UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SHANE STEEL PROCESSING, INC.
and J & J LAND, LLC, a Single Employer

and **CASES** **7–CA–47710**
7–CA–48016

LOCAL 771, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL–CIO

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SUPPLEMENTAL DECISION AND ORDER

Keltner W. Locke, Administrative Law Judge. A principal issue in this case concerns the status of J & J Land, LLC, a company not yet in existence when Shane Steel Processing, Inc. committed the unfair labor practices to be remedied here. The government contends that Shane's owner and his fiancée formed J & J Land as a sanctuary for Shane's assets, to place the assets beyond reach and unavailable to remedy Shane's unlawful conduct. Applying the Board's four–factor test, I conclude that Shane Steel Processing, Inc. and J & J Land, LLC, constitute a single employer. Accordingly, even though J & J Land holds the title to Shane's factory and grounds, those assets may be used to satisfy Shane's make-whole obligation.

Procedural Matters

After the compliance hearing closed, the General Counsel sought to introduce into evidence certain documents which had been subpoenaed but not previously produced. The

General Counsel sought and obtained a written stipulation regarding these records and then moved for the admission of both the stipulation (marked as General Counsel's Exhibit 39) and the documents (marked as General Counsel's Exhibits 40, 41, 42). In view of the parties' stipulation, I grant the General Counsel's motion and receive these documents into the record. Because the exhibit numbers proposed by the General Counsel already have been used, and because all parties have agreed that these documents should be admitted into the record, the documents will be received as *Joint* Exhibits 39, 40, 41 and 42, rather than as General Counsel's exhibits.

Also, after close of the hearing, the General Counsel sought an order requiring Respondents "to pay 401(k) money owed through March 22, 2007 to the employees listed in the amended compliance specification, dated June 7, 2007." This motion will be addressed later in the decision, after the discussion of background facts needed to place it in context.

Background

Respondent Shane manufactured and processed steel bars at its plant in Fraser, Michigan. Since about March 9, 1976, the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the "International Union") has been the exclusive collective–bargaining representative of Shane's production and maintenance employees. (In the discussion below, the word "employee" means an employee in this bargaining unit.) The International Union assigned to its Local 771 (the "Union" or the "Charging Party") responsibility to represent these employees.

The last collective–bargaining agreement expired in March 2002. The terms and conditions of employment continued in effect without change for about two years. Then, beginning in May 2004, Respondent began changing certain terms and conditions of employment without first notifying and bargaining with the employees' exclusive representative. More specifically, Respondent Shane violated Section 8(a)(5) and (1) of the Act by making the following changes:

1. On about May 21, 2004, Shane discontinued its practice of making a contribution to each employee's 401(k) plan account to match the contribution which the employee had made.

2. On about May 31, 2004, Shane reduced employees' wages by 10 percent and eliminated dental and optical benefits.

3. On about June 1, 2004, Shane changed medical benefits and eliminated the following benefits: Perfect attendance bonus; providing employees visiting the medical clinic either with rides to the clinic or mileage reimbursement; providing employees with prescription co–pay reimbursement.

4. On August 3, 2004, Shane changed its attendance policy.

5. On October 8, 2004, Shane eliminated the 401(k) program.

The Union filed unfair labor practice charges against Shane on July 26, 2004 (in Case 7–CA–47710) and October 20, 2004 (in Case 7–CA–48016). An investigation of these charges

resulted in the issuance of a consolidated amended complaint on November 18, 2004.

After the parties appeared to have reached a ("non–Board") settlement, the Regional Director for Region 7 issued an order conditionally approving the withdrawal of charges and dismissing the consolidated amended complaint. When Shane failed to comply with the terms of that agreement, the Regional Director reinstated that complaint by a May 24, 2005 Order.

In June 2005, Shane's president and majority shareholder, John Hartley, formed a limited liability company with his fiancée, Jane McNamara. (The initials in this company's name – J & J Land, LLC. – presumably derive from the first names of the two partners.) Shane's accountant, Robert Silverberg, filed J & J Land's articles of organization with the State of Michigan. Silverberg identified himself in this filing as J & J Land's "organizer." Documents which J & J Land filed with government agencies show its business address to be the same as Shane's.

Hartley and McNamara each owned a 50–percent interest in the limited liability company. Each held the title of "member," which is roughly analogous to "partner" in a partnership.

On July 27, 2005, Shane sold its plant and grounds to J & J Land for one dollar. Hartley participated in this transaction both as Shane's president and as a member of J & J Land. On the same day, Hartley and McNamara, acting on behalf of J & J Land, took out new mortgages, pledging the Shane plant and grounds as security.

The mortgage lender required Hartley and McNamara to execute an "Affidavit of Property Use (Commercial)," stating what J & J Land intended to do with the property it had purchased. The affidavit consisted of a preprinted form which allowed the affiants to specify the property use by checking one of two boxes. The following description appeared to the right of the first box: "Investment Property: Not owner operated. Purchased as an investment to be held or rented to a third party." Hartley and McNamara left this box blank. Instead, they checked the second box: "Owner Operated: Operated by owner for purposes of owner's business."

Hartley later testified, during the compliance hearing, that checking the "Owner Operated" box had been, in effect, a mistake, "an omission on our part that we signed it without correcting it to investment property." However, Hartley admitted that he had never advised the mortgage lender of this "mistake."

As mentioned above, in May 2005, the Regional Director had reinstated the consolidated amended complaint because Shane had not satisfied the terms of the settlement agreement. Shane had filed an answer to this complaint after it issued the first time. However, 9 days after Shane sold its property to J & J Land, it withdrew its answer.

Under the Board's Rules, a withdrawn answer has the same effect as no answer at all. The General Counsel filed a Motion for Default Judgment which the Board granted in a Decision and Order dated May 31, 2006. In it, the Board ordered Shane to restore the terms and conditions of employment which were in effect before the unlawful unilateral changes, and to make the employees whole for losses they suffered because of those unfair labor practices.

On November 21, 2006, the United States Court of Appeals for the Sixth Circuit enforced the Board's Decision and Order.

On May 7, 2007, the Regional Director issued a Compliance Specification and Notice of Hearing which named both Shane and J & J Land as Respondents and alleged them to constitute a single employer. This pleading marked J & J Land's debut as a party.

Respondent Shane filed an Answer to the Compliance Specification on May 24, 2007, and an Amended Answer on June 4, 2007. Respondent J & J filed an Answer on May 25, 2007.

The Regional Director issued an Amended Compliance Specification and Notice of Hearing on June 7, 2007. A hearing opened before me on June 11, 2007 in Detroit, Michigan. The parties presented evidence on June 11 through June 13, 2007, when the hearing closed. Counsel thereafter had the opportunity to submit briefs, which have been considered carefully.

The Single Employer Issue

In their Answers to the Compliance Specification, both Respondent Shane and Respondent J & J Land denied that they constituted a single employer. The General Counsel bears the burden of proving such status by a preponderance of the evidence.

At the outset, it may be noted that a single–employer analysis is appropriate only where two ongoing businesses are coordinated by a common master. *Cadillac Asphalt Paving Co.*, 349 NLRB No. 5, slip op. at 3 (January 16, 2007), citing *APF Carting, Inc.*, 336 NLRB 73, fn. 4 (2001), enfd. mem. 60 FedApps 832 (D.C. Cir. 2003); *NYP Acquisition Corp.*, 332 NLRB 1041, fn. 1 (2000), affd. sub nom. *Newspaper Guild of New York Local 3 v. NLRB*, 261 F.3d 291 (2d Cir. 2001). After J & J Land came into existence in June 2005, and after it purchased Shane's factory and grounds in July 2005, Shane continued to operate. Therefore, I conclude that it is appropriate to examine the relationship between Shane and J & J Land.

Credibility

The discussion below, concerning the status of J and J Land, relies on the testimony of the company's two owners, John Hartley and Jane McNamara. On occasion during her cross–examination, McNamara didn't provide totally responsive answers to the questions posed. To the extent that Hartley's testimony conflicts with McNamara's, I credit Hartley.

Legal Principles

In determining whether two ostensibly separate entities really constitute a single employer, the Board applies a four–factor test. However, a recent decision suggests that an alternative test may be used in appropriate cases. First, I will describe the standard test and then the alternative.

The Board's basic test entails consideration of these four factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *Central Mack Sales*, 273 NLRB 1268, 1271–1272 (1984). No single aspect is controlling, and all four factors need not be present to find single–

employer status. Instead, the ultimate determination turns on the totality of the evidence in a given case. *Dow Chemical Co.*, 326 NLRB 288, 288 (1998).

