TLI, Incorporated and Crown Zellerbach Corporation *and* General Teamsters Local Union No. 326 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 4-CA-13033

31 July 1984

DECISION AND ORDER

By Chairman Dotson and Members Hunter and Dennis

On 9 December 1983 Administrative Law Judge James L. Rose issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed a brief in answer to the Respondents' exceptions, and the Charging Party filed cross-exceptions and a supporting memorandum, and a brief in response to the Respondents' exceptions.[1]

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

The 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,[2] and conclusions as modified, and to adopt the recommended Order as modified.

The judge found that Respondent Crown Zellerbach (Crown) was a joint employer of the drivers leased to it by Respondent TLI, and thus was obligated with TLI to restore to the status quo ante those terms and conditions of employment that he found were unlawfully unilaterally changed. In addition, the judge ordered that Crown and TLI together must meet and bargain with the Union.

Crown filed exceptions to the judge's decision, contending, among other things, that the judge did not apply the appropriate standard for determining Crown's joint employer status and that, under the correct standard, Crown cannot be found to be a joint employer. We disagree with Crown's assertion that the judge applied an improper standard; however, after considering the evidence, we decline to adopt the judge's conclusion that Crown was a joint employer.

Crown contends that the analysis to be used in making joint employer determinations is that set out in *Parklane Hosiery*.[3] The four factors considered by the Board in *Parklane* were: (1) functional interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. Crown argues that, inter alia, because Crown and TLI have neither common management nor common ownership, they cannot be considered joint employers.

We find that the judge was quite correct in concluding that *Parklane* is irrelevant for determining joint employer status, and that the case applies only when deciding whether two separate companies constitute a single enterprise. As noted by the judge, the appropriate standard for determining joint employer status was recognized by the Third Circuit in *NLRB v. Browning-Ferris Industries*.[4] There the court found that, where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act. Further, we find that to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984).

In finding that Crown was a joint employer with TLI, the judge focused on several aspects of their relationship. The Crown/TLI lease agreement provides that Crown "will solely and exclusively be responsible for maintaining operational control, direction and supervision" over the drivers leased to it, and the judge found that Crown, in fact, exercised this authority. Drivers report daily to the Crown facility for instructions on deliveries, and return their trucks there when they are finished. Mechanical or other problems on the road are reported to Crown rather than TLI. When a driver is required to work during his vacation, he is notified by the Crown foreman. All drivers' logs and records are kept by Crown, and are submitted to TLI for payroll purposes. The drivers work only for Crown, and there has never been a transfer of a driver to another TLI job.

The judge further found that wages and other economic benefits were almost totally under Crown's control, and therefore Crown affected the principal terms and conditions of employment. The judge based this finding on Crown's presence at both bargaining sessions between TLI and the

[1] The Charging Party's motion to strike Respondent TLI's exceptions is denied. Although the exceptions contain no citations of authority and no supporting brief was filed by TLI, nonetheless, references in the exceptions to the judge's decision and the record are sufficient to indicate the findings and conclusions to which TLI is excepting.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] 203 NLRB 597, amended 207 NLRB 991 (1973).

[4] 691 F.2d 1117 (3d Cir. 1982).

Union, where Crown representative Struthers outlined Crown's economic position and its need to cut labor costs substantially in order to remain competitive in its business. The judge indicated that Crown dictated the maximum acceptable package TLI could negotiate and still keep Crown as its customer, and concluded that Crown was a joint employer.

We disagree. Although Crown may have exercised some control over the drivers, Crown did not affect the terms and conditions of employment to such a degree that it may be deemed a joint employer. The Crown foreman instructs the drivers as to which deliveries are to be made on a given day; however, the drivers themselves select their own assignments, on a seniority basis.[5] The record indicates that Crown neither hires nor fires the drivers and, contrary to the judge's finding, Crown does not discipline the employees. When a driver engages in conduct adverse to Crown's operation, Crown supplies TLI, not the employee, with an "incident report" whereupon a TLI representative investigates. Disciplinary notices, or necessary actions, are issued by TLI. In addition, although accidents on the road are reported to Crown, it is TLI which investigates and determines whether or nor the accident was preventable and whether further action is necessary. Our dissenting colleague would find that Crown's participation in the daily operational activities of the drivers constitutes sufficient control over terms and conditions of employment to establish that Crown is a joint employer with TLI. We find, however, that the supervision and direction exercised by Crown on a day-to-day basis is both limited and routine, and considered with its lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint employer finding. See *Laerco*, supra.

