

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 30, 1996

TO : Philip E. Bloedorn, Acting Regional Director
Region 30

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Enterprise Express/Airborne Express 177-1650
Cases 30-CA-12786; 12963 530-4825-5000

These Section 8(a)(1) and (5) cases were submitted for advice as to whether Airborne Express (Airborne) is jointly liable with Enterprise Express, Inc. (EEI), its Wisconsin subcontractor, for refusing to meet and bargain with the Union.

FACTS

Description of Airborne and EEI Operations

Airborne is the third largest transporter of time sensitive freight in the United States, and has traditionally been the low-cost competitor in the industry. As a trucking and air freight forwarding company, it ships documents and parcels to destinations throughout the United States. A principal part of its service is providing door-to-door express delivery of small parcels and documents, and it uses outside independent contractors to do this work in designated local areas.

Airborne has a headquarters department of Cartage Contracting and Administration to handle relations with drivers of its subcontractors at secondary terminals. Gary LaPlante is the current manager of this department. Airborne's district field service manager in Wisconsin is Betsy Tate.

EEI, a Wisconsin corporation owned solely by James Andrulis, is Airborne's primary local subcontractor in Milwaukee, Madison, Appleton, and DePere. Andrulis is EEI president and treasurer and Gary Plewe is the vice-president and secretary. EEI was formed at Airborne's suggestion in 1979,¹ but Airborne did not provide any start-up money or

¹ Andrulis had been employed in the transportation industry in 1979 and made sales calls on Airborne. Airborne told

other investment in EEI. Neither Andrulis nor Plewe is a shareholder in Airborne and no Airborne officers are shareholders in EEI. EEI has a principal business office at a facility separate from Airborne's facilities in Milwaukee.

When incorporated in 1979, EEI's only customer was Airborne, for which EEI provided pickup and delivery services with five trucks and six drivers in Milwaukee. In the 1980's, as Airborne's business grew, it requested that EEI open an operation in Madison in 1984. Airborne had been using several companies to deliver its goods in Madison and wanted one, EEI, to use trucks and uniforms with the Airborne logo. In 1986, a similar situation occurred in Appleton, and Airborne asked EEI to expand into the Appleton market.²

When the Appleton facility got crowded, Airborne directed EEI to open a sorting facility in DePere, which depicts Airborne's name and logos, but has no EEI signs. Airborne had to approve the facility before EEI was authorized to lease it. EEI maintains the property and liability insurance on that building, but Airborne reimburses EEI for the leasing costs. The lease, however, does not mention Airborne.

As Airborne's business grew, EEI's staff and scope of business expanded to include loading and unloading Airborne's airplanes and performing routine maintenance on Airborne's ramp equipment and vehicles. All EEI employees who work as loadmasters on the aircraft have to be trained in elements of safety and weight and balance for loading, in compliance with FAA standards. EEI pays employees in training, which Airborne provides annually or semiannually. Airborne gives and grades the tests and, when EEI employees pass the training, they receive a card that says "Airborne Express operator permit." The card has no indication that the person is an EEI employee. If a person fails the test for ramp work, EEI puts the person on other jobs, such as

Andrulis it was unhappy with its contractor and wanted someone new, and asked him if he would be interested in forming a company for Airborne's Milwaukee operations.

² At the urging of Airborne in 1985 or 1986, EEI also opened an office in Iron Mountain, Michigan, which has since closed.

dock or driver work, and provides another employee for Airborne to train.

Except for DePere, EEI works out of facilities owned by Airborne. Airborne gives EEI dispatch, training, and parking areas, and allows EEI employees to use Airborne's lunch facilities. After a plane is unloaded, goods are transported by EEI vehicles back to Airborne facilities, where the unloading procedure is directed by Airborne. EEI employees follow an Airborne manual on how to unload and handle the packages. At the facility every package bar code is scanned, thereby telling the computer that the shipment has arrived at the destination airport. Packages are then loaded onto EEI trucks, and re-scanned with different scanners taken by drivers on their routes.