The Board doesn't give all four factors equal weight. In a number of cases, the Board has attached particular importance to the third factor, centralized control of labor relations. For example, in *Mercy Hospital of Buffalo*, 336 NLRB 1282 (2001), the Board stated that "the most critical factor is centralized control over labor relations." Accord: *Gerace Construction, Inc.*, 193 NLRB 645 (1971). See also *Beverly Enterprises*, 341 NLRB 296, 306 (2004),

However, in *Viking Industrial Security, Inc.*, 327 NLRB 146 (1998), when the Board discussed its four–factor test, it explained that "The fundamental inquiry is whether there exists overall control of critical matters at the policy level." Presumably, such critical matters may concern more than labor relations.

Moreover, the Board also has stated that the absence of an arm's–length relationship is "essentially synonymous" with single–employer status. See, e.g., *Lebanite Corp.*, 346 NLRB No. 72 at fn. 5 (March 31, 2006). Similarly, in *Bolivar–Tees, Inc.,* 349 NLRB No. 70 (April 12, 2007), the Board stated that the "hallmark of a single employer is the absence of an arm's–length relationship among seemingly independent companies." See also *Screen Creations LTD.*, 349 NLRB No. 70 (April 12, 2007); *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991).

Likewise, in *AG Communication Systems Corp.*, 350 NLRB No. 15 (June 29, 2007), the Board, citing *RBE Electronics of South Dakota*, 320 NLRB 80 (1995), stated: "In summing up the essence of a single–employer relationship, the Board has observed that "[s]ingle employer status is characterized by the absence of an arm's–length relationship found among unintegrated companies." On the other hand, in *Lebanite Corp.*, 346 NLRB No. 72 at fn. 5 (March 31, 2006), discussed further below, the Board criticized a judge for according too much importance to the absence of an arm's-length relationship.

It certainly implies no criticism of the Board to observe that the various precedents cited above point to different factors as being especially significant. In some cases, the Board has identified centralized control of labor relations as the alpha factor heading the pack, but in at least one case, the Board has attached particular importance to control of critical matters at the policy level or to the absence of an arm's-length relationship. As noted above, in some cases, the Board has called the absence of an arm's-length relationship the "hallmark" or "essence" of single-employer status but in another case, the Board held that a judge erred by giving this consideration weight equal to that accorded a factor in the Board's four-factor test.

Perhaps the Board's invocation of different determinative criteria in different cases merely reflects that individual circumstances make one factor more important in some cases but render some other consideration more significant in other cases. By analogy, a golfer regards one club as more appropriate for one shot and a different club better for another shot. Far from being irrational, such choices result from skill, experience, and insight. The real problem is that those of us with high handicaps need explicit guidance regarding why the pro preferred one particular club on one occasion but selected another club for a seemingly similar shot later.

The present case illustrates how specific circumstances can affect which factor becomes most important in the Board's analysis. As noted above, if the employment practices of two ostensibly separate companies really are under common control, the Board accords significant

weight to that fact. Likewise, if each company has a separate and autonomous labor relations policy, unaffected by the other company, the Board regards that fact as particularly probative. However, if one of the two companies has no employees, then the Board gives less weight to the "centralized control of labor relations" factor. *Bolivar–Tees, Inc.*, above.

The *Bolivar–Tees* decision provides clear guidance applicable to the present case. Because J & J Land does not have any employees, I will not accord "centralized control of labor relations" the same weight which this factor would otherwise receive.

Another matter to be considered – the presence or absence of an "arm's–length" relationship – presents a greater challenge. It is important to avoid the error discussed by the Board in *Lebanite Corp.*, above. Doing so requires a clear understanding of exactly what the Board meant.

In *Lebanite Corp.,* the Board stated that the absence of an arm's–length relationship between two entities can be "essentially synonymous" with single–employer status. Those words, "essentially synonymous," would seem to mean the same thing as "tantamount to" or "for all practical purposes identical with. . ." That would make the presence or absence of an arm's–length relationship pathognonomic: If an arm's–length relation is absent then, ipso facto, single–employer status must be present.

The Board's *Lebanite Corp.* decision seems to endorse this equivalence principle. It strongly suggests that a judge could, in an appropriate case, ignore the four–factor test and decide the single–employer issue based solely on whether or not an arm's–length relationship existed.

So far, this equation of single employer status with the absence of an arm's–length relationship causes no conceptual problem. However, in *Lebanite Corp.* the Board further stated that the judge had erred by treating the absence of an arm's–length relationship "as neither synonymous with his single–employer finding nor as an aspect of interrelation of operations within the four–factor analysis, but [instead] as an independent fifth factor. . ." 346 NLRB No. 72 at fn. 5. In other words, the judge had chosen to use the four-factor test rather than opting to decide the single-employer issue solely on the absence of an arm's-length relationship. Having made this choice, the judge should only have treated the absence of an arm's-length relationship as one consideration to be taken into account while evaluating the "interrelation of operations" factor.

Here is the conceptual difficulty: If the presence or absence of an arm's–length relationship is practically the same thing as ("essentially synonymous" with) single–employer status, then how can it also be less important than one of the factors in the four-factor test?

Stated another way, in algebra, if A = B and B = C, then A = C. Two quantities each equal to a third are equal to each other. By similar logic, two separate tests for the same condition should be equivalent, or at least consistent. If the "hallmark" of single-employer status – the absence of an arm's-length relationship – weighs as heavily as an elephant in one test, how can it weigh as lightly as a mouse in another test for the same thing?

The difference between these two tests seems even more pronounced when it is noted that *Lebanite Corp.* views the absence of an arm's-length relationship as a consideration

relevant to the "interrelation of operations" factor, but this factor isn't even the most important in the Board's four–factor analysis. That distinction usually goes to "centralized control over labor relations."

It appears clear that, in *Lebanite Corp.*, the Board indeed is offering the judge a choice of which test to use. Thus, it stated that "the Board sometimes treats single employer status and absence of an arm's-length relationship as essentially synonymous. In some cases, however, the Board has treated absence of arm's-length relationship within the traditional four-factor test as bearing on the factor of interrelation of operations. . ." 346 NLRB No. 72 at fn. 5.

It isn't quite so clear, however, which test the Board would deem more appropriate in the present case. Accordingly, I will evaluate the evidence using each of the tests so that the Board may choose the one it deems preferable. The four–factor test will be applied first.

Factor 1: Interrelation of Operations

The record leaves no doubt that John Hartley and his fiancée, Jane McNamara, created J & J Land to rescue Shane from its financial problems. Before doing so, Hartley, in his capacity as Shane's president and majority shareholder, unsuccessfully had sought other means of infusing money into the steel processing company. He credibly testified that after "first tier" lenders declined, he sought financing from institutions offering loans at subprime rates. Hartley found a lender with experience helping distressed companies. This source would lend money, but only if Hartley and Shane complied with a number of requirements. Fundamentally, Hartley testified, "we were at a place that it was either comply [with the requirements] or close the doors."

Hartley and his fiancée, Jane McNamara, established J & J Land specifically to satisfy some of the conditions imposed by the lender. As required by the lender, Shane conveyed its property to J & J Land by quitclaim deed. (Technically, the transaction entailed two conveyances because the lender also required Shane to divide the land into two separate parcels.) Immediately, J & J Land took out new mortgages, secured by the property it now owned, and used the resulting money to pay some of Shane's debts.

J & J Land then leased the property to Shane, which was supposed to pay $25,000 per month rent. Shane didn't always pay the full amount, but when J & J Land received a lesser sum, its principals did not protest.

Hartley's credible, poignant testimony made clear that he and McNamara had created J & J Land not to be a stellar business success on its own, but rather for one specific purpose, saving Shane: "[O]ur effort wasn't about creating a land company that's going to soar like an eagle. It was about salvaging Shane, salvaging jobs at Shane, the future of Shane, and the assets of Shane."

Other facts support the conclusion that Hartley and McNamara had established J & J Land as part of Hartley's efforts to save Shane, and that J & J Land existed solely for this purpose. An accountant employed by Shane had prepared J & J Land's articles of organization. J & J Land never had its own offices or telephone number, but instead used Shane's. J & J Land did not have any employees of its own, but instead, a Shane employee took care of J & J Land's records and documents, which resided in a Shane filing cabinet.

J & J Land's counsel argues that J & J Land was engaged in a business, real estate investment, totally different from the manufacturing business of Shane Steel. The credited evidence does not support this argument. Hartley's testimony makes clear that he and McNamara did not create J & J Land to invest in real estate but to save Shane Steel. Indeed, in their "Affidavit of Property Use," described above, Hartley and McNamara characterized J & J Land's purchase not as "investment property" but as "Operated by owner for purposes of owner's business." I do not credit Hartley's explanation that he and McNamara checked the wrong box by mistake. In view of Hartley's testimony that he and McNamara did not create J and J Land to "soar like an eagle" but rather to save Shane, checking the "investment property" box would not have seemed the appropriate choice at the time. Only later did it become apparent that this choice reflected on the single-employer issue.