We further reject the judge's conclusion that Crown controlled the economics of the relationship and therefore determined the terms and conditions of employment. Although Struthers attended both bargaining sessions and outlined his company's position, there is no evidence that he demanded specific reductions or that he made particular proposals. He did make clear that without transportation cost savings of approximately $200,000 the lease agreement with TLI was in jeopardy and that alternate transportation arrangements were being considered. The specific savings, however, were left entirely to TLI and the Union to work out. Thus, it cannot be said that Crown "shared or codetermined" those matters governing the essential terms and conditions of employment to an extent that it may be found to be a joint employer.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, TLI, Incorporated, Newark, Delaware, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

1. Delete all references to Crown Zellerbach Corporation from the Order's provisions.

2. Substitute the attached notice for that of the administrative law judge.

MEMBER DENNIS, concurring in part and dissenting in part.

I agree with my colleagues that Respondent TLI violated Section 8(a)(5), but I cannot agree with their finding that Respondent Crown Zellerbach is not a joint employer of the drivers with TLI. Crown's lease agreement with TLI provides that Crown "will solely and exclusively be responsible for maintaining operational control, direction and supervision over said drivers . . . including, but not being limited to, scheduling and dispatching of the drivers, routing instructions, loading and unloading procedures, and all other matters relating to day-to-day private carriage operation of Crown." As the judge found, not only does Crown have the authority under the lease to control the manner and means by which drivers perform, it in fact does so. For example, drivers report daily to a Crown foreman to get their instructions concerning which deliveries are available; when drivers are unable to make deliveries as scheduled, they report to a Crown foreman; a Crown foreman contacts a vacationing driver when it is necessary for the driver to work; and Crown maintains drivers' logs and records.

In short, Crown actually exercises the daily operational control it reserved for itself under the lease agreement. I would find that Crown maintains sufficient control over terms and conditions of drivers' employment to constitute a joint employer with TLI, and that it must therefore remedy the 8(a)(5) violations.

[5] Seniority is determined by how long a driver has worked at the Crown facility.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with General Teamsters Local Union No. 326 as the exclusive bargaining representative of employees in the following appropriate bargaining unit:

> All truckdrivers employed at Crown Zellerbach Corporation, Newark, Delaware, plant excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally implement collective-bargaining proposals or tentative agreements or other changes in terms and conditions of employment absent the valid, preexisting impasse in bargaining or the express consent of the Union.

WE WILL NOT bypass the Union and bargain directly with our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment and on request embody in a signed agreement any final understanding reached by the parties.

WE WILL restore to all employees in the above-described bargaining unit holiday pay at the rate of 10 hours per holiday and the appropriate pay for the drop and hook work and WE WILL make whole all employees for any losses they may have suffered as a result of the unilateral change in the method of paying holiday pay and drop and hook work pay.

TLI, INCORPORATED

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on July 6 and 7, 1983, on the General Counsel's complaint[1] alleging the Respondents to be joint employers and to have engaged in violations of Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 151, et seq., by: (a) on or about May 21, 1982,[2] bypassing the Charging Party and dealing directly with employees in the bargaining unit, (b) on or about May 21 granting employees two additional paid holidays and quarter of an hour pay for drop-hook work, and (c) refusing to meet and bargain with the Charging Party since May 27.

In addition to seeking remedies for the violations alleged, at the close of the hearing counsel for the Charging Party stated that he also seeks restoration of the status quo ante which would include backpay to all individuals in the bargaining unit of $2.56 per hour since May 24. In his brief the General Counsel also proposed such a remedy. While the evidence does show that commencing May 24 the wage rate of the bargaining unit employees was reduced from $12.81 per hour to $10.25 per hour, this was never alleged by the General Counsel to have been violative of the Act, nor was such an allegation set forth in the charge.

The Respondents appeared separately and denied that they are joint employers. Each specifically denies that it has engaged in any activity violative of the Act. In addition, each Respondent contends that implementation of the changes was following good-faith negotiations and after reaching impasse. Finally, each Respondent contends that a full restoration remedy would be inappropriate even if the violations alleged are found.

On the record as a whole, including my observation of witnesses, briefs and arguments of counsel, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Crown Zellerbach Corporation (Crown) is a fully integrated paper products company engaged at Newark, Delaware, in the manufacture and distribution of corrugated boxes. In the conduct of its business, the Respondent annually sells and delivers to points outside the State of Delaware goods and products valued in the excess of $50,000. It is admitted, and I find, that Crown is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

TLI Incorporated (TLI) is a Missouri corporation engaged throughout the United States in providing labor, specifically truckdrivers, to various firms, including Crown at its Newark facility.

