

American Air Filter Company, Inc. and General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 9-CA-15228-1

September 18, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On April 30, 1981, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt her recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, American Air Filter Company, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

² In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions,

258 NLRB No. 10

the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively with General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of the employees set forth below by contracting out the work of those employees or otherwise changing their wages, hours, and other terms and conditions of employment without first bargaining with the above-named labor organization. The appropriate unit is:

All truckdrivers employed by us in the transportation of our products; but excluding all office clerical employees, dispatchers, all other employees and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them under Section 7 of the Act.

WE WILL give employees Ed Bradley, Ed McMahan, and the estate of Luke Bunch, who were displaced by our termination of the contract with Transport Associates, Inc., backpay with interest.

WE WILL bargain collectively with General Drivers, Warehousemen & Helpers Local Union No. 89, as the exclusive representative of the employees in the unit described above with respect to wages, hours, and other terms and conditions of employment.

AMERICAN AIR FILTER COMPANY,
INC.

DECISION

STATEMENT OF THE CASE

ARLINE PACTH, Administrative Law Judge: This case was heard before me in Louisville, Kentucky, on January 21 and 22, 1981. The charge was filed on April 23, 1980, by General Drivers, Warehousemen & Helpers, Local Union 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter called the Union or Local 89). The complaint issued on June 5, 1980, alleging that American Air Filter Company, Inc. (hereinafter called AAF or Respondent),¹ violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. Respondent filed a timely answer on June 12, 1980, denying the commission of any unfair labor practices.

The parties were given opportunity at the hearing to introduce evidence, examine and cross-examine witnesses, and argue orally. After considering the entire record and briefs filed by the General Counsel, the Union, and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in the manufacture and sale of air filters at its Louisville, Kentucky, plant. During the past 12 months, a representative period, Respondent purchased and received at its Louisville facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Kentucky. The General Counsel contends, the Respondent concedes, and I find, therefore, that Respondent is an employer engaged in conduct affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ISSUES

The issues presented for resolution in this case are: (1) whether American Air Filter is a joint employer of drivers whose services are supplied by Transport Associates, Inc., and (2) if AAF is a joint employer, whether it has a duty to bargain with the Union over the decision to replace those drivers with other drivers and the effects of such an action.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *AAF's Relationship With Transport*

Since 1973, AAF has leased drivers from Transport Associates, Inc. (hereinafter Transport), an agency in the business of staffing the transportation operations of other companies. The terms of AAF's arrangement with Transport were defined in a series of 1-year contracts, the latest of which was renewed in 1978. It imposed

upon the lessor, Transport, the duty to furnish bonded, qualified drivers on a cost-plus basis; that is, a sum paid by AAF which reflected the mileage and hourly rates earned by each driver, contributions to their employee benefit programs, and a premium for Transport's overhead.

The contract specifically reserved to AAF the right to refuse or reject drivers referred to it, to dispatch the drivers, direct the loading and unloading of the product, select the routes, direct the drivers as to pickups and deliveries, and "exercise exclusive supervision and control over the entire operation of vehicles and drivers." Additionally, the Respondent was obliged to pay other costs including tolls, weighing expenses, motels, telephone bills, and other justifiable road expenses, and to maintain insurance policies on vehicles provided for the drivers.² Respondent also agreed to pay increased wages during the term of the contract if the cause for such increases were beyond Transport's control, with the proviso that in such an event, Respondent could terminate the contract on 90 days' notice. Pay raises were negotiated between AAF and Transport at the time the contract was renewed, although one driver succeeded in negotiating a separate and higher rate of pay with AAF which was accepted by Transport.

As a practical matter, Transport's role was that of an employment or personnel service. It gave applicants road tests, had them fill out application forms, and then referred them to clients. It provided no supervision after the drivers were so referred and, in fact, had no further contact with its employees other than processing and mailing their weekly paychecks.