It appears reasonable that if Hartley and McNamara had created J & J Land to make profitable real estate investments – to "soar like an eagle" – the company would have operated quite differently. For example, when Shane failed to pay the full amount of its monthly rent, J & J Land would have followed the procedure set forth in the lease to obtain full payment. J & J Land's failure to do so makes little sense if its principals intended it to be a viable real estate investment company. However, such inaction does appear logical if Hartley and McNamara created J & J Land as a device to save Shane.

In the testimony quoted above, Hartley admitted that he and McNamara created J & J Land to salvage Shane. If J & J Land had held even one other piece of property, apart from Shane's, it might raise at least a scintilla of doubt about this admission. However, the record affords no reason to believe that J & J Land ever held, *or even tried to purchase*, property from a seller other than Shane.

In sum, Hartley set out to obtain a loan Shane needed to survive. After "first tier" lending institutions rebuffed him, Hartley turned to the subprime market. Even there, the only financing Hartley could find came with serious strings attached. To meet those conditions, Hartley and his fiancée, with help from Shane's accountant, established J & J Land. Once created, this company "lived" in a filing cabinet in Shane's offices, with no address other than Shane's and no telephone other than Shane's.

J & J Land's operations were more than "interrelated" with Shane's. Its total function was to serve Shane as a source of financial life support, and it was just as much a part of Shane's operations as a mitochondrion is a part of the cell which surrounds it. Accordingly, I conclude that the "interrelation of operations" factor strongly indicates single–employer status.

Factor 2: Common Management

As already mentioned, at the time Shane conveyed its property to J & J Land, Hartley not only was Shane's president but also owned an 80 percent interest in that corporation. Within months, Hartley acquired the remaining 20 percent interest and became Shane's sole shareholder. Even without this final 20 percent interest, Hartley had full control of Shane at all material times.

Hartley only held a 50 percent interest in J & J Land. McNamara, who held the other 50 percent interest, testified that she participated jointly with Hartley in making decisions, even

when Hartley alone signed a document resulting from that decision. She certainly provided considerable capital, in the form of loans and contributions, which allowed J & J Land to acquire the Shane property and relieve some of Shane's debt in the process. Moreover, there is no reason to doubt that McNamara participated as a full and equal partner in this company. However, J & J Land really didn't have any daily operations. McNamara played no part in the daily operations of Shane.

In sum, the record establishes that Hartley managed the daily operations of Shane as its chief executive and owner, and that he performed about 50 percent of the quite negligible management duties associated with J & J Land. Although Hartley did not have total control of J & J Land, because of his role in the management of both entities, I conclude that the "common management" factor weighs towards a finding of single-employer status.

Factor 3: Centralized control of labor relations

Hartley, as Shane's president and majority stockholder, fully controlled that corporation's labor relations policies and actions. However, neither Hartley nor McNamara controlled J & J Land's labor relations because that company had no employees and, therefore, no labor relations.

The record does not establish that J & J Land, as an entity, exercised any control over Shane's labor relations. Likewise, no evidence indicates that McNamara held any position in Shane's hierarchy or otherwise controlled or influenced Shane's labor relations, I find that she did not.

As already noted, when one of the two entities has no employees, the Board gives less weight to the "centralized control of labor relations" factor. *Bolivar–Tees, Inc.*, above. To the extent this factor is entitled to weight, I conclude that it weighs in favor of finding single-employer status.

Factor 4: Common Ownership or Financial Control

As discussed above, at all material times, Hartley held at least an 80–percent interest in Shane and had plenary control of Shane's operations. Hartley also owned a 50 percent interest in J & J Land, but the exact amount of control he exercised over this company is somewhat uncertain. Some J & J Land documents bear only Hartley's signature, and not that of McNamara. However, she testified that before Hartley signed any such document, he and she would discuss the matter and reach agreement.

In crediting this testimony, I note that Hartley and McNamara have been engaged to each other at all material times and that they live together. Additionally, I note that McNamara is president and chief executive officer of a not–for–profit corporation not involved in this proceeding, serves on the boards of other organizations, holds a master's degree, and has experience in commercial leasing. Particularly considering McNamara's experience in commercial leasing, it seems likely that she contributed not only capital but also business acumen to J & J Land and participated fully in the decision–making.

Accordingly, I find that Hartley and McNamara did discuss and reach agreement before Hartley signed the documents on behalf of J & J Land. Further, I conclude that Hartley and McNamara equally shared control of the limited liability company.

The record does not establish that J & J Land exercised any control over Shane's operations. Rather, J & J Land simply served as a source of funding and debt relief.

As to Shane's control of J & J Land, it is true that Shane's accountant helped Hartley and McNamara organize J & J Land by preparing necessary documents. It is also true that a Shane employee took care of the filing of these documents. Likewise, because J & J Land had no office space or telephone line, Shane provided those services as needed. However, J & J Land did not have any day–to–day operations for Shane to control. It had no employees and existed, essentially, on paper in a file drawer. To the extent J & J Land had any operations at all, Shane only could influence those operations, through Hartley, rather than control such decision–making.

Discussion

The first of the four factors – interrelation of operations – clearly weighs in favor of single–employer status. To the extent that J & J Land had any operations at all, they related to Shane. J & J Land held no property except that which it had acquired from Shane and then leased back to Shane. The sole reason that Hartley and McNamara organized J & J Land was to help Shane out of its financial distress and J & J Land existed solely for that purpose.

The second factor – common management – also militates towards a finding of single–employer status. Although the two entities did not have identical management, Hartley managed Shane and participated in the management of J & J Land. The Board does not require absolutely identical management. *Hydrolines, Inc.*, 305 NLRB No. 40 (October 15, 1991).

The third factor – centralized control of labor relations – weighs only minimally, if at all, in favor of single–employer status because one of the two entities had no employees and, therefore, no labor relations. As discussed above, the Board typically views centralized control of labor relations to be a critical factor in assessing single–employer status, *AG Communication Systems Corp.*, 350 NLRB No. 15 (June 29, 2007), but accords that factor less importance when one of the entities has no employees. *Bolivar–Tees, Inc.*, above, citing *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993) (where some companies have no employees, factor of centralized control of labor relations becomes less important).

In accordance with *Bolivar–Tees*, I will not accord the third factor the weight it usually receives. Although I find that this factor does not weigh substantially in favor of single–employer status, it does not preclude reaching that conclusion based on other evidence.

The fourth factor – common ownership or financial control – does not add much weight on either side of the scale. In *Mercy Hospital of Buffalo*, above, the Board stated that common ownership, "while significant, is not determinative in the absence of centralized control over labor relations" and that common ownership alone does not establish a single–employer relationship.

Also in *Mercy Hospital of Buffalo* the Board, citing *Dow Chemical Co.*, 326 NLRB 288 (1998) stated that a single–employer relationship will be found only if one of the entities exercises actual or active control over the day–to–day operations or labor relations of the other. However, as discussed above, the Board has stated that it will not give so much weight to "centralized control of labor relations" where one of the entities has no employees. *Bolivar–Tees, Inc.*, above; *Three Sisters Sportswear Co.*, above.

Reducing the weight given to "centralized control of labor relations" increases the importance of "interrelation of operations." That factor strongly points towards single-employer status. Based on the increased weight given to this factor, and noting that the "common management" factor also favors such a finding, I conclude that Shane and J and J Land constitute a single employer.

The evidence now will be evaluated using the alternate one–factor test, concerning the presence or absence of an arm's–length relationship. For the following reasons, this test strongly militates in favor of finding single–employer status.

As discussed above, the evidence establishes that Hartley and McNamara created J & J Land solely as a means of helping Shane survive its financial difficulties and that it continued to exist solely for this purpose. Thus, it did not invest in any other properties except for Shane's.

Although Shane had agreed to pay J & J Land a specified amount of rent each month, it failed to do so, yet J & J Land took no steps to hold Shane to the terms of the lease. The principals of J & J Land weren't interested in that company soaring "like an eagle" but only in it serving to relieve Shane's financial distress.

The evidence clearly indicates the absence of an arm's length relationship and, in this case, that absence certainly constitutes the hallmark of a single–employer relationship. J & J Land's relationship with Shane was closer than symbiotic. It existed for no purpose other than sustaining Shane through its financial difficulties.

In sum, I conclude that the General Counsel has proven that Shane Steel and J & J Land constitute a single employer.

Undisputed Allegations

Because Shane and J & J Land constitute a single employer, admissions by one of these entities binds the other.