In the conduct of its business, TLI annually receives more than $50,000 for services performed outside the State of Missouri. It is admitted, and I find, that TLI is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7).

II. THE LABOR ORGANIZATION INVOLVED

General Teamsters Local No. 326, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union or the Charging

[1] The charge was filed on June 21, 1982, and the complaint issued on February 28, 1983.

[2] All dates are in 1982 unless otherwise indicated.

Party) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The material facts leading to this dispute are largely undisputed and may be summarized as follows.

For a number of years Crown has functioned as a private carrier in the delivery of its furnished product. Under the applicable rules and regulations of the Interstate Commerce Commission, a private carrier is one which is authorized to deliver its own product to customers. This is contrasted with contract carrier and common carrier. Contract carriers are licensed to haul only for specific businesses under contract. Common carriers have a general license to haul commodities for anyone. While there are other distinctions, ramifications, and rules involved, these general distinctions suffice for purposes of this matter.

As a private carrier, Crown is authorized to transport its product to various customers and to backhaul materials to be used in its Newark facility, but it is not authorized to haul other materials or to do hauling for other companies. In connection with this private carrier operation, Crown leases tractors and trailers from a truck leasing concern (at the material time herein one Newell Leasing Company of Akron, Ohio) and for a number of years has also leased the drivers.

TLI is a nationwide company engaged in the business of furnishing truckdrivers to companies such as Crown. Basically, under its agreement with Crown, TLI secures the services of drivers (all of whom worked for TLI's predecessor in hauling Crown products from the Newark facility), arranges for the drivers to be paid, pursuant to data furnished each week by Crown, and negotiates collective-bargaining agreements with the representative of the drivers in the appropriate bargaining unit.

As testified to by Harry Struthers, Crown's current manager at the Newark facility, Crown leases the drivers in order to have TLI's expertise in dealing with labor-management relations in the trucking industry, as well as to provide a buffer between itself and the drivers in the event of labor disputes. For this service, Crown pays TLI $23 per week per driver in addition to all costs of employment of the drivers including health and welfare, pension, fringe benefits, actual wages, mileage, workmen's compensation, and the like.

In 1979 TLI became Crown's leasor of drivers assuming the business that had been provided by a company called Country Wide. TLI hired all of Country Wide's drivers, recognized the Union as the bargaining representative for those drivers, and signed the existing National Master Freight Agreement (NMFA) along with an addendum thereto.

In 1981 Crown undertook a study of its delivery costs and concluded that a substantial reduction would have to be made in order to stay competitive in the industry. It also concluded that there were available alternatives for delivery of its product, including the use of common carriers. Thus, Crown advised TLI that in order for TLI to continue as a leasor of drivers, it would have to reach an agreement with the Union to reduce labor costs. This matter was broached to the Union's then chief executive officer by TLI's director of labor relations, Charles R. Jones. The Union was not enthusiastic.

Then in late 1981 the Union notified TLI of the forthcoming expiration (March 31) of the NMFA along with the addendum, proposing to reopen the contracts for negotiation. In reponse, TLI wrote the Union that it was withdrawing from the multiemployer bargaining, and wished to negotiate a successor agreement individually.

Although there had been some preliminary telephone discussions between representatives of TLI and representatives of the Union, the parties did not meet until March 29. Struthers also attended this first meeting and outlined Crown's economic position, stating that substantial relief in labor costs was necessary.

Jones outlined his computation of the labor costs which included an average gross pay for each driver of $33,850 per year plus benefits (workmen's compensation insurance, payroll taxes, health welfare and pension) of $10,240 or a total-per-employee cost of approximately $44,000 annually for the nine drivers.

William Zeigler, the Union's chief spokesman at the time, stated that the Union understood Crown's position and therefore TLI's. Zeigler stated that the Union was willing to freeze wages and would look into such nonproductive items as sick leave and the like. The meeting ended, however, with no proposals or counterproposals having been submitted by either party. Apparently TLI did agree to submit a proposal to the Union.

On April 12, Jones sent Zeigler a letter outlining the general nature of their discussion on March 29 and attached a proposal which in material respects provided for a beginning wage rate of $10 per hour (under the existing collective-bargaining agreement employees were receiving $12.81 per hour), mileage of 24 cents, six holidays to be paid for 8 hours (employees were receiving 12 holidays at 10 hours), the elimination of sick days, a maximum of 2 weeks' vacation, 2 days' funeral leave and the elimination of drops and hooks (employees were receiving a minimum of one-half hour for each drop or hook in addition to other compensation depending on the nature of the drop or hook).[3] And TLI proposed to keep the current level of payments for health and welfare and pension.