In accordance with AAF's needs, three drivers were assigned to Respondent on an exclusive basis: Ed Bradley began working for AAF in 1973 while two other drivers Ed McMahan and Luke Bunch were added in 1978. Once the drivers were referred to AAF and met with its approval, Respondent's traffic manager, Roger Roalofs, was solely in charge of supervising their day-to-day operations. Roalofs issued the drivers their weekly schedules and required them to report to him on a daily basis. Each driver was obliged to keep a log and trip reports on forms provided to them by Respondent and submit them to Roalofs who maintained the documents in compliance with Federal regulations. If a driver was involved in an accident, received a fine or was delayed and had to stay overnight in a motel, Respondent compensated him for his expenditures. The drivers reported their absences to Roalofs and scheduled vacations with him. The trucks they drove bore AAF's name; they were given gasoline credit cards with AAF as the payee and keys to Respondent's parking lot. Employee handbooks were prepared by Transport, but were distributed to them by Roalofs. Moreover, Roalofs frequently issued memos to the drivers instructing them on such topics as the proper maintenance of their vehicles or warning them against permitting unauthorized passengers in their vehicles.

¹ In 1978 Respondent was purchased by the Allis-Chalmers Corporation. On January 1, 1981, it was liquidated into the present corporation as an operating division and called Replacement Filter Division, Fiber Glass Group, American Air Filter Co., Inc.

² Respondent leased the trucks from a separate and independent firm.

B. AAF's Role in Collective Bargaining

On January 30, 1979, pursuant to an agreement which designated only Transport as the employer, the Board's Regional Director certified Local 89 as the collective-bargaining representative for the unit comprised of "All truck drivers employed by the Employer in the transportation of American Air Filter products." When collective bargaining commenced some 12 months later, only three meetings were necessary before Transport and the union representatives reached agreement.

The first bargaining session on December 10 was attended by the Union's business agent, Glen Tomes, committeeman McMahan, and Rod Marshall, operations manager for Transport. Roalofs was not present, but his views were represented by Marshall on several occasions. Tomes related that at this first meeting, after he proposed a basic draft contract similar to those which had been negotiated for other units of Transport's drivers, Marshall insisted that the seniority and dispatch provisions in the agreement be revised to reflect the procedures utilized at AAF. In addition, when a question arose with respect to preserving McMahan's special rate of pay, Marshall stated that he would have to consult with Roalofs and obtain his verification. Further, whenever Marshall commented that Roalofs was not receptive to retroactive pay increases, Tomes asked that he participate directly in the negotiations.

At the next meeting on December 20, Marshall stated that Roalofs had approved the special pay rate for McMahan, and was agreeable to a pay schedule based on 17 or 18 cents per mile, an increase of 2 or 3 cents over the current rate. The union negotiators, believing it tactically necessary to do so, demanded a greater increase than Roalofs was willing to pay. When this demand was made, a heated discussion ensued, and again Tomes told Marshall that Roalofs should be at the bargaining table if his authorization was needed.

At the third meeting on January 14, Marshall revealed that he had Roalofs' concurrence with respect to the agreement reached with the Union on wage increases.³

Charles Spond, assistant to the union president, who attended only this final meeting, also testified that Marshall indicated he had AAF's approval for the increased costs negotiated in the contract and that there would be no problems. At the conclusion of the meeting, the parties initialed those portions of the contract which deviated from the original draft to signify that agreement had been reached.

³ Respondent argues incorrectly that Tomes' testimony bearing on what Roalofs discussed with Marshall is inadmissible hearsay. Since Transport is cited in the complaint as a party in interest, Marshall's statements are received as admissions of a party opponent. See Fed. R. Evid., Rule 801(d)(2)(A). Testimony as to what Roalofs allegedly said to Marshall is also admissible to establish the source of the Union's belief that Respondent was involved in negotiations, not to prove the truth of the matters asserted therein. Even if portions of Tomes' testimony about Roalofs' statements to Marshall were to fall within the rule against hearsay, such statements are not necessarily inadmissible in Board proceedings. *United Rubber, Cork, Linoleum and Plastic Workers of America, Local 878 (Goodyear Tire & Rubber Company)*, 255 NLRB 251 (1981). This permissive approach is particularly warranted here where the out-of-court declarant Roalofs testified at the hearing.

