

Great Lakes Chemical Corporation and its alter ego GLI, Inc. and C & N General Services, Inc. (a joint employer), and its successors Cooke County Security Guard Service, Inc., S&W Security Services, and Security & General Services, Inc. and Oil, Chemical and Atomic Workers International Union, Local 3-724. Cases 10-CA-21446, 10-CA-21640, 10-CA-24463, and 10-CA-28118

May 21, 1997

### SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HIGGINS

On August 13, 1996, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent and the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations 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, and conclusions and remands these proceedings to the Regional Director for further action consistent with this decision.<sup>1</sup>

### ORDER

The National Labor Relations Board affirms the rulings, findings, and conclusions of the administrative law judge and orders that these proceedings be remanded to the Regional Director for further action consistent with this decision.

<sup>1</sup> The only issues adjudicated by the judge at this stage of these bifurcated compliance proceedings were whether: (1) GLI is a single employer or alter ego of GLC, and whether the operations of GLI, Inc. constitute an expansion of the unit manufacturing operations at Great Lakes Chemical Corporation's (GLC) Newport, Tennessee facility; (2) whether the method proposed by the General Counsel is a reasonable method of identifying, and a reasonable approximation of the backpay owed to, the discriminatees; and (3) whether certain named individuals laid off by GLC's predecessor should be included in the group of discriminatees. Thus, questions regarding the specific application of the backpay formula to individual discriminatees are outside the scope of this phase of the compliance proceedings. To the extent that the Respondents' exceptions raise such factual questions, the Respondents may raise those questions during further compliance proceedings.

*Richard P. Prowell, Esq.*, for the General Counsel.  
*Richard F. Shaw and Andrew W. Kramer, Esqs. (Jones, Day, Reavis & Pogue)*, for Respondent Great Lakes.  
*D. Bruce Shine, Esq.*, for Respondent C & N Services.  
*John Williams*, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard these cases in Atlanta, Georgia, on March 19, 20, and 21, 1996. They represent a compliance proceeding related to decisions of the Board reported at 298 NLRB 615 and 300 NLRB 1024, which issued on May 22 and December 28, 1990. The Board directed Respondents Great Lakes Chemical Corporation (GLC) and C&N General Services, Inc. (C&N), a joint employer, their officers, agents, successors, and assigns, to take certain affirmative action, including that of employing and making whole the former employees of Syntex Chemical Corporation (Syntex) for their losses resulting from Respondents' unfair labor practices in violation of Section 8(a)(1) and (3) of the Act and to recognize and bargain collectively in good faith with Oil, Chemical and Atomic Workers International Union, Local 3-724 (the Union) in the unit found by the Board to be appropriate.

On June 19, 1992, the Board Orders were enforced by the United States Court of Appeals for the District of Columbia (967 F.2d 624). On March 24, 1995, the Regional Director issued a compliance specification and notice of hearing in these cases. Subsequently, on March 31, 1995, the Regional Director issued a complaint in Case 10-CA-28118 and consolidated that proceeding with the compliance proceeding.

On November 27, 1995, GLC and GLI filed a motion to bifurcate the compliance proceeding. Responses in opposition to this motion were filed by counsel for the General Counsel and the Charging Party. By order dated November 29, 1995, the associate chief administrative law judge in Atlanta granted the motion to bifurcate the proceeding and limited the scope of the initial compliance hearing to: "1. Whether GLI, Inc. (GLI) is an alter ego of, and single employer with, Great Lakes Chemical Corporation (GLC); and, 2. Whether the proposed methodology used in the compliance specification for computing and allocating backpay is consistent with the enforced Order of the NLRB and the provisions of the Act."

At the hearing the parties agreed to broaden the scope of the initial compliance hearing to obtain a determination whether nine named individuals are eligible for backpay.

Subsequent to the hearing on March 27, 1996, in a conference call with all the parties, I reiterated to the parties and formalized a position stated during the hearing that I would broadly interpret the bifurcation order and determine the extent to which the creation and operation of GLI might impact upon the compliance and unfair labor practice issues presented. Otherwise the stated reason for requesting bifurcation is without purpose. The parties were advised to raise any due

process concerns this might cause and treat the matter fully in their briefs. The Respondents made a motion for a reply brief at the hearing, and that motion had been granted.

#### Statement of the issues

In its present form, the issues presented in this case are (1) whether the operations of GLI, Inc. constitute an expansion of GLC's manufacturing operations at its Newport, Tennessee facility and an expansion of the collective-bargaining unit represented by the Union at that location and/or whether GLI is a single employer with, and alter ego of, GLC such that the jobs and backpay derived from Respondents' creation and operation of GLI should be incorporated into the backpay formula; (2) whether the method proposed by counsel for the General Counsel is a reasonable approximation of the backpay owed to the discriminatees in this matter; and (3) whether nine named individuals who had been laid off by Respondent's predecessor should be included in the group of discriminatees encompassed by the Board's Order herein.

#### The alter ego/successor issue

The compliance specification contains two separate allegations which relate to the issue of the extent to which GLI, Inc. can be included in the remedy issued in this case. Paragraph 6 of the compliance specification alleges:

The above-described operations of GLI, a subsidiary corporation created and controlled by GLC in the context of unremedied unfair labor practices, constitute an expansion of GLC's manufacturing operations at its Newport, Tennessee facilities and an expansion of the collective bargaining unit represented by the Union at GLC's Newport, Tennessee location.