Airborne gives EEI a list of customers for whom deliveries must be made at a certain time. Airborne determines when a package is to be delivered, and pays EEI on the basis of actual delivery time. When Airborne began that program, it told EEI not to deliver a package before its due time, even if the driver was in the building. This required EEI drivers to have to go back and forth to the same area or building, sometimes more than once a day.

Most packages are due to be delivered by noon, so EEI drivers try to deliver all packages by noon. This goal is set by Airborne. In the past, Airborne has told EEI how to run its morning operation. On high volume days, Airborne may send in an extra airplane, which arrives about 45 minutes after the first plane. Tate ordered that EEI not have any drivers leave until the second load was sorted. Tate determines when the EEI drivers can leave even though the drivers are on EEI's timeclock.

Under the cartage contract, EEI elected to use the Airborne trademark and trade name on its vehicles used in performing cartage services. EEI vehicles are also required to disclose that EEI operates the vehicle as an independent contractor for Airborne. Airborne determines the color of the EEI trucks which will use the Airborne decals. Because EEI opted to use Airborne trademarks on its vehicles, it was required to have its drivers wear Airborne uniforms. Airborne supplies the uniforms at no cost to EEI. When EEI employees successfully complete probation, they get two sets of uniforms per season, and each year employees get a new set of uniforms. The contract requires that EEI conform to vehicle and uniform standards set by Airborne, and EEI drivers have been required to change clothes or remove

certain apparel before being allowed out of the Airborne facility to make their deliveries. EEI employees identify themselves as Airborne when communicating with customers. This is done with the knowledge and consent of Airborne.

Airborne conducts unannounced audits. If an EEI truck does not meet Airborne's standard (for example a crack in the windshield), it will not pass Airborne's audit and EEI will have to replace the truck that day. If EEI is not in compliance with Airborne uniform or vehicle standards, the auditor notifies Airborne's contracting office, which can cancel the EEI contract for noncompliance.

EEI pays for leasing, maintenance, and insurance of its vehicles. In special circumstances, e.g. when aircraft is delayed many hours, Airborne gives EEI special permission to lease other vehicles. Airborne is listed on the EEI vehicle insurance as "other insured." Therefore, if Airborne is sued because of a vehicle operated by EEI, EEI's policy is responsible for any suit.

Airborne's standard cartage agreement attempts to create an arm's length relationship between Airborne and its subcontractors. The cartage agreement between Airborne and EEI includes the following clauses:

Contractor shall be solely responsible for the interviewing, hiring, training, disciplining and termination of its employees. Contractors shall be solely responsible for all terms and conditions of employment pertaining to its employees.
[para. 1]

All persons employed by Contractor to perform services for Contractor hereunder shall be subject to the exclusive control and direction of Contractor, it being the intention of the parties that the Contractor shall be and remain an Independent Contractor. [para. 4]

Contracts may be canceled by either party for any reason on 60 days notice. Either party may also cancel the contract on 15 days notice if the other party is in "material breach."

EEI, like other Airborne subcontractors, is paid on a per-delivery rate set forth in Schedule A of the basic cartage contract. The schedule states that: "The rates shown reflect the maximum rates to be paid. A lower rate

may be negotiated at the time service is performed." The rate is also affected by incentives designed to get subcontractors to increase sales. According to Andrulis, Airborne's system of indexing forces EEI to negotiate new compensation schedules with Airborne every six months. Thus, EEI is paid on a package rate which, after a certain number, decreases for each additional package EEI handles. According to Andrulis, it is no longer possible for EEI to continue in business unless the base rate is changed, because although the volume of packages grows, Airborne does not want to pay EEI a portion of the increased revenues and, in fact, wants to pay less.

Over the years, Airborne has come up with formulas as guidelines to assist local Airborne managers in determining what to pay for different kinds of deliveries. In order to figure out EEI's profit and loss, the formula lists: trucks; whether EEI is making any money on the method of payment; and EEI's expenses. EEI pays drivers \$8.50 per hour plus benefits. A form submitted to the Region showed that Airborne had been paying \$1.28 per shipment, but in negotiations with EEI for new rates, Airborne started by offering EEI only \$1.20 per shipment. When Andrulis told Airborne he needed more money, Airborne responded that Andrulis was paying his people too much money.