Transport President William Tatter's view of Respondent's role in the negotiations differs sharply from that of the union agents. Both in his testimony at the hearing and in a statement provided to the Board, Tatter maintained that the collective-bargaining agreement was never subject to AAF's approval and that this fact as well as Transport's exclusive role as employer was made perfectly clear to the Union throughout the negotiations.

However, Roalofs' testimony regarding his conversations with Marshall during the weeks in which collective bargaining was taking place, tends to corroborate Tomes' testimony rather than Tatter's.⁴ Roalofs stated that Marshall advised him late in 1979 that negotiations were going forward. He, in turn, informed his immediate supervisor to the same effect. Moreover, Roalofs acknowledged that Transport officials continued to discuss various portions of the agreement with him as negotiations progressed. In particular, Roalofs recalled that they discussed preservation of a special wage rate for one if not all three of the drivers. He further remembered telling Marshall that he hoped the contract would not entail revisions in AAF's current dispatch procedures. However, he had no recollection one way or the other of telling Marshall he could live with a 17- or 18-cent mileage rate.

C. Events After Collective Bargaining

The contract concluded by the parties on January 14 was ratified by the unit employees on January 19, and submitted in final form for execution to Transport Associates on January 23, 1980.

However, Tatter testified that, in late January 1980, he and Marshall met with Roalofs to review various provisions in the collective-bargaining agreement which had economic consequences for Respondent. According to Tatter, Roalofs expressed some dismay as to the increased costs resulting from the agreement but gave no indication that Respondent intended to terminate the contract. Tatter left that meeting assuming there would be further discussions with Roalofs. Instead, sometime in February, Roalofs advised Tatter by telephone, followed by a confirming letter on February 19, that Respondent was invoking its right to cancel the contract. In a response dated April 15, Tatter agreed to an expiration date of April 19, and asked Roalofs to have the drivers report back to Transport's offices on their final date of employment.

Neither Respondent nor Transport advised the Union prior to that date that the contract definitely was to be terminated. Rather, early in February, Tomes called Transport to find out why a signed agreement had not been returned to him. According to Tomes' affidavit, Marshall advised him that Transport needed AAF's approval before it could execute the agreement but that he still did not see any problems. In subsequent conversations in February, Tomes learned from Marshall and Tatter that AAF was opposing the retroactive pay provi-

⁴ Tatter did not attend the bargaining sessions and therefore cannot reliably state what was said there. Tomes was not only present but kept notes which he brought to the hearing. Moreover, portions of his testimony were confirmed by Spond and Roalofs. I therefore credit his account of the bargaining meetings.

sions and was unwilling to renew its lease contract with Transport. Tatter assured Tomes he would contact him in the event the situation altered.

However, Tomes heard nothing further from Transport and, therefore, on March 18, filed a charge with the Board alleging that it was refusing to recognize and implement the labor agreement. After investigation, the Regional Director concluded that Transport was not obligated to sign the collective-bargaining agreement without AAF's approval and therefore determined that no complaint should issue.⁵

Not until April 19 did the Union learn that Respondent had formally terminated its contract with Transport. On that date, Roalofs advised the drivers that AAF would no longer be requiring their services. The Union filed the charge in the instant case 4 days later. When the drivers reported back to Transport, they were advised that there was no other work available for them and that they should apply for unemployment compensation.

By letter of July 18, 1980, to the manager of labor relations for the Allis-Chalmers Corporation, Tomes wrote: "As heretofore requested through Transport Associates, Incorporated, we are again requesting to meet for purposes of negotiating the terms and conditions of a Bargaining Agreement for the truck drivers as certified January 30, 1979." Respondent responded swiftly on July 23, denying that it had any duty to bargain and rejecting the Union's request. It also advised the Union that it was leasing the services of one driver from an agency other than Transport.

