materials. As a result, national and international "expedited-transportation" carriers like Airborne, which move an increasing share of the nation's freight, are required to guarantee deliveries on a much shorter time frame than was formerly acceptable.[6] This requirement impels them to exert control at every stage, including the local pickup and delivery components that are contracted out.[7] They consequently exercise much more control over their local contractors' operations, and more effective control over the contractors' terms of employment, than their trucking predecessors did. They do not always exercise this control through direct "hiring, firing, discipline, supervision and direction" of the local contractor's employees—the focus of the Board's inquiry—but rather through their pervasive domination of the local carrier's operations.

In many localities, rather than employ its own drivers, Airborne contracts with local carriers to make its pickups and deliveries. Several of the Respondent local carriers were formed for the sole purpose of performing local pickup and delivery work for Airborne. In Rhode Island and Wisconsin, a local union of the Teamsters obtained bargaining rights with the respective Respondent local carrier; later alleged the unfair labor practices that gave rise to the complaint here; and named Airborne as a respondent joint employer.

Airborne imposes its own, highly standardized operational requirements on the Respondent local carriers at every stage, and monitors and retains effective control over those operations. Airborne owns the terminals the local carriers use, and the onsite equipment used at those terminals. Although Airborne rarely participates in the local carriers' hiring of employees, it has ongoing input into the required number and allocation of each carrier's trucks, substantially affecting hiring and route assignments. All the local carriers' drivers, like Airborne's own drivers, are given copies of Airborne's lengthy handbook of operational procedures; are taught by Airborne trainers to perform their work the "Airborne Way"; wear Airborne uniforms; drive trucks with Airborne logos; use scanners and other equipment owned by Airborne; and follow Airborne's reporting and documentation requirements on the road. Local carrier employees are also required to solicit new customers for Airborne.

Airborne also imposes its own sorting, processing, and delivery procedures at each of its terminals. Although Airborne's onsite "terminal" and "district" managers

[1] The Board should also reconsider *Plumbers Local 447 (Malbaff)*, 172 NLRB 128 (1968), and its progeny, which hold that "an employer does not discriminate against employees within the meaning of Sec. 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees." 172 NLRB at 129. Coupled with the Board's strict test for joint-employer status, *Malbaff* makes it easy to frustrate the Sec. 7 rights of employees who work for a contractor dependent on an antiunion client.

Commentators have persuasively criticized this line of cases. See Bita Rahebi, Rethinking the *NLRB's Treatment of Temporary Workers*, 47 UCLA L. Rev. 1105, 1114 (2000); Michael Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 Boston College L. Rev. 329, 346 fn. 82 (1998); Craig Becker, *Labor Law Outside the Employment Relation*, 74 Texas L. Rev. 1527, 1548–1551 (1996). Although it has since been applied broadly, *Malbaff* itself was decided in the context of unlawful secondary activity by a union and the question presented was whether an *employer* could obtain relief under Sec. 8(a)(3), 8(b)(1)(A), or 8(b)(2), as opposed to Sec. 8(b)(4). The Board has never explained why the holding in *Malbaff* should apply in cases where, for example, a client employer discourages union activity among a contractor's employees and then terminates its relationship with the contractor when employees organize.

[2] *Floyd Epperson*, 202 NLRB 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974).

[3] *Jewel Tea Co.*, 162 NLRB 508 (1966).

[4] *Jewell Smokeless Coal*, 170 NLRB 392 (1968), enfd. 435 F.2d 1270 (4th Cir. 1970).

[5] *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966).

[6] "Expedited transportation" is the industry term for any shipment for which pickup is requested and which is made with a specific delivery guarantee, whether it is handled by an air or motor carrier. "*It's the Highway, Not the Skyway*," Logistics Management & Distribution Report, Oct. 1, 2000.

[7] See, e.g., "*Parcel Industry in High Gear*," Traffic World, March 26, 2001; "*It's the Highway, Not the Skyway*," Logistics Management & Distribution Report, October 1, 2000; "*They've Got Mail*," Fortune Magazine, February 7, 2000; "*Expanding a Small World*," Distribution, July 1, 1996; "*Trucking, Air Freight to Surge by 2004*," Traffic World, February 26, 1996; "*It's 10:00 p.m.—Do You Know Where Your Airfreight Is*?" Traffic Management, October 1, 1995; "*The Times They Are A'Changin' for Carriers*," Purchasing, September 7, 1995; "*The Big Guys Move In on the Regionals*," Traffic Management, May 1, 1992.

frequently operate through the local carrier's supervisors, they also constantly monitor, audit, and require operational modifications. Their instructions are highly specific, and many affect the conditions of employment. In addition, the local cartage rates that Airborne agrees to pay are based largely on the local carriers' wage rates. Those wage rates are consequently a key subject of negotiation between Airborne and the local carriers, and they are essentially preset by the resulting local cartage contracts. On a number of occasions, Respondent local carriers have requested, and in some cases received, upward adjustments in their cartage rates based solely on the need to attract qualified drivers with higher wages. On another occasion, Airborne's regional management in Wisconsin imposed a "maximum rate" for drivers' pay pursuant to Airborne's "corporate guidelines."

Under these circumstances, it would seem highly difficult for the local carriers and their employees to engage in meaningful collective bargaining without Airborne's participation. Airborne's operational requirements effectively determine conditions of employment that are subject to the Act's bargaining requirements: for example, the speed and frequency with which an employee is required to perform a task, the equipment he uses, and the way he uses it. Airborne also codetermines economic terms of employment through the cartage rates it negotiates with the local carriers. Consistent with the Act's goal of promoting collective bargaining, the Board arguably can and should recognize this reality in defining a joint employer—as it once did. See *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (approving Board's joint-employer doctrine as then applied and summarizing test as "whether the [client employer] possessed sufficient control over the work of the employees").

Given business trends driven by accelerating competition, highlighted by this case, the Board's joint-employer doctrine may no longer fit economic realities.[8] The potentially negative impact of the Board's narrow current standard is not limited to the expedited-transportation industry. *M.B. Sturgis/Jeffboat Division*, 331 NLRB 1298 (2000)—in which we invited briefing on the joint employer test, but ultimately did not address the issue—involved temporary workers in manufacturing and shipbuilding. Other recent Board cases suggesting the need for reexamination have involved janitors, the building trades, and other industries.[9] It is clear that workplace relationships are becoming more varied as domestic industries continue to seek flexibility and that the increasing contracting-out of work is blurring the traditional employer-employee relationship, as well as distinctions between employer and client contractor.[10] Commentators, in turn, have pointed out the shortcomings of the Board's current approach.[11] As one writer observes, under that approach, the "delegation of supervisory authority to other employers . . . enables firms to escape the basic compromise that the NLRA generally imposes on the owners of capital—the requirement that they bargain collectively with employees who make that capital productive." Harper, supra, 39 Boston College L. Rev. at 345.

Innovations designed to enhance competitiveness should not, defeat the aims of the National Labor Relations Act. Although it does not always recognize its obligation,[12] the Board, like all administrative agencies, has a duty to "adopt [its] rules and policies to the demands of changing circumstances," if the Act is to remain meaningful. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968), citing *American Trucking Assns. v. Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397, 416 (1967). The Board should apply the law dynamically, or at least explain why it cannot. In this regard, the joint-employer issue is ripe—in fact, overdue—for the Board's consideration.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[8] I have recently suggested that, in another area of the law, the Board's earlier decisions were truer to the Act's purposes than its later rulings. See *Citywide Corporate Transportation, Inc.*, 338 NLRB 444, 444 (2002) (Member Liebman, concurring) (questioning exclusion from statutory coverage of shareholder-employees who, as group, have effective voice in formulation and determination of corporate policy). That seems to be the case here, and the stakes arguably are higher now.

[9] See, e.g., *Martiki Coal*, 315 NLRB 476, 478 (1994) (miners); *Trinity Maintenance*, 312 NLRB 715, 753 fn. 113 (1993) (janitors); *Flav-O-Rich, Inc.*, 309 NLRB 262, 264–265 (1992) (laborers); *G. Wes Ltd.*, 309 NLRB 225, 226 (1992) (asbestos workers); *Southern California Gas*, 302 NLRB 456, 461–462 (1991) (porters); *Chesapeake Foods*, 287 NLRB 405, 407 (1987) (chicken catchers).

[10] See, e.g., Peter Cappelli, *The New Deal at Work* (Harvard Business School Press 1999); Simon Domberger, *The Contracting Organization*, (Oxford U. Press 1998).

[11] See, e.g., Harper, supra, 39 Boston College L. Rev. at 344–356; Becker, supra, 74 Texas L. Rev. at 1540–1544.

[12] See *MV Transportation*, 337 NLRB 770, 776 (2002) (Member Liebman, dissenting).

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire or consider for employment any employee-applicants because of their membership or activities on behalf of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251, a/w International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT threaten employees with loss of work if they choose the Union to be their collective-bargaining representative.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole, with interest, those employee-applicants for any losses they may have suffered by reason of our discriminatory refusal to hire or consider them for hire.

PROFESSIONAL DELIVERY SERVICES, INC.

Kathleen F. McCarthy Esq., Elizabeth Vorro Esq., and *Paul Bosanic Esq.,* for the General Counsel.
David Kresser Esq., Robert W. Ashmore Esq., and *Howard B. Jackson Esq.,* for Airborne.
Naomi Soldon, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me in Boston, Massachusetts, and Milwaukee, Wisconsin, on various dates in January, February, March, and April 1999.