There is also evidence that for a line haul truck operation from terminal to terminal, EEI had to complete a form to justify its cost in order to receive reimbursement from Airborne. That form states that the base wage rate should be \$10 an hour. Therefore, EEI cannot set up this terminal to terminal operation if it pays its employees more than \$10 an hour because that is all Airborne will reimburse EEI. Airborne factors EEI's expenses into what Airborne will pay EEI per package and when Airborne told Andrulis the rate will not be increased, it again stated that EEI is paying its employees too much.

EEI received three letters from Airborne in January 1995. On January 19, Tate notified EEI that she considered EEI in breach of the contract because EEI did not deliver to some locations during terrible weather conditions, and threatened to terminate the EEI contract. Concerning that same situation, EEI also was charged back \$600 for Airborne's having to use other contractors to deliver those packages. A third letter involved a driver not doing what he should have, and told EEI to correct the situation.

According to Andrulis, EEI establishes its own wage scale for EEI employees. Airborne does not establish the wage scale and has never told EEI exactly what the wage scale should be. Airborne has, however, told EEI that its employees are the highest paid among all the Airborne vendors and, as noted above, has criticized EEI for paying such a high wage to its employees.

On or about March 16, 1995, EEI President Andrulis and his bankruptcy attorney notified Airborne that they planned to file bankruptcy and cease operations within a week if Airborne did not agree to a substantial compensation increase and financial assistance with an upcoming insurance payment. Airborne increased EEI's compensation rates by \$281,000 per year and advanced EEI \$60,000 on future services so that EEI could pay an insurance premium.

By letter dated September 27, 1995, EEI asked Airborne to consider various proposals to "address Enterprise's inability to continue operations under the current Cartage Agreement." In that letter, EEI complained that Airborne's November 1993 implementation of Incremental Pricing Compensation had severely impacted EEI's ability to continue operating. EEI explained that it had serious losses during the previous five months, and predicted that the losses would dramatically increase with the upcoming holiday season because Airborne's compensation at the "threshold" cartage rates had the effect of exacerbating EEI's losses. EEI stated that "it is virtually impossible to attract and maintain qualified drivers and employees at the hourly rates effectively dictated by Airborne's Incremental Pricing Compensation program," which had caused EEI to record losses in November and December in past years. EEI further asserted that it would run out of cash by approximately December 8, 1995. EEI stated that it was fully prepared to terminate its operations effective December 9 if Airborne did not "renegotiate the Cartage Agreement to provide EEI with sufficient operating revenues, including an amount sufficient to reach a collective bargaining agreement with the union." Airborne responded by negotiating another rate increase which provided EEI approximately \$155,000 per year in added revenue. However, Airborne also began seeking, and apparently found, two potential successor contractors to replace EEI at Appleton/DePere.

Collective Bargaining History

On October 25, 1994, Teamsters Local 344 (the Union) filed a petition seeking to represent EEI's employees at the

Wisconsin facilities in three separate bargaining units.³ An election was conducted pursuant to a Stipulated Election Agreement on December 9, 1994. The Union was certified at all three locations on December 20, as no objections were filed.

By letter dated December 21, 1994, the Union requested Airborne's district manager Tate to bargain. Tate responded that Airborne had no ownership interest in EEI and the Union should deal with EEI. The Union renewed its request to bargain with Airborne on January 12, 1995. On January 18, Tate responded that Airborne was not a joint employer with EEI and the Union should leave Airborne out of the matter. Airborne did not respond to subsequent Union bargaining requests made on March 13 and May 19.

EEI and the Union engaged in nine bargaining sessions between March 7 and August 15, and in a tenth session on January 16, 1996.⁴ The parties reached tentative agreements on management rights, union security, recognition, no strike/lockout and other non-economic matters. According to the Union, whenever it sought to discuss economic proposals or Union access to the facilities, Andrulis stated that he could not agree to the proposals without Airborne's approval. Based on this conduct and Airborne's refusal to participate in bargaining, the Union filed the instant Section 8(a)(5) charges.