Zeigler wrote Jones stating, among other things, that proposal was "totally unacceptable." In subsequent phone conversations, however, Zeigler did advise Jones that the Union would be willing to freeze wages and reduce the amount of nonproductive items as he indicated earlier.

On May 5, Jones wrote again and attached to his letter another proposal which in material respects increased the hourly wage rate to $10.25 per hour to start ($10.65 and $11.05 for the second and third years) with mileage of .247 (.255 and .265), 10 holidays at 8 hours, the elimination of sick days, a vacation schedule from 1 to 5 weeks depending on seniority, 2 days' funeral leave, the elimi-

[3] A drop is the disconnection of a trailer from a tractor, and a hook is connecting a trailer to a tractor.

nation of drops and hooks, and agreement to keep the current level of health and welfare and pension payments.

The parties then met on May 21, again with Struthers present, to outline Crown's position that substantial labor savings were required. In fact, Crown had made the determination that unless the Union would agree to such savings (presumably of the magnitude outlined in TLI's proposal of May 5) Crown would sever relations with TLI and Newell Trucking, and have its product hauled by a common carrier. Although such action would require at least 30 days' written notice by certified mail to TLI, Jones testified that he had been instructed by his superiors that unless TLI was able to reach a satisfactory agreement with the Union, TLI would waive the notice from Crown. None of this was told to the Union before, during, or after the May 21 meeting.

In fact, Crown had decided to commence using a common carrier on Monday, May 24, unless a satisfactory agreement was reached on May 21, but the Union was not so informed. Neither Struthers nor Jones bothered to notify the Union at the negotiating session on May 21, or subsequently that date, that absent an agreement there would be no work for employees in bargaining unit. In short, the parties were negotiating under a deadline known to Crown and TLI but not to the Union.

According to Jones' notes of May 21 meeting, the Union made a counterproposal by writing on TLI's May 5 proposal. Thus the Union's counterproposed wages of $12.81 for the term of the contract, elimination of mileage, 12 holidays at 8 hours, vacation as in TLI's proposal, funeral leave at 3 days, elimination of drops and hooks, and TLI to continue health and welfare and pension payments. There was no union counterproposal on sick leave.

Thus according to Jones' notes, which are generally consistent with Zeigler's testimony, TLI and the Union were in disagreement on the wage rate, holidays, and funeral leave. TLI proposed $10.25 per hour ($10.65 and $11.05) along with mileage, whereas the Union proposed $12.81 per hour for the term of the contract and no mileage. TLI proposed 10 holidays and the Union proposed 12. The union wanted 3 days for funeral leave. The union accepted TLI's proposed deletion of pay for drops and hooks.

At this session, Jones testified that Roland Blansfield, the Union's steward and a driver for Crown, stated that the drivers would like one-quarter-hour drops and hooks and Jones made a note to that effect. Blansfield testified that he believes he did not speak at this meeting.

In any event, there is no indication in Jones' notes that TLI offered to add one-quarter hour for drops and hooks. Perhaps Blansfield mentioned that the drivers wanted pay for drops and hooks, but such was not an item about which the Union and TLI had any disagreement. According to Jones' notes, the Union's counterproposal included the elimination of pay for drops and hooks. At best, discussion on this item was minimal for it was not in dispute.

After the meeting, company negotiators returned to the Crown facility and, while Struthers was making arrangements to have his boxes delivered by a common carrier, Jones was in consultation both with his home office and Blansfield.

Jones asked Blansfield whether he thought the men would work for the Company's proposal and Blansfield told him, I conclude, that he would and he thought they would if the Company agreed to 12 holidays and a quarter hour for drops and hooks. Jones left and returned, telling Blainsfield, "You got it."

Blansfield than asked Jones for the Company's agreement to be put in writing. This was done and sent to the Union on May 25. The change in wages and benefits implemented by TLI on May 24 was its May 5 proposal to the Union plus two additional holidays and a quarter hour for drops and hooks.

There was then a letter dated May 25 from Jones to Zeigler stating that the parties had reached an "impasse" on May 21 and accordingly the Company implemented its final offer effective May 24. Zeigler replied stating that the parties had not, in fact, reached an impasse in negotiations and demanded further bargaining. He subsequently wrote TLI demanding, among other things, that the Company meet and bargain with the Union. Neither TLI nor Crown has responded to the Union's demands for bargaining and at the present time, the TLI drivers for Crown are being paid in accordance with the wage and benefit package implemented on May 24.

B. *Analysis and Concluding Findings*

1. The joint employer issue

The complaint alleges that Crown and TLI are joint employers and that Crown therefore is liable, along with TLI, for the alleged unfair labor practices. Crown and TLI both contend that they are not joint employers.