IV. DISCUSSION

A. American Air Filter is a Joint Employer

An employer is defined in Section 2(2) as "any person acting as an agent of an employer, directly or indirectly . . ." who exercises control over the employee's working conditions. A joint employer is one who shares that control with another employer as established by objective evidence. See *Harold A. Boire, Regional Director v. Greyhound Corporation*, 376 U.S. 473, 481 (1964); *Floyd Epperson and United Dairy Farmers, Inc.*, 202 NLRB 23 (1973), *enfd.* 491 F.2d 1390 (6th Cir. 1974). The facts adduced in this case prove beyond doubt that AAF and Transport were joint employers.

It is true that Transport initially hired the drivers, referred them to clients, sent them their paychecks, and included them in its benefit programs. However, beyond that, Transport was completely divorced from the daily supervision of the drivers once they were assigned to AAF. At that point, AAF alone assumed control of the employees' daily working conditions. AAF had the contractual right to reject employees recommended to it. Consequently, it had the right to approve the drivers as well. Although the drivers were technically on Transport's payroll, they were, in reality paid by AAF. The men worked full time for AAF; the number of days and hours they worked each week were dictated by AAF's

delivery schedule. The only supervisor to whom they reported, Roger Roalofs, was an AAF employee. The trip sheets and logs which the drivers kept were those which AAF was required to maintain. When AAF terminated its contract with Transport, the drivers found themselves without work. In effect, AAF had fired them.

In sum, it was AAF, not Transport, which had the most consistent contact and control over the day-to-day incidents of the drivers' employment relationship. Since "control of the essential elements of labor relations is a prerequisite to the existence of a joint employer relationship" (*S. S. Kresge Co. K-Mart Division v. N.L.R.B.*, 416 F.2d 1225, 1230 (6th Cir. 1969)), it follows that such a relationship existed between AAF and Transport. See *U.S. Pipe & Foundry Company and Winfrey Enterprises, Inc.*, 247 NLRB 139 (1980); *Sinclair and Valentine Co., Inc., a Division of Wheelabrator-Frye, Inc.*, 238 NLRB 754 (1978); *Syufy Enterprises, a Limited Partnership*, 220 NLRB 738 (1975); *Mobil Oil Corporation*, 219 NLRB 511 (1975).

Respondent admits that it controlled the drivers' functions as if it were their employer, but nevertheless argues it was not a joint employer because it exercised such control solely to retain a private carrier status in compliance with Interstate Commerce Commission standards as set out in *Personnel Service, Inc.*, 110 M.C.C. 695 (1969).

This argument does not aid Respondent's position. To the contrary, the obligations imposed by the ICC upon an employer which seeks the economic advantages of private carrier status are entirely consistent with the duties imposed on a joint employer under the National Labor Relations Act.

Respondent further argues that the certification of Transport as the employer of drivers who drove AAF products bars litigation of its status as a joint employer in this proceeding.

I find Respondent's argument unpersuasive for it misperceives the nature of representation hearings and the certification process. These proceedings are intended principally to determine the interests of the employees in being represented by the designated union, the scope of the appropriate unit, and the employees included therein. See *American Cable & Radio Corp. v. Douds*, 111 F.Supp. 482, 485 (D.C.N.Y. 1953). Indeed, the very cases which Respondent cites as authority for the proposition that determinations in prior representation proceedings bar relitigation of the same issues under a theory of *res judicata* deal with questions affecting the employees in the bargaining unit, and not the employer. See, e.g., *Joint Council of Teamsters No. 42, etc. (Irvine-Santa Fe Company)*, 248 NLRB 808 (1980) (Board refused to relitigate question of employee status of independent contractors); *Missouri Pacific Employees Hospital Association et al.*, 251 NLRB 1547 206 (1980) (Board refused to clarify bargaining unit to include employee classifications which existed prior to but were omitted from the unit certification and the collective-bargaining agreement). In representation proceedings, the Board's role may be most aptly likened to that of the neutral investigator. See *N.L.R.B. v. Fresh'nd-Aire Company, Division of Cory Corporation*, 226 F.2d 737, 740-741 (7th Cir. 1955). However, the Board's

⁵ The Union's appeal of this determination and a petition to amend the certification to designate American Air Filter as an employer were withdrawn on May 20, 1980.