The Region initially concluded that EEI bargained in bad faith with the Union by its refusal to agree to Union economic proposals without Airborne's approval, since Airborne was not a joint employer with EEI. After EEI's counsel was advised of the Region's findings, and at the Region's suggestion, EEI sent the Union a letter on December 11, 1995, confirming the resumption of the negotiations on January 16; that EEI was not obligated to obtain Airborne's consent before accepting or rejecting any economic proposal, and that it was not EEI's intention to do so. The Regional Committee thereupon concluded that the December 11 letter resolved the bad faith bargaining finding against EEI, and

³ Appleton and DePere are combined into one unit.

⁴ The hiatus in bargaining between August 1995 and January 1996 was, in part, the result of the Union and EEI agreeing to hold bargaining in abeyance pending the Region's determination of the "joint employer" question.

was prepared to issue a merit dismissal letter. However, on January 16, 1996, Airborne notified EEI that the subcontract for Appleton/DePere was being canceled in 60 days, and no further bargaining has occurred.⁵

ACTION

We concluded that complaint should issue, absent settlement, alleging that Airborne is a joint employer of EEI's employees, and that by refusing to bargain with the Union representing these employees concerning wages, Airborne violated Section 8(a)(5) and (1).⁶

The Board has held that the question of joint employer status must be decided upon the totality of the facts of the particular case.⁷ Joint employer status exists when two separate entities share or codetermine matters governing essential terms and conditions of employment of a group of employees. A joint employer must meaningfully affect matters relating to employment such as hiring, firing, discipline, supervision and direction.⁸ Further, the language in a contract between two business entities is not conclusive evidence regarding joint employer status, as the Board looks to the "actual handling of day-to-day operations."⁹

⁵ The Union has filed a Section 8(a)(1) and (3) charge alleging that the contract cancellation was discriminatorily motivated. [FOIA Exemptions 2 and 5

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⁶ [FOIA Exemptions 2 and 5

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⁷ Cabot Corporation, 223 NLRB 1388 (1976).

⁸ The Greyhound Corporation, 153 NLRB 1488, 1495 (1965), *enfd.* 368 F.2d 778 (5th Cir. 1966); C.R. Adams Trucking, 262 NLRB 563, 566 (1982); NLRB v. Browning Ferris Industries, 691 F.2d 1117, 1123-1124 (3d Cir. 1982); Laerco Transportation, 269 NLRB 324, 325 (1984).

As to the element of wages, a joint employer relationship has been found where one entity exercised sole control over hiring and paying the wages of employees supplied to the other, which exercised sole control over assignment and supervision of the employees' work and workplace conditions.¹⁰ The Board has observed that wages are "...perhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the Act."¹¹ Thus, the Board stated that a repudiation of a contract's wage rate provision "amounts, as a practical matter, to the striking of a death blow to the contract as a whole...."¹² Therefore, since wages are such a significant term and condition of employment, an employer's *de facto* control of wages alone, in certain situations, can be sufficient to make it a joint employer.

In Capitol EMI Music, 311 NLRB 997, 998, n.7 (1993), the Board agreed with the ALJ's conclusion that Graham, which supplied temporary employees to subcontractors like Capitol, shared and co-determined essential employment conditions sufficient to make it the joint employer, with Capitol, of these temporary employees. "Thus, Graham negotiated the wage rates of its temporary employees assigned to Capitol." Id. at 998. The ALJ specifically noted that Graham paid all wages and statutory taxes, and that reimbursement from Capitol also included funds to cover Graham's overhead and operating expenses, "as well as Graham's profits." Id. at 1013. The ALJ implicitly found that compensation under Graham's various subcontracts fluctuated, and also differed from typical "cost-plus" contracts, since Graham and subcontractors like Capitol actively negotiated wage rates "only after reviewing the clients' facilities including the actual work areas and after developing an understanding of the type work to be performed." Id. at n.35.

⁹ Goodyear Tire & Rubber Co., 312 NLRB 674, 677 (1993) and cases discussed therein.

¹⁰ See Continental Winding Co., 305 NLRB 122, 123 (1991).

¹¹ Oak Cliff-Golman Baking Company, 207 NLRB 1063, 1064 (1973).