Specifically, in its brief, Crown contends that the criteria for determining whether "two nominally separate entities can be treated as joint employers (or a single employer)" are well established and are set forth by the Board in *Parklane Hosiery Co.*, 203 NLRB 597 (1973). *Parklane*, however, concerned whether two companies were a single employer. This, as the Board and the Third Circuit have recognized, is a different issue from whether two companies are joint employers.

Thus in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), the court held that the appropriate standard for determining joint-employer status involves examination of facts relating to control over the work of employees. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). Analysis of four factors approved by the Supreme Court in *Radio Union Television Broadcast Technicians Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965) (interrelation of operations, centralized control of labor relations, common management, and common ownership) is irrelevant because such tend to prove whether two separate companies constitute a single enterprise, and this is a distinct concept from joint employer.

Here the question is not whether Crown and TLI are a single employer. The question is whether Crown maintained sufficient control over the employment of the individuals doing the work as to conclude that it has joint control with TLI. If so, it is a joint employer for the

purposes of the Act. As the Third Circuit noted, the concept of joint employer recognizes that two distinct business entities may in fact *share* or codetermine those matters governing the essential terms and conditions of employment." (691 F.2d at 1124.)

The work here (delivery of Crown's product) is being done pursuant to Crown's determination to operate as a private carrier. Thus, under the regulations of the Interstate Commerce Commission, Crown is required to keep drivers' logs, which it does through the drivers; have certain licenses; ensure that the drivers do not exceed the maximum allowable driving time within a 24-hour period and so forth. In short, it is Crown, and not TLI which is responsible as the carrier. Crown, of course, does not have to operate as a private carrier. But it chose to do so, and thereby chose to accept whatever benefits and liabilities are incident to operating as such.

Under the terms of the Crown/TLI lease:

> Crown at all times will solely and exclusively be responsible for maintaining operational control, direction and supervision over said drivers, such control, direction, and supervision, including, but not being limited to, scheduling and dispatching of the drivers, routing instructions, loading and unloading procedures, and all other matters relating to day-to-day private carriage operation of Crown.

Not only did Crown have the authority under the lease agreement to control the manner and means by which the drivers performed their duties, but in fact did so. The evidence reveals that on a day-to-day basis, the drivers would report to an employee of Crown (referred to by the Union as dispatcher and referred to by Crown as the shipping foreman) to get their instructions concerning which deliveries were available each particular day. Also, when drivers had mechanical or other problems and were unable to make deliveries as scheduled, they would report to the Crown foreman. Only on rare occasions was a representative of TLI physically present at the Crown facility. Day-to-day control of the driver's work was in Crown.

The drivers drive trucks with Crown's logo on them. They report to work at the Crown facility and, when their deliveries are finished, return their trucks to Newark. In the event that they are required to work during their vacation they are contacted by the Crown foreman. On those occasions when there is a question concerning the proper pay an employee should have received, the employee or the union steward is referred by TLI to the Crown account clerk. All of the drivers' records for purposes of payment are kept by Crown and are submitted to TLI simply for the administrative task of making out the appropriate paycheck.

Crown's management writes memos to the drivers concerning such matters as how to perform their duties, safety, notification of days off, and the like. When an employee does something that is considered to be a dereliction of duties, Crown notifies the employee, with a copy to TLI.

Though employed by TLI, the drivers work only for Crown. There has never been a transfer of a driver to another TLI job.

Finally, the principal terms and conditions of employment (wages and other economic benefits) are almost totally under the control of Crown. Crown dictated to TLI how much savings it required in order to continue operation as a private carrier with leased drivers and this was relayed by TLI to the Union during the course of contract negotiations. Indeed Struthers was present and made the economic presentation to the Union at the only two bargaining sessions the parties had. TLI's interest in the outcome of bargaining concerned only keeping Crown as a customer (at $276 per year per driver). All wages and benefits were, in fact, paid by Crown with TLI simply acting as a conduit.

In short, by contract Crown maintained for itself the daily operational control of the drivers and, in fact, exercised such control. It dictated the maximum acceptable economic package TLI could negotiate and still keep Crown's business. Under these circumstances it is clear, and I find, that Crown shared with TLI the authority to make decisions regarding essential terms and conditions of employment and thus was at all material times a joint employer with TLI.

2. The alleged violations

a. *A direct dealing with employees*

The General Counsel contends that on the afternoon of May 21, following the negotiation session, Jones approached Blansfield and asked if the drivers would work for the Company's offer, to which Blansfield responded, in effect, that he thought they would if the Company would give 12 holidays and a quarter hour for drops and hooks. Such is alleged to be individual bargaining bypassing the Union.

