

O-J Transport Company, Inc. and Gratiot Driver Leasing, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO and National Federation of Public and Private Employees, AFL-CIO, Federation of Private Employees Division, affiliated with District 1, Marine Engineers Beneficial Association (MEBA), AFL-CIO, Party to the Contract.
Case 7-CA-41105

May 11, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On September 23, 1999, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, supporting argument, and an answering brief. The Respondent filed an answering brief and a reply brief.

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,¹ and conclusions as modified herein and to adopt the recommended Order as modified and set forth in full below.²

The judge found that Respondent O-J Transport Company, Inc. violated Section 8(a)(2) and (1) of the Act by recognizing National Federation of Public and Private Employees, AFL-CIO, Federation of Private Employees Division (FOPE) as the bargaining representative of a

unit of its truck drivers at a time when O-J did not employ a substantial and representative complement of employees in that unit. The judge also found that O-J violated Section 8(a)(3) and (1) by entering into and enforcing a collective-bargaining agreement with FOPE containing a union-security clause. We agree with the judge, for the reasons stated in his decision.

In its exceptions O-J argues that the judge found the 8(a)(2) violation on a theory that was not alleged in the complaint. It contends that the complaint alleges as unlawful only conduct allegedly committed by O-J and Gratiot Driver Leasing, Inc. (GDL) as joint employers,³ and therefore that the judge erred in finding that O-J had violated Section 8(a)(2) acting alone.

We find no merit in that contention. The complaint alleges that "[the] Respondents engaged in [the unlawful conduct] even though FOPE did not represent a majority of the Unit, *or at a time when Respondents did not employ a substantial and representative compliment [sic] of employees in the Unit.*" (Emphasis added.) Thus, although the complaint does not explicitly allege an 8(a)(2) violation by O-J acting alone, it certainly does allege a violation on a premature recognition theory, which was the violation the judge found. And although counsel for the General Counsel did not move to amend the complaint, she clearly stated, on the first day of the hearing, that the premature recognition allegation did not depend on a finding of joint employer status.⁴ No party opposed proceeding on that basis until O-J broached the subject in its posthearing brief to the judge. The theory under which the judge found the violation—i.e., that O-J prematurely recognized FOPE—was, at a minimum, closely related to the complaint allegation—if not expressly alleged—and it was fully litigated.⁵ We therefore find that the judge properly found that O-J alone violated Section 8(a)(2).⁶

The judge found that O-J and GDL were joint employers of drivers on GDL's payroll. But although, as the judge noted, the Board normally finds joint employers to be jointly and severally liable for unfair labor practices, he declined to do so with regard to GDL. He reasoned

¹ The Respondent has 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.

² We shall modify the judge's recommended Order to conform to the remedies normally provided for the kinds of violations committed in this case. See, e.g., *Cascade General*, 303 NLRB 656, 657 fn. 14 (1991), *enfd.* 9 F.3d 731 (9th Cir. 1993), *cert. denied* 511 U.S. 1052 (1994). Thus, the Respondent is required to withdraw recognition from the Union unless and until it has been certified by the Board as the exclusive representative of employees in an appropriate bargaining unit. We note that the Respondent need not refund the dues of employees who voluntarily joined the Union before March 16, 1998, when the Respondent and the Union entered into a collective-bargaining agreement containing a union-security clause. *Cascade General*, 303 NLRB at 657 fn. 14. Interest on refunded dues shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, we shall add certain standard remedial provisions that were omitted from the judge's recommended Order.

³ GDL was in the personnel leasing business. Its only customer was O-J, to which it leased truckdrivers.

⁴ *McKenzie Engineering*, 326 NLRB 473 (1998), and *Sumo Airlines*, 317 NLRB 383, 384 (1995), cited by O-J, are distinguishable from this case. In neither of those cases did counsel for the General Counsel make any statement of that sort.

⁵ *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990).

⁶ The General Counsel has not excepted to the judge's failure to address the merits of the complaint's alternative allegation that O-J and GDL, as joint employers, violated Sec. 8(a)(2) by recognizing FOPE when FOPE did not represent a majority of the drivers employed by the two firms.

that GDL had dissolved; that its dissolution took place at the same time that O-J was committing unfair labor practices; that GDL was not a party to the contract with FOPE, and thus need not be directed to remedy the violations arising from that agreement; and that there was no reason to believe that O-J could not provide the appropriate monetary remedy imposed. The General Counsel contends that the judge should not have excused GDL from all remedial obligations.

We agree with the judge that no remedy is warranted with respect to GDL, but only for the following reasons. FOPE sought recognition only from O-J (not from GDL), and it is clear that only O-J unlawfully recognized and entered into a contract with FOPE.⁷ Thus, even if the Respondents were joint employers of some drivers at the time O-J extended recognition, there is no basis for finding liability on the part of GDL. We therefore need not decide whether O-J and GDL were joint employers because the determination of that issue would not affect the outcome of this case.

ORDER

The National Labor Relations Board orders that the Respondent, O-J Transport Company, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing National Federation of Public and Private Employees, AFL-CIO, Federation of Private Employees Division, affiliated with District 1, Marine Engineers Beneficial Association (MEBA), AFL-CIO (FOPE) as the exclusive collective-bargaining representative of its drivers at a time when FOPE does not represent a majority of em-

ployees in a bargaining unit comprising a substantial and representative complement of employees.

(b) Entering into or enforcing a collective-bargaining agreement with FOPE containing a union-security clause at a time when FOPE does not represent a majority of employees in a bargaining unit comprising a substantial and representative complement of employees; provided, however, that nothing in this Order shall require the Respondent to rescind any improvements made in the employees' terms and conditions of employment pursuant to the collective-bargaining agreement.

(c) 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 necessary to effectuate the policies of the Act.

(a) Reimburse its employees, with interest, for dues and fees withheld from or paid by them pursuant to the contractual union-security agreement.

(b) Withdraw recognition from FOPE as the exclusive collective-bargaining representative of its drivers unless and until it has been certified by the National Labor Relations Board as the exclusive representative of those employees in an appropriate bargaining unit.

(c) Within 14 days after service by the Region, post at its Detroit, Michigan facility, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 1998.

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

⁷ *Professional Facilities Management*, 332 NLRB No. 40 (2000).