Although all of the charges relate to the operations of Airborne Freight Company, they are separable in that one set deals with a series of transactions and relationships in Providence, Rhode Island, and the second set deals with a series of transactions and relationships in Milwaukee and Madison, Wisconsin.

1. The Rhode Island charges and complaints

The charge in Case 1–CA–32742 was filed on March 20, 1995, against Airborne Freight Company and Current Carrier Corporation[1] and was amended four times, on April 28, May 8, July 12, and October 3, 1995. The amendment dated May 8, 1995, added Professional Delivery Services. The charge in Case 1–CA–32767 was filed against Airborne and Current on March 29, 1995. The charge in Case 1–CA–33771 was filed against Professional Delivery Services on January 31, 1996. The charge and amended charge in Case 1–CA–34010 were filed against Professional Delivery Services on April 18 and June 3, 1996.

A complaint in Case 1–CA–33771 was issued on April 8, 1996. A complaint in Case 1–CA–34010 and Case 1–CA–34011 was issued on June 13, 1996. A complaint in Cases 1–CA–32742 and 1–CA–32767 was issued on March 27, 1997. By Order dated March 27, 1997, Cases 1–CA–32742, 1–CA–32767, 1–CA–34011, 1–CA–33771, and 1–CA–24010 were consolidated.

On April 25, 1997, Region 1 issued an Order which withdrew any allegations that a company called Interstate Parcel Service Inc., violated the Act. This resulted in a partial dismissal of the charges in Cases 1–CA–32742 and 1–CA–32767. The Region nevertheless still asserted its contention that Interstate was a joint employer and party-in-interest with Airborne, although no contention was or is made that Interstate would incur any liability as a result of these proceedings.

Prior to the commencement of the hearings, a settlement was reached with Respondent, Current Carrier, and a complaint alleging that this Company violated the Act was severed and dismissed on January 25, 1999. These were Cases 1–CA–32742 and 1–CA–32767.

In the final configuration, the complaints involving the Rhode Island cases, alleged as follows:

a. That from about 1989 to April 1995, Airborne had a contract with Interstate Parcel for the latter to provide cartage services for Airborne in Rhode Island and the southern part of Massachusetts.

b. That pursuant to an election in Case 1–RC–20182, Teamsters Local 251 was certified as the bargaining representative of certain employees of Interstate in 1994.

c. That at all relevant times, Airborne and Interstate have been joint employers and by virtue of such relationship, Airborne was bound to the above noted certification.

d. That in 1994 and 1995, Airborne, in order to evade its obligations to bargain with the Union and for discriminatory reasons, terminated its contract with Interstate and entered into contracts with a number of succeeding companies, namely Current Carrier Corporation, Agents Transportation Service (ATS), Expressman Courier Service Inc. (ECS), and Professional Delivery Services.

e. That at all material times, Airborne was a joint employer with the aforesaid named companies, vis-à-vis the employees performing the work of sorting, delivering, and picking up packages in the Rhode Island and southern Massachusetts area.

f. That Airborne in conjunction with its contractors (also joint employers), refused to hire the employees of Interstate because of their membership in and activities on behalf of Teamsters Local 251 and in order to avoid becoming a successor to Interstate.

The Respondent, Professional Delivery Services did not file an answer to the complaint issued in Cases 1–CA–32742 and 1–CA–32767, despite having been served at its last known address. At the hearing, the General Counsel moved for summary judgment against this Company which is granted.[2]

[1] The caption is amended to reflect the fact that the General Counsel at the opening of the hearing stated that a company called Interstate Parcel is not a respondent.

[2] At some time, well before the hearing, counsel representing Professional, sent a letter to the Regional Office stating that the Company was defunct and that he was withdrawing as its representative.

2. The Wisconsin charges and complaints

Charges in Cases 30–CA–12786 and 30–CA–12963, against Airborne, were filed on January 27 and July 17, 1995. A charge in Case 30–CA–13491 was filed against Waltco and Airborne on September 9, 1996. The charges in Cases 30–CA–13161 and 30–CA–13467 were filed against Airborne and Enterprise Express Inc., respectively on January 24 and August 31, 1996. These charges were each amended. A charge and amended charge in Case 30–CA–13917 were filed against Airborne and Enterprise Express on July 24, and September 16, 1997.

A complaint was issued against Airborne in Cases 30–CA–12786 and 30–CA–12963 on June 7, 1996. A complaint was issued against Airborne and Waltco in Case 30–CA–13491 on July 10, 1997. (This complaint was amended on July 2, 1998.) A complaint in Cases 30–CA–13161 and 30–CA–13467 was issued on July 10, 1997. (Amended on July 2, 1998.) A complaint in Case 30–CA–13917 was issued on December 19, 1997. (Amended on July 2, 1998.)

Ultimately, on October 19, 1998, the Wisconsin cases were consolidated with the Rhode Island cases and the Milwaukee Region case designations were renumbered from Cases 30–CA–12786, 30–CA–12963, 30–CA–13491, 30–CA–13467, and 30–CA–13917 to Cases 1–CA–36465, 1–CA–36467, 1–CA–36466, 1–CA–36468, and 1–CA–36469.

Prior to the commencement of the Milwaukee hearings, a settlement agreement was reached with Waltco in Case 1–CA–36468 (formerly 30–CA–13491) and that case was no longer part of the trial. (Waltco became a contracting cartage company at Madison after the contract between Airborne and EEI was terminated in June 1994. The settlement provided, in substance, that Waltco, as the successor to EEI would recognize and bargain with Local 244.)

The consolidated complaint in Cases 1–CA–36465 and 1-CA–36466, formerly 30–CA–12786 and 30–CA–12963, names Airborne Express and Airborne and EEI as Respondents. This complaint alleges in substance:

a. That Airborne has controlled the revenues available to its contractor Enterprise Express Inc. (EEI) and thereby has exercised control over the delivery routes, wages, and other economic benefits for EEI's employees and therefore EEI and Airborne have been joint employers of the employees of EEI.

b. That on December 20, 1994, the Union was separately certified as the bargaining representative of three separate units of employees of EEI in Case 30–RC–5642.

c. That the Union requested Airborne to bargain on various dates from December 21, 1994, to May 19, 1995, which requests were refused.

d. That since March 7, 1995, EEI has bargained with the Union and but for its inability to consummate economic items, including but not limited to wages and benefits, has bargained in good faith with the Union. It is claimed that EEI could not meaningfully consummate a contract containing the aforementioned economic items without the full participation of Airborne because Airborne controlled the revenues available to EEI.

e. That because Airborne has refused to bargain, the General Counsel seeks, as part of the remedy, an Order requiring Airborne to bargain for the period required by *Mar-Jac Poultry* [*Co.,* 136 NLRB 785 (1962)]. (Extending the certification year.)

f. That because EEI has bargained in good faith to the extent it was able, the General Counsel does not seek any remedy against EEI.

The amended complaint in Case 1–CA–36467, formerly 30–CA–13467, names Airborne and EEI as Respondents and alleges in substance:

a. That on January 16, 1996, Airborne notified EEI that it was canceling the cartage agreements coving the Appleton and DePere facilities effective March 24, 1996.

b. That since June 10, 1996, Airborne has refused to respond to the Union's request that Airborne, as joint employer with EEI, bargain with respect to the effects of the cancellation of the EEI contract insofar as the employees in Appleton and DePere were concerned.

c. That on June 24, 1996, EEI notified Airborne and the Union that it was closing its Milwaukee and Madison, Wisconsin facilities effective August 24, 1996.

d. That since July 10, 1996, Airborne has refused to bargain with the Union with respect to the Union's request dated July 10, 1996, that Airborne, as joint employer, bargain concerning the effects of the closing actions taken by EEI at Milwaukee and Madison.

e. That since July 10, 1996, Airborne has refused to furnish information requested by the Union relating to the names of any subcontractors that Airborne was currently negotiating with as well as any written proposals from either side.

The amended complaint in Case 1–CA–13917, formerly 30–CA–13917, names Airborne, EEI and NFW, Inc., as the Respondents and makes the following allegations:

a. That after notifying Airborne on July 18, 1996, that it was closing its Milwaukee and Madison, Wisconsin facilities effective August 24, 1996, EEI was sold to, succeeded, and replaced by NFW Inc., d/b/a Enterprise Express, called NFW/EEI, as the local contractor for Airborne for the Milwaukee Wisconsin facilities.

b. That sometime before March 19, 1997, Airborne notified NFW/EEI that it was canceling the cartage agreement for Milwaukee, Wisconsin, and that Airborne failed to notify and bargain with the Union over its decision to cancel the contract with NFW/EEI.

c. That since March 19, 1997, Airborne refused written requests by the Union to bargain as a joint employer with respect to the cancellation of the NFW/EEI cartage agreement or to bargain with the Union on behalf of the employees in the certified Milwaukee unit.

d. That since March 19, 1997, Airborne has refused the Union's written requests for information. The Union requested that Airborne provide information regarding the new employers with whom it had contracted with in the Milwaukee area and an updated seniority list of all EEI/Airborne employees.