The next paragraph, paragraph 7 of the compliance specification, alleges:

GLI is a single employer with, and alter ego of, GLC and is jointly responsible with GLC for remedying the unfair labor practices found by the Board in the underlying decisions herein.

Respondent denies both allegations. The backpay specification prepared by counsel for the General Counsel is based on this contention that the jobs and backpay derived from Respondents' creation and operation of GLI should be incorporated into the backpay formula. Respondent GLC's motion for bifurcation states that it is made "in order to promote the most efficient means of considering and resolving the issues raised by the Compliance Specification." The motion further states:

In the period before and since the compliance specification was issued, counsel for the Respondents and the General Counsel have pursued good-faith settlement discussions that have been crippled because of the differences between the parties in two critical issues on which the Respondents seek a bifurcated and expedited hearing. . . . These two issues are: (1) whether GLI is the alter ego of, and single employer with GLC; and (2) whether the Regional Director's formula for calculating and distributing backpay is consistent with the Board's

enforced Order and the Act. Unless and until these two issues are resolved, no settlement or resolution can be reached because these two issues control the outcome of most of the remaining issues in this matter.

The resolution of all other issues, such as how many alleged discriminatees are entitled to backpay, which particular alleged discriminatees should receive backpay, and how much each particular individual should receive, requires a determination of the proper method for calculating backpay and how it will be distributed. Unfortunately, differences between Respondents and the General Counsel over the method of calculating backpay prevents a settlement of these issues. In addition, while GLC and the Union have engaged in negotiations on a collective bargaining agreement, an agreement has not been reached due to differences regarding the composition of the unit, i.e., whether GLI employees are properly included in the bargaining unit by virtue of the allegations in the Compliance Specification. A bifurcated hearing to adjudicate just the two critical issues identified above may also help foster a negotiated settlement of all other issues.

Throughout the hearing, I advised counsel that although the motion for a bifurcated hearing, and the order granting that motion, refer specifically only to the alter ego issue and the backpay formula issue, to the extent there was any related issue to be considered in resolving paragraphs 6 and 7 of the compliance specification, I would interpret the bifurcation broadly to encompass such an issue or issues. Without resolving all possible issues related to both paragraphs 6 and 7 of the compliance specification, the stated purpose for bifurcation cannot be fulfilled.

In the posthearing brief of counsel for the General Counsel, little mention is made of Respondent meeting any of the traditional tests which would ordinarily be employed by the Board in determining that GLI is an alter ego of GLC. The simple reason is that by the close of the hearing it was quite apparent that few, if any, of those tests could be met. Instead, counsel for the General Counsel offers a lengthy argument why for other reasons GLI should be found a successor, a sham creation, or merely an extension of work formerly performed at GLC, such that GLI should be encompassed by the Board orders issued herein. Counsel for the General Counsel's arguments, while carrying appeal from an equitable perspective, have little support in existing case law. In my view, those arguments, if accepted, would constitute an expansion of traditional remedies which should be addressed as a matter of first impression by the Board.

GLC is a manufacturer of chemical intermediates at its facility in Newport, Tennessee. Several of GLC's customers have patents to certain chemicals and/or the manufacturing processes used to produce those chemicals which they contract with GLC to produce. The GLC facility is composed of a number of buildings, including five production buildings, constructed on approximately 30 acres of land that it acquired from Syntex in 1984. The production of a specific chemical by GLC may require the use of only part of a building, or an entire building, and the production equipment within the building sometimes requires extensive modification. As counsel for the General Counsel notes, such expenses are paid for one way or another by the customer—

either by requiring the customer to pay for the modifications at the time GLC incurs them or by incorporating the costs of the modifications into the price that GLC charges for the chemical to the customer. In this sense, the arrangement between GLI and McNeil is similar to that between GLC and other customers.

Starting in 1985, Great Lakes pursued plans for a cooperative venture with Johnson & Johnson to produce a new product called TOSPA. TOSPA was to be used by McNeilab, Inc., a wholly owned subsidiary of Johnson & Johnson, and McNeilab Specialty Products Company, a division of McNeilab, Inc. (jointly as McNeil), as an intermediate chemical compound for making Sucralose, a new artificial sweetener. Because the product and technology were new, they needed to be validated in pilot studies prior to McNeil committing to construction of a permanent production-scale facility.

GLC and McNeil entered into an "Agreement in Principle" signed in December 1986, pursuant to which GLC was to design in separate phases, construct, and operate a pilot plant according to requirements specified by McNeil. McNeil was to pay for and oversee the cost of the work and the facility. While the "Agreement in Principle" contemplated the eventual design and construction of a full-scale plant, it left negotiation of a permanent agreement for a later day. As counsel for the General Counsel notes, this early contract between GLC and McNeil did not specifically provide for the creation of a separate corporate entity to produce TOSPA. I do not find this particularly significant, however, because this issue did not really need to be addressed until the results of the pilot studies were obtained. The manner in which those pilot studies were conducted strongly suggests that discussions had already taken place about the need for a separate corporation because even the pilot studies were conducted as if separate from other GLC Newport operations.