¹² Id.

On the other hand, an employer that merely pays a subcontractor on a "cost-plus" basis is not a joint employer of the subcontractor's employees. In Cabot Corp.,¹³ Cabot contracted with another company to perform maintenance work on a cost-plus basis during a strike, and the contract between Cabot and the other company specifically itemized employee wage rates. The Board recognized that such a contract provision raised the question of whether Cabot exercised control indicative of joint employer status, since it "could imply that these wage rates might have been negotiated between the contracting parties." However, since the rates in the subcontract were merely those already set forth in the subcontractor's agreement with the union and the two companies simply could have provided that Cabot would reimburse the subcontractor "for wages the latter was already paying elsewhere under its collective-bargaining agreement" without becoming joint employers, no such status was found.¹⁴ In Chesapeake Foods,¹⁵ Chesapeake was engaged in chicken-processing and contracted for chicken-catching services, for which it paid subcontractors based on the number of chickens delivered to its processing plants. One subcontractor's chicken catchers were represented by a union, which negotiated a collective-bargaining agreement. Earlier, Chesapeake had changed compensation methods from a per-coop of chickens to a per thousand of chickens basis, and had suggested to the subcontractor an approximate wage rate that the subcontractor should seek in negotiations with the union. The union asked Chesapeake to bargain over its subsequent unilateral decision to reduce by one-half the compensation it was paying the subcontractor.¹⁶ Chesapeake

¹³ 223 NLRB 1388 (1976).

¹⁴ Id. at 1389. See also Goodyear Tire & Rubber Co., 312 NLRB 674, 677-78 (1993) (subcontract setting forth wage reimbursement schedules, under which subcontractor paid drivers, along with a margin, is only cost-plus contract where party providing services is paid based on actual cost plus prearranged profit and not codetermination of wages).

¹⁵ 287 NLRB 405 (1987).

¹⁶ Chesapeake had asked the subcontractor to negotiate a reduction in the compensation rate set forth in the subcontract, but the subcontractor refused to discuss the matter.

refused and terminated the contract covering one of the subcontractor's several crews, causing their layoff by the subcontractor, because of the subcontractor's "contract rate, which is the highest in the industry, and your unwillingness to reduce your rate."¹⁷ The Board reversed the ALJ's finding that Chesapeake effectively controlled the catchers' wages through its control over the subcontractor's compensation, finding instead that Chesapeake was present at but never actually joined in contract negotiations between the union and the subcontractor, and only voiced its opinion to an employee that the subcontractor might cut wages. The Board further concluded that although the subcontractor solely worked for, and received compensation from, Chesapeake pursuant to a terminable-at-will contract, the portion of that compensation which was ultimately paid to the catchers as wages was determined by the subcontractor and the union in negotiating the collective-bargaining agreement. 287 NLRB at 407. Finally, the Board noted that if Chesapeake actually controlled the catchers' wages, it could have forced the subcontractor to accept the requested decrease in its, and thereby the subcontractor's employees', compensation under the subcontract but that, since Chesapeake was unable to do that, it obtained its desired economic relief by reducing the amount of work given to the subcontractor. Ibid.

In Cabot Corp. and Chesapeake, the subcontractor was always able to negotiate with the union for a contract because whatever its costs were, they would be paid by the general contractor under its cost-plus arrangement. Since it was not necessary to have the general contractor at the bargaining table to effectively negotiate a contract, a joint employer finding was unwarranted.¹⁸ Thus, where an employer supplying employees to another company has fixed costs, including wages either set unilaterally or negotiated

¹⁷ Id. at 406.

¹⁸ Accord: TLI, Inc., 271 NLRB 798, 799 (1984), enfd. 120 LRRM 2631 (3d Cir. 1985) (company leasing drivers not joint employer even though it made clear at negotiations between drivers' company and union that without transportation cost savings of certain amount, the lease agreement would be jeopardized and alternatives were being considered, since company leasing drivers did not demand specific reductions and completely left how savings would be worked out to the negotiating parties).

with a union, and is reimbursed by the other company based on those costs and a certain profit margin, then the supplying employer is considered to solely, rather than jointly, control employee wages. If, on the other hand, the two employers negotiate the amount of reimbursement, including the wage component, which the supplying employer receives, then the Board will find them to be joint employers. See Capitol EMI Music, above.