3. Summary judgment against Professional Delivery Service

As noted above, Professional was named as a Respondent in the complaint in Cases 1–CA–32742 and 1–CA–32767 and did not file an answer, despite being served. I therefore make the

following findings and conclusions with respect to this Respondent:

a. Professional, since April 1995, was a corporation with a place of business in Cranston, Rhode Island, and was engaged in the business of pickup and delivery of freight for Airborne. Annually, it performed services valued in excess of $50,000 for Airborne, the latter being an employer directly engaged in interstate commerce.

b. Professional, was and/or is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

c. From about April 1995, Professional became a local contractor for Airborne, having replaced Airborne's previous contractor, Interstate Parcel Service, Inc.

d. On or about April 21 and 22, 1995, Professional, by its agent, Stephen Wright, threatened employees with loss of work if they chose to be represented for collective-bargaining purposes by Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251, a/w International Brotherhood of Teamsters, AFL–CIO.

e. Professional refused to hire former employees of Interstate because the employees joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities and in order to avoid an obligation to bargain collectively with the Teamsters Local 251 in the following collective-bargaining unit:

> All drivers and dockmen employed by Interstate Parcel Service at 33 Sharpe Drive, Cranston, Rhode Island, but excluding all other employees, guards and supervisors as defined in the Act.

f. That by engaging in the aforesaid conduct, Professional engaged in conduct violating Section 8(a)(1), (3), and (5) of the Act which conduct affects commerce within the meaning of Sections 2(2) and (7) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent Airborne admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Unions, Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251, a/w International Brotherhood of Teamsters, AFL–CIO and Teamsters Local 344, affiliated with the International Brotherhood of Teamsters, AFL–CIO are labor organizations within the meaning of Sections 2(5) of the Act.

A. The Rhode Island Cases

Airborne is engaged in the business of transporting, door-to-door, documents and small packages throughout the United States and internationally.[3] To do this, it owns and operates a fleet of airplanes and in many cases owns and operates trucks and vans to pick up and deliver these packages. Most of its customers tend to be enterprises of one sort or another. At some of the larger cities in which it does business, Airborne will own vans and delivery vehicles and will directly employ a group of people, mostly dispatchers, drivers, and dockmen, who are responsible for making the local pickups and deliveries. In those locations where Airborne is the direct employer of drivers, such as Boston, the drivers and dockmen are covered by a collective-bargaining agreement between Airborne and the International Brotherhood of Teamsters.

At terminal facility locations such as Cranston, Rhode Island, Airborne employs a terminal manager (Doreen Loomis), and a relatively small group of customer service representatives who do a variety of tasks in the office and who deal with customers. A large part of what these office people do relates to inputting and managing paper such as invoices and computerized data, which allows Airborne to know where and when packages are in route and where and when they are supposed to be going to or coming from their destinations. Whereas the physical handling and delivery of packages requires people to transport these packages in vans, trucks, and airplanes, the routing, tracking, and billing functions require a substantial amount of sophisticated computing power with corresponding personnel.

From about 1989 to April 1995, Airborne had a contract with a company called Interstate Parcel pursuant to which that company provided cartage services for Airborne in Rhode Island and the southern part of Massachusetts. The owner of this company was John Kranz and he had performed similar services for Airborne in Buffalo and Albany, New York. The people who worked for Interstate worked as dispatcher/supervisors, dock persons, and land vehicle drivers.[4]

The General Counsel alleges that at all relevant times, by virtue of the degree of control of Airborne over the operations of Interstate, Airborne and Interstate were joint employers. This contention is denied by Airborne.

In 1993, Local 251, during the course of a campaign to organize the Rhode Island employees, filed an unfair labor practice charge against Interstate and Airborne in Case 1–CA–31567 which, among other things, alleged that they were joint employers. That charge was dismissed on May 24, 1994, insofar as it alleged that Airborne was a joint employer with Interstate. A complaint was nevertheless issued against Interstate which it settled for an amount in excess of $50,000.00. The settlement, which was executed in July 1994, also called for Interstate to reinstate certain employees. Peter Shaw, the chief employee organizer for the Union, accepted reinstatement.

In August 1994, Local 251 filed a representation petition naming Airborne and Interstate as joint employers but this was withdrawn.

[3] Among its competitors are United Parcel, TNT, Federal Express, and the U.S. Postal Service.

[4] In performing their work, they use scanners which are owned by Airborne. These are, essentially, data input devises where, for example, information is inputted into Airborne's computer system at times when packages are picked up, when they arrive and leave a terminal, and when they are delivered to a consignee. Drivers are required to use the scanners at various time while on the road and there is a device through which the driver can download the information through the telephone.

On August 29, 1994, Local 251 filed a representation petition in Case 1–RC–20182 naming only Interstate as the employer. The Union and Interstate entered into a Stipulated Election Agreement which provided for an election on the premises in Cranston, Rhode Island, such premises being owned by Airborne and used by Interstate. When Airborne's local representative refused to allow the election to be held on its property, a mail-ballot election was agreed to and the Union won the election and was certified. The record shows that Airborne did not participate in any of the representation case proceedings and there is no evidence that it directed, encouraged, or induced Interstate to take any position or do anything in relation to the representation case. Nor is there any evidence showing that after Local 251 was certified, that Airborne played any role, either directly or behind the scenes, in relation to any bargaining or bargaining strategy in relation to any negotiations that took place between the Union and Interstate.

In August 1994, Kranz told Terminal Manager Loomis that he wanted Airborne to cancel his contract because the Union was organizing and that he had to spend a "ton of money" on union issues. He further told Loomis that he didn't want to be the one to cancel the contract because if he did, he believed that the NLRB might bring legal action against him. Loomis told Kranz that she was not qualified to deal with such an issue and that Kranz had to talk to Pat Blankfard who is one of Airborne's people responsible for negotiating contracts with cartage companies.

On September 12, 1994, Blankfard sent an internal e-mail stating, in substance, that Kranz wanted to terminate his contract as soon as possible because he (Kranz) had been advised that he should not terminate the contract "due to the possibility that the Labor Board could bring in union avoidance charges against his other companies" in Albany and Buffalo.

Rich Corrado responded by e-mail dated September 13, 1994, and stated:

> DO NOT TERMINATE THE CONTRACT. We need legal direction before we take any action. We may be stuck here. If we terminate at this point we'll be on the hook in the unfair labor suit. I'll call Rob Ashmore when I get back to the GO.

Soon thereafter, in mid-September 1994, Airborne sent out bid solicitations for the Rhode Island work. In this regard, Corrado testified that he decided to solicit bids because (a) Kranz was having union problems, (b) Airborne thought that Kranz would ask for more money, (c) Airborne needed to arrange for a contingency substitute in the event that Kranz canceled the contract, and (d) there were problems with the appearance of Kranz' trucks that had not been resolved.

An employee of Interstate, John Hurst, testified that before the election, Kranz told about 8 to 10 employee that if the Union was selected, Airborne would cancel the contract in 30 days, would hire a new contractor who would not likely hire the drivers, and that therefore everyone would be out of a job. This testimony while unrefutted, is hearsay insofar as Airborne is concerned and irrelevant unless the General Counsel can show either that Kranz was speaking on behalf of Airborne or that his remarks are attributable to Airborne by virtue of a conclusion that Interstate and Airborne were joint employers.

On October 11, 1994, and shortly before the originally scheduled date of the election, a company called Expressman Courier Service, submitted a bid to do cartage work in Rhode Island.

In November 1994, Current Carrier Corporation was engaged by Airborne to do cartage on some Rhode Island routes. As noted above, Current entered into a settlement agreement remedying certain allegations of a complaint that was issued against it.

In or about January 1995, another company called Agents Transportation Service, (ATS) obtained a contract with Airborne to do about three routes in Rhode Island. Subsequently, a company called Expressman Courier Services Inc. (ECS), the principal owners formed ATS and that company was awarded a contract by Airborne to do some of the Rhode Island work. (Principally in lower Massachusetts and eastern and northern Rhode Island.) Based on the testimony of Michael Palazzini, there is no question but that ATS and Expressman are, in fact, one employer, having common ownership and control.

At some point, Airborne awarded a contact to another company called Professional Delivery Services to do cartage services in most of the remaining portion of Rhode Island.

On or about April 11, 1995, Airborne canceled its contract with Interstate, after having notified Professional and Expressman that those companies were to be the recipients of contracts to do cartage work. Airborne's position is that after it refused Kranz' request to cancel the contract, the level of service performed by Interstate declined to the point that keeping the contract was untenable. Airborne's position, which is supported by evidence, is that Kranz essentially sought the cancellation of his Rhode Island contract in order to avoid having to deal with the Union and when the direct approach did not work, essentially abandoned service so that Airborne would be forced to be the one to cancel the contract.