Three "validation runs" were required to test the production processes necessary for making TOSPA. The first two were conducted in building 11 at GLC's Newport, Tennessee facility. The first validation run was made during the period March to June 1987. It was generally considered a failure.

Around August 1987, Tom Dziubakowski was reassigned from GLC's Eldorado, Arkansas facility to become plant manager at what was then known as the "TGS Project" to oversee the second validation run. Dziubakowski and other management associated with this project worked from office trailers located adjacent to, interconnected with, but separate from the GLC administrative offices in Newport. The second validation run was made from September to December 1987. The second validation run was concluded in December 1987, at about the same time the administrative law judge issued his decision in the underlying unfair labor practice cases. The second validation run was somewhat more successful. As counsel for the General Counsel notes, it was only 6 weeks after the judge's decision issued that GLC incorporated GLI as a wholly owned subsidiary.

The third validation run was conducted from March to December 1988. It was considered a success. Upon the conclusion of the third validation run, the substantial equipment and modifications that had been made to building 11 were turned over by McNeil to GLC and became its property. The build-

ing and equipment are currently used by GLC for the production of flame retardants.

Construction began on the separate TOSPA production facility in March 1987 and was completed on January 1, 1989. The facility was constructed on part of the same property that GLC had acquired from Syntex in 1984, which GLC subdivided by means of a fence. Actual production of TOSPA did not begin until around May 1988. As counsel for the General Counsel notes, equipment utilized by employees in the production of TOSPA are the same general types of equipment utilized by employees in the other GLC chemical production operations. As Respondent notes, however, the actual processes and the standards employed are much different because TOSPA is intended for human consumption as part of an artificial sweetener, and therefore, unlike any production process of GLC, requires FDA oversight.

As counsel for the General Counsel notes, employees hired by GLI worked in the same general job classifications as GLC employees and engaged in similar functions. They participated in the same corporate fringe benefit programs, including health insurance, pension, long-term disability insurance, accident disability insurance, dismemberment insurance, life insurance, and vacation policies. GLC and GLI utilize the same emergency fuel oil storage facilities and the same scales to weigh trucks. On at least one occasion, waste water generated by the production process at GLC has been stored temporarily at facilities owned by GLI.

Due to a lack of FDA approval of TOSPA, production has been halted and the employment complement at the GLI facility has remained at approximately eight since December 1992. Due to the uncertainty of TOSPA approval, GLC has recently begun to explore with Johnson & Johnson the possibility of utilizing the GLI facility for the production of GLC products other than TOSPA. As of the time of the hearing, such talks were simply at the exploratory stage.

Based on these facts, counsel for the General Counsel argues that the jobs and backpay derived from Respondents' creation and operation of GLI should be incorporated into the backpay formula. Counsel for the General Counsel's argument is most succinctly stated in the following portion of his posthearing brief:

Counsel for the General Counsel's position is based upon the simple theory that if a completely separate entity can be held liable for the backpay and reinstatement obligations of its predecessor, an entity created by a wrongdoer as an expansion of its business enterprise should be as well. The theory must hold true particularly where, as here, both enterprises are engaged in the same business, at the same location where the unfair labor practices were committed, and utilize the same employee classifications. In such situations entities such as GLI must be found to be an alter ego of, or single employer with, their parent entity. To conclude otherwise would permit respondents to violate the Act with impunity, and, indeed, the Board has found it appropriate to pierce the corporate veil when the corporate form is employed to perpetrate fraud, evade existing obligations, or circumvent the Act. Here the Respondents have engaged in the latter two.

There is no question that GLI had its genesis at the GLC Newport, Tennessee facility where the administrative law judge found that Respondent had undertaken a painstaking scheme to violate the Act. Further, that genesis occurred at just about the same time that the original unfair labor practice trial herein took place. Due to general similarities between the two facilities, as well as their physical proximity, counsel for the General Counsel argues that operations of GLI constitute an expansion of GLC's manufacturing operations at the Newport, Tennessee facility. In fact, however, there is no evidence whatever other than the timing to suggest that the creation of GLI was in any way the product of an effort by Respondent to evade existing obligations which might result from the underlying decision here, or to circumvent the Act. The record as a whole, as more fully described below, is utterly convincing that incorporation of GLI was initiated not by GLC but by Johnson & Johnson and/or McNeil for a totally legitimate business purpose. Moreover, just as there are certain general similarities between the operations of GLI and GLC, there are many differences, all of which point to a conclusion that the two operations are separate solely for business reasons.

Soon after the agreement in principle was signed in December 1986, the parties began negotiating a final agreement. From the beginning of these negotiations in early 1987, Johnson & Johnson insisted that a separate corporation be established for the TOSPA project. Johnson & Johnson and McNeil wanted a separate corporation in order to protect their interests in the new proprietary technologies, should Great Lakes become either acquired by another corporation or insolvent.

The initial testing of the TOSPA production process was done in West Lafayette, Indiana. After the agreement in principle was signed in December 1986, a pilot plant was set up in building 11 of the GLC Newport plant under the designation of the "TGS Project." Rather than using GLC Newport employees, a separate work force, with its own separate managers and supervisors, was hired. Employees at the TGS pilot plant had different work areas, break areas, locker rooms, and shower facilities than those of GLC. Pursuant to the agreement in principle, McNeil paid the costs of the TGS pilot projects, which amounted to \$300,000-\$500,000 for the first validation run and \$1.8 million for the second validation run.