As the judge noted, at the time of the hearing the Board held the view that employees of a supplier employer, such as GDL, who were jointly employed by the supplier and a user employer, such as O-J, could not be included in a bargaining unit with employees who were solely employed by the user employer without the consent of both employers. *Lee Hospital*, 300 NLRB 947, 948 fn. 12 (1990). After the judge issued his decision, the Board overruled *Lee Hospital* and its progeny and held that such a unit is permissible without the employers' consent. *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1304 (2000). The Board in *M.B. Sturgis* also explained that the fact that a single supplier employer's employees may be jointly employed does not require a union petitioning to represent the supplier's employees to name the joint employers or to litigate the existence of a joint employer relationship. *Id.* at 1308. fn. 21. In *Professional Facilities Management*, the Board held that the same reasoning applies to a union, such as FOPE, that seeks to represent only the employees of a user employer, even if they are jointly employed. 332 NLRB No. 40, slip op. at 1-2.

Member Hurtgen notes that this case involves only Sec. 8(a)(2), i.e., recognition that is *prohibited* by that section. Accordingly, he does not pass on any 8(a)(5) issues, i.e., recognition that can be *required* by that section.

⁸ 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."

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT recognize National Federation of Public and Private Employees, AFL-CIO, Federation of Private Employees Division, affiliated with District 1, Marine Engineers Beneficial Association (MEBA), AFL-CIO (FOPE) as the exclusive collective-bargaining representative of our drivers at a time when FOPE does not represent a majority of employees in a bargaining unit comprising a substantial and representative complement of employees.

WE WILL NOT enter into or enforce a collective-bargaining agreement with FOPE containing a union-security clause at a time when FOPE does not represent a majority of employees in a bargaining unit comprising a substantial and representative complement of employees; provided, however, that we are not required to rescind any improvements made in the employees' terms and conditions of employment pursuant to the collective-bargaining agreement.

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 reimburse our employees, with interest, for dues and fees withheld from or paid by them pursuant to the contractual union-security agreement.

WE WILL withdraw recognition from FOPE as the exclusive collective-bargaining representative of our drivers unless and until it has been certified by the National Labor Relations Board as the exclusive representative of those employees in an appropriate bargaining unit.

O-J TRANSPORT COMPANY, INC.

Linda Rabin Hammell, Esq., for the General Counsel.
Sheldon Kline, Esq. (Morgan, Lewis, & Bockius, LLP), for O-J Transport Co.
Peter R. Albertins, Esq. (Foster, Swift, Collins & Smith, P.C.), of Lansing, Michigan, for Gratiot Driver Leasing, Inc.
Ronald R. Borges, of Farmington Hills, Michigan, for FOPE.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Detroit, Michigan, on April 21 and 22, 1999. The case originated from a charge filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW) on June 23, 1998. On October 13, 1998, a complaint and notice of hearing was issued. The complaint alleges O-J Transport Company Inc. (O-J) and Gratiot Driver Leasing, Inc. (GDL) are joint employers who violated Sections 8(a)(1), (2), and (3) of the Act by recognizing National Federation of Public and Private Employees, AFL-CIO, Federation of Private Employees Division, affiliated with District 1, Marine Engineers Beneficial Association (MEBA), AFL-CIO (FOPE) as the representative of a unit of drivers employed by Respondents; by negotiating a collective-bargaining agreement with FOPE; and by enforcing the agreement's union-security clause "even though FOPE did not represent a majority of the unit, or at a time when Respondents did not employ a substantial and representative complement of employees in the unit."

In its answer to the complaint, Respondents admitted certain allegations, including the filing and serving of the charges; their status as employers within the meaning of the Act; the status of UAW and FOPE as labor organizations within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondents denied being joint employers and having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Counsel for the General Counsel, counsel for both Respondents, and FOPE all were represented, participated fully, and filed timely briefs which have been duly considered. UAW, the Charging Party, made no appearance and filed no brief.

Counsel for the General Counsel advances two independent theories to support the complaint. The first theory is that O-J and GDL were joint employers of a single bargaining unit of drivers at the time O-J granted recognition to FOPE. Pursuant to this theory, the General Counsel contends that FOPE did not represent a majority of the unit described in the complaint because there were approximately 130 drivers in that unit at the time of recognition and because FOPE had authorization cards for only eight drivers. The General Counsel's second theory is independent of the first. Pursuant to the second theory, even if O-J and GDL are not joint employers, O-J violated the Act by recognizing FOPE at a time when there was not a substantial

and representative complement of drivers in the unit employed by O-J.

Respondents argue the General Counsel has failed to prove that O-J Transport and GDL were joint employers at the time FOPE was recognized, but that even if a joint employer relationship is shown, the General Counsel has failed to prove that O-J, GDL, and FOPE all consented to the formation of the bargaining unit described in the complaint. Respondent argues that under current Board doctrine, the bargaining unit described in the complaint could not be formed without the consent of all parties. In response to the General Counsel's second theory, Respondents argue that at the time O-J recognized FOPE, "O-J was engaged in normal business operations and employed a substantial and representative complement of drivers." According to Respondents, at the time of recognition, O-J did not anticipate that it would hire any additional drivers or curtail its use of leased drivers and owner-operators. According to Respondents and FOPE, the bargaining unit expanded dramatically in the subsequent months due to a collectively bargained restriction on O-J's use of leased drivers, and this subsequent expansion did not affect the lawfulness of O-J's recognition of FOPE.

On the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

THE UNFAIR LABOR PRACTICES

A. Background

Respondent O-J is a trucking company that hauls automobile parts in Detroit, Michigan, and surrounding areas. Its customers are the "big three" automobile companies: Ford, General Motors, and Chrysler.

In 1997, and for many years prior, O-J did not employ truckdrivers directly, but instead relied exclusively on leased drivers and owner-operators. Three driver leasing companies, Respondent GDL, Logistics Services, Inc. (LSI), and Drive Staff, supplied O-J with the vast majority of its leased drivers, with most of those coming from GDL. On average, O-J used between 130 and 140 leased drivers. In addition, O-J used between 90 and 120 owner-operators.