Notwithstanding other evidence that may support an assertion that Airborne may have made a decision to cancel Interstate's contract if the employees of that company chose union representation, the General Counsel does *not* contend that the cancellation of the agreement, by itself, is a violation of the Act.[5] They concede that pursuant to the Board's decision in *Plumbers Local 447* (*Malbaff),* 172 NLRB 128 (1968), a company cannot be held to violate Section 8(a)(3) of the Act when the employees of a subcontracting employer lose their jobs because the contract is canceled, even if the contract was can-

[5] From a practical point of view, there certainly would be a strong inducement for Airborne to look for another cartage company to be available as a substitute contractor if its existing contractor became unionized. From Airborne's own testimony, once a contractor starts doing business with it, it becomes a "nightmare" to change that contractor particularly as Airborne has assured its own customers of uninterrupted service often with overnight delivery. Thus, if Airborne's contractor is subject to an unannounced economic strike, this would cause a substantial interruption in Airborne's local service and without the ability to immediately engage another cartage company, it would likely lose customers to its competitors. As Airborne's own employees are represented by the Teamsters Union, it is highly unlikely that it would be in a position to utilize its own unionized employees as substitutes to maintain service in the event of a Teamsters strike against a contractor.

celed for antiunion considerations.[6] See also *Computer Associates*, 324 NLRB 285 (1997). Moreover, this situation is distinguishable from that in which employer A, *while retaining its contractual relationship with employer B*, has been found to have violated 8(a)(3) with respect to employees not its own, when it urged or caused employer B to discharge specific individuals who were engaged in union activity. *Holly Manor Nursing Home*, 235 NLRB 426, 428 fn. 4 (1978); *Central Transport, Inc*, 244 NLRB 656, 658–659 (1979); and *Georgia-Pacific Corp*., 221 NLRB 982, 986 (1975).

Nevertheless, the General Counsel contends that if Airborne and Interstate are found to be joint employers, then Airborne would have violated Section 8(a)(3) of the Act by canceling the contract if the cancellation was motivated by the fact that the employees chose the Union to represent them. The General Counsel also argues that if a joint-employer status is established, Airborne would be liable under Section 8(a)(5) of the Act for unilaterally laying off its employees without first bargaining with the Union that represented these employees and with whom it (Airborne) had an obligation to bargain.

On April 30, 1995, Expressman and Professional commenced operations under their contracts with Airborne. Prior to commencing operations, both Companies hired people and although hiring some of the former Expressman employees, did not hire all who applied.

As to Expressman (and its alter ego Agents Transportation), which is still a party in the case, the General Counsel alleges that at the direction of Airborne, Expressman refused to hire former employees of Interstate because those employees selected the Union to represent them. This allegation was denied by both Companies. The General Counsel also asserts that if Airborne and Expressman are found to be joint employers, after a finding that Airborne and Interstate were joint employers, then if Airborne violated Section 8(a)(1), (3), and (5) by unilaterally and/or discriminatorily laying off the former employees, then Airborne had the obligation to offer these people reinstatement to their former jobs. Under this theory, it would therefore follow that when Expressman did not hire all of the former Interstate employees who applied, Airborne violated Section 8(a)(3) of the Act, as did Expressman, as Airborne's joint employer. Under this theory, it would not matter if Expressman's motivation in refusing to hire was not based on the employee's union membership or desires.

The General Counsel further contends that if Airborne was the joint employer with Interstate, it had the obligation to continue to bargain with the Union even after it canceled Interstate's contract and notwithstanding the fact that Airborne entered into two new contracts with Expressman and Professional which became, under the General Counsel's theory, the new joint employers with Airborne of the employees who continued to be covered by the Board's previously issued certification.

Insofar as the Rhode Island events are concerned, it is therefore obvious that the only way that Airborne can be held liable under any section of the Act, would be if Airborne were held to be a joint employer with the respective cartage companies. That is, the issue of joint employer becomes the focal and deciding issue insofar as Airborne is concerned. However, as to the remaining employer respondent, Expressman, that company could be held to have violated Sections 8(a)(1), (3), and (5), if the General Counsel can establish, by a preponderance of the evidence, that this respondent independently refused to hire its predecessor's employees for discriminatory reasons and therefore should be found to be a "successor." *Galloway School Lines*, 321 NLRB 1422 (1996).

1. The joint-employer issue in Rhode Island and the allegations of Airborne liability

The drivers of the cartage companies under contract with Airborne for the Rhode Island area wore uniforms having Airborne insignia and the vehicles they used were marked with Airborne logos. Thus, if a package was picked up, the person handing over the package to the driver, could reasonably assume that the driver was an employee of Airborne. Also, if that driver got into an accident, the person in the other vehicle could reasonably assume that he was involved in an accident with someone working for Airborne.

Whether a person having an accident with a contractor driver wearing an Airborne uniform and driving an Airborne labeled van would be able to sue Airborne for a tort, is not the question before me. Nor am I called upon to decide whether a customer would have a breach of contract case against Airborne if his parcels were misplaced or not delivered on time because of the actions of a contract driver.[7] In either case, the contractor and its employees are engaged in performing an essential element of Airborne's services and are the interface between Airborne, Airborne's customers, and the general public. However, the issue here is not the relationship between Airborne and its customers or the public, to the extent affected by use of public roads, but the relationship between Airborne, its contractors, and the employees who are hired by its contractors. The questions in this case are whether, pursuant to case precedent under the National Labor Relations Act, Airborne and its contractors can be considered as joint employers so as (a) to impose a bargaining obligation on Airborne when it was never certified by the Board as the employer of the bargaining unit employees and (b) whether Airborne can be held liable for any discriminatory actions taken by its contractors, with or without its approval or authorization.

The case law in this area shifted to some extent in the early 1980s. It is the General Counsel's argument that the current case law is inconsistent with economic realties and that as a

[6] *Malbaff* involved a situation where a union which was engaging in secondary boycott activity was charged with violations of Sec. 8(b)(1)(A) and (2) of the Act in that it was alleged that by seeking to have one employer cease doing business with another, it was causing or attempting to cause an employer to discharge and discriminate against nonunion employees. A majority of the Board, with Chairman McCullogh dissenting, rejected this argument, holding that a general contractor and its subcontractors at a construction site are not joint employers and that an attempt to cause one to cease doing business with another is not the same as causing an employer to discriminate against employees.

[7] That Airborne could be held liable for tort or contract breaches committed by employees of the contractor is implicitly recognized by the fact that the cartage agreements require the contractor to carry cargo insurance and liability insurance naming Airborne as an additional insured.

matter of public policy, the Board should revert to its earlier standards as set forth in cases such as *AMP*, 218 NLRB 33 (1975); *Floyd Epperson*, 202 NLRB 23 (1973); *Jewel Tea Co*., 162 NLRB 508 (1966); *Hoskins Ready-Mix Concrete* 161 NLRB 1492 (1966); *S.S. Kresge Co*., 161 NLRB 1127 (1966); 169 NLRB 442 (1968), enfd. in relevant part 416 F.2d 1225 (6th Cir. 1969); *Thrifttown*, 161 NLRB 603 (1966); and *Jewel Smokeless Coal*, 170 NLRB 392 (1968), 175 NLRB 57 enfd. 435 F.2d 1270 (4th Cir. 1970).

In more recent cases, the Board and the courts have tended to emphasize the actual control by one employer over another's employment relations as opposed to considering whether the company alleged to be a joint employer has a potential right of control. The types of situations where this becomes an issue could include, inter alia, concessionaires at department stores, companies providing temporary employment services, franchisers and franchisees, or contractors and subcontractors doing work at construction sites.[8]

In an opinion adopted by the Board in *Goodyear Tire & Rubber Co*., 312 NLRB 674 (1993), the administrative law judge summarized the current legal test for determining whether two separate corporations should be considered to be joint employers with respect to a specific group of employees.[9] He stated:

> Prior to 1982 when the United States Court of Appeals for the Third Circuit decided *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3rd Cir. 1982), the Board's analysis of what constituted a joint employer relationship was somewhat more amorphous than it is today. After that decision, however, the Board decided to adopt the Third Circuit's rule and did so in *TLI, Inc*., 271 NLRB 798 (1984). The test is . . . . Where two (or more) separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for the purposes of the Act. In *Laerco Transportation*, 269 NLRB 324 (1984), the Board, referring to the *Browning-Ferris* test, defined the essential terms and conditions of employment as those involving such matters as hiring, firing, disciplining, supervision, and direction of employees.

In *Teamsters Local 776 (Pennsy Supply)*, 313 NLRB 1148, 1162 (1994), the administrative law judge, in an opinion adopted by the Board, held that two companies were not joint employers despite a degree of authority exercised by one over the other. The judge stated:

> Evidence of minimal and routine supervision of employees, limited dispute resolution authority, and the routine nature of work assignments has been held insufficient to establish a "joint employer" relationship . . . .
>
> On the other hand, evidence of substantial control over hiring, promotion, and the base wage rates, hours and working conditions of employees, coupled with evidence of close and substantial supervision of employees, and constant presence of supervisors with a detailed awareness and control of employees' daily activities, has been held by the Board to be sufficient to establish a "joint employer" relationship . . . . The Board found a "joint employer" relationship in another recent case, *Continental Winding Co*., 305 NLRB 122, 123 (1991), where even though one employer alone hired employees supplied to another and set and paid their wages, the record supported the judge's finding that the other employer to which the employees were supplied exercised sole authority to assign, schedule, and supervise the workplace conditions, and the performance of work by the employees. There, the Board said, the supervision was more than "routine" and was not "insignificant."[10]

In my opinion, the facts developed in this record insofar as they cover Airborne's Rhode Island operations establish, under the current legal test, that Airborne cannot be construed as a joint employer with any of the contract cartage companies that it has engaged in this locality. The undisputed facts show that Airborne has entered into contracts which, by their terms, carefully and deliberately define a cartage company as an independent contractor who is to have full and complete control over the hiring, firing, discipline, work assignments, and all other terms and conditions of employment of its own employees.[11]

The evidence shows that in Rhode Island at least, once a contractor has obtained a bid for a specific geographic area, it and it alone determines the number and size of the routes it will run, the number of employees it will hire, the individuals who it will hire, and the wages and benefits it will offer to its employees. There is no evidence whatsoever to indicate that Airborne, in Rhode Island, has had any say or influence in these decisions and no evidence to suggest that the hiring, disciplining, or fir-

[8] In *NLRB v. Denver Construction Trades Council*, 341 U.S. 675 (1951), the Supreme Court held that a general contractor and its subcontractor were not joint employers and constituted separate persons under Sec. 8(b)(4)(B) of the Act, even if the former exercised some degree of control over the operations of the latter at a construction site. The Court stated; "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other." I also note that for the garment industry, the statute makes an explicit exception to the prohibitions of Sec. 8(e) which, in effect, treats jobbers and contractors as if they were joint employers as a matter of law for purposes of hot cargo agreements but only in that industry.