Specification paragraph 1(a) alleges that at all material times, Respondent Shane has been a Michigan corporation with an office and place of business located at 17495 Malyn Boulevard, Fraser, Michigan, and has been engaged in the manufacture and processing of commercial steel bars. In its Answer, Shane admitted this allegation. J & J Land's Answer neither admitted nor denied it. In view of Shane's admission, I conclude that the General Counsel has proven the facts alleged in Specification paragraph 1(a).

Specification paragraph 1(b) alleges that at all material times, J & J Land has been a Michigan limited liability company with an office and place of business located at 17495

Malyn Boulevard, Fraser, Michigan, and has been a real estate holding company which owns the land at 17495 Malyn Boulevard, Fraser, Michigan. Shane's Answer denies this allegation. J & J Land's Answer states that it "admits only that it is a Michigan limited liability company with a registered office address of 17495 Malyn Boulevard, Fraser, Michigan, and that it owns that property. J & J denies it owned land, conducted business, or was even in existence when the underlying events took place."

Based on the admission in J & J Land's Answer, I find that it is a Michigan limited liability company with a registered office address of 17495 Malyn Boulevard, Fraser, Michigan, and that it owns that property.

Specification Paragraph 4 alleges that the gross backpay due the discriminatees is the amount of earnings they would have received but for the unilateral changes implemented by Respondent Shane. In its Answer, Shane admits this allegation. J & J Land does not.

Because Shane and J & J Land constitute a single employer, Shane's admission is binding on J & J Land. Additionally, to the extent that J & J Land disagrees with the backpay formula and method of calculation described in the Specification, it must set forth in its answer an alternative formula which it considers more accurate or equitable. Thus, Section 102.56(b) of the Board's Rules and Regulations states, in part:

> As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

Section 102.56(c) provides that if a respondent's answer fails to comply with this requirement, "the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate."

In its Answer to paragraph 4 of the Specification, J & J Land stated that it "neither admits nor denies the allegations in Paragraph 4 as they pertain to another party. To the extent the allegation was intended for J & J as well, J & J denies it owes the discriminatees any amounts whatsoever. J & J did not exist on June 1, 2004." Although this Answer does raise the single–employer issue and, more generally, the question of whether J & J Land bears any responsibility to make the discriminatees whole, it does not dispute the definition of "gross backpay" set forth in Specification paragraph 4. J & J Land's Answer also does not offer an alternate definition of "gross backpay." Thus, it neither states a disagreement with the core allegation raised by Specification paragraph 4 nor sets forth a basis for such a disagreement. In these circumstances, and in accordance with Section 102.56, I deem J & J Land to have admitted the definition of "gross backpay" alleged in the Specification. Further, I conclude that the General Counsel has proven the allegations set forth in Specification paragraph 4.

Specification paragraph 5 alleges that "Respondents' liability for backpay for the discriminatees commenced on June 1, 2004, the date that Respondent Shane unilaterally

reduced their wages. Respondents' liability for backpay is continuing to accrue." Shane's Answer admits this allegation but J & J Land's Answer does not. J & J Land stated in this Answer that it "denies the factual allegations and legal conclusions in Paragraph 5 because they are false and erroneous as to J & J. J & J has no liability. J & J neither admits nor denies the appropriateness of the measure of damages alleged or the calculations. . .because it lacks the information necessary to do so, and leaves the Regional Director to his proofs."

J & J Land's Answer suffices to raise the issue of its relationship with Shane and to place into controversy the single–employer status alleged in the Specification. The government clearly bore the burden of proving such status, a burden which it carried. However, J & J Land's Answer fails to challenge the two main allegations raised by Specification paragraph 5, or at least, fails to challenge these allegations in a manner compliant with Rule 102.56(b).

Specification paragraph 5 alleges, in effect, that the backpay period began June 1, 2004. J & J Land does not, in its Answer, propose an alternate starting date or otherwise explain why the alleged June 1, 2004 date was incorrect. Similarly, J & J Land's Answer does not expressly challenge the allegation that backpay liability continued to accrue. Accordingly, I will deem J & J Land to have admitted these allegations. Further, I conclude that the General Counsel has proven all allegations raised in Specification paragraph 5.

Computation of Make–Whole Remedy

Discriminatees' Backpay

Specification paragraph 6(a) alleges that an appropriate measure of the gross backpay for each discriminatee is the product of the number of hours each discriminatee worked multiplied by the rate differential from their hourly rate immediately prior to June 1, 2004, and their hourly rate after June 1, 2004, for each calendar quarter until December 31, 2006. Shane's Answer admits this allegation but J & J Land's Answer's does not. Rather, it states that "J & J denies the factual allegations and legal conclusions in Paragraph 6(a) because they are inapplicable to J & J and, therefore, false and erroneous as to J & J. J & J neither admits nor denies the appropriateness of the measure of damages alleged or the calculations and amounts alleged, because it lacks the information necessary to do so, and leaves the Regional Director to his proofs."

Thus, rather than disputing the central allegation in Specification paragraph 6(a) – the appropriate measure for determining gross backpay for each discriminatee – and rather than offering an alternate method, J & J Land did not take a position on this issue but instead left "the Regional Director to his proofs." That response, neither admitting nor denying the central allegation, fails to satisfy Section 102.56(b). Therefore, I deem J & J Land to have admitted this allegation, as Shane did expressly. Therefore, I conclude that the government has proven all allegations raised by Specification paragraph 6(a).

Specification paragraph 6(b) alleges that "Based on Respondent Shane's records, the discriminatees worked regular and overtime hours and were paid for vacation and holiday hours each calendar quarter, as set forth in Attachment 1. The appropriate regular rate and overtime rate differentials were applied and appear opposite the discriminatees' names in Attachment 1 and in Schedule A." Shane's Answer admits this allegation but J & J Land's Answer does not.

J & J Land answered the allegations in Specification paragraph 6(b) much the same as its response to Specification paragraph 6(a), neither admitting nor denying "the appropriateness of the measure of damages alleged or the calculations and amounts alleged, because it lacks the information necessary to do so, and leaves the Regional Director to his proofs."

For reasons discussed above, J & J Land's Answer does not satisfy its obligations under Board Rule 102.56(b). Accordingly, I deem J & J Land to have admitted the allegations raised by Specification paragraph 6(b) and conclude that the General Counsel has proven these allegations.

Paragraph 6(c) in the amended Specification alleges that "The amount of wages due each discriminatee from June 1, 2004 until February 25, 2007 is summarized in Schedule A below." Shane's Amended Answer admits this allegation. Again, J & J Land's Answer does not satisfy Section 102.56 and, therefore, I will deem J & J Land to have admitted these allegations. Further, I conclude that the government has proven the allegations raised by Specification paragraph 6(c) and in Schedule A.

Specifically, I find that for the period alleged in the Amended Specification, Respondents must make the discriminatees whole for lost wages by paying the following amounts, plus interest:

Discriminatee	Amount		Discrimnatee	Amount
Jackie Davis	$ 77.68		Patrick Randazzo	$ 7,213.50
Gary Engle	$ 2,493.58		Richard Regelin	$ 5,729.10
Robert Hayes	$ 8,224.20		Robert Rochner	$ 8,758.85
William Koch	$ 8,592.45		William Silew	$ 6,399.90
Kenneth LaFleur	$ 8,028.80		Joseph Sliwiniski	$ 120.96
Nick Maltese	$ 6,947.91		Julio Vargas	$ 8,217.11
William Martin	$ 7,281.36		Mirko Vitanoski	$ 7,136.15
Mark Moore	$ 523.90		Frederick Wendt	$ 8,226.00
Terry Poore	$ 2,153.45		Howard Wucetich	$ 7,342.00
TOTAL				**$103,466.90**

Reimbursement for out–of–pocket expenses

Specification paragraph 7(a) alleges that "An appropriate measure of medical, dental, optical, and prescription drug expenses incurred by the discriminatees can be found by applying relevant provisions in the collective bargaining agreement and insurance coverages, co–pays, deductibles, and co–insurance payments in effect immediately prior to June 1, 2004." Shane's Answer admits this allegation but J & J Land's Answer does not. Taking into account Shane's admission and J & J Land's failure to deny the allegations in accordance with Section 102.56, I find that the General Counsel has proven the allegation raised by Specification paragraph 7(a).

The government alleged in Specification paragraph 7(a) the method for calculating how much money each discriminatee should receive as reimbursement for that individual's out–of–pocket medical, dental, optical and prescription drug expenses. Using this method, the General Counsel calculated these amounts and set them out at the following places in the Specification:

Paragraph 7(b), Attachments 2 through 19, and Schedule B.

The allegations in Specification paragraph 7(b) differ in a fundamental way from those in paragraph 7(a), and this difference should be discussed. In describing how the reimbursement amounts should be calculated, paragraph 7(a) referred to provisions in the collective–bargaining agreement and in the insurance documents which established coverage. Because Shane was a party to these contracts, Shane obviously had knowledge of their provisions. So did J & J Land because one of its two owners, Hartley, also was president of Shane.