Louis James has been O-J's president since 1997. His immediate predecessor as president was Calvin Outlaw, James' uncle. O-J is wholly owned by John James, Louis James' brother. O-J is a member of the O-J Transport Group, a federation of companies in all of which John James has an ownership interest. The O-J Transport Group includes Motor City Intermodal, O-J Transportation Land Development, Renaissance Global Logistics, and Motor City Logistics (formerly known as International Contract Logistics, hereafter ICL). O-J's president, Louis James, is the chairman of Renaissance Global Logistics' board of managers. He is also on the board of ICL. FOPE has represented employees at ICL for 1-1/2 to 2 years.

B. The Joint Employer Relationship

GDL is a personnel leasing company. It was incorporated in July 1989 by Kathryn Niemer, O-J's current vice president of administration and general counsel. Niemer has known John James and Calvin Outlaw for 27 years. She is an attorney who

formerly practiced law at the firm which represents GDL in this proceeding. At all material times until about May 1998 GDL supplied drivers and dispatchers to O-J, GDL's only customer, pursuant to a leasing agreement.

Danny Hay originally owned GDL, and at the same time worked as O-J's operations manager. In August 1993 Geraldine Carter purchased GDL from Hay for \$1. Carter has been employed by O-J since November 1979 in a variety of capacities, including office manager and administrative assistant to Calvin Outlaw. Like Hay, Carter has owned GDL while simultaneously working for O-J. Until May 1998 when GDL ceased all business, Carter divided her time equally between working for O-J and running GDL. Carter was remunerated by a \$500/month draw from GDL, which she received in addition to her O-J salary. Sharon Evans, another O-J employee, assisted Carter in conducting GDL business and served as GDL's corporate secretary. Since approximately April 1, 1997, Carter has worked full-time as O-J's human resource manager.

GDL had annual gross receipts of \$3 to \$4 million. Carter listed her home residence as GDL's legal address, but actually conducted GDL's business at O-J's terminal at 4005 W. Fort Street in Detroit. She never conducted formal corporate GDL meetings. O-J's support staff performed GDL's payroll and personnel work; GDL had no human resource department itself. O-J's human resource department interviewed prospective GDL drivers and set up their mandatory drug tests. Discharged GDL drivers were instructed to return their logs and other property to O-J, and O-J's human resource department advised displaced GDL drivers about termination of benefits. O-J's human resource department maintained custody and control of the leased drivers' personnel files.

Pursuant to the lease agreement between O-J and GDL, O-J had the sole and exclusive right to direct, supervise, and control the manner in which transportation services were performed by GDL's leased workers, as well as the method of their performance. O-J could not discharge GDL drivers directly, but could cause GDL to replace them. By agreement, GDL was obligated to adopt and enforce all of O-J's specific work rules. Carter testified that she in fact incorporated O-J's work rules as her own and enforced them as to the leased drivers. O-J's managers made incident reports to Carter, on the basis of which GDL drivers were disciplined or discharged. The fringe benefits offered to drivers by GDL were the same as those carried by O-J. In fact, both O-J and GDL participated in the same 401(k) plan.

Leased drivers utilized by O-J performed their work with O-J's trucks and equipment. Even the dispatchers were on the payroll of GDL rather than O-J. All leased drivers reported to those dispatchers and received their delivery route and pick-up instructions from them. Wages paid by GDL were determined by O-J's trip-rate structure. GDL had no independent written formula regarding payment to drivers.

In 1993, 1 month before Carter purchased GDL from Hay for \$1, Teamsters Local 299 was certified by the Board as the bargaining representative of the drivers employed jointly by O-J and GDL. Niemer, then an attorney in private practice, served as the legal representative of both O-J and GDL in that proceeding. In that capacity, Niemer signed a stipulated election

agreement and tally of ballots containing recitals that O-J and GDL were joint employers.

Representatives of GDL and O-J collaborated on bargaining strategies with respect to Teamsters Local 299. Negotiations did not yield an agreement. Unfair labor practice charges brought by Teamsters Local 299 led to a consolidated complaint alleging O-J and GDL as joint employers. O-J and GDL, in their combined answers filed by Niemer, admitted to their joint employer status.

In the following year a petition was filed with the Board that resulted in Teamsters Local 299 being decertified. Niemer once again represented both O-J and GDL, and once again stipulated to their joint employer status in an election agreement. The *Excelsior* list that Niemer forwarded to the Board prior to that election, as well as the March 22, 1995, certification of results refers to O-J and GDL as joint employers, as does the tally of ballots that Niemer signed.

C. Beginning of the Merger Between GDL and O-J

I find that in August or September 1997 Carter informed Louis James that she was considering dissolving GDL. James replied that O-J would consider hiring the GDL drivers. Further, in mid-February 1998 Carter advised Louis James that she had made a decision to dissolve GDL. James said that O-J would hire GDL drivers.

I credit Carter's affidavit dated September 10, 1998, regarding these matters over her denials on the witness stand. Similarly, I discredit Louis James' denial that he ever spoke to Carter about dissolving GDL. The circumstances of Carter's affidavit make it more worthy of belief, and I rely on Carter's pretrial affidavit as a substantive admission of a party opponent. Carter's affidavit was furnished to the Board in private. She chose not to be represented by counsel at the affidavit session, and, presumably receiving no advice or warnings about the legal import of her admissions, supplied frank evidence. In contrast, she delivered her trial testimony facing corporate superiors Niemer and James, who have power over her now-sole livelihood at O-J.

There is further evidence that Carter's affidavit is more reliable than either her or Louis James' trial testimony. On the witness stand, the demeanor of both Carter and James was guarded and evasive when it came to the issue of Carter dissolving GDL. Further, in his testimony, Louis James contradicted himself on the subject. When called as an adverse witness in the General Counsel's case-in-chief, even though he was vague about the date, saying that it was "after all of the drivers came over," James nevertheless admitted that Carter told him she intended to dissolve GDL. When recalled as O-J's witness, James implausibly testified that he never spoke to Carter about her dissolving GDL. It is simply incredible that Carter and James never discussed the matter, and equally implausible that they only discussed the issue in passing. In fact, all the circumstances here point to the fact that they undoubtedly discussed the issue at length at some point prior to April 1. Prior to that date, Carter relied on a monthly draw for operating GDL, and after that date Carter became a full-time employee of O-J. Those two events did not happen in a vacuum. On the witness stand, Carter claimed that she discussed the dissolution

not with James but with Niemer. This testimony, however, was not even corroborated by Niemer, even though Niemer was recalled to the stand thereafter.