[9] This is unlike an alter ego situation where two companies are separate in name only and by virtue of common ownership and control are, in reality, one enterprise. See for example *Advance Electric*, 268 NLRB 1001, 1002 (1984).

[10] See also my discussion of joint-employer issues in *Bronx Health Plan*, 326 NLRB 810 (1998), adopted by the Board at fn. 1.

[11] The General Counsels point to provisions in the cartage agreement which they assert give Airborne a right of control over the hiring and qualification standards of the cartage company's employees. I don't agree. For the most part, the cited sections merely require the cartage company to meet and have its employees meet whatever State and Federal standards are applicable to drivers of commercial vehicles handling the types of packages that are likely to be handled. These requirements are, in fact, imposed by law, and their mention (or reminder), in the cartage contracts are essentially redundant.

ing of a contractor's employees was in any way under the control or even the suggestion of Airborne. The day-to-day supervision of the drivers and dock persons employed by the contractors in Rhode Island have been carried out exclusively by the contractor's supervisors and no evidence was presented to suggest the contrary.

The General Counsel argues that inasmuch as the cartage agreements can be canceled without cause on 60-day notice, this gives Airborne de facto control over the contractor's operations because the contractor is always at the complete mercy of Airborne. This might be arguable if Airborne was the only enterprise that used cartage companies and there was no competition for their services. But that is not the case, and as the testimony showed, once a contract is made with a contractor, it is undesirable on Airborne's part to change contractors because the transition from one to another is not easy. That is, while Airborne may be in the driver's seat when a number of cartage companies are bidding for the contract, once a contract is given out, the relative power shifts a bit toward the contractor who can play on Airborne's desire not to rock the boat in midstream. (This was demonstrated time and again in the Milwaukee case, where the existing contractor sought and obtained revisions in its rates.)

The vehicles used by the contractors, with two exceptions, have been owned by the contractors and there is no evidence that Airborne has any equity in those vehicles or has helped finance them.[12] While it is true that the contractor's vehicles have Airborne logos and the drivers wear Airborne insignia, this is essentially explained as an advertising function for the benefit of Airborne and for which the contractor receives some credit when determining the contract price.[13]

The General Counsel also points to the provisions of an indemnification agreement entered into between Airborne and PDS, one of the replacement contractors. They assert that by the terms of this agreement, Airborne was given the ultimate right to control the wage rates and benefits of PDS employees if unionized. This, I think, stretches the point too far.

It is obvious that the indemnification agreement was entered into on the insistence of PDS, (not Airborne), when PDS realized that if it was required to bargain with the Union as a successor, then it could face the possibility that the costs on which it premised its bid could be increased. PDS therefore demanded and obtained assurance from Airborne that notwithstanding the price structure of its existing contract, it could seek to reopen that contract if collective bargaining resulted in a labor agreement that increased its costs. Airborne did not, pursuant to the indemnification agreement have the right to control the wage and benefits of PDS's employees; it simply agreed to discuss a reopening of PDS's contract at a future time if PDS costs increased as a result of collective bargaining and to say yes or no to any increase proposed by PDS. By the same token, the indemnification agreement gave PDS the right to cancel its agreement if Airborne refused to accede to a requested rate increase, whereupon Airborne would assume the costs that PDS incurred in obtaining vehicles and equipment to perform the cartage agreement.

In effect, the General Counsels seem to be taking the position that any time a subcontractor obtains or has the ability to convince the contractor to renegotiate the terms of their contract, particularly if the subcontractor's costs are affected by collective bargaining, this means that the general contractor is the one having the de facto control over the subcontractor's labor relations. I don't buy this argument which, if extended to its logical conclusion, would mean that in virtually all contractor-subcontractor relationships, the two companies involved should necessarily be construed as joint employers whenever the employees of the subcontractor are unionized.

Finally, the General Counsel points to a manual which is issued to Airborne's own drivers but which may or may not be used by the contractor and its drivers at the contractor's discretion. This manual deals with subjects as mundane as keeping eye contact with the customer to more difficult subjects such as how to handle attempted deliveries. The fact that a contractor has made this book available to its drivers as a guide to how to deal with the various situations that might come up while on the road, is not in my opinion, evidence of sufficient weight to establish that Airborne and not the contractor, controls the work done by the contractor's employees. See *Speedee 7-Eleven*, 170 NLRB 1332, 1333 (1968), and *S. G. Tilden, Inc*., 172 NLRB 752 (1968).[14]

In short, it is my conclusion, based on the record developed in this matter, that the evidence cannot establish that Airborne was, at any time, a joint employer with any of the cartage companies that it has contracted with to perform Rhode Island and southern Massachusetts services.

Similarly, there was no evidence presented by the General Counsel or the Charging Party which would tend to show that Airborne, in any way, influenced, directed, or determined the hiring decisions of any of the cartage companies who commenced operations on April 30, 1995, and who replaced the predecessor, Interstate Parcel.

Having concluded that under current Board law, the evidence in this case cannot establish that Airborne is or was a joint employer with any of the cartage companies that it did business with in Rhode Island, and concluding that there is no evidence to show that Airborne influenced the hiring decisions of the contractors who succeeded Interstate, I shall recommend that

[12] For a period of time, there were two trucks owned by Airborne that were used to deliver or pick up packages at the Airport. These were driven by the contractor's employees who were assigned to do this work. All other vehicles used by a contractor have been owned by the contractors.

[13] Contractors do not always have Airborne logos painted on their vehicles. But it is probable that in a metropolitan area, such as Providence and environs, the agreement will provide for the use of such logos. If the vans used by the contractor do use Airborne logos, this can and has become an area of substantial friction between the contractor and Airborne inasmuch as Airborne will be interested in the appearance of the vehicles and the contractor may be interested in not spending money to maintain the appearance in the manner desired by Airborne.

[14] It is noted that in *Speedee 7-Eleven*, the Board also rejected the contention that the franchiser's right to terminate an agreement on 30 days notice would, standing alone, negate the existence of an independent contractor relationship.

the allegations against Airborne, insofar as the Rhode Island cases, be dismissed.

2. The hiring of employees by ATS/Expressman

Notwithstanding my conclusion that Airborne was not a joint employer with ATS/Expressman and did not have any role in the hiring decisions made by ATS/Expressman's agents, the latter company could violate various sections of the Act if it discriminatorily refused to hire its predecessor's employees because of their union affiliation and/or because it sought to evade becoming a successor as defined in *Burns Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), by deliberately making its hiring decisions so as to insure that less than 50 percent of its work force did not consist of people employed by the predecessor. If that were the case, then ATS/Expressman (a single employer) would be liable for violating Section 8(a)(3) by refusing to hire employees for discriminatory reasons and for violating Section 8(a)(5) by refusing to recognize and bargain with Local 251. *Galloway School Lines*, 321 NLRB 1422 (1996).

Like any other case involving an allegation that an employer has either discharged employees or refused to hire employees because of their union affiliation or activities, the legal framework is set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). That is, the General Counsel must make out a prima facie showing that the employer was motivated by illegal reasons and if this is done, the burden shifts to the employer to show that it made or would have made the same decision for nondiscriminatory reasons.

In taking over the operations of a predecessor, a succeeding employer must make its hiring decisions devoid of any consideration of employee union affiliation or support. That does not mean that it is required to give preference to the previous employees and there is no legal principle that its failure to give such a preference is presumptive evidence of discriminatory intent. For example, as here, a new employer may favor relatives and friends in making its hiring decisions Nepotism, one of the older human social behaviors, does not constitute evidence that the employer is engaging in illegal discrimination. *Belfance Electric*, 319 NLRB 945 (1995).

I also note that in an industry like this, the job skills and required abilities for driving vans and loading and unloading packages, is not high. What is required is stamina, and as for driving, the employees need only know how to drive a car and how to read sufficiently well to find addresses. This lack of skill manifests itself in the fact that the people who have accepted employment as starting drivers for the cartage companies in Rhode Island and Wisconsin are paid close to the minimum wage, are required to work long hours, and do not get paid any overtime premium because they are not covered by the Fair Labor Standards Act. Unfortunately for them, their skills are low and their jobs are fungible; being subject to easy replacement by other people with a similar lack of skills. Thus, I agree with Palazzini that the types of jobs he was filling for ATS/Expressman, were not "rocket science," that they required little training and that the experience gained by the previous employees provided little or no advantage in doing these jobs, vis-à-vis, persons who walked in off the street and applied for them. Clearly, if the skills possessed and/or acquired by the predecessor's employees had a strong advantage vis-à-vis non-experienced applicants, this would weigh in considering the employer's motivation in refusing to hire them. *NLRB v. Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974). But this is not the case here and the failure of Expressman to offer jobs to all or most of the predecessor's employees does not, in my opinion, count for much.