Under Rule 102.56(b), the extent of a respondent's knowledge affects how specifically he must answer a particular allegation. The Rule requires a respondent to admit, deny, or explain each and every allegation of the specification, *unless the respondent is without knowledge*. . ." (Italics added) The Rule further states that "As to all matters *within the knowledge of the respondent*, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice."

In this instance, because of Respondents' presumed knowledge of their agreements with the Union and health insurance carrier, they bore a rather heavy pleading burden in answering the allegations in Specification paragraph 7(a). If they disagreed with the General Counsel's decision concerning which contractual provisions were relevant, if they disagreed with how the General Counsel interpreted these terms, or if they disagreed with how the General Counsel used them in calculations, then they had to state specifically, in their Answers, "the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures." Section 102.56(b).

However, answering Specification paragraph 7(b) does not require the same specificity. Unlike the allegations raised in Specification paragraph 7(a), those in paragraph 7(b) do not rest on facts which the Respondents necessarily would know. These latter allegations reflect the medical, dental, optical and prescription drug expenses which employees or their dependents incurred at various times. Respondents might not be aware of when an employee, or a family member, actually went to the doctor, dentist, optician or pharmacist. Similarly, Respondents may have even less knowledge of how much the employee or dependent had to pay out of pocket on a particular occasion for a particular health–related service.

Thus, should the Specification allege that, on a particular date, Employee X spent $5 out–of–pocket for a prescription, the Respondents need not explain in their answers why they doubt it. Likewise, if Respondents wish to deny the obligation to reimburse Employee Y $500 for back surgery, they do not have to plead that Employee Y actually was running in a marathon on the day in question. A simple denial places the matter in issue and places it before the judge. The General Counsel then bears the burden of proof.

Answering Specification paragraph 7(b), J & J Land stated, in part, that it neither admitted nor denied the allegations because it lacked the necessary information. That answer satisfied the requirements of Section 102.56(b) of the Board's Rules.

Shane also did not admit these allegations either in its original Answer or in its Amended Answer. However, during the hearing, Shane entered into a stipulation which admitted all the allegations raised in Specification paragraph 7(b) except for some of those

pertaining to two of the discriminatees, Jackie Davis and Joseph Sliwinski.

J & J Land did not enter into this stipulation. However, my conclusion that Shane and J & J Land constitute a single employer results in the further conclusion that Shane's admissions, in the stipulation, are binding on J & J Land. Additionally, based on Shane's stipulation, I conclude that the General Counsel has proven all allegations raised in Specification paragraph 7(b), Schedule B, and Attachments 2 through 19, except for certain of the allegations pertaining to employees Jackie Davis and Joseph Sliwinski.

Based on the stipulation, I conclude that the General Counsel has proven that the discriminatees listed in the table below are entitled to receive reimbursement in the stated amounts for out–of–pocket medical, dental, optical and prescription drug expenses:

Discriminatee	Medical Expenses	Dental Expenses	Optical Expenses	Prescription Drug Expenses	Total Reimbursement
Gary Engle	$ 95.00	$ 0.00	$ 0.00	$ 136.21	$ 231.21
Robert Hayes	$ 393.31	$ 1,000.00	$ 15.00	$ 305.15	$ 1,713.46
William Koch	$ 0.00	$ 106.00	$ 0.00	$ 0.29	$ 106.29
Kenneth LaFleur	$ 448.44	$ 0.00	$ 0.00	$ 95.05	$ 543.49
Nick Maltese	$ 4,308.58	$ 0.00	$ 115.00	$ 967.84	$ 5,391.42
William Martin	$ 2,023.82	$ 0.00	$ 65.00	$ 948.15	$ 3,036.97
Mark Moore	$ 150.00	$ 0.00	$ 0.00	$ 128.52	$ 278.52
Terry Poore	$ 0.00	$ 205.50	$ 0.00	$ 0.00	$ 205.50
Patrick Randazzo	$ 1,866.72	$ 0.00	$ 0.00	$ 350.77	$ 2,217.49
Richard Regelin	$ 3,603.18	$ 0.00	$ 0.00	$ 972.62	$ 4,575.80
Robert Rochner	$ 70.97	$ 0.00	$ 0.00	$ 405.29	$ 476.26
William Silew	$ 155.90	$ 15.00	$ 0.00	$ 75.55	$ 246.45
Julio Vargas	$ 1,341.84	$ 0.00	$ 0.00	$1,218.40	$ 2,560.24
Mirko Vitanoski	$ 130.00	$ 75.00	$ 0.00	$ 70.16	$ 275.16
Frederick Wendt	$ 1,226.40	$ 122.50	$ 50.00	$1,015.79	$ 2,414.69
Howard Wucetich	$ 5.00	$ 0.00	$ 0.00	$ 3.77	$ 8.77
TOTAL:	**$15,819.16**	**$1,524.00**	**$ 245.00**	**$5,720.94**	**$24,281.72**

The table above does not show out–of–pocket expenses for Discriminatees Jackie Davis and Joseph Sliwinski. The reimbursement due them will be discussed next.

Although Shane, in its stipulation, did not admit that discriminatees Davis and Sliwinski were entitled to reimbursement for *all* the out–of–pocket expenses itemized in the Specification, Shane did admit their entitlement to reimbursement for some of those expenses. Apart from the stipulation, the evidence does not establish that Davis and Sliwinski incurred any out–of–pocket medical, dental, optical or prescription drug expenses. Therefore, the dollar figures in the stipulation determine the total reimbursement for such expenses due these two

discriminatees. Davis' expenses will be considered first.

In its stipulation, Shane admitted the accuracy of the Specification's calculations regarding medical, dental, optical and prescription drug reimbursement owed to Jackie Davis from the beginning of the backpay period through April 20, 2005. Based on the stipulation I conclude that Respondents must reimburse Davis for the following out–of–pocket expenditures:

DATE REIMBURSEMENT								
	Out–Of–Pocket Medical Expenses		Out–Of–Pocket Optical Expenses		Out–Of–Pocket Prescription Drug Expenses			
	Year	Amount	Year	Amount	Year 2004	Amount	Year 2005	Amount
	07/21/04	$ 5.00	07/14/04	$ 15.00	05/10/04	$ 5.00	01/06/05	$ 5.00
	08/06/04	$ 5.00	02/21/05	$ 5.00	05/10/04	$ 5.00	01/06/05	$ 5.00
	10/18/04	$ 5.00			05/21/04	$ 5.00	01/06/05	$ 35.00
	01/17/05	$ 5.00			05/21/04	$ 5.00	01/28/05	$ 15.00
	04/02/05	$ 5.00			06/01/04	$ 5.00	02/23/05	$ 5.00
					06/01/04	$ 5.00	02/23/05	$ 15.00
					07/06/04	$ 35.00	02/23/05	$ 15.00
					07/06/04	$ 15.00	02/23/05	$ 35.00
					07/06/04	$ 35.00	03/08/05	$ 5.00
					07/06/04	$ 35.00	03/28/05	$ 15.00
					08/09/04	$ 35.00	03/28/05	$ 15.00
					08/09/04	$ 15.00	03/28/05	$ 5.00
					08/09/04	$ 15.00	03/28/05	$ 35.00
					08/09/04	$ 15.00	04/18/05	$ 15.00
					09/09/04	$ 15.00		
					09/09/04	$ 15.00		
					10/14/04	$ 15.00		
					10/14/04	$ 15.00		
					10/15/04	$ 35.00		
					11/01/04	$ 35.00		
					11/01/04	$ 15.00		
					11/15/04	$ 15.00		
					11/15/04	$ 15.00		
					11/15/04	$ 15.00		
					12/02/04	$ 35.00		
					12/02/04	$ 5.00		
					12/17/04	$ 15.00		
					12/24/04	$ 15.00		
TOTAL		**$ 25.00**		**$ 20.00**				**$ 710.00**

TOTAL EXPENSE REIMBURSEMENT: $755.00

Shane's stipulation also admits the accuracy of certain figures, pertaining to Sliwinski's out–of–pocket expenses, which are set forth in Specification Attachment 15. Thus, Shane

admits that this attachment correctly reflects the medical, dental, optical and prescription drug expenses Sliwinski incurred from the start of the backpay period through the end of calendar year 2004, and also from the third quarter of 2006 through the end of the period covered in the Amended Compliance Specification.