In early 1987, concurrent with the startup of the "TGS Project" and during negotiations on the final agreement, GLC and J&J discussed various locations for building the permanent TOSPA facility. Various sites in Arkansas, Texas, and Tennessee were considered. The Newport, Tennessee site adjacent to the GLC Newport plant was finally selected because of certain environmental, tax, and employment training benefits that were extended by the State of Tennessee. Groundbreaking for the new facility occurred in March 1987 and construction began in May 1987.

GLI was incorporated in January 1988. Under the TOSPA Agreement, McNeil retains considerable control over GLI. McNeil had control over changes in the design of the TOSPA facility that increased the cost of operations. The GLI facility cannot be used for anything other than TOSPA production unless prior approval is given by McNeil. TOSPA can only be sold by GLI to McNeil. Inventory levels for GLI are set by McNeil. If GLI materially breaches or interferes

with the supply of TOSPA, McNeil has the right to assume total operational control of GLI, and/or to take control of the GLI board of directors. In addition, the price of TOSPA, the raw materials used, and the overhead and labor costs for producing and selling TOSPA are all regulated by the TOSPA agreement. Further, the amount of profit that GLI can make from the sale of TOSPA is determined by a formula in the TOSPA agreement.

In 1988, when GLI began staffing up for the third validation run, GLI used its own hiring and screening process. In February 1988, GLI began hiring by running advertisements for technicians in local newspapers. GLI concurrently engaged the services of the Tennessee Department of Employment Security to screen the 3000 GLI applications from individuals who responded to the advertisements. When FDA approval of TOSPA was not forthcoming in December 1988, GLI began to lay off most of its technician work force. From November 1988 to January 1989 the number of GLI technicians went from 61 to 4. No such layoff occurred at GLC Newport, and it did not hire any of the GLI technicians laid off at this time. In June 1990, GLI once again began to hire technicians when it received a "start-up" notice from McNeil to begin TOSPA production. From June until December 1990, GLI increased its technician work force from 3 to 73. The work force reached 110 by August 1992. In December 1992, it again appeared FDA approval of TOSPA would not be forthcoming, McNeil instructed GLI to once again shut the plant down. From November until December 1992, the number of GLI technicians went from 103 to 8. No layoff occurred at the GLC Newport plant. GLC Newport's hiring continued to climb in response to the growth of its business, which is totally unrelated to the TOSPA production of GLI.

Just as there are certain similarities between the agreement GLI has with McNeil and those GLC has with other customers, there are also very significant differences. Perhaps most significant is the fact that none of the other GLC contracts allows the buyer to take control of the production operation or the corporate board of directors. Also significant is the fact GLC's other contracts do not guarantee a profit payment, as does the TOSPA agreement. Further, none of GLC's other contracts require the construction of a totally separate production facility. Last but not least, no other contract provides an interest-free loan of working capital for the product's production.

Differences in ownership between GLI and GLC Newport are also significant. The Great Lakes Newport facility is owned solely and exclusively by GLC. The GLI facility is owned by both GLC (which owns GLI's common stock) and McNeil (which owns GLI's preferred stock). GLI and GLC Newport are separately administered. They have separate addresses, telephone and fax numbers, and separate Federal tax employer identification numbers. Their offices are physically and functionally separate. GLI and GLC Newport also have separate bank accounts and separate utility contracts for electricity, gas, oil, and water.

While there are similarities between equipment used by GLI and GLC, there are also substantial differences. GLI and GLC both produce chemicals, and therefore have similar generic types of chemical plant equipment such as valves, pipes, centrifuges, and vessels. The similarities end there however. The carbohydrate chemistry which TOSPA produc-

tion is predicated is much more complex than the organic chemistry used to produce bromine chemicals that form the basis of GLC Newport products. The differences in chemicals and equipment between GLI and GLC Newport are also reflected in different safety procedures used in the two facilities.

GLI and GLC Newport have separate management and supervision. Day-to-day control over operations at GLI—including all labor relations—is not shared with GLC Newport, but rather is exercised exclusively by GLI personnel. GLI has its own plant manager and personnel manager. No individual at GLC Newport controls or has any role in any aspect of GLI's employment terms and conditions, including hiring, discipline, wages, hours, or work assignments. Each facility has separate plant rules which can be revised at any time without consulting with the other company. Job descriptions were separately drafted and developed. GLI and GLC have different training programs that are developed and administered separately. There are distinct differences in the type of training GLI technicians receive as a result of the fact that TOSPA requires FDA approval. Wage rates are, and have been since the beginning of the TOSPA project, separately established, controlled, and administered. GLI conducts its own wage rate survey of companies in the Newport, Tennessee area. GLI disciplinary and promotion decisions are made without any GLC coordination or permission.