TLI argues that 12 holidays and a quarter hour for drops and hooks were part of its final proposal to the Union, thus Jones' discussion with Blansfield did not amount to individual bargaining. Jones testified that when in negotiations the question of 12 holidays was raised by the Union he stated, "If that's what it takes to get a contract O.K.," and that he made a similar statement when Blansfield raised the matter of a quarter hour for drops and hooks.

I do not credit Jones' testimony in this regard. Although I found him, as well as all witnesses in this matter, to be generally credible, he was testifying to events which took place more than a year prior to the hearing. His notes and his memory are inconsistent on this point.

The Company's proposal from which the parties were working was dated May 5. According to Jones' testimony and notes, the Union's counterproposal was notations on the paper, which included "12.81—*three years*" near wages; "12 to *coincide*" next to holidays and by the paragraph proposing elimination of drops and hooks, "O.K."

There is no indication, either in Jones' notes or the document submitted as being the Company's proposal and the Union's counter, that the 12 holidays and the

quarter hour for drops and hooks had been agreed to by TLI. Indeed, this evidence shows that the union had agreed to eliminate drops and hooks entirely. Other than some comment Blansfield may have made, pay for drops and hooks was not an item for discussion at the time. No doubt, the Union's agreement to eliminate drops and hooks rested in part on TLI's acceptance of its proposal to keep the wage rate in place. But there is simply no significant credible evidence showing that a quarter hour for drops and hooks was part of TLI's proposal—ever.

Similary, while Jones may have indicated during the negotiation session that he would agree to continue 12 holidays, there is no further indication in any of the documentary evidence submitted by TLI that such was ever a part of any company proposal, final or otherwise.

In short, I conclude that when Jones had the discussion with Blansfield o the afternoon of May 21 concerning the wage rate, holidays, and drops and hooks, Jones did negotiate with Blansfield.

While Blansfield was a leader among the bargaining unit and was the shop steward, he certainly had not been vested with the authority to negotiate an agreement. Throughout this matter Jones had dealt with Zeigler as the Union's spokesman and, just prior to his discussion with Blansfield, Jones talked to Zeigler. Jones knew that Blansfield had no authority to negotiate on his own.

I therefore conclude when Jones asked Blansfield if the drivers would go to work for the Company's proposal and when Jones agreed to increase its economic package pursuant to Blansfield's statement, Jones negotiated with an employee in derogation of the Union's authority as the employees' bargaining representative. The Respondent accordingly violated Section 8(a)(5) of the Act. *Kaiser-Permanent Medical Care Program*, 248 NLRB 147 (1980).

b. *Granting additional benefits*

It is alleged that without prior notice to the Union or affording the Union an opportunity to bargain about the items discussed between Jones and Blansfield, the Respondents unilaterally granted two additional paid holidays and a quarter hour for drops and hooks. In reality, however, the employees were already receiving 12 holidays. While the agreement to pay 12 holidays was in excess of the Respondents' contract proposal, such was not an additional benefit. However, the proposal on holidays, and presumably the implementation, was to pay employees for 8 hours as opposed to the 10 hours they had been receiving. Thus, implementation of the holiday provision amounted to a reduction in benefits to employees.

Similarly, agreeing to pay employees a quarter hour for drops and hooks was more than the company proposal, but was, in reality, a reduction from the status quo. Drivers had been receiving a minimum of one-half hour for drops and hooks and in some situations an hour.

Although implementation of the holiday and drops and hooks provisions were reductions rather than grants, it is clear that all the facts concerning this issue were presented by the parties. Indeed, TLI and Crown do not defend on grounds that by implementing these two matters, there was reduction rather than an increase. Rather, it is contended that these two items were specifically contained in TLI's "final proposal" and since the parties had reached an "impasse" at the meeting of May 21, TLI was at liberty to implement these items.

I reject the Respondents' defense for two reasons. First, there is insubstantial evidence to support the contention that either the 12 holidays or the quarter hour for drops and hooks was part of TLI's proposal to the Union. Second, even if Jones did tentatively agree to these proposals, there is insubstantial evidence in this record to support the contention that the parties had reached an impasse.

It is well established that (*Marriott Corp.*, 258 NLRB 755 fn. 2 (1981)):

> Absent a valid, preexisting impasse, or the consent of the union, an employer, during the course of contract negotiations, is not free to implement proposed changes or those tentatively agreed to by the parties.