It is undisputed that in February 1998, James instructed Niemer to hire 10 "knowledgeable and experienced drivers" to serve as "lane ambassadors." According to James, in January 1998, prompted by Ford's urging and implementation of "just in time" and "in-line sequence" operations, James realized that O-J needed to communicate more effectively with its customers at the operational level. James thus, decided that O-J needed to have a group of knowledgeable and experienced drivers who could relay information and solve problems at the customers' loading docks. This group of drivers who were to perform certain customer relations duties, James called "lane ambassadors."

According to James, Niemer was assigned to identify potential lane ambassadors. Niemer compiled a list of 10 potential lane ambassadors, all of whom were drivers employed by GDL. Respondent admits that before O-J hired a single lane ambassador, Niemer met with Carter, president of GDL, and told her that O-J wanted to hire some of GDL's drivers as lane ambassadors. Significantly, the timing of this conversation in mid-February is almost exactly the same as the conversation between Carter and James, which Carter candidly admitted in her pretrial affidavit, in which Carter told James of her decision to dissolve GDL. I find it impossible to believe that at the time of this conversation, Carter and Niemer did not also discuss Carter's intention to terminate GDL. It stretches the imagination to believe that while Respondent did not previously employ one single driver, and even the O-J dispatchers were on the payroll of GDL, Niemer would have gone to Carter to seek permission to hire not one, but ten of GDL's employees directly without both Niemer and Carter discussing the long-term implications of this move. What is most plausible is that if Carter did ever discuss the dissolution of GDL with Niemer, it was in this conversation, not later, and perhaps this is why the subject was not raised with Niemer when she was called as a witness following Carter.

Niemer gave the list of 10 potential lane ambassadors to James. James then met with these drivers, explained the duties of a lane ambassador, as well as extra benefits they would receive, and asked them whether they would be interested in working for O-J. As lane ambassadors, in return for the extra duties and responsibilities, lane ambassadors would receive an extra \$75 per week. Further, as employees of O-J, the lane ambassadors would be paid for nondriving time, such as time spent on the customer's dock performing lane ambassador duties. They were to receive vacation benefits, paid sick leave, pay during jury duty, paid leave for bereavement, and pay when the automotive plants shut down. All 10 accepted the position and began working directly for O-J soon thereafter.

D. O-J Recognizes FOPE as Exclusive Bargaining Agent of all Drivers

Very shortly after the lane ambassadors were hired by O-J, one of them telephoned FOPE to inquire about the Union. Apparently, this lane ambassador learned about FOPE because FOPE represented employees of International Contract Logis-

tics (ICL), a sister company of the O-J Transport Group, as described above.

Following the phone call, Walter Browne, president of FOPE, traveled to Detroit and had dinner with two of the lane ambassadors. Those two lane ambassadors then set up a meeting between Browne and all of the lane ambassadors for the following day. On February 21 the lane ambassadors met with Browne and, during this meeting, signed FOPE authorization cards.

On February 26 Browne faxed a letter to Louis James demanding that O-J recognize FOPE as the collective-bargaining representative of O-J's truckdrivers and mechanics.

Louis James testified that on getting the recognition demand, he asked Niemer to handle the matter. Niemer testified she telephoned FOPE in Florida and spoke to a person named Gilbert Carillo, who sent her copies of the signed authorization cards by fax. As pointed out by counsel for General Counsel, Niemer testified she retained the faxed cards but later "lost" them and was consequently unable to produce them in response to the General Counsel's subpoena. Niemer was unable to identify the exact date of the call or the fax transmission. Be that as it may, I do credit Niemer that FOPE faxed her copies of eight authorization cards. I do so in part because while Niemer's credibility left something to be desired, Browne was entirely credible. I credit Browne entirely that he accumulated eight authorization cards from lane ambassadors in the manner he described, and I find that these were later shown to Niemer in support of FOPE's demand for recognition.

According to both Niemer and Louis James, the decision to recognize FOPE with respect to O-J's drivers was made by James. He made the decision to grant voluntary recognition based solely on Niemer's assurance that FOPE had a card majority. He never saw the cards himself. James authorized Niemer to send FOPE a letter granting voluntary recognition.

On March 3 Niemer sent a letter to Walter Browne, in which O-J Transport voluntarily recognized FOPE as the collective-bargaining representative of O-J's truckdrivers. Although FOPE had demanded recognition on behalf of O-J's truckdrivers and mechanics, the letter granted recognition to FOPE for O-J's "truck drivers only."

At the trial and in her posttrial brief, counsel for the General Counsel devoted a great deal of attention suggesting there was some form of collusion between O-J and FOPE, both as to the recognition itself and as to the collective-bargaining agreement which was later negotiated between them. Respondent, on the other hand, spent a great deal of time devoted to proving its own innocence. While I in no way credit all of Respondent's asserted innocent reasons for recognizing FOPE, if—and to the extent—counsel for the General Counsel's case were to depend on proving such collusion, I would find against her. Whatever O-J's own reasons may have been for recognizing FOPE, there is no substantial evidence to suggest any wrongdoing or collusion on the part of FOPE. For reasons more fully explained below, however, I find that collusion between O-J and FOPE is simply not a necessary element of this case.

What is relevant—and in fact undisputed—is that at the time recognition was extended, O-J employed only 10 drivers, 8 of whom had signed FOPE authorization cards. All 10 were GDL

leased drivers who had just been hired by O-J within the past several days to serve as "lane ambassadors." O-J's records show that seven of the card-signers were authorized to "transfer" from GDL to O-J on February 13. Almost all of the card-signers completed O-J employment applications within the week before they executed FOPE authorization cards. Four completed this "transfer" from GDL to O-J within 48 hours of meeting with Browne.