I have described and quoted above counsel for the General Counsel's argument why GLI should be found to be the alter ego of GLC, or alternatively, its successor. As I have also noted, however, GLI meets few if any of the tests traditionally employed by the Board to find alter ego status. Typically, in order to establish that two companies are alter egos, the General Counsel must show that one company is a "disguised continuance" of the other. *The Market Place*, 304 NLRB at 999. As the Board stated in that case, "Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management," quoting *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 259 fn. 5 (1974). In conducting this analysis, the Board attempts to determine "whether the purpose behind . . . the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act." *Mid-Hudson Leather Goods Co.*, 291 NLRB 449, 452 (1988); *Hydro Logistics, Inc.*, 287 NLRB 602 (1987), *enfd.* 897 F.2d 1233 (2d Cir. 1990). In an alter ego analysis, the Board traditionally considers whether the two entities have "substantially identical" business purposes, ownership, management, supervision, operations, equipment, and customers, and whether the putative alter ego was created to avoid the labor law obligations of the other entity. While all of these factors are relevant, none is dispositive. *Image Convention Services*, 288 NLRB 1036, 1039 (1988).

The chronology of events leading to the creation of GLI itself strongly suggests that GLI was not created as a sham. Although counsel for the General Counsel correctly argues that GLI's incorporation occurred shortly after the administrative law judge's decision, the "Agreement in Principle" between McNeil and GLC was signed 1 full year before that decision. From the very beginning, the "TGS Project" had a separate identity from other work at the GLC Newport fa-

cility. In August 1987, even before the administrative law judge issued his decision, Tom Dziubakowski was reassigned from GLC's Eldorado, Arkansas facility to become plant manager over this "TGS Project" to oversee the second validation run. Dziubakowski and other management associated with this project worked from office trailers separate from the GLC administrative offices in Newport.

Other credible record evidence establishes beyond any doubt that GLI was created for a legitimate business purpose—to protect proprietary interests of McNeil and Johnson & Johnson in the production of TOSPA which was to be used by McNeil for the production of Sucralose. In this case, each stage of the TOSPA project was conducted through arm's length transactions, first between GLC and McNeil, and then between McNeil and GLI. If there could be any doubt that GLI was not a sham created by GLC to avoid possible obligations pursuant to the underlying unfair labor practice findings, that doubt was put to rest by the uncontradicted and utterly credible testimony of Phillip Crowley, assistant general counsel of Johnson & Johnson, that it was Johnson & Johnson and McNeil's idea—not GLC's—to create a separate legal entity. J & J and McNeil insisted that the TOSPA project be conducted by a special purpose corporation (in which McNeil would be a shareholder) so that McNeil's own interests could be protected.

McNeil has paid in excess of \$100 million for the pilot project, construction of the permanent facility, and GLI's operations. Much of this has been paid by McNeil to GLI pursuant to their contract while the GLI facility has been dormant due to lack of necessary FDA approval. It defies logic and common sense to believe that GLC hoodwinked Johnson & Johnson into paying it over \$100 million so that GLC could avoid paying to meet labor obligations.

GLI and GLC Newport have different customers and business purposes. GLC Newport produces entirely different products, none of which requires FDA approval or are intended for human consumption. It is because of these differences, not to avoid labor obligations, that GLI and GLC have maintained such separateness. It is because of these difference that even when the "TGS Project" was located in building 11 on the GLC property, it maintained totally separate facilities, and both the production operations and administration operation were kept separate.

Counsel for the General Counsel has made no allegations that GLI is independently liable for, or in any way participated in, the unfair labor practices that GLC Newport was found to have committed. Nothing in the decisions and orders concerning Great Lakes even mentions GLI or the TGS pilot projects that preceded it. Nor was any evidence offered during the hearing alleging that GLI independently committed any unfair labor practices. Rather, counsel for the General Counsel has simply alleged that the establishment of GLI constituted an "expansion of the bargaining unit" at GLC Newport. Perhaps because of the simplicity of this allegation, I fully expected counsel for the General Counsel to cite some specific authority remarkably similar to the case at hand which would support that position even if GLI were not found to be a traditional alter ego of GLC. Instead of offering specific authority, however, counsel for the General Counsel offers a simple argument of logic and equity which, if accepted, would constitute an expansion of traditional rem-

edies which should be addressed as a matter of first impression by the Board.

I have been unable to find any precedent directly supporting his position. Perhaps the closest case similar to this is where one department within an entity is merely spun off to form another company using the same work force, equipment, and supervisors. Such was the case in *Johnstown Corp.*, 313 NLRB at 170, 177-180 (1993), enf. granted in part, denied in part, and remanded sub nom. *Stardyne, Inc. v. NLRB*, 41 F.3d at 141, 151 (3d Cir. 1994). However, as discussed above, hiring and work assignments for TOSPA production were sequestered from other GLC Newport operations even when the initial "TGS Project" for producing TOSPA was located in building 11. The record is abundantly clear that TOSPA production was always intended to be separate from GLC Newport operations because of it being intended for human consumption, thereby requiring FDA oversight. The record is equally clear that GLI was incorporated separately not because of a desire by GLC to avoid the ramifications of the administrative law judge's decision, but because of the legitimate business concern on the part of McNeil and Johnson & Johnson to protect their proprietary interest in TOSPA. Accordingly, I find this case inapplicable.

Derivative liability under a single-employer theory may also be imposed where an entity makes compliance with an order impossible by transferring bargaining unit work, and thus reinstatement opportunities, away from the entity that committed the unfair labor practice. *Total Property Service*, 317 NLRB 975 (1995). GLI, however, did not take over work that previously had been done by GLC Newport unit employees. Rather, from the beginning the TOSPA project was a new experimental project that used a separate work force to conduct separate operations from those conducted at GLC Newport. Simply stated, operations of GLC Newport and GLI are, and have always been, totally separate. There is no shared community of interests between GLI technicians and Great Lakes Newport technicians. Accordingly, this case is also inapplicable.