interests are altogether different when it acts as a prosecutor whose duty it is to protect against potential violations of the Act. This is not to say that an employer has no interest in the representation hearings, but such proceedings are merely administrative and are not final dispositions of the substantive rights of the parties. Thus, Board precedent establishes that questions affecting a joint employer's status in an unfair labor practice proceeding are treated as separate and distinct from such determinations in representation hearings. For example, in *U.S. Pipe & Foundry Company and Winfrey Enterprises, Inc.*, *supra*, U.S. Pipe first contracted in 1966 for the services of truckdrivers with a company, the successor to which was Winfrey Enterprises. That same year, the union was certified as the authorized representative for all truckdrivers employed by Winfrey and thereafter entered into successive collective-bargaining agreements with that firm. In late 1975, the union filed two petitions naming U.S. Pipe and Winfrey as employers of the drivers working exclusively for U.S. Pipe. The cases were consolidated for hearing after which the Board decided that no question existed concerning representation since Winfrey continued to recognize the union as the employees' representative. *United States Pipe and Foundry Company-Soil Pipe Division*, 223 NLRB 1443 (1976). Nevertheless, a complaint issued in 1977 charging U.S. Pipe with a failure to bargain with the union over its termination of the contract with Winfrey. The Board ruled that the respondents were joint employers, but, because U.S. Pipe had given the union adequate notice that it would be terminating the unit employees and had bargained about the matter, no violation of the Act was found. Implicit in the Board's decision is the assumption that U.S. Pipe had a duty to bargain with the union even though it was not certified as an employer at a time when its status as a joint employer was known. In *Royal Typewriter Company, et al.*, 209 NLRB 1006 (1974), *affd.* 533 F.2d 1030 (8th Cir. 1976), the Board held that the company, an unincorporated division of Litton Business Systems, and Litton Industries, were a single employer obligated to bargain with a union which some years earlier had been certified as the bargaining representative for a unit of employees at Royal Typewriter only. The Board and the court expressly rejected Litton's claim that it was denied due process by being joined as a party late in the proceedings. See also *N.L.R.B. v. Long Lake Lumber Company and F. D. Robinson*, 138 F.2d 363 (9th Cir. 1943).

The significant question, then, should not be whether it is unfair to litigate a respondent's status as a joint employer when it was not certified initially as an employer, but whether its rights are unjustly affected during the unfair labor practice proceeding. The Board's approach in the cases discussed above is equally applicable to the case at bar: an employer, such as AAF, is in no way prejudiced simply because it was not named an employer or failed to participate in the representation hearing where it had ample opportunity to and did, in fact, litigate fully the question of its joint employer status in the unfair labor practice proceeding. See *Royal Typewriter, supra* at 1011, fn. 12. To find otherwise would elevate form over substance.

B. AAF Has a Duty To Bargain

Having found that AAF was a joint employer, it follows that its bargaining duty was no less than that of Transport. See *Mobil Oil, supra* at 516; *Ref-Chem Company and El Paso Products Co., Individually and as Co-Employers*, 169 NLRB 376, 380 (1968), enforcement denied on other grounds 418 F.2d 127 (5th Cir. 1969).

Respondent contends, however, that, because the Union failed to notify it of its duty to bargain until some 3 months after the contract with Transport was terminated, its due-process right to notice was violated so that no bargaining duty may be imposed on it. In support of this position, Respondent cites *Alaska Roughnecks and Drillers Association v. N.L.R.B.*, 555 F.2d 732 (9th Cir. 1977), cert. denied 434 U.S. 1069 (1978), a decision which it regards as squarely on point.