Accordingly, I find that the government has proven that Sliwinski is entitled to medical, dental, optical and prescription drug reimbursement for the expenses listed in Specification Attachment 15 which Sliwinski incurred on the following dates:

DATE REIMBURSEMENT						
Out–Of–Pocket Medical Expenses						
	Year 2004	**Amount**	**Year 2006**	**Amount**	**Year 2007**	**Amount**
	06/17/04	$ 5.00	07/06/06	$ 39.83	01/25/07	$ 15.00
	06/13/04	$ 5.00	07/06/06	$ 28.90		
	07/22/04	$ 5.00	07/06/06	$ 15.00		
	08/12/04	$ 5.00	07/11/06	$ 7.14		
	08/12/04	$ 5.00	07/11/06	$ 18.46		
	08/24/04	$ 5.00	07/11/06	$ 29.41		
	09/07/04	$ 5.00	07/11/06	$ 2.77		
	09/16/04	$ 5.00	07/11/06	$ 6.95		
	09/24/04	$ 5.00	07/11/06	$ 696.50		
	10/4/04	$ 5.00	07/11/06	$ 171.50		
	20/5/04	$ 5.00	07/11/06	$ 161.98		
	12/3/04	$ 5.00	07/11/06	$ 76.80		
	12/14/04	$ 5.00	07/11/06	$ 654.52		
	12/31/04	$ 5.00	07/13/06	$ 15.00		
			07/19/06	$ 4.16		
			08/04/06	$ 96.78		
			08/08/06	$ 188.64		
			08/10/06	$ 15.00		
			09/25/06	$ 1.34		
			09/25/06	$ 1.44		
			09/25/06	$ 1.05		
			09/25/06	$ 2.17		
			09/25/06	$ 1.46		
			09/25/06	$ 52.94		
			09/25/06	$ 18.46		
			09/25/06	$ 17.89		
			09/25/06	$ 6.56		
			09/25/06	$ 4.12		
			09/30/06	$ 86.09		
			10/04/06	$ 35.48		
			10/31/06	$ 15.00		
			11/09/06	$ 15.00		
			11/22/06	$ 15.00		
TOTAL						**$2,588.34**

DATE REIMBURSEMENT						
Out–Of–Pocket Prescription Drug Expenses						
	Year 2004	Amount	Year 2006	Amount	Year 2007	Amount
	06/17/04	$ 5.00	07/05/06	$ 25.00	01/11/07	$ 25.00
	06/17/04	$ 5.00	07/11/06	$ 1.85	01/11/07	$ 45.00
	07/02/04	$ 15.00	07/12/06	$ 45.00	01/31/07	$ 25.00
	07/02/04	$ 15.00	07/17/06	$ 25.00	02/02/07	$ 5.00
	07/20/04	$ 5.00	07/17/06	$ 45.00	02/02/07	$ 25.00
	08/04/04	$ 35.00	08/01/06	$ 25.00	02/13/07	$ 45.00
	08/04/04	$ 5.00	08/01/06	$ 5.00	02/13/07	$ 25.00
	08/04/04	$ 5.00	08/03/06	$ 25.00	03/09/07	$ 25.00
	08/04/04	$ 35.00	08/03/06	$ 1.85	03/09/07	$ 45.00
	08/04/04	$ 15.00	08/03/06	$ 45.00	03/16/07	$ 5.00
	08/04/04	$ 36.75	08/30/06	$ 25.00	03/16/07	$ 3.74
	08/04/04	$ 15.00	08/30/06	$ 45.00	04/12/07	$ 25.00
	08/04/04	$ 5.00	09/03/06	$ 25.00	04/13/07	$ 25.00
	08/05/04	$ 3.17	09/11/06	$ 25.00	04/15/07	$ 5.00
	08/27/04	$ 5.00	09/11/06	$ 45.00	04/15/07	$ 25.00
	09/02/04	$ 5.00	11/05/06	$ 25.00		
	09/02/04	$ 5.00	11/05/06	$ 45.00		
	09/02/04	$ 35.00	11/06/06	$ 2.15		
	09/02/04	$ 15.00	11/07/06	$ 1.85		
	09/02/04	$ 36.75	11/07/06	$ 25.00		
	09/02/04	$ 15.00	11/09/06	$ 45.00		
	09/02/04	$ 5.00	11/09/06	$ 25.00		
	09/04/04	$ 5.00	11/27/06	$ 2.15		
	09/04/04	$ 5.00	12/06/06	$ 45.00		
	09/10/04	$ 23.75	12/14/06	$ 25.00		
	09/13/04	$ 15.00				
	09/20/04	$ 35.00				
	10/03/04	$ 5.00				
	10/03/04	$ 5.00				
	10/03/04	$ 15.00				
	10/03/04	$ 36.75				
	11/02/04	$ 5.00				
	11/02/04	$ 5.00				
	11/02/04	$ 5.00				
	11/02/04	$ 15.00				
	11/02/04	$ 36.75				
	11/22/04	$ 5.00				
	11/22/04	$ 35.00				
	11/22/04	$ 2.18				
	12/01/04	$ 5.00				
	12/01/04	$ 1.84				
	12/07/04	$ 15.00				

DATE REIMBURSEMENT (Continued)						
Out–Of–Pocket Prescription Drug Expenses						
	Year 2004	Amount	Year 2006	Amount	Year 2007	Amount
	12/07/04	$ 15.00				
	12/07/04	$ 5.00				
	12/07/04	$ 5.00				
	12/07/04	$ 36.75				
	12/08/04	$ 0.07				
	12/08/04	$ 35.00				
	12/13/04	$ 5.00				
	12/13/04	$ 15.00				
	12/13/04	$ 5.00				
	12/15/04	$ 5.00				
	12/16/04	$ 15.00				
	12/18/04	$ 5.00				
TOTAL						**$1,748.35**

TOTAL EXPENSE REIMBURSEMENT: $4,336.69

The following table summarizes Respondents' obligations to reimburse Davis and Sliwinski for out–of–pocket medical, dental, optical and prescription drug expenses which they incurred:

Discriminatee	Medical Expenses	Dental Expenses	Optical Expenses	Prescription Drug Expenses	Total Reimbursement
Jackie Davis	$ 25.00	$ 0.00	$ 20.00	$ 710.00	$ 755.00
Joseph Sliwinski	$2,588.34	$ 0.00	$ 0.00	$1,748.35	$4,336.69

401(k) Plan

Specification paragraph 8(a) alleges that "An appropriate measure of the reimbursement for the unilateral elimination of Respondent Shane's 401(k) matching contribution and subsequent elimination of the 401(k) plan can be found by examining the contribution percentage history of the discriminatees in the months prior to June 1, 2004 and, by projecting the same contribution percentage continuing through December 31, 2006, calculating the earnings or losses that would have resulted from the discriminatee's and matching contributions, less the discriminatee's projected contribution." The paragraph further alleges that the Specification's Schedule C reflects the monthly contribution history for the discriminatees from November 2003 through May 2004 and the chosen projected contribution.

Shane's Answer admits these allegations. J & J Land has not admitted the allegations. In view of my conclusion that Shane and J & J Land constitute a single employer, Shane's admission may be attributed to J & J Land.

Moreover, Specification paragraph 8(a) does not depend on facts outside Respondents' knowledge, but instead alleges the appropriateness of the method the General Counsel used to compute liability for failure to make 401(k) matching contributions and for eliminating the 401(k) plan. Section 102.56(b) of the Board's Rules requires that a respondent disputing such a procedure "specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises. . ." J & J Land's Answer, however, fails to state a specific basis for disagreement and also fails to set forth in detail its position on the applicable premises.

Thus, J & J Land's Answer states that it "neither admits nor denies the appropriateness of the measure of damages alleged or the calculations and amounts alleged, because it lacks the information necessary to do so, and leaves the Regional Director to his proofs." Because I have concluded that Shane and J & J Land constitute a single employer, I further conclude that all the 401(k) information also is available to J & J Land. Such a conclusion rests not only on legal principles but also on the practical recognition that Shane's president owned a one–half interest in J & J Land and was deeply involved in organizing and running it. Therefore, I reject J & J Land's claim that it lacked the information necessary to dispute the General Counsel's calculations.

Additionally, to the extent that Specification paragraph 8(a) alleges the method of calculation, rather than the dollar amounts resulting from such calculations, J & J Land didn't need detailed knowledge about the contributions made (or not made) to each discriminatee's 401(k) account. However, J & J Land's Answer did not call into question any specific premises or procedures.

In sum, I conclude that J & J Land's Answer to Specification paragraph 8(a) fails to satisfy the requirements of Section 102.56 of the Board's Rules. Therefore, I will deem J & J Land to have admitted the allegations raised in that subparagraph.

Specification paragraph 8(b) alleges that the amount of reimbursement was detailed in Specification Attachments 20 through 26 and summarized in Attachment Schedule D. In its Amended Answer, Shane admits these allegations.