E. The Collective-Bargaining Agreement Between O-J and FOPE

Negotiations between O-J and FOPE began March 10 and concluded March 16 with the signing of a collective-bargaining agreement. It is undisputed that GDL did not participate in the negotiations with FOPE, nor did O-J agree to negotiate on GDL's behalf. During negotiations, Niemer represented O-J. Niemer's testimony about negotiating and signing this collective-bargaining agreement casts a shadow of incredulity which, standing by itself, raises questions about the arms-length nature of the relationship between O-J and FOPE. For example, Niemer testified that although all of O-J's negotiators took notes at the sessions, no one retained them—not even Niemer herself, an attorney. According to Niemer, nor did O-J retain any of FOPE's written bargaining proposals. Further, Niemer claims she selected John Azhar, a senior project analyst, and Debra Latimore, O-J's chief financial officer, to assist her during negotiations. Neither Azhar nor Latimore were called as witnesses by Respondent.

Many of Niemer's actions, beginning with her not keeping the notes she purportedly took, to the lack of any proof whatever of any real cost analysis of the final collective-bargaining agreement, run counter to most standards of professionalism. In the final analysis, however, Louis James' explanation of his reasons for entering into the collective-bargaining agreement with FOPE is not altogether incredulous. Moreover, I found the testimony of Browne, both as to recognition and as to the negotiation of the collective-bargaining agreement, to be altogether credible. I find FOPE's actions utterly consistent with the goals of any self-respecting labor organization in trying to negotiate this collective-bargaining agreement.

According to Louis James, who I credit on this issue, going into negotiations with FOPE, he communicated three main bargaining objectives to Niemer. First, James wanted a contract that was affordable, based on O-J's contracts with its customers. Second, James wanted to be able to use leased drivers because, given the market for drivers, it was very difficult for O-J to find drivers. And third, James wanted to maintain O-J's ability to use owner-operators, because they represented one-third or more of O-J's fleet.

Niemer claims she entered negotiations with a written draft proposal which included a management-rights clause that allowed O-J to "do anything, any time, anywhere." As noted, Niemer produced no copy of this purported proposal, but in my view it is not terribly significant whether negotiations began with a proposal from O-J or FOPE. I have no doubt that during the first bargaining session O-J and FOPE identified the major issues for bargaining. Nor do I have any doubt, as testified to by both Niemer and Browne, Browne objected to O-J's ability

to use leased drivers and owner-operators. Any self-respecting union would have done the same thing. Further, FOPE had successfully made the same demand on ICL. Niemer was aware of this because in late 1997 she had reviewed the ICL draft agreement at John James' request.

In total the parties bargained for 7 days. One bargaining session was held each of the first 3 days. The last 4 days of bargaining were more intense. Bargaining concluded on March 16 and the parties signed the contract on that date.

In the end, although FOPE attempted to limit O-J's use of owner-operators, O-J ultimately retained its ability to use owner-operators without restriction. In order to prevail on the owner-operator issue, however, O-J agreed to make essentially the same concessions regarding leased drivers as it had done with ICL. O-J retained its ability to use leased drivers for a period of 90 days, but after 90 days, the leased drivers were required to become employees of O-J. In addition, O-J was required to offer employment, within a period of 90 days, to "certain of" the leased drivers it was using at the time the contract was negotiated. It also agreed to hire them at current O-J benefit levels, to waive the probationary period, and to carry forward the drivers' lease-company seniority.

According to Louis James, at the conclusion of bargaining, Niemer gave James an oral assurance that the labor agreement did not increase O-J's labor costs. She did not provide any written analysis or calculations. James admits he signed the contract without thoroughly reading it. Be that as it may, James testified credibly that he believed the agreement satisfied the three objectives he had outlined at the beginning of bargaining. According to James, the 90-day limit on the use of leased drivers was not a major concession because it allowed O-J to continue using driver leasing companies as a "recruiting tool." Similarly, the agreement to offer employment to "certain of" the leased drivers was not perceived as a major concession because it only required O-J to offer permanent employment to "some or however many we wanted" of the leased drivers O-J was using at the time. Although the agreement provided a number of new benefits for O-J's drivers, James believed that O-J's labor costs would increase only slightly because O-J could anticipate productivity gains as a result of the negotiated performance and attendance bonuses.

F. Continuation of the Merger Between GDL and O-J

Shortly after the collective-bargaining agreement was signed, O-J offered permanent employment to all of the leased drivers from GDL and LSI. It made no offers to the five or ten drivers leased from Drive Staff.

Niemer testified that about 75 percent of the drivers added to the O-J payroll came from GDL. O-J's and GDL's payroll records, taken in conjunction with Carter's testimony that GDL did no business after May 1998, reveal that most of GDL's drivers "transitioned" to O-J during the months of February through April. Because leased drivers retained previous seniority when transferred to the payroll of O-J, O-J's records do not show with complete accuracy how the O-J payroll expanded. What the records do show is that O-J either employed or leased 120 drivers and 38 owner-operators on January 15; 125 drivers and 44 owner-operators on March 3; and 134 drivers and 61

owner-operators on July 16. The parties agree that by July 16 the O-J payroll had expanded to about 130 drivers, of which all but 13 were formerly employed by GDL. There is no question that throughout this period, O-J's business operations remained relatively stable, and it incurred no major increases or downturns in business.

O-J admits that the union-security clause of the collective-bargaining agreement with FOPE has been applied to all drivers that have been added to its payroll since the agreement was signed. O-J has regularly deducted union dues from drivers' paychecks and remitted the moneys to FOPE.

G. The Dissolution of GDL

As I have found above, in August or September 1997, Carter informed Louis James that she was considering dissolving GDL. More significantly, in mid-February 1998, at the same time Louis James, with the help of Niemer, decided to hire the first 10 GDL employees as "lane ambassadors," Carter advised James that she had decided definitely to dissolve GDL. James said that O-J would hire GDL drivers.

I have no doubt whatever that conversations continued between Carter, Niemer, and James well into and even beyond March 1998 concerning Carter's decision to dissolve GDL. Carter, Niemer, and James all testify to such conversations. I simply find that those were not the first such conversations on that subject. For example, while James testified Carter never had a conversation with him in which they discussed Carter's decision to dissolve GDL, he then testified that some time after April 1, Carter and James had a "general conversation" about Carter's reasons for taking a job with O-J, at which time Carter "mentioned, in passing, her decision to dissolve GDL." That James is making a valiant effort to place his first notice of Carter's decision to dissolve GDL sometime after the collective-bargaining agreement was signed with FOPE is utterly transparent. I find James' testimony on the issue of the timing of their conversations about Carter's decision to dissolve GDL totally unbelievable.