In that case, Mobil, which operated an offshore oil drilling platform in Alaska, contracted in 1973 with Santa Fe to perform its drilling and production operations. The evidence showed that Mobil exercised some supervision over Santa Fe's employees at the site. When the union petitioned for an election later in 1973 for a unit of employees assigned to the Mobil platform, only Santa Fe was designated as the employer. Immediately after the union won the election, Santa Fe notified Mobil of an increase in payments in anticipation of higher labor costs that would result from collective-bargaining negotiations. Mobil rejected the increase, and, on June 14, 1974, notified Santa Fe that it was terminating the contract a month later. Santa Fe notified the union of Mobil's termination, whereupon the union wrote to Mobil requesting bargaining. The Board held that Mobil was a joint employer and had a duty to bargain with the union as to the decision to replace unit employees and the effects of that decision. The court of appeals denied enforcement of the Board's Order, finding that the extent of Mobil's control over the Santa Fe employees was not dispositive of the bargaining question. Rather, the court reasoned that the Board's rules governing representation proceedings required that notice shall be given to the employer. The union's failure to give Mobil notice of and an opportunity to challenge its purported employer status at the representation hearing was, in the court's view, a denial of due process. Moreover, since no bargaining demand was ever made upon it, Mobil was entitled to assume that Santa Fe was the exclusive employer, absolving it of any duty to notify the union of its decision to terminate the contract.

Respondent's reliance on the court of appeals' decision is misplaced, for critical distinctions exist between the facts in the present matter and those in *Alaska Roughnecks Association*.⁶

⁶ Even were there no distinctions between these cases, and with all due deference to the Ninth Circuit, I would not regard *Alaska Roughnecks Association, supra*, controlling here for I am bound by the Board's construction of the Act even though it may be at variance with the views of the court of appeals. See *Drivers, Chauffeurs and Helpers, Local 639, etc. (District Distributors, Inc.)*, 119 NLRB 845, 850 (1958); *Nowak Logging Company*, 119 NLRB 1573 (1958); *Insurance Agents' International Union, AFL-CIO (The Prudential Insurance Co.)*, 119 NLRB 768 (1957), reversed 260 F.2d 736 (D.C. Cir. 1958), *affd.* 361 U.S. 477 (1960).

Unlike Mobil, which terminated its contract with Santa Fe before negotiations commenced, and was found to have played no overt or covert role in these negotiations,⁷ AAF was involved in collective bargaining in a manner which led the parties to believe that the Company was acquiescing in its role as an affected joint employer. Roalofs acknowledged discussing provisions in the agreement with Transport officials throughout the period of time that negotiations were taking place. Thus, Roalofs conveyed to Transport AAF's position on dispatch procedures, preservation of wage rates, increased wages, and retroactive increases. It is apparent that Roalofs commented on these matters with the expectation that Marshall would represent AAF at the bargaining table and attempt to incorporate its positions into the agreement. His independent testimony provides compelling proof that AAF was participating, albeit indirectly, in the negotiations.

Transport's president, Tatter, took the position that AAF had no legitimate role in the negotiations. However, since he did not attend any of the bargaining sessions, his subjective view of what the parties' arm's-length relationship should have been cannot prevail over accounts of what actually occurred. Thus, Tatter may have had no knowledge that Tomes asked Marshall on numerous occasions to seek Roalofs' attendance at the meetings. Through such requests to Transport, the Union did make a bargaining demand on Respondent for it is well established that the knowledge and conduct of one employer is imputed to the joint employer as well. See, e.g., *United States Pipe and Foundry, supra. Ref-Chem Company, supra* at 380. Tatter also may have been unaware of Marshall's consultations with Roalofs. Therefore, whether Roalofs appeared personally at the sessions is immaterial, for he clearly was relying on Transport to represent AAF's best interests. Respondent's posture during the negotiations was nothing less than that of an interested and involved party.

When Marshall transmitted Roalofs' positions to the members of the Union's negotiating team, they had every reason to believe that Transport was acting as a spokesman for Respondent and that it was committed to collective bargaining. Roalofs' testimony shows that the Union's belief was correct. There was, then, no need for the Union to make a specific and separate bargaining demand on AAF. Transport, too, apparently assumed that AAF had concurred in the agreement for it is unlikely that Marshall would have initialed the draft on January 14 absent AAF's approval.