Here, in contrast to the cost-plus cases, and more similar to the situation in Capitol EMI Music, we conclude that Airborne and EEI effectively do negotiate over, and thereby co-determine, the wages of EEI drivers. EEI was established to perform business for Airborne, and Airborne continues to account for 99 percent of EEI's operations. Until 1993, the parties apparently operated on a cost-plus basis, but since Airborne changed the cartage agreement to Incremental Pricing Compensation, it has on many occasions paid EEI less than the rates in its cartage contract, as those rates are only a maximum. Andrulis estimates that EEI has been forced by Airborne's compensation system to renegotiate several times a year with Airborne about the compensation rates Airborne pays it, since otherwise Airborne can and does lower these rates at will. Although these compensation rates are supposedly based on EEI expenses, including wages, Airborne often dictates during negotiations levels of "acceptable" expenses. As set forth above, Airborne specifically set a maximum wage rate in determining EEI's expenses for operating a new terminal-to-terminal operation and made clear that only a certain level of reimbursement by Airborne based on those expenses was possible. Also, during negotiations regarding Airborne's lowering of cartage rates, Andrulis stated that Airborne has often informed EEI that the wages EEI pays its employees should be lower. Moreover, negotiations are almost inevitable when lower cartage rates would force EEI to choose between unacceptable options (operate at unsustainable losses or with lower wage rates), since the cartage contract does not allow EEI to refuse compensation changes made by Airborne, as the employer supplying chicken catchers in Chesapeake Foods was able to, and did. We further note that the outcome of negotiations here has depended on the relative strengths of the parties' bargaining positions at any given time. Thus, according to Andrulis, Airborne often can force EEI to accept lower cartage rates when EEI, as is normally the situation, cannot afford to go out of business by terminating its Airborne contract. On the other hand, when EEI threatened to cease providing services because it could not afford to operate on

what Airborne was paying, at times like holiday seasons when Airborne could not afford an interruption or decrease in its current subcontractors' services, Airborne raised the compensation rate it paid EEI twice in 1995, and advanced EEI a substantial sum on future services so that EEI could pay insurance premiums and, in effect, stay in business.

Thus, Airborne's change in and negotiations with EEI over the compensation rates directly affected EEI's continuing in business in 1995, and clearly exhibited conduct inconsistent with a normal cost-plus contractual arrangement. Moreover, since Airborne changed from a cost-plus basis for reimbursing EEI to its "Incremental Pricing" system in 1993, EEI is never quite sure when a rate change will necessitate deviations from any agreed-upon wages and benefits for its represented employees. It is significant that EEI bargained about other non-economic items over which it admittedly had control, and only refused to bargain about wages. Thus, it asserted that, as a practical matter, it could not set a wage scale in a contract without Airborne's input because of Airborne's practice under the cartage agreement. Since EEI could not negotiate a wage rate without knowing what Airborne's compensation to EEI would be, and since Airborne often changed and negotiated with EEI about this compensation rate while making negative comments about the level of EEI wages, we conclude that Airborne controlled wages of EEI employees by controlling EEI's ability to set wages in a collective-bargaining agreement and therefore, as a joint employer, was obligated to bargain with the Union over wages.¹⁹

¹⁹ Although arguably insufficient by themselves for a finding that Airborne also co-determined work assignment and direction of EEI employees, we further note that Airborne's terminal manager at least occasionally told EEI employees when they had to wait for packages and when to deliver packages, in a manner indicating that EEI does not solely control the sorting operations or delivery schedules of the drivers. Further, according to Andrulis, Airborne apparently directs the loading and unloading of packages on and from aircraft, and has directed EEI that certain individuals should be banned from Airborne operations.
[FOIA Exemptions 2 and 5]

Accordingly, the Region should issue complaint, absent settlement, alleging that Airborne is a joint employer of the EEI employees and that by refusing to bargain with the Union over wages, Airborne violated Section 8(a)(5).

B.J.K.