After the collective-bargaining agreement was signed by O-J and FOPE, the transition of employees from GDL to O-J increased posthaste. During the transition, Carter played an active role. For example, Carter's pretrial affidavit noted that if she was "not mistaken," she told transferring GDL employees that they had to join FOPE because of the contract. Carter's testimony also reveals that she met with small groups of GDL drivers, explained her decision to dissolve GDL, and told the drivers that they could work for O-J. Over the next few months, GDL drivers were all gradually transferred to the payroll of O-J, a task performed largely by Carter herself.

As noted, approximately April 1, Carter officially assumed the title of human resources manager of O-J. She no longer split her time between O-J and GDL. Carter ceased receiving any draw from GDL. GDL ceased doing all business sometime in May 1998.

Analysis and Conclusions

The Board's well-established standard for determining joint employer status asks whether two employers "share or code-terminate those matters governing the essential terms and condi-

tions of employment.” *Lee Hospital*, 300 NLRB 947, 948 (1990). Under this standard, joint employer status will be found where both parties “meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.” *Id.*; see also *TLL, Inc.*, 271 NLRB 798 (1984), *affd.* 772 F.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 NLRB 324, 325 (1984).

In looking at the period prior to February 1998, before O-J directly hired its first 10 employs as lane ambassadors, there is little question that O-J and GDL were joint employers of truckdrivers and dispatchers alike. First, one cannot overlook the fact that on not just one, but numerous occasions O-J and GDL have acknowledged and admitted they were a joint employer of GDL employees. In 1993, 1994, and again in 1995, Kathryn Niemer, O-J’s current vice president of administration but, then an attorney in private practice, stipulated repeatedly in various Board proceedings that O-J and GDL were joint employers.

Further, the facts reflect without question the truth of that admission. Niemer herself incorporated GDL. GDL performed the sole function of supplying drivers and dispatchers to O-J. GDL’s original owner, Danny Hay, also worked as O-J’s operations manager. Geraldine Carter, who purchased GDL from Hay for \$1, has been employed continuously by O-J since November 1979 in a variety of capacities, including office manager and administrative assistant to Calvin Outlaw, and now as human resources manager. Although Carter ostensibly owned GDL, she divided her time equally between working for O-J and running GDL, and was remunerated by a mere \$500/month draw from GDL, which she received in addition to her O-J salary. Sharon Evans, another O-J employee, assisted Carter in conducting GDL business and served as GDL’s corporate secretary.

All of GDL’s business was actually conducted at O-J’s terminal at 4005 W. Fort Street in Detroit. O-J’s support staff performed GDL’s payroll and personnel work. GDL had no human resource department itself. O-J’s human resource department interviewed prospective GDL drivers and set up their mandatory drug tests. Discharged GDL drivers were instructed to return their logs and other property to O-J, and O-J’s human resource department advised displaced GDL drivers about termination of benefits. O-J’s human resource department maintained custody and control of the leased drivers’ personnel files.

Pursuant to the lease agreement between O-J and GDL, O-J had the sole and exclusive right to direct, supervise, and control the manner in which transportation services were performed by GDL’s leased workers, as well as the method of their performance. O-J could not discharge GDL drivers directly, but could cause GDL to replace them. By agreement, GDL was obligated to adopt and enforce all of O-J’s specific work rules. Carter testified that she in fact incorporated O-J’s work rules as her own and enforced them as to the leased drivers. O-J managers made incident reports to Carter, on the basis of which GDL drivers were disciplined or discharged. The fringe benefits offered to drivers by GDL were the same as those carried by O-J, and both O-J and GDL participated in the same 401(k) plan. Wages paid by GDL were determined by O-J’s trip rate structure. GDL had no independent written formula regarding pay-

ment to drivers. Based on these facts, there can be no serious question that O-J and GDL shared or codetermined those matters governing the essential terms and conditions of employment of GDL employees, and that O-J meaningfully affected matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of GDL drivers and dispatchers. I find that at all times material herein, O-J and GDL were joint employers of drivers and dispatchers employed by GDL.

Nor is there any serious question that when O-J hired 10 “lane ambassadors” from the payroll of GDL beginning in February 1998, these employees performed duties substantially similar to the work being performed by employees on the payroll of GDL. Indeed, in footnote one of its posttrial brief, Respondent O-J states: “Throughout this brief, drivers who serve as lane ambassadors are called ‘drivers’ and ‘lane ambassadors’ interchangeably. This is because lane ambassadors are merely drivers with additional duties. They are not a separate classification of employees; they are a sub-classification of drivers. Therefore, it is appropriate to refer to lane ambassadors as both ‘lane ambassadors’ and ‘drivers.’” Counsel for the General Counsel argues that all of these drivers (those on the payroll of O-J and those on the payroll of GDL) share such a substantially similar community of interests that they constitute a single bargaining unit. Respondent counters that regardless of whether GDL and O-J are joint employers, before a single bargaining unit is found, the joint employers must first consent—and no consent exists here.

In support of its position, Respondent notes current Board cases hold that if two employers are joint employers of certain employees, those employees may not be included in a bargaining unit with other of the employer’s employees unless both employers consent. *Hexacomb Corp.*, 313 NLRB 983 (1994); *Brookdale Hospital Medical Center*, 313 NLRB 592, 593 (1993); *Lee Hospital*, *supra* at fn. 12; *Greenhoot, Inc.*, 205 NLRB 250, 251 (1973). Respondent acknowledges that in 1996 the Board heard oral argument in three cases involving joint employers and the *Greenhoot* doctrine, but no decision has been issued to date. See *Jeffboat Division, American Commercial Marine Service Co.*, 9-UC-406; *M. B. Sturgis, Inc.*, 14-RC-11572 (331 NLRB No. 173 (2000)); and *Value Recycle, Inc.*, 33-RC-4042. Counsel for the General Counsel responds that, “as urged in the December 2, 1996, oral argument before the Board in *Jeffboat Div., American Commercial and Marine Services*, the Board should return to its traditional test of deciding unit questions by analyzing control, actual or potential, over employment conditions, in light of the parties’ commercial relationship. Consent is irrelevant for bargaining in units of jointly and solely employed workforces, as long as one of the joint employers controls some working conditions of both workforces.” For reasons explained below, while I find that O-J and GDL were joint employers of drivers on the GDL payroll, I find it unnecessary to address the issue whether those drivers and the drivers on the payroll of O-J constitute a single bargaining unit or separate bargaining units.