In contrast to Mobil Oil, AAF participated in collective bargaining and attempted to obtain the most favorable terms possible. Only at the conclusion of the collective-bargaining process, when it determined that the terms were disadvantageous did it sever its ties with Transport. In these circumstances, Respondent's status as a joint employer and its duty to bargain with the Union is not contingent on the technical niceties of pleading in representation hearings, nor on whether or not it is satisfied with the final terms of a labor contract. Rather, an

employer such as AAF has a mandatory obligation to bargain when it subcontracts out of the plant "work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 210-211 (1964). Moreover, a company must give prior notice to the employees' representative sufficiently in advance of actual implementation of its decision to replace the workers to allow reasonable scope for bargaining. *Sun-Maid Growers of California*, 239 NLRB 346 (1978), *affd.* 618 F.2d 56 (9th Cir. 1980). Accordingly, by contracting out work previously performed by the drivers, without notifying or bargaining with Local 89 about that decision or about the effects of replacing the men with other employees, Respondent violated Section 8(a)(1) and (5) of the Act. See *Sun-Maid Growers of California, supra; Mobil Oil Corp., supra*.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The employees in the bargaining unit described in the certification of representative in Case 9-RC-12725 as "All truck drivers employed by the Employer in the transportation of American Air Filter products, but excluding all office clerical employees, dispatchers, all other employees and professional employees," constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
4. Respondent and Transport Associates, Inc., are joint employers of the employees in the above-described unit.
5. The Union at all material times has been the exclusive collective-bargaining representative of the employees in the above unit within the meaning of Section 9(a) of the Act.
6. By terminating its contract with Transport Associates, Inc., and thereby displacing the employees in the above unit, without permitting the Union to bargain over the underlying decision or its effects on those employees as found herein, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent, American Air Filter, has engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative actions to effectuate the policies and purposes of the Act.

In *Mobil Oil Corp., supra* at 512, the Board observed that the employer's contract with Santa Fe gave it the privilege of cancellation upon notice so that neither the contract termination nor the actual displacement of unit employees occasioned thereby was alleged as a violation of the Act. The Board concluded, therefore, that the reinstatement of that contract and reinstatement of the em-

⁷ *Mobil Oil Corp., supra* at 515. The Ninth Circuit suggested that its result might have been different had Mobil intervened in Santa Fe's labor dispute. See *Alaska Roughnecks Association, supra* at 736-737.

ployees would be inappropriate. The same reasoning is applicable here and the same result is warranted. Accordingly, as in *Mobil Oil*, Respondent shall be required to bargain with the Union concerning the decision and effects of displacing unit employees Bradley, McMahan, and Bunch,⁸ and to make these employees whole for any losses suffered. Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),⁹ from April 19, 1980, until the occurrence of the earliest of the following conditions: "(1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the decision and effects of the displacement of unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith." Compare *Mobil Oil Corp.*, *supra* at 512 with *Sun-Maid Growers of California*, *supra* at 355 (restoration of the verbal agreement with the subcontractor and reinstatement of the displaced employees ordered where Sun-Maid had not entered into a subsequent contract with another employer and no economic hardship could be foreseen thereby).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁰

The Respondent, American Air Filter Company, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of the employ-

⁸ Subsequent to his termination with Respondent, Bunch died in an automotive accident. Consequently, Respondent's backpay obligation to Bunch runs from April 19, 1980, to the date of his death and shall be paid to his estate. See *Biscayne Television Corporation*, 137 NLRB 430 (1962).

⁹ See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ees in the bargaining unit set forth in paragraph 3 of the Conclusions of Law above, and from contracting out the work of those employees or otherwise changing their wages, hours, and other terms and conditions of employment without first bargaining with the above labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Make whole those employees displaced by its termination of the contract with Transport Associates, Inc., for any loss of pay and other benefits suffered by them commencing on April 19, 1980, until such time as one of the conditions outlined above in the section entitled "The Remedy" is met.

(b) Bargain collectively with Local Union 89 as the exclusive representative of the employees in the aforementioned unit with respect to wages, hours, and other terms and conditions of employment.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its office in Louisville, Kentucky, copies of the attached notice marked "Appendix."¹¹ Copies of this notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹¹ In the event that 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."