For the foregoing reasons, I find that GLI is not a single employer with, and/or alter ego of, GLC. Further, I find that the operations of GLI do not constitute an expansion of GLC's manufacturing operations at its Newport, Tennessee facility and/or an expansion of the collective-bargaining unit represented by the Union at that facility. Finally, I find therefore that GLI is not jointly responsible with GLC for remedying the unfair labor practices found by the Board in the underlying decisions herein. Backpay will need to be recomputed by counsel for the General Counsel accordingly.

#### The backpay formula issue

In devising a gross backpay formula, counsel for the General Counsel uses the actual total labor costs incurred by Respondent Great Lakes during the backpay period, divided among a class of discriminatees (all former Syntex employees) in a nondiscriminatory manner (i.e., relative Syntex tenure or "seniority"). Respondent argues that this is not an appropriate formula because it does not give Respondent "credit" for the former Syntex employees it did hire unless they happen to have had enough tenure to fall on counsel for the General Counsel's list. Respondent argues that this unfairly imposes specific Syntex seniority on its hiring decisions. Counsel for the General Counsel argues that Respondent

is in reality attempting to relitigate an issue already considered and rejected by the judge, the Board, and the circuit court. I agree with counsel for the General Counsel.

Respondent argues that counsel for the General Counsel's model is too broad because, according to Respondent, the underlying decisions simply found that GLC violated the Act by discriminating against all the former Syntex employees as a group. According to Respondents, there was no finding that GLC discriminated between and among the former Syntex employees due to their relative union activity. Counsel for the General Counsel asserts that this issue was considered and resolved in the underlying proceedings as well, thereby mandating a nondiscriminatory method for identifying backpay recipients—hence relative tenure with Syntex. I agree.

The Board found, and the circuit court agreed, that beginning in July 1984 GLC connived to violate the Act and avoid becoming a successor employer obligated to recognize and bargain with the labor organization representing its predecessors' employees by manipulating the employees it hired from the ranks of its predecessor, Syntex. It did this in two ways: first, by manipulating the number of employees hired from its predecessor; and second, by manipulating the identity of those predecessor employees which it in fact hired.

The Board affirmed the decision of the administrative law judge that Respondents' scheme was embodied in a recommendation from Personnel Manager Bill McCord who was sent to Respondent's Newport, Tennessee facility to assess the labor situation there. McCord prepared a written plan of action which he submitted to GLC's senior vice president, McGuire, calling for:

- (1) the blacklisting of all current union officials by name;
- (2) the blacklisting of all former union officials who were presumably in office during the 1979 strike;
- (3) the blacklisting of all "troublesome" maintenance department employees;
- (4) the careful selection of employees to avoid union problems;
- (5) the hiring of Jim Butler to aid in the selection of employees, i.e., sort out the good from the bad;
- (6) hire 16 to 20 Syntex employees at the top rate of pay and then hire no more Syntex employees but hire trainees instead;
- (7) tell all the new employees that the Company will operate non-union; and
- (8) consult with nonunion employers in the area before staffing in order to learn how to establish a nonunion attitude. [Emphasis added.]

The administrative law judge concluded that GLC's scheme exhibited "the most egregious union animus but also utter contempt for the law." The judge also found that Senior Vice President McGuire reviewed the foregoing plan of action, "found nothing in the memoranda to make him uncomfortable," and assigned McCord to staff the Newport plant accordingly. McCord did in fact hire Butler as a supervisor to assist him in implementing the above scheme. The judge found that Butler told at least two employees "that the Union would not be back in the plant and certain people would not return to work if he had anything to do with it." Butler named certain present and former union officials including Bill Murr, Hoyal Crum, Farley Ball, Roy Shults, Tim Barnes, and Garry Watts. Similarly, he also included for exclusion some former Syntex employees who were not identified as holding union office including Larry McCarter, Frank

Prosise, and Ronnie Barrett. Next to Barrett's name on notes he maintained during prehire interviews, Butler wrote, "was a strong union person—no."

To counter contentions that GLC discriminated against former Syntex employees, GLC introduced evidence and argued at the trial stage of this proceeding, "that it hired some union committeemen, all employees with more seniority, and employees with more formal education." The administrative law judge found these arguments "insignificant when compared to the damning evidence out of Respondents' own files."

Respondent attempts to limit the effect of the underlying decision by claiming that only local union officials named in the order should not be displaced by those former Syntex employees that it actually hired. This argument is based on the observation that the order concerning local union officials specifically required the dismissal of "any and all persons hired to fill such positions." Respondent notes quite correctly the such language clearly anticipates that displacement of other discriminatees was contemplated at least as a possibility. However, the decision makes it equally clear that a class of discriminatees other than those named in the order were also discriminated against by Respondent favoring certain other former Syntex employees. As noted above, the underlying decision of the Board establishes that pursuant to the memorandum dated May 21, 1984, GLC manipulated the identity of the employees it hired by, inter alia, the "black-listing of all 'troublesome' employees," and "the careful selection of employees to avoid union problems."