An impasse in negotiations is said to exist when after good-faith bargaining, the parties are unable to reach an agreement and from the circumstances it appears unlikely that further bargaining will be productive. See *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enfd. sub nom. *AFTRA, Kansas City Local v. NLRB.*, 395 F.2d 622 (D.C. Cir. 1968). Obviously this is a plastic concept dependent on the mental state of the parties which, in turn, is shown by the facts existing at the particular time a party claims impasse. Thus to determine whether or not an impasse existed at a particular moment permitting an employer, for instance, to implement proposed changes depends on evaluation of many objective factors. These include how negotiations had progressed to that point; how far apart the parties were on various significant issues; the number of negotiation sessions the parties had; the intensity of their positions; and the like. In the case none of the facts that normally establish existence of an impasse are present.

The parties met twice but only at the May 21 meeting were specific proposals discussed. From the history of these brief negotiations it is obvious that the parties had not yet reached a point where no further movement was likely. Thus on April 12, TLI sent the Union a proposed wage and benefit package which the Union found "totally unacceptable." TLI then sent a revised proposal increasing the wage, holiday, and vacation offer. This proposal was the focal point of discussion on May 21. And Jones claims that he increased his offer at the meeting by adding two holidays and a quarter hour for drops and hooks. Though I find that the increase was not offered until following the meeting, in either case, TLI's movement precludes finding impasse. As the Third Circuit has noted in *Saunders House v. NLRB*, 719 F.2d 683, 688 (3d Cir. 1983):

> A concession by one party on a significant issue in dispute precludes a finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason to believe that

further bargaining might produce additional movement.

The principal issue in dispute was economic. Crown and, therefore, TLI demanded substantial concessions, which the Union was willing to agree to in principle. What form the concessions would take was the matter under discussion. The Union had agreed to elimination of drops and hooks as part of its ecomonic proposal. Then TLI increased its offer by agreeing to one-quarter hour for drops and hooks. There is no indication how a quarter hour for drops and hooks relates to wages but there must be some relation. Pay for drops and hooks means something to employees in terms of their earnings, and to the Respondent in terms of labor costs.

It may very well have been that TLI felt under pressure to conclude negotiations quickly, lest Crown sever its lease with TLI. However, this possibility was not communicated to the Union on May 21. Had it been, the parties may very well have reached an agreement on that date. In any event, on May 21, TLI made concessions in its economic proposal. To accept Jones' statement that the parties had reached an impasse is to accept as a fact his self-serving declaration in the face of substantial evidence to the contrary.

I therefore conclude that there was no preexisting impasse when Jones agreed with Blansfield to keep the holidays at 12, though reducing the hours paid from 10 to 8, and to pay a quarter hour for drops and hooks. By implementing these changes from the terms of employment under which the drivers were working, TLI and Crown, I conclude, violated Section 8(a)(5) of the Act.

c. *Refusing to meet and bargain*

It is unquestionably a company's obligation to meet and bargain with the representative of its employees in an appropriate bargaining unit. It is uncontested that by letter of May 27 Zeigler requested Jones to meet and bargain. Jones' June 15 letter in response ignored this request. Why the Respondents have not met with the Union on request is not explained in this record or on brief. In any event, there is no question concerning TLI's responsibility (and that of Crown as a joint employer) or the Union's continued representation of employees in the appropriate bargaining unit, even if the May 24 change in wages and benefits was lawful. Accordingly their failure to meet on request has been a violation of Section 8(a)(5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The unfair labor practices found above occurring in connection with the businesses of Crown and TLI described above have a substantial impact upon trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that TLI as an employer and Crown as a joint employer have committed certain unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including restoration to the status quo ante of those terms and conditions of employment which I have found were unlawfully changed, with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).

At the close of the hearing and on brief, counsel for the Union further contends that TLI and Crown ought to be ordered to restore the wage rate of $12.81 per hour and make whole all those employees in the bargaining unit whose wages were reduced effective May 24. The General Counsel makes the same request. Neither explains the basis on which a remedy may be ordered for commission of an unfair labor practice neither alleged nor litigated—changing the employees wage rate during negotiations.

When TLI implemented change in terms and conditions of employment effective May 24, it did so absent a preexisting impasse. But the change in wages was not alleged a violation of the Act. There is no allegation in the complaint (or the charge) to this effect nor did the General Counsel seek to amend the complaint to allege that reducing the employees' wage rate from $12.81 to $10.25 per hour on May 24 was unlawful. Even now, neither the General Counsel nor the Charging Party contend that reducing the wage rate was a violation of the Act. Rather, both suggest that to remedy those violations alleged, the status quo ante should be restored.