The essential facts are as follows:

Airborne, in or about August 1994, contemporaneously with the union organizing campaigns in Rhode Island and Wisconsin, started soliciting bids from various people who might be able to provide cartage services.

By letter dated October 11, 1994, Expressman, by Michael Palazzini, submitted a bid. The cover letter stated, among other things, that Expressman has operated "for ten years in a union free environment and we are eager to take this opportunity to expand."

In January 1995, Airborne awarded a portion of the Rhode Island work to Expressman and that company started to do some work in a small area around Providence using three vans. To staff this small operation, Palazzini hired three drivers for Expressman, his cousin, Brian Tutato, John Madden who is married to Tutato's sister, and Steven Primo, who is a friend of Tutato.

In January 1995, Airborne notified Expressman that it was going to receive the larger contract. Thereafter, in April 1995, Expressman formed ATS which was designated to do the Rhode Island contract under the management of Palazzini.[15] (As previously described, Expressman and ATS constituted a single employer). Under this cartage contract, ATS/Expressman was responsible for deliveries and pickups in a defined geographic area, consisting of the areas located to the north and east of Providence. This area also included the three routes that Expressman had set up to make deliveries since January 1995 and Palazzini decided to retain his relatives and their friend. Palazzini initially decided that the cartage contract could be divided up into 21 routes and made his hiring decisions accordingly.

Palazzini conceded that before hiring, he attended a meeting with Expressman's lawyer who advised that the company might become a "successor" upon taking over the contract from Interstate and might be obligated to bargain with Local 251. In this regard, the record does not show exactly what advice was given

[15] Palazzini was called by the General Counsel as an adverse witness pursuant to Rule 611(c). At the time that he was called as a witness, he no longer was employed by ATS or Expressman, although he was, himself, a contractor for Airborne now providing dispatch services in Rhode Island. He therefore was somewhat disinterested vis-à-vis, ATS/Expressman, but he continued to have a relationship with Airborne which could have affected his testimony. It appears that Palazzini cooperated to some extent with the Regional Office during the investigation and provided some materials, including some notes he made of his reasons for not hiring some of Interstate's employees. However, these notes were made months after the event and are hardly dispositive. On balance, I thought that Palazzini was a candid and honest witness.

by this lawyer. (As ATS/Expressman did not appear at the hearing, no one objected based on attorney-client privilege.) Palazzini's testimony was that he assumed, based on this conversation with the lawyer, that his company was going to have to bargain with the Union but that he never did so because they never asked. Assuming arguendo, that the lawyer gave correct advice about the law relating to successorship, I don't think that I can leap from that to the conclusion that Palazzini, on behalf of ATS/Expressman, therefore decided to violate the law by deliberately manipulating his hiring decisions to insure that it did not become a successor. (Presumably correct legal advice would have included advice regarding the possibility of being caught and the attendant legal liabilities to be suffered.)

Before hiring any more drivers, Palazzini hired Michael Wallace, a former supervisor at Interstate to be operations manager. Palazzini testified that in considering which drivers of Interstate to offer employment, he relied to a great extent on Wallace's opinion about them. In this regard, an Interstate employee Jeffrey Zarrella, testified that during the organizing campaign in 1994, Wallace asked him why he was wearing a union button. Also, Interstate employees, Frank Velleco Jr. and Brenda Baldino testified that they were separately told by Wallace to remove union buttons. This evidence, I presume, was adduced to show antiunion animus on Wallace's part and that I should infer that he probably influenced Palazzini to not offer employment to those employees who were union adherents. Notwithstanding the fact that Wallace did not testify in this proceeding, the statements attributed to him back in 1994, seem to me to be relatively innocuous and by themselves, hardly constitute sufficient proof that he made hiring recommendations based on each employee's union sentiment. I also note that although the General Counsel offered evidence to show that some of the Interstate employees who were not offered jobs had openly expressed their union support, there is no evidence to show that those people who were offered jobs were also not union adherents.

Palazzini testified that apart from Wallace and another employee named Kevin Moffett, he did not approach the other Interstate employees until later in April 1995 because he felt that it would not be proper to talk to them about hiring at a time when Airborne had not yet officially announced that it was canceling the contract with Interstate. (The cancellation occurred on April 11, 1995.) While perhaps overly delicate, I can't say that this was irrational. Palazzini testified that he felt that it was not his place to be the one to tell Interstate's drivers that Interstate's contract was about to be cancelled and that they were going to lose their jobs.

Sometime in March and April 1995, Palazzini recruited and hired some friends of his cousin Tutalo and the latter's friend, Primo. Consequently, a group of young men were hired and these included Jerry Ferreira, Jesse Killeen, Mark Egan, Stephen Alfonso, and Paul Desaulniers. (Desaulniers was a high school friend of Palazzini.)[16]

In early April 1995, Palazzini placed an advertisement in the local newspaper seeking drivers for the Rhode Island, East Bay area. On April 14, he hired Kevin Moffett, an Interstate driver, whom he made a supervisor. At some point in April, Palazzini hired as drivers, David Weatherford, (this person had previously worked for another Airborne contractor in Massachusetts), Tim Maguire, and Russ Marcoux. (Marcoux was hired during the course of a series of "interviews" that Palazzini held with the former Interstate employees.)

As noted above, Airborne gave official notice to Interstate on April 11, 1995, that it was canceling its contract.

Following this notice, (and after having already hired at least 6 nonInterstate drivers), Palazzini solicited the employees of Interstate to make job applications. He did this by posting a notice at the Airborne facility inviting them to go to the Howard Johnson Hotel in Warwick Rhode Island. On April 17 and 18, 1995, about 30 Interstate drivers filed applications with him at meetings held at the hotel. After briefly meeting with these individuals, in small groups, Palazzini got together with Wallace to make a list of the applicants and ranked them in order of preference based, in large part, on Wallace's experience with them.

Resulting from the April 17 and 18 interviews, Palazzini hired nine drivers from Interstate. These were Kyle Borassa, Charles Footman, Jason Goldstein, Richard Lajoie, Michael Minisce, Alan Olson, David Ravo, Noel Silva, and David Vargas. He also hired two other drivers, Franz Baudouin and Arthur Ramsdell, who had previously worked for Interstate but were not employed by that company at the time that Interstate's contract was canceled. According to Palazzini, he made job offers to five other Interstate drivers, but these were made after some of the people who initially accepted jobs, turned them down.

The bottom line here is that of the employee complement that started to work for ATS during the first weeks of its operations, a majority did not come from the former employees of Interstate. This fact was, to some degree, up in the air, at the beginning of the trial. But after examining payroll records, the General Counsel decided that absent proof of discriminatory motivation in the hiring decisions, ATS/Expressman could not be considered to be a *Burns* successor.

In the absence of direct evidence proving intent, and at best, minimal evidence of antiunion animus, it is not easy to prove that a succeeding employer who offers jobs to some, but not all, of a predecessor's employees, has acted with illegal motivation.[17]

In *U.S. Marine Corp*., 293 NLRB 669, 670 (1989), the Board held that a prima facie case of discriminatory motivation may be supported by consideration of the lack of any legitimate basis for a respondent's action. The Board stated:

> The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in

[16] Although Palazzini testified that he also hired Todd Cheetham during this time, Cheetham does not appear on the payroll records until the third week of operations.

[17] In *Harvard Industries*, 294 NLRB 1102 (1989), the General Counsel had the good fortune to have located former employees of the company who participated in the hiring process and who testified that the company went about its hiring so as to insure that less than a majority of its work force would be former employees of the predecessor.

> refusing to hire employees of the predecessor: substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

In *Galloway School Lines*, 321 NLRB 1422 (1996), the Board held that the employer was a successor where, but for its illegal refusals to hire the predecessor's employees, they would have constituted a majority of the new work force. The Board noted:

> [T]he alleged successor employer's motive is the critical issue. Within the *Wright Line* framework, there are several factors which the Board has considered in analyzing the lawfulness of the alleged successor's motive: expressions of union animus; absence of a convincing rationale for the failure to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct demonstrating a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its hiring in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force . . . .
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> . . . .
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> Therefore, . . . we agree . . . that the Respondent' s asserted "random-selection" process was a subterfuge, that its failure to hire the alleged discriminatees in this case was part of a plan to avoid bargaining obligations respecting the entire driver/monitor unit under the *Burns* successorship doctrine, and that it violated Section 8(a)(3) and (1).

In *Laro Maintenance Corp*., 312 NLRB 155 fn. 2 (1993), the Board found a violation where, among other things, the Respondent had no legitimate reason for refusing to interview or consider the predecessor's employees for employment See also *Houston Distribution Service*, 227 NLRB 960, 966 (1977), and *Weco Cleaning Specialists*, 308 NLRB 310 fn. 4 (1992).

In *NLRB v. Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974), the court noted; "Despite the presence of a pool of experienced workers, respondent went to considerable length to replace the union employees with entirely new workers."

In my opinion, there is not much evidence of antiunion animus demonstrated by representatives of ATS/Expressman and this factor weighs heavily against the General Counsel's contention. Further, the actions of Palazzini, in the method by which he went about staffing the new operation does not seem to me to be either irrational or illegitimate. He hired some drivers on the basis of kinship and personal friendship and this does not seem to me to be all that unusual. He offered a fair number of jobs to former employees of Interstate and the evidence does not show that either he or Wallace made a distinction between those employees who were for the Union as opposed to those who were against the Union. The jobs in question were low skill jobs where prior experience would not have made much, if any, difference in their performance. What was needed were people who were willing to work long hours at low pay and who could drive and read enough English to make it to their destinations. To this extent, there was, in my opinion, no objective reason to favor the former Interstate employees over new applicants.