In addition to discriminating against present and former union officials, the administrative law judge specifically found that Respondents discriminated against maintenance department employees, as a subgroup, because of the union activity of the employees holding this job classification. The administrative law judge noted that an element of the Respondents' scheme to rid itself of the Union was to take care "before hiring any of the Syntex maintenance department employees; and instead utilize contractors to provide 'labor type' jobs but that contractors should not use Syntex employees because they might cause problems with other employees." I agree with counsel for the General Counsel that both the judge and the Board found Respondents discriminated between and among former Syntex employees based on their relative union activity.

The administrative law judge's Conclusions of Law offer additional support for counsel for the General Counsel's position on this issue. The judge could easily have concluded that Respondents discriminated against employees solely because they held union office, but he went much further by reaching the conclusion:

7. Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire or refusing to hire employees because they held union office, engaged in union activities, or otherwise exercised rights guaranteed by Section 7 of the Act. [Emphasis added.]

Such language clearly establishes a finding of discrimination that transcended discrimination solely against those holding union office, for otherwise there would have been no need for the emphasized wording. Accordingly, a non-discriminatory method using relative tenure or "seniority" is

perfectly appropriate to rank and position all discriminatees for application of the Board's remedy.

Respondents dispute the idea that discriminatees should be positioned and ranked for backpay priority and distribution based on the nondiscriminatory formula using relative tenure, and contend instead that their employment of former Syntex employees should serve to offset the backpay owed to other former Syntex employees with more tenur or "seniority" who Respondent discriminated against. Respondents' alternative backpay formula is computed accordingly. The judge's decision, however, makes it clear that the Respondents not only discriminated against former Syntex employees as a group but also illegally discriminated between and among former Syntex employees as an element of the scheme to avoid GLC's legal obligations as a successor employer. As Respondents' proposed backpay formula does not provide any way to reposition those former Syntex employees who were hired instead of those former Syntex employees who were intentionally passed over, its alternative formula must be rejected. Stated in its simplest terms, Respondent is asking to be given "credit" for selecting certain specific former Syntex employees because it knew or believed them not to support the Union. Respondent will not be given credit for intentionally and discriminatorily selecting certain people over others.

Counsel for the General Counsel admits that the backpay formula he is proposing is somewhat unique, but the unique facts and circumstances which Respondents created in this matter serve to justify it. An analysis of the underlying decision by the administrative law judge reveals that Respondents were engaged in a blatant scheme to manipulate its employee complement to avoid their obligations as a successor. He found that Respondents had to operate the facility by working the limited number of employees, those that its scheme permitted them to hire, on two 12-hour shifts, 7 days per week (298 NLRB at 618, 619). Maintenance employees were averaging 64 hours of overtime per week during 1986 (298 NLRB at 623). Any reasonable backpay formula must take these massive amounts of overtime work at premium pay into account. GLC, unable to hire more Syntex employees without becoming a successor, was also forced to utilize the services of contractors, and Respondents acknowledged that contractors and their production technicians were performing maintenance work (298 NLRB at 623). The administrative law judge concluded that more employees, specifically maintenance employees, would have been hired by the Respondents absent its illegal conduct, and provided in the remedy section of his decision as follows:

Thus, having found that the Respondents discriminatorily refused to consider for hire or to hire employees previously employed by Syntex Chemicals, Inc., Newport, Tennessee plant, I shall recommend that Respondents offer all individuals who would have been hired in and after July, 1984 employment in the positions for which they would have been hired absent Respondents unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions, dismissing if necessary, any and all nonSyntex employees hired to fill such positions. Respondents shall also place on a preferential hiring list all remaining discriminatees listed in Appendix C who, under non-

*discriminatory criteria, would have been hired absent the lack of available jobs.* Furthermore, I shall recommend that respondents make whole for any losses they may have suffered *all individuals it would have hired* absent its unlawful discrimination against them. [Emphasis added.]

Clearly the decision calls for both a nondiscriminatory method to determine the number of discriminatees Respondents would have hired, and a ranking all of the discriminatees, utilizing "nondiscriminatory criteria" for the purposes of determining reinstatement and backpay priority. The backpay formula utilized by counsel for the General Counsel meets both of these two objectives. The method employed for calculating backpay yields the number of employees to receive it and theoretically but equitably determines which of them would have been employed during any calendar quarter involved during the backpay period. By utilizing a standard workweek as the constant to determine the number of employees that would have been working during any calendar quarter and applying thereto order based on tenure to determine which of the discriminatees are entitled to backpay, the backpay formula remains consistent with the formula mandated for the preferential hiring list (298 NLRB at 626). Finally limiting Respondents' maximum liability to the labor costs they incurred during each quarter of the backpay period negates any contention that the formula is punitive for Respondents are not obligated to incur a liability any greater than the outlay they incurred to violate the Act.

Dividing a group's earnings by the number of employees in the group is permissible to determine a base rate to be applied to calculate the claims of discriminatees. *City Disposal Systems*, 290 NLRB 413, 419-421 (1988); *Sioux Falls Stock Yards Co.*, 236 NLRB 543, 544 (1978). Although the Board does not approve of such pooling and averaging in situations where replacements for discriminatees can actually be ascertained, here there is a Board finding that Respondents' unfair labor practices have resulted in a situation where the exact number of employees that would have been hired is unknown, but can be approximated using an objective formula, with no resulting penalty to Respondent. The total amount Respondent spent on labor costs stays exactly the same. Thus an "equitable" formula is appropriate. Cf. *Shell-Globe Corp.*, 296 NLRB 116 (1989). Admittedly, here counsel for the General Counsel uses an average to determine, not the amount that discriminatees are to recover, but, instead, to determine the number of discriminatees who are entitled to recover a given amount. However, in either case, the theory and principles behind both approaches are the same.