J & J Land, however, did not admit these allegations. As discussed above, J & J Land constitutes a single employer with Shane, and thus is privy to all of Shane's information concerning contributions to the 401(k) plan. Moreover, J & J Land possesses the information because one of its two owners, Hartley, also is president of Shane. Thus having knowledge, J & J Land had to do more than plead a general denial. However, J & J Land's Answer does not meet the specificity requirements of Section 102.56 of the Board's Rules. Therefore, I will deem J & J Land to have admitted the allegations in Specification paragraph 8(b). Accordingly, I conclude that the General Counsel has proven the allegations raised by Specification paragraph 8(b). Further, I conclude that the Respondents must make whole the discriminatees listed below by reimbursing each as indicated.

NAME	AMOUNT		NAME	AMOUNT
William Koch	$ 2,938.22		William Silew	$ 2,127.82
Nick Maltese	$ 852.02		Julio Vargas	$ 1,354.96
Robert Rochner	$ 3,126.87		Frederick Wendt	$ 2,034.05
TOTAL				**$12,433.99**

Perfect Attendance Bonus

When the Board's Regional Director amended the Specification on June 7, 2007, he added a new paragraph 9. It concerned Shane's unlawful discontinuation of the "perfect attendance bonus" program. (The original paragraph 9, with modifications, became paragraph 10 in the Amended Specification.)

The newly–added paragraph 9 alleged that the Respondents must make whole certain of the discriminatees by paying them the perfect attendance bonuses they would have received if Shane had not unlawfully discontinued the bonuses. In a newly–added Schedule E, the Amended Specification identified the affected discriminatees and the amounts necessary to make them whole for their losses. Neither Respondent has denied these allegations. I find that the Respondents must make the discriminatees listed below whole, in the indicated amounts, for the losses they incurred because of the unlawful discontinuation of the perfect attendance bonus:

NAME	AMOUNT		NAME	AMOUNT
Robert Hayes	$125.00		Mirko Vitanoski	$ 75.00
Kenneth LaFleur	$125.00		Frederick Wendt	$125.00
Robert Rochner	$125.00		Howard Wucetich	$ 75.00
William Silew	$125.00			
TOTAL				**$ 775.00**

Specification Paragraphs 10 and 11

The original Specification alleged a backpay period from June 1, 2004 until December 31, 2006. The Amended Specification extended the backpay period to February 25, 2007.

As mentioned above, paragraph 9 of the original Specification, modified to reflect the longer backpay period, became paragraph 10 in the Amended Specification. The new paragraph 10, like the original paragraph 9, provided a total backpay figure for each discriminatee. Respondents could satisfy their obligations to make the discriminatees whole by paying the specified amounts *plus interest accrued on those amounts* to the date of payment, calculated according to Board policy.

The amounts alleged in the new paragraph 10 differ somewhat from the amounts found by me, as discussed above in this decision, because I have concluded that two of the discriminatees, Davis and Sliwinski, should receive lower amounts than the Specification alleged as reimbursement for out–of–pocket medical, dental, optical and prescription drug expenses. Additionally, the Specification may include some arithmetical errors. These matters will be addressed later in this decision.

Before discussing the totals, however, one other matter must be considered because it could affect the amount of backpay. This matter concerns a motion which the General Counsel filed after the hearing closed.

General Counsel's Post–Hearing Motion

After the close of the hearing, the General Counsel filed a "Motion for the Administrative Law Judge's Order to Require Respondents to Pay 401(k) Moneys Owed Through March 22, 2007." Thereafter, the Union submitted a letter, dated August 27, 2007, stating that it concurred in the General Counsel's motion. Respondent J & J Land has filed an Opposition to the motion. The General Counsel's Motion stated, in part, as follows:

> 1. The Amended Compliance Specification, dated June 7, 2007, Schedule D, contains 401(k) figures calculated through December 31, 2006.
>
> 2. These calculations were generated based on records obtained during the compliance investigation from two sources. One set of records was provided by Respondent Shane. These were payroll records, and were complete through February 25, 2007, only. The other set of records was provided by Paychex, Inc., the 401(k) administrator, and these records were complete through December 31, 2006, only.
>
> 3. Respondent Shane laid off its bargaining unit employees on March 22, 2007.[1]
>
> 4. As of the date of the hearing, June 11, 2007, Respondent Shane had not provided the Region the appropriate records necessary to calculate Respondents' additional liabilities through March 22, 2007, although said records were the subject of a duly issued subpoena duces tecum sent March 9, 2007. Similarly, Paychex, Inc., the fund administrator, had not provided the records necessary to calculate the 401(k) liability through March 22, 2007 although said records were the subject of a subpoena duces tecum sent on March 12, 2007.
>
> 5. Following the close of hearing on June 13, 2007, the subpoenaed records were provided and a final 401(k) calculation for the period through March 22, 2007 has been completed. This calculation alters the 401(k) amounts listed in the Amended Compliance Specification, and is attached hereto as Exhibit 1, Revised Schedule D, Revised Schedule F, Revised Attachment 20 through 26. (Note, the schedules and attachments are intended to replace the corresponding schedules and attachments to the Amended Compliance Specification. The shaded rows are those that have changed as a result of this calculation.)
>
> 6. To fully remedy the violations found, the Administrative Law Judge's Order in the instant proceedings should require Respondents to pay the employees listed in the Amended Compliance Specification the 401(k) contributions owed, and return on investment due through March 22, 2007, and as set forth herein in Exhibit 1. See *Hubert Distributors*, 344 NLRB No. 29 (2005). Additionally, the Order should require Respondent [to] pay the employees interest on the total liability accrued to the date of payments, as calculated by the Region, pursuant to *New Horizons for the Retarded*, 283 NLRB 1173 (1978).

[1]The layoff of bargaining unit employees and concurrent cessation of business operations is the subject of the Complaint and Compliance Specification issued in Case 7–CA–50288, on July 31, 2007. Additional backpay calculations through March 22, 2007 have been included therein, as well as other, appropriate make whole remedies, except for the 401(k) moneys owed employees through March 22, 2007, which are addressed herein.

In considering the General Counsel's Motion, I begin by recognizing a fundamental goal in this proceeding, namely, arriving at accurate backpay figures to assure that the discriminatees receive a full make–whole remedy for the losses they suffered. Further, I note that in accordance with well–established Board policy, any uncertainties should be resolved in

favor of the discriminatees, who are the innocent victims of unlawful conduct.

Moreover, these discriminatees rely upon the General Counsel to represent their interests in this proceeding. Just as the discriminatees should not receive less than a full remedy because of some uncertainty in the evidence, they also should not suffer because of the procedural choices made by the General Counsel. So far as consistent with due process, the goal of accuracy should prevail over punctilio.

However, the General Counsel's Motion does raise some procedural concerns which affect Respondents' due process rights. First, the General Counsel has not sought to amend the Compliance Specification. That would have allowed Respondents the opportunity to admit or deny the allegations in the manner provided by the Board's Rules.

This problem might be overcome by treating the General Counsel's Motion as a motion to amend the Specification. However, the Motion alone does not constitute such an amendment. Only if the judge granted such a motion, thereby amending the Specification, would the Respondents be obliged to answer the new allegations. Most certainly, a lack of response to the Motion cannot be equated with failing to answer an allegation in the Specification.

Additionally, the Motion relies on documents which the General Counsel received after the hearing closed and which are not part of the record. As discussed above, after the hearing closed, the General Counsel moved for the admission of other documents (unrelated to the 401(k) issues) and, based upon the stipulation of the parties, I granted that motion and received the documents into evidence. However, the General Counsel has not offered into evidence or moved for the receipt of the 401(k) documents on which the Motion is based. The parties also have not stipulated either to the admission of these documents or to their contents.

If the General Counsel had offered these documents into evidence, Respondents would have had the opportunity to object. Such an objection might well have challenged whether the documents constituted "newly-discovered evidence" which properly might be received into the record after the hearing closed. Although this issue isn't free from doubt, I am concerned that the documents might not, in fact, meet the Board's standard for "newly–discovered evidence." To satisfy that test, the evidence must have been in existence at the time of the hearing and the movant must have been "excusably ignorant" of it. Moreover, the facts must establish that the movant acted with reasonable diligence to uncover and introduce the evidence. See *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46 fn. 1 (1998).

The records in question certainly appear to have been in existence at the time of the hearing. However, it is not clear that the General Counsel acted with the requisite "reasonable diligence" in obtaining the documents. In *Point Park University*, 344 NLRB 275 (2005), the Board noted that a party seeking to introduce "newly–discovered evidence" had failed to seek enforcement of the subpoena when the subpoenaed party failed to produce the records at the hearing. The Board concluded that the party had not acted with "reasonable diligence." Here, there is no indication that the General Counsel sought enforcement of the subpoenas seeking the documents.