In conclusion, it is my opinion that the General Counsel has been unable to provide sufficient convincing evidence of illegal motivation so as to sustain the complaint's allegations against ATS/Expressman.

B. The Wisconsin Cases

To recap, the issues in the Wisconsin cases are as follows:

1. Should Airborne and Enterprise Express (EEI) be construed as joint employers?

2. By virtue of Board certifications dated December 20, 1994, in petitions naming EEI as the sole employer, should Airborne, if a joint employer, be obligated to bargain with Teamsters Local 334?

3. If obligated to bargain, did Airborne violate Section 8(a)(1) and (5) by failing to bargain over the effects of the cancellation of its contracts with EEI insofar as the Appleton and DePere locations?

4. Did Airborne, since July 10, 1996, refuse to bargain over the effects of EEI's decision to close the Milwaukee and Madison operations?

5. Did Airborne, since March 19, 1997, refuse to bargain over the decision to cancel its contract with NFW/EEI at the Milwaukee facility? (NFW had purchased the stock and assets of EEI in August 1996 and performed the cartage work for Milwaukee.)

6. Did Airborne, as a joint employer with EEI, refuse to furnish information to the Union in violation of Section 8(a)(1) and (5)?

The General Counsel although naming EEI as a respondent, essentially as a foundation for naming Airborne as a joint employer, does not contend that EEI violated the Act and concedes that EEI bargained in good faith after the Union was certified. The General Counsel asserts that because Airborne controlled EEI's finances and operations, there could not be any meaningful bargaining between the Union and EEI and that Airborne should have been a party to the negotiations as requested by the Union and refused by Airborne.

The Wisconsin operations of Airborne were at all relevant times, managed by its district field services manager, Betsy Tate. There were four facilities, a large one located in Milwaukee and smaller ones in Madison, Appleton, and Green Bay (Green Bay was a substation of Appleton and was later moved to DePere). Like the situation in Rhode Island, Airborne's local pick up and delivery operations have been carried out through the use of cartage contractors. At Milwaukee, Appleton, and Madison, Airborne directly employed a small group of clerical workers to do customer service functions such as answering phones and tracking packages. (At the Green Bay facility, there were no Airborne employees.)

In 1979, Airborne made a deal with a man named Jim Andrulis to perform the Milwaukee local deliveries and pickups. Andrulis formed EEI to do this service and he was its sole

stockholder. Thereafter, in the 1980s, EEI contracted to be the cartage company for Appleton and Madison. Although losing the contract for Madison for a period of about a year and a half, EEI eventually regained that contract and was, until 1994, the sole contractor for Wisconsin. In this capacity, EEI had gross revenues during the 1990s in excess of $5 million per year. During a portion of this time, Andrulis testified that this operation was very profitable to him although he also testified that after Airborne revised the payment formula that it would agree to, his profits started an inexorable slide to zero.

During its time as the cartage contractor, EEI employed about 125 to 140 employees in Milwaukee as drivers, dispatchers, and dock workers. It also employed another 40 to 50 employees in Madison. A somewhat lesser number were employed in Appleton/Green Bay. All the drivers wore uniforms having the Airborne label and all drove trucks, which while owned or leased by EEI, had Airborne logos on them.[18] Thus, like the drivers in Rhode Island, they appeared to the general public as being employed by Airborne.

The basic contracts between Airborne and EEI (and also the subsequent contractors), are essentially the same as those in Rhode Island and contain the same boilerplate language asserting that the relationship between Airborne and the cartage company is an independent contractor relationship with the contractor having the sole control over hiring, firing, directing and assigning work, setting wages, hours, and all other benefits and working conditions. And the uncontroverted evidence produced in this hearing was that it was the contractor who supervised the day-to-day operations and that it was the contractor and not Airborne, who had and maintained complete control over the labor relations and employment conditions of the employees it hired to do the work in question. Notwithstanding the contention of the General Counsel, I do not think that the evidence regarding the Wisconsin operations, differed much, if at all, from the Rhode Island operations.

Moreover, in relation to the Union's petition seeking an election vis-à-vis EEI, the evidence shows that although Andrulis sought the assistance of Airborne in conducting an election campaign, he was met with stony silence and an absolute refusal of help. Describing one meeting with Airborne, Andrulis testified that when he asked for their help to deal with the Union's organizing campaign, they simply would not respond. (As noted above, the Union was certified as the bargaining representative of EEI's Wisconsin employees, in three separate units, on December 20, 1994.)

Notwithstanding the above, the General Counsel contends that Airborne was a joint employer with EEI by virtue of Airborne's "meaningful" control over EEI. He states:

> This meaningful control is manifested primarily in four ways. First, Airborne's ability to direct how EEI performs the a.m. sort stems from Airborne's presence at the terminal where EEI drivers work. Second, Airborne required EEI to provide extensive information about its operational costs which enabled Airborne to dictate EEI's reimbursement rates, and effectively, to control its employee wage rates. Third, Airborne's "threshold" or "incremental" method of reimbursement required frequent negotiation of rates and precluded EEI from establishing wages and benefits in a union collective bargaining agreement. Fourth, by controlling the number of vehicles EEI operated with, Airborne effectively determined the number of employees EEI could hire, and, conversely, limited the number of employees EEI could hire and the wage and benefit rates it could pay those employees.
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> Key to understanding Airborne's control over EEI is the service EEI was expected to provide Airborne. Airborne contracted with EEI to "provide pickup and delivery service" within specified times. In turn, Airborne reimbursed EEI for making on time pickups and deliveries, not attempted pickups of deliveries. Had EEI been a true independent contractor, Airborne's legitimate control would have been limited to insuring that EEI performed the contract services on time. Instead, Airborne crossed the line by controlling the means and methods used by EEI to perform the services and by requiring data unrelated to performance of the contract services, thereby actually controlling EEI's employment relations.

The characteristics relied on by the General Counsel are not all that different from the characteristics that any subcontractor has when it bids against other contractors and obtains a contract from a large and powerful customer. Unless, there is some special relationship, such as kinship, or political pull or baksheesh (not unknown), the price paid to the contractor in a bid situation is a market price. And the contractor's concomitant ability to pay its employees whatever it or they want, is limited by the amount of money the market will bear when the contractor receives the contract in the first place *or* if and when it attempts to renegotiate its contract thereafter.[19] I don't see what if any difference it makes that one side or the other has more or less information about the other's costs, as it is the market which ultimately determines the price unless one of the participants has monopoly power vis-à-vis the other.[20] Once the parties agree to a contract, it may be that the vendor may want more, but as there is an existing contract, it doesn't seem all that unusual for the customer to ask the supplier to justify why

[18] Some of the vehicles that were leased by EEI were owned by another company that also was owned by Andrulis.

[19] In this sense, a contractor is not any different from any other enterprise which receives money from its products or services based on what the market will bear, otherwise defined as the point at which its customers will begin to refuse to buy the product or service and move to someone else for a lower price or a substitute product. The market price, by definition, has to set a limit to the total compensation that any enterprise pays to its shareholders, employees, and its own suppliers of goods and services. In the absence of a monopoly (whether private or governmental), or a group of enterprises engaged in an effective price fixing conspiracy, the market place become the process whereby all prices are set including the prices of labor except to the extent that a minimum price for labor may be established by governmental fiat.

[20] Inasmuch as Airborne is a company whose shares are traded on a stock exchange, it makes public a great deal of information regarding its own operations, costs, and profits. I doubt that this public disclosure gives much if any advantage to the contractors who deal with it.

it wants an increase in the price already established.[21] That this was done by Airborne and that EEI may have given some data to Airborne in an attempt to get more money, doesn't indicate to me that Airborne controlled EEI. All it indicates is that before agreeing to a change in the contracted price, Airborne asked EEI to furnish information to justify its claim that it couldn't afford to perform the service at the price which had already been mutually agreed upon.[22]

The relationship between Airborne and EEI became increasingly estranged in the 1990s and *before* the union started to organize. The record is replete with requests by EEI for more money and requests by Airborne that EEI justify such requests. The record also shows that there were several occasions when Airborne rejected these requests and several occasions when it acceded to EEI's requests. In the main, Airborne essentially caved in when EEI threatened to cancel the contract *and* was the only cartage company available in the area capable of handling the Wisconsin operations, *and* Airborne determined that it would not be able, within time limits available to it, replace EEI with another contractor. In those circumstances, it was not EEI's cost information that caused Airborne to cave in; it was the lack of a local competitor to EEI which gave EEI the leverage to make a credible threat and get what it wanted.