Counsel for the General Counsel and Respondents address the issue of whether Respondents violated Section 8(a)(2) of the Act by recognizing FOPE at a time when O-J did not em-

ploy a substantial and representative complement of drivers. As both note, an employer violates Section 8(a)(2) by recognizing a union at a time when the employer does not employ a substantial and representative complement of employees. *Grocery Haulers, Inc.*, 315 NLRB 1312, 1316 (1995); *Cascade General*, 303 NLRB 656, 657 (1991), enfd. 997 F.2d 571 (9th Cir. 1993), supplemented by 9 F.3d 731 (9th Cir. 1993); *Delta Carbonate, Inc.*, 307 NLRB 118, 119 fn. 7 (1992), enfd. without opinion 989 F.2d 486 (3d Cir. 1993); *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984); *Herman Bros.*, 264 NLRB 439, 440 (1982); *Hayes Coal Co.*, 197 NLRB 1162, 1163 (1972). As these decisions have noted, determining whether a representative complement exists strikes a salutary balance between the objectives of allowing a maximum number of employees to voice their selection and deciding questions concerning representation as quickly as possible.

I agree with Respondent that the Board's decision in *Anaconda Co.*, 225 NLRB 953, 955 (1976) (quoting *Clement-Blythe Cos.*, 182 NLRB 502, 502 (1970)), is instructive. The issue in that case was whether an employer violated Section 8(a)(2) by voluntarily recognizing a union at a time when the unit was expected to expand. At the time of recognition, February or March of 1975, there were 11 employees in the bargaining unit; the union had nine valid authorization cards. At the time of the hearing, December 1975, the unit had expanded to 16 employees. By March 1976 the employer expected that there would be 32 employees in the unit. By December 1976 83 unit employees were expected, and by November 1977, 95 unit employees were expected. Despite these specific plans for expansion the Board concluded that there was a substantial and representative complement of employees in the unit at the time of recognition and therefore the employer did not violate Section 8(a)(2). If, however, an employer expects that the unit will expand in the immediate future, and is able to predict that expansion with "reasonable certainty," recognizing the union would violate Section 8(a)(2) of the act. See *Hospital San Francisco, Inc.*, 293 NLRB 171, 174 (1989). In the instant case, at the time of recognition, FOPE had authorization cards from 8 of the 10 employees on O-J's payroll. In *Anaconda*, it took 9 months for the unit to expand from 11 to 16. It was expected to take a year from the date of recognition for the unit to double in size, and almost 3 years for the unit to expand more than eight-fold. In the instant case, the "unit expansion" to more than 10-fold was, for all practical purposes, overnight. That it actually took a few months for GDL employees to be transitioned to the O-J payroll was a delay prolonged only by the necessary time it took to actually process required paperwork to transfer employees from one payroll to the other.

I agree with counsel for the General Counsel that O-J knew at the time it granted recognition to FOPE that its driver workforce was soon going to expand exponentially. Geraldine Carter had already broached the subject of dissolving GDL with O-J in 1997. When Carter renewed the subject with Louis James in mid-February 1998 and told James she had made a decision to dissolve GDL, James pledged to hire the GDL drivers. Obviously this does not mean there was absolute certainty that either event would take place. Presumably Carter could have changed her mind. Even if she did not James could have

decided not to hire the GDL drivers directly. He might have decided at the last minute to approach LSI or Drive Staff, both companies from whom he leased at least some drivers, and suggest they hire the GDL drivers, leasing them back to O-J. Other circumstances might have changed Carter's and James' plan as well, but the important element here is that there was indeed a plan. Absent unforeseen and unexpected circumstances, that plan—for Carter to dissolve GDL and for James to hire GDL employees—was a virtual certainty, which both expected to take place in the immediate, not the distant, future. In short, I find that as of March 3 when it recognized FOPE, O-J knew with "reasonable certainty" that it would be placing more than 100 additional drivers on its payroll.

In fact, the hiring of O-J's first 10 employees as "lane ambassadors" appears to be the logical beginning of O-J implementing the plan. As James himself testified, Ford Motor Company had been pressing him for some time to have employees on his own payroll that could perform some customer-relations function. This was not a concept that Ford had only recently devised. James' own testimony makes it clear that he had dragged his feet for some time in meeting Ford's request. One would have to be extremely naive to believe it was sheer coincidence that at precisely the same time Carter was considering dissolving GDL, and had informed James of this, James decided to finally meet Ford's request and hire the first 10 employees as "lane ambassadors." On the contrary, it is perfectly natural that James would finally meet Ford's request and establish the lane ambassador position when he did given that Carter had told James she was thinking of dissolving GDL. Nor is it surprising that when James decided to hire these "lane ambassadors," he did not even consider any drivers being leased to him by LSI or Drive Staff. As James testified, he had Niemer put together a list of potential candidates, and every single one of those potential candidates was on the payroll of GDL. It is perfectly natural that only GDL employees would be considered for such a position given that GDL, unlike LSI or Drive Staff, was "in house," i.e., being run by Carter, an O-J employee, from O-J's own business offices, and Carter had already discussed with James her intent to dissolve GDL.

As I have noted, counsel for the General Counsel devotes a great portion of her posttrial brief suggesting that O-J and FOPE were engaged in some form of collusion, both on the matter of recognition and the matter of the collective-bargaining agreement. While there may have in fact been such collusion here, I doubt it. Granted collusion is extremely difficult to prove, but what the record here tends to suggest is that FOPE was acting innocently and with due diligence in securing the employee authorization cards, demanding and obtaining recognition, and negotiating the collective-bargaining agreement with O-J. In the final analysis, however, FOPE's culpability or innocence is irrelevant. O-J employed only 10 drivers directly as of March 3, the date it recognized FOPE based on a card-showing from eight drivers. It was O-J who knew with virtual certainty that the bargaining unit, even assuming it was made up only of drivers on its own payroll, would expand exponentially in the immediate future. Based on all the facts, therefore, I find that O-J violated Section 8(a)(2) of the Act by recognizing FOPE at a time when O-J did not employ a sub-

stantial and representative complement of employees in that unit.