The Respondents object, relying on *Camay Drilling Co.*, 254 NLRB 239 (1981). There the General Counsel argued before the Board that unilateral implementation of a final wage proposal should be found violative of Section 8(a)(5), claiming that the matter was fully litigated. The Board did not agree that it had been sufficiently litigated and stated, "Moreover, to determine an issue of this magnitude when it is raised for the first time as a post-hearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense." 254 NLRB at 240 fn. 9.

No doubt the Board may find and remedy a violation not alleged where such has been fully litigated. See *Conair Corp.*, 261 NLRB 1189 (1982) (Chairman Van de Water and Member Hunter dissenting, inter alia, on this point), enf. denied on this point 721 F.2d 1355 (D.C. Cir. 1983). But, as the court noted, to grant a posttrial amendment to the complaint requires at least a finding that the affected party impliedly consented to litigating the issue.

There is no indication that either Respondent knew the wage reduction was being litigated, or consented to doing so. The Respondents went to trial assuming their exposure in the event the General Counsel prevailed to be one thing. The now requested remedy increases that exposure by many thousands of dollars. It is therefore reasonable to assume that with notice, the matter would have been tried differently—or perhaps settled.

Further, as the court noted in *Conair*, consent should not be inferred simply because the affected party offered evidence bearing on the issue. Here, for instance, the claim of impasse is material to the violations alleged and would also be material to the broader issue of altering wages and other terms of employment. By defending the allegations in the complaint the Respondents did not necessarily consent to litigating the wage reduction matter.

Given that the complaint was narrowly drafted, and absent any indication during the hearing that the issues alleged would be expanded (except for counsel's statement at the close that he was seeking a broad remedy), I conclude that the Respondents did not have notice of, or consent to, litigation of the wage reduction issue.

It is arguable that *Camay* is inapposite because Board's holding dealt with finding, or not, a substantive violation. And here the issue is one of mere remedy. Such a distinction, however, ignores the fundamental question—whether in fairness it can be said that the Respondents had sufficient notice of this matter to prepare an adequate defense.

In *Rushton & Mercier Woodworking Co.*, 203 NLRB 123 (1973), the respondent violated Section 8(a)(3) in laying off bargaining unit employees. Pursuant to its unlawful plan the respondent also laid off nonunit employees. In order to remedy the effects of discrimination the administrative law judge recommended reinstatement (and make whole) for both groups even though the layoff of nonunit employees had not been alleged as a violation.

The Board rejected this remedy: "These employees were not alleged as discriminatees, and, therefore, it would be a violation of due process to now find that they were discharged in violation of the Act and therefore entitled to reinstatement." 203 NLRB at 126.

Similarly in *Consolidated Casinos Corp.*, 266 NLRB 988 (1983), the charging party excepted to the failure of the administrative law judge to include in his recommended remedy three individuals who had not been named in the complaint. The Board said: "Accordingly, consonant with fundamental concepts of due process, the Union's exceptions must be denied." 266 NLRB at 988.

Therefore I decline to recommend restitution to the status quo ante for the reduction in wage rate or other implemented changes not alleged to have been unfair labor practices. However, since I have found the reduction in the holiday pay and the drop-hook work was unlawful and my findings are fairly within allegations of the complaint, I shall order restitution of these conditions of employment along with backpay until such time as the Respondents bargain to a valid preexisting impasse or receives the consent of the Union before implementing these changes. See *Carpenter Sprinkler Corp.*, 238 NLRB 974 (1978).

On these findings of fact and conclusions of law and the entire record, I issue the following recommended[4]

[4] 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.

ORDER

The Respondents, TLI Incorporated and Crown Zellerbach Corporation, jointly, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet and bargain with the Union as the exclusive bargaining representative of the unit of employees in the appropriate bargaining unit. The appropriate unit for collective bargaining is:

> All truckdrivers employed at Crown Zellerbach's Newark, Delaware, plant excluding all other employees, guards, and supervisors as define in the Act.

(b) Implementing proposed modifications of holiday pay or drop-hook work without bargaining to a valid preexisting impasse or the express consent of the Union.

(c) Bypassing the Union and negotiating directly with employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Restore to all employees in the above-described bargaining unit holiday pay at the rate of 10 hours per holiday and the appropriate pay for the drop and hook work as defined in the TLI addendum to the National Master Freight Agreement, and make all employees whole for any losses they may have suffered as a result of the Respondents' unilateral reduction in holiday and drop and hook pay.

(b) On request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the above-described unit with respect the wages, hours and other terms and conditions of understanding reached by the parties.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, 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 Newark, Delaware plant copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 4, 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.

[5] 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."

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