For example, in 1995 Airborne agreed to several substantial increases when EEI threatened to cease performing the contract.[23] Thus, effective January 1, 1995, Airborne increased aircraft handling fees to EEI in the amount of $2690 per month or $32,200 per year. Effective February 12, 1995, the rate was increased for the Appleton operation by $11,400 per month or $136,000 per year. On March 24, 1995, Airborne agreed to advance $60,000 to EEI and effective March 26, 1995, the Milwaukee rate was increased by about $9800 per month or $117,000 per year. At the same time, the Madison rate was increased by $12,300 per month or $148,000 per year. In response to a threat to go out of business by EEI in September 1995, Airborne increased, effective October 15, 1995, the Milwaukee rates by $13,000 per month or $156,000 per year. When I asked Andrulis about these rate increases, he testified that he was aware that the other contractors in the area were not interested in bidding for the Airborne work, and therefore he felt that he had the leverage in his negotiations with Airborne.[24]

Indeed, at one point *before* the Union started its campaign to organize the Wisconsin employees, an Airborne official, Gary Lapland, wrote a memorandum to Tate and other Airborne managers, dated March 15, 1993, in part bemoaning EEI's perceived leverage over Airborne. He stated:

> EEI wants to get rid of IMT [Iron Mountain]. I told them we would put this out for bid AS SOON AS POSSIBLE . . . . I would like to combine ATW [Appleton] with at least half of the ATW area. I know that his will be more expensive up front but we could have a back up plan for a place to put these vehicles for EEI.
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> . . . .
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> I am not proposing to expand EEI. I am proposing to reallocate some of the territory that they now have in such a way that it would be beneficial to both of us. For example, if we took away half MKE, [Milwaukee], half of MSN [Madison], and half of ATW and brought in some real good truckers, EEI would be forced to upgrade their operation in order to compete. Now, if at the same time we found other places to put the displaced trucks, but never giving them more than half of a station, we would be keeping them whole. Putting their eggs in a few more baskets and introducing competition in each of their areas. If it turns out that EEI can not handle this type of operation and their operations get worse rather than better we can systematically start replacing them in areas that they can not handle.
>
> Advantages of this type of plan:
>
> 1. It would allow us to put in new D/O's [Driver owners] in some of our strongest potential markets.
> 2. It would insure that EEI can not hold us ransom ever again.
> 3. It would give EEI a more diversified revenue and shipment base so that they are not tied to any one market for growth.
> 4. It will force EEI to become more cost effective in order to be competitive.

[21] Of course, if a contractor can show that it no longer can perform the contract at the agreed upon price, the customer may or may not agree to an increase if it wants to keep the particular vendor and not go to the trouble of obtaining a substitute, assuming that one is readily available. This, no doubt, is the source of low ball bids where a contractor may artificially make a low bid in the expectation that it will be able to convince the customer to pay more once it is on the job and halfway through the project.

[22] Indeed, Airborne's witnesses testified that they were not that interested in getting information directly from EEI because they assumed that such information would likely be unreliable in order to justify Andrulis' request for an increase in rates. Their testimony was that they relied on their own observations and assumptions in arriving at what they believed to be a reasonable cost for EEI's operations at any given time. For example, in GC Exh. 188(c), there are comments by Airborne personnel to the effect that they did not believe either that EEI had added vehicles or that such additions were necessary when they were evaluating Andrulis' reasons for why he desired a rate increase.

[23] I do not mean to overemphasize EEI's leverage vis-à-vis Airborne as Airborne is gigantic in relation to EEI, and over time, has far more resources at its disposal including the ability to do the work with its own employees if necessary. What I am saying is that there is an ebb and flow in the relationships between an enterprise like Airborne (which itself has to compete with rivals) and its vendors such as EEI, which may, for at least a while, have little competition in a local area.

[24] The fact that EEI was able to take advantage of its situation as the incumbent contractor and being able to negotiate increased prices, undercuts, in my opinion, the theoretical opinion testimony of Michael Belzer, a labor economist, who was proffered as an expert by the General Counsel. His opinion was that Airborne controlled the price that it would pay to EEI by virtue of the structure of the contract and by virtue of the assertion that it could extract cost information from EEI when the latter requested raises. To some degree, his opinion was based on inaccurate assumptions, but in any event, was contradicted by the actual experience between Airborne and EEI which showed a complicated relationship and not one where Airborne was able to control or dictate to EEI the amounts the latter received under these contracts.

5. It will give EEI a continual base of low salary employees to offset the longer term employees with higher salaries.

Disadvantages:

1. We would be spreading the EEI virus if they prove to be non-effective.
2. Any moves we make would have to be pre-planed to avoid increases in our overall cost. The cost could be substantial.
3. EEI would not be able to cross utilize management personnel if the stations involved were too far apart this would increase their management overhead.
4. EEI leases all of its vehicles. I am not sure of the impact of this type of move on their cost.

Notwithstanding the testimony of Andrulis of EEI and Betsy Tate of Airborne, both of whom agreed that EEI and not Airborne did the supervising and the hiring and firing of EEI's employees, the General Counsel argues that Airborne had the "right to control" the firing of these employees. In support of this contention he offered one incident (over 17 years), where after seeing an EEI supervisor walk on a moving conveyer belt, Betsy Tate threatened to have that person barred from the building. Obviously if this threat had been carried out (it was not), EEI could not assign that person to the Airborne Milwaukee facility and it is probable that he would have lost his job. Nevertheless, this single incident is not, in my opinion, sufficient evidence of Airborne's intention to impose control over EEI's firing decisions. It seems to me that Airborne should be able, without being found to be a joint employer, exercise some power over a contractor when the contractor's employees engage in activity which may result in injury and impose legal liability on Airborne for accidents that occur on its premises.

Similarly, the fact that there is evidence that Betsy Tate or other Airborne managers have prodded EEI to get their trucks out on the road early, doesn't mean to me that they exercised such a degree control over EEI's operations to the extent that it must be found that Airborne is responsible for the employees of EEI. Airborne entered into contracts with various business entities in Wisconsin to guarantee shipment of packages and parcels within certain time limitations. It clearly has a desire to fulfill those contractual obligations and if this means putting a match under the local contractor's management to insure that those contractual obligations are met, this doesn't mean that it becomes an employer of the contractor's employees. As stated by the Board in *Southern California Gas Co*., 302 NLRB 456, 461 (1991);

> An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not, in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees.

The General Counsel points to the fact that Airborne provided EEI with its operations manual which documents a set of procedures designed to make most efficient use of the delivery process and has been designed, over time, by industrial engineers. (Time and motion studies.) But as in the case of Rhode Island, Andrulis testified that he was not required to adopt these procedures and when he or his supervisors felt that they were not appropriate to his operation, they did not. By the same token, in 1993, Andrulis was given a tour of two of Airborne's Chicago area facility in order for him to observe how Airborne operated the respective terminals with Airborne's own employees. Andrulis testified that he was not all that impressed and that the operations he saw were not all that different from his own.

On one other occasion, Andrulis wanted to use three trucks on the weekends at one of the facilities and Airborne insisted that it contracted for the use of four trucks and wanted Andrulis to comply with the contract. Again, this is not, to my mind, the kind of, or degree of control over employment and labor relations that would warrant, in conjunction with all of the evidence in this case, a finding, under current law, that Airborne was a joint employer with EEI.

I summation, I do not believe that under present legal standards, the General Counsel has shown that Airborne either had sufficient actual or potential control over the employment and labor relations policies and practices of EEI to warrant a conclusion that Airborne should be considered to be an employer of EEI's employees. As such, it is my conclusion that the allegations of the Milwaukee complaints, insofar as they allege that Airborne has violated the Act, should be dismissed.[25]

CONCLUSIONS OF LAW

1. By threatening employees with loss of work if they chose to be represented for collective-bargaining purposes by Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251, a/w International Brotherhood of Teamsters, AFL–CIO, the Respondent, Professional Delivery Services Inc., violated Section 8(a)(1) of the Act.

2. By refusing to hire former employees of Interstate because said employees joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities and in order to avoid an obligation to bargain collectively with the Teamsters Local 251, the Respondent, Professional Delivery Services Inc., violated Section 8(a)(1), (3), and (5) of the Act.

3. By the aforesaid conduct, the Respondent, Professional Delivery Services Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. The Respondent, Airborne Freight Company, has not violated the Act in any manner as alleged in the Complaints.

5. The Respondent, Agents Transportation Service/Expressman Courier Service Inc. has not violated the Act in any manner as alleged in the complaints.

[25] Having concluded that Airborne was not a joint employer with its contractors in Wisconsin, it is not necessary for me to consider the defense that Airborne cannot, in any event, be found to have an obligation to bargain with the Union when the Union deliberately did not name it as an employer in the representation case.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As the record establishes that the Respondent, Professional Delivery Services illegally refused to offer employment to certain employees of Interstate Parcel when it took over the operations of that company in Rhode Island, it must make them whole for any loss of earnings and other benefits, from April 30, 1995, computed on a quarterly basis from the date of such refusal. less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I will leave for compliance the determination of those employees who were discriminated against.

It appearing that Professional Delivery Services no longer is performing as a contractor for Airborne in Rhode Island, there is no reason to order that company, assuming it still exists, to offer employment to any of the former Interstate employees. Also, any backpay would be limited by the date that it ceased performing the services it contracted for in Rhode Island.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Professional Delivery Services Inc., Cranston, Rhode Island, its officers, agents, and successors, shall

1. Cease and desist from

(a) Refusing to hire or consider for employment, any employee-applicants because of their membership or activities on behalf Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251or any other labor organization.

(b) Threatening employees with loss of work if they choose a union as their collective-bargaining representative.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole those employee-applicants for any losses they may have suffered by reason of the Respondent's discriminatory refusal to hire or consider for hire, in the manner described above in the remedy section of this decision.

(b) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, and if it still in existence, post at its facility, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."