As O-J and FOPE approached the bargaining table, FOPE's demands, including the demands that O-J cease using leased drivers and owner-operators, were utterly consistent with the institutional interests of every labor organization. There is simply no basis for finding any collusion between FOPE and O-J. This is not to say that FOPE was completely ignorant of how its demands, if met, would affect the size of the bargaining unit. Obviously FOPE knew the approximate number of drivers, both leased drivers and owner-operators, that O-J was using. FOPE knew that if either of these demands was agreed to, the size of the bargaining unit would expand 10-fold, or perhaps even more. In view of its agreement with ICL, FOPE no doubt even had some reason for optimism that it would gain one of these concessions. What FOPE did not necessarily know, however, was how easily it would win the concession from O-J to stop using leased drivers, given the fact it was already O-J's plan to move the leased drivers of GDL to its own payroll.

In many ways, O-J was in a no-lose position by recognizing FOPE when it did. If O-J could negotiate a collective-bargaining agreement to its liking, all would be well. If O-J could not negotiate a collective-bargaining agreement to its liking, and a strike ensued by the 10 lane ambassadors, O-J could simply alter its plan to hire the GDL employees. Or it could choose to go through with its plan. In either case, O-J would have available at least 10 times the number of drivers represented by FOPE. Economic action, if any, would have very limited effect on O-J. In the end, O-J was able to negotiate an agreement that it found very palatable. As Louis James testified, he did not see the contract with FOPE as involving any major concessions. He not only retained the right to use owner-operators, he secured the right to continue use leased drivers for up to 90 days, thereby effectively allowing for a probationary period during which new employees would not be protected by whatever rights and privileges might be afforded by the collective-bargaining agreement. Since it was already his intention—as expressed to Carter—to hire GDL employees directly, the agreement indeed represented few concessions by James. I find that by entering into the collective-bargaining agreement with FOPE containing a union-security clause, when both parties knew the result would be to expand the bargaining unit 10-fold and at the same time require those “new” employees to join the Union, O-J violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. Respondents O-J and GDL are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondents O-J and GDL are, and have been at all times material herein, joint employers of GDL employees.
3. FOPE and UAW are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.
4. By recognizing FOPE as the exclusive collective-bargaining representative of its drivers at a time when O-J did not employ a substantial and representative complement of

employees in that bargaining unit, Respondent O-J violated Section 8(a)(1) and (2) of the Act.

5. By entering into a collective-bargaining agreement with FOPE containing a union-security clause, when both parties knew the result would be to expand the bargaining unit 10-fold and at the same time require those “new” employees to join the Union, Respondent O-J violated Section 8(a)(1) and (3) of the Act.

6. The unfair labor practices which Respondent O-J has been found to have engaged in have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Counsel for General Counsel argues in her posttrial brief that GDL is culpable as a joint employer for O-J's unfair labor practices, and that as such it should be held jointly and severally liable for providing the necessary remedy. It is true that while GDL was in business supplying leased drivers to O-J, GDL and O-J were joint employers of those employees. It is also true that where joint employer status is found, the Board typically holds joint employers jointly and severally liable for unfair labor practices found to have been committed. The circumstances that gave rise to Respondent O-J's unfair labor practices, however, occurred contemporaneously with GDL dissolving. Even though GDL was separately represented at the unfair labor practice hearing, all of the evidence indicates that GDL has conducted no business of any kind after May 1998. GDL was not a signatory to the collective-bargaining agreement with FOPE, and therefore to the extent there is a need to direct the remedial portions of this decision to that agreement, there is no need and no reason to include GDL. Further, Respondent O-J is an ongoing, thriving enterprise, and there is no reason to believe O-J cannot and will not be in a position to provide the appropriate monetary remedy in this case. Accordingly, I find no reason whatever to hold GDL jointly and severally liable for providing the necessary remedy herein, and to do so would simply be punitive.

As counsel for the General Counsel notes in her posttrial brief, there is no debate that O-J deducted dues on the strength of its union-security clause with FOPE. In view of the unlawful recognition granted by O-J to FOPE, obviously the remedy must include that O-J cease giving effect to the collective-bargaining agreement with FOPE, reimburse employees with interest for monies withheld from their pay as a result of having to join FOPE pursuant to the union-security clause of that agreement, and withdraw recognition to FOPE. Board law is clear, however, that any improvements in employees' terms and conditions must not be rescinded. *Cascade General*, 303 NLRB 656, 657 (1991); *A.M.A. Leasing, Ltd.*, 283 NLRB 1017 fn. 4 (1987).

Finally, counsel for the General Counsel argues that the remedy should include a provision requiring O-J to withhold future recognition of FOPE unless and until such time as the Board certifies FOPE as the exclusive collective-bargaining representative of its employees. I find that such a provision would have an unnecessary and unwarranted punitive effect on FOPE. As noted several times above, counsel for General Counsel attempts repeatedly to implicate FOPE in some form of collusion with O-J, both as to the matter of recognition and with regard to the collective-bargaining agreement. Despite her repeated attempts, however, there is simply no evidence of any collusion or wrongdoing on the part of FOPE. Once the existing collective-bargaining agreement is abrogated, the employees are made whole by O-J for the monies unlawfully withheld from their pay, recognition is withdrawn from FOPE, and O-J posts an appropriate notice to employees, all of the unfair labor practices will have been adequately remedied. To then pre-

clude FOPE from ever obtaining the opportunity to represent O-J's employees unless it is certified by the Board is punitive, for any other labor organization could lawfully organize employees and be recognized on the basis of a valid authorization card check. Such drastic measures might be appropriate if actual collusion was shown between O-J and FOPE, but despite her repeated efforts to infer such collusion in this case, counsel for the General Counsel has simply failed to provide any substantive reliable evidence to prove the point. Consequently, provided FOPE should obtain a fresh showing of majority support, obtained in an uncoerced manner following Respondent O-J's complete remedy of its unfair labor practices found herein, I find no reason to restrict FOPE from representing employees in a manner that would not be imposed on any other labor organization.

[Recommended Order omitted from publication.]