Point Park University involved a rather different factual situation so I hesitate to apply the precedent here. In any event, whether or not the General Counsel acted with "reasonable

diligence" in the present case, the fact remains that the pertinent documents are not part of the record and the General Counsel hasn't sought to make them part of the record.

At the hearing, the Board attorney who drafted the Specification testified in some detail about his computation of the 401(k) amounts. Someone acting on behalf of the General Counsel must have engaged in similar calculations to prepare the figures set forth in attachments to the General Counsel's Motion. Certainly, Respondents have the right to hear testimony concerning these calculations, and to cross–examine the witness. In view of J & J Land's opposition to the Motion, I cannot assume that either Respondent would waive the right to such cross–examination.

Indeed, it cannot simply be assumed that the Respondents would assent to the introduction of the records without objection. Thus, although the Respondents stipulated to the post–hearing introduction of other records (Joint Exhibits 39 through 42), they have not stipulated to the records which form the basis for the General Counsel's Motion.

Additionally, if the General Counsel had offered the records into evidence during the hearing, Respondents would have been entitled to conduct a voir dire examination before deciding whether or not to object. The right to engage in such an examination takes on added significance because the Respondents did not create all of the records at issue here. A company which is not a party, Paychex, Inc., provided some of them. Respondents have the right to challenge not only how the Board attorney used the records to compute backpay but also the accuracy and reliability of the documents themselves.

Accordingly, granting the General Counsel's Motion would require more than a relaxation of some minor formalities, it would seriously implicate Respondents' due process rights. Therefore, I deny the General Counsel's Motion.

This denial does not prevent the General Counsel from seeking to fix Respondents' additional 401(k) liability in a separate proceeding. Specification paragraph 5 alleges that Respondents' backpay liability is continuing. Moreover, the General Counsel's Motion indicates that the government is seeking to compute some of Respondent's backpay liability for the period after February 25, 2007 in Case 7–CA–50288. (The calculations in Case 7–CA–50288 do not, however, include the 401(k) losses.) Nothing would seem to preclude the General Counsel from separately litigating the discriminatees' 401(k) losses for the period after December 31, 2006.

Technical Matters

For clarity, this section will address certain technical matters in the Amended Specification. These matters concern (1) the backpay periods and (2) arithmetic.

Backpay Periods

The Compliance Specification defines four categories of losses resulting from the unfair labor practices. Each discriminatee listed in the Specification incurred losses in at least one of these categories, and three of the discriminatees (Rochner, Silew and Wendt) sustained losses in all four categories.

These categories are (1) lost earnings (due to Shane's unlawful unilateral reduction in wages); (2) lost reimbursement for out–of–pocket medical, dental, optical and prescription drug expenses (due to Shane's unlawful change in reimbursement for those expenses); (3) lost contributions to the 401(k) plan (because Shane unlawfully stopped making matching contributions and, later, unlawfully terminated the plan); and (4) lost perfect attendance bonuses (because Shane unlawfully eliminated the perfect attendance bonus).

The Amended Specification does not compute all these losses for the same periods of time. (Because the backpay period continues, I will use the term "computation period" to signify that part of the backpay period covered by the Amended Specification.)

For losses in the third category, relating to 401(k) plan contributions, the Amended Specification calculates the amounts of losses the discriminatees incurred during a "computation period" which began June 1, 2004 and ended December 31, 2006. For reasons discussed above, I have denied the General Counsel's motion which effectively would have extended that period to March 22, 2007.)

For losses in the other three categories, the Amended Specification calculates the losses sustained by the discriminatees during a "computation period" which began June 1, 2004 and ended February 25, 2007. However, one caption in the Amended Specification could cause confusion by suggesting a different ending date.

Subparagraphs 6(a), 6(b) and 6(c) of the Amended Specification concern the wage losses the discriminatees incurred. Immediately below subparagraph 6(c) appears a table, captioned "Schedule A," which summarizes those losses.

Subparagraph 6(c) alleges that Schedule A sets forth the wage amounts for the period from June 1, 2004 until February 25, 2007. However, the caption above the third column of Schedule A itself states "Backpay June 1, 2004 *through March 22, 2007*" (emphasis added). For the following reasons, I conclude that the March 22, 2007 date is a typographical error.

Schedule A summarizes the calculations set forth in the Amended Specification's Attachment 1. Those calculations do not extend beyond February 25, 2007. Moreover, Attachment 1 includes a footnote stating "Although the employees worked through about March 22, 2007, this period ends on February 25, 2007 – the last day for which they received a paycheck."

Because the underlying calculations extend only through February 25, 2007, a summary of those calculations obviously would be limited to the same period.

Additionally, as quoted above, the General Counsel's "Motion for the Administrative Law Judge's Order to Require Respondents to Pay 401k) Moneys Owed through March 22, 2007" states, in a footnote that "The layoff of bargaining unit employees and concurrent cessation of business operations is the subject of the Complaint and Compliance Specification issued in Case 7–CA–50288, on July 31, 2007. Additional backpay calculations through March 22, 2007 *have been included therein*. . ." (emphasis added) Presumably, the General Counsel would not have sought a remedy for losses after February 25, 2007 in Case 7–CA–50288 if the present Specification already alleged such losses.

For these reasons, I conclude that, notwithstanding the caption, Schedule A summarizes the wage losses incurred by the discriminatees during the time period June 1, 2004 through February 25, 2007.

Arithmetic

As discussed above, the unfair labor practices caused the discriminatees four different kinds of losses. The Amended Specification includes a separate schedule for each type of loss. Schedule A, for example, alleges the total wage loss incurred by each discriminatee and Schedule B alleges how much each discriminatee must be reimbursed for out–of–pocket medical, dental, optical and prescription drug expenses. Schedule D alleges the 401(k) plan loss sustained by each discriminatee and Schedule E alleges the loss each discriminatee suffered because of the unlawful discontinuance of the perfect attendance bonus.

By adding the losses alleged for each discriminatee in these four schedules, the Amended Specification computes the total loss sustained by that discriminatee and lists that figure beside the discriminatee's name in a concluding table, Schedule F. For each discriminatee, the figure shown in Schedule F should be the sum of the figures shown for that discriminatee in Schedules A, B, D and E. However, not all the sums shown in Schedule F agree with my own addition of the numbers.

The Amended Specification alleges the following figures for Discriminatee William Silew:

William Silew	
Schedule A	$6,399.90
Schedule B	$ 246.45
Schedule D	$2,127.82
Schedule E	$ 125.00
Schedule F (Total of above)	$8,999.17

My own addition results in a sum $100 less: $8,899.17.

The Amended Specification alleges the following figures for Discriminatee Frederick Wendt:

Frederick Wendt	
Schedule A	$ 8,226.00
Schedule B	$ 2,414.69
Schedule D	$ 2,034.05
Schedule E	$ 125.00
Schedule F (Total of above)	$13,959.74

However, my own addition results in the sum $12,799.74.

For each of the other discriminatees, the figure listed in Schedule F accurately totals the amounts listed in Schedules A, B, D and E. Silew and Wendt are the only exceptions.

Because the General Counsel presumably used spreadsheet software or other computer program designed for such tasks, I hesistate to substitute my own pencil and paper calculations. However, in this instance, repeated checking convinces me to go with the graphite.

Finally, it may be noted that in two instances, Schedule F does not reflect the backpay figure actually established by the evidence. As discussed above, the record did not establish that Discriminatees Jackie Davis and Joseph Sliwinski incurred the total unreimbursed out–of–pocket expenses alleged for them in Schedule B. Accordingly, their total backpay amounts are less than alleged in Schedule F.

Summary

Respondents will satisfy their obligation to make the discriminatees whole for losses incurred *during the backpay periods alleged in the Amended Specification*, by payment of the amounts set forth below, together with interest calculated in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1968), minus any tax withholdings required by state or federal law.

Discriminatee	**Total (Not including interest)**		**Discriminatee**	**Total (not including interest)**
Jackie Davis	$ 832.68		Patrick Randazzo	$ 9,430.99
Gary Engle	$ 2,724.79		Richard Regelin	$ 10,304.90
Robert Hayes	$ 10,062.66		Robert Rochner	$ 12,486.98
William Koch	$ 11,636.96		William Silew	$ 8,899.17
Kenneth LaFleur	$ 8,697.29		Joseph Sliwinski	$ 4,457.65
Nick Maltese	$ 13,191.35		Julio Vargas	$ 12,132.31
William Martin	$ 10,318.33		Mirko Vitanoski	$ 7,486.31
Mark Moore	$ 802.42		Frederick Wendt	$ 12,799.74
Terry Poore	$ 2,358.95		Howard Wucetich	$ 7,425.77
TOTAL				**$146,049.25**

Dated Washington, D.C., April 1, 2008

Keltner W. Locke
Administrative Law Judge