The test in a compliance proceeding is whether the circumstances surrounding the violations were such that the formula for computing backpay is not arbitrary. *Intermountain Rural Electric Assn.*, 317 NLRB 588 (1995). The compliance specification relies primarily on the relative tenure or "seniority" and not the former job classification of the discriminatees while they were employed at Syntex to accomplish this result. The Board ordered a preferential hiring list and prospective reinstatement with discriminatees ranked by this method in this very matter (298 NLRB at 616).

Obviously the goal of any method for computing backpay is to place all of the discriminatees in the posture that they

were likely to have been in had Respondents treated them in a nondiscriminatory manner. The Board and the courts have long noted, however, that accomplishing this task cannot be performed with precision, but to the extent that a reasonable approach to allocating and computing backpay is imprecise, the deficiency is construed against the wrongdoer. *Intermountain Rural Electric Assn.*, supra.

The compliance specification provides for the computation of quarterly gross backpay for each discriminatee by multiplying the wage rate GLC paid to a representative employee in any particular calendar quarter times 40 (the number of hours in a standard workweek) times 13 (the number of weeks in a calendar quarter). I agree with counsel for the General Counsel that each of the discriminatees is entitled to the quarterly gross backpay computed in this fashion unless Respondents demonstrate that their aggregate labor costs are less than the sum of the discriminatees' gross backpay during any calendar quarter. Once a maximum backpay figure has been determined based on the amount a discriminatee would have earned in the absence of discrimination, the burden of proof is upon a respondent to demonstrate that the backpay liability should be some amount less. *Woonsocket Health Centre*, 263 NLRB 1367 (1982).

Counsel for the General Counsel's compliance specification affords the Respondents the opportunity to demonstrate that their labor costs in any calendar quarter were lower than the total gross backpay of all the discriminatees. The computation sheet for each discriminatee provides, in a column entitled "Cumulative Back Pay," for a running sum of the quarterly gross backpay of each discriminatee and of the quarterly gross backpay for each of the discriminatees who are more senior. The specification provides in those cases where Respondents demonstrate that their quarterly labor cost is less than the sum of the gross backpay for all discriminatees, gross backpay would be disallowed to those discriminatees whose cumulative backpay figure exceeded the Respondents' labor cost figure.

The term labor costs includes all costs Respondents incurred for labor including amounts paid to contractors. Respondents' alternative formula is deficient in that it does not include costs associated with Respondents' use of contractors beyond the differential between the wage rate of those discriminatees hired via C&N and the wage rate paid by GLC. Respondents appear to argue that absent a specific finding of an unfair labor practice concerning contractor usage, GLC is free to utilize contractors rather than its own employees whenever it wishes. Adopting Respondents' position would permit GLC to unilaterally relieve itself of the remedy ordered by the Board and utilize employees obtained from labor suppliers as opposed to discriminatees from the preferential hiring list as ordered by the Board. Respondents are not free under the terms of the Board's order to utilize contractors to the detriment of the employees on the preferential hiring list.

At the hearing here, Respondents acknowledged that their proposed backpay formula did not provide for the computation of overtime or for the allocation of any overtime to any of the discriminatees. Respondents attempt to excuse this omission as a negligible amount traded for their declining to protest using the top rate of pay to compute backpay here. In response, counsel for the General Counsel correctly points out that Respondents' scheme involved awarding the top rate

of pay to the former Syntex employees it chose to hire. Thus it is entirely appropriate to compute the pay rate of the discriminatees here utilizing the top rate, and no trade off is called for. *Coronet Foods*, 316 NLRB 700 (1995).

Further, the amount of overtime involved is vastly much larger than Respondents would have the Board believe. For instance, the 64 hours of overtime averaged by the maintenance employees computes to 96 regular time hours. Thus, each maintenance employee was being paid not only their own work but also the work of over two additional employees. Such would triple the amount of gross backpay due or triple the Respondents' proposed number of job positions on which to apply their backpay formula. Thus, the failure to provide an alternative overtime computation is fatal to Respondents' alternative formula. As the Board recently observed, a respondent is "required to do more than gesture vaguely in the direction of thousands of employee time cards" when proposing an alternative backpay formula. *Intermountain Rural Electric Assn.*, supra. Accord: *Aztec Concrete*, 285 NLRB 1303 (1987).

Respondents also contend that former Syntex supervisors should serve to offset the reinstatement and backpay claims of discriminatees with more Syntex tenure or seniority. On this issue, as with the issue of the former Syntex employees that Respondent did hire, Respondent is asking to be given credit for its own discrimination. Further, permitting the Respondents to offset available job positions with the former Syntex supervisors would run counter to the specific terms of the order giving, as a remedy for Respondent's violations of the Act, preference to the former employees of Syntex.

The hiring of Syntex supervisors into unit positions was an element of Respondents' argument against a successor finding, contending that its operations were distinguishable from those of Syntex based on the fact that its operations required fewer supervisors. Respondents now urge that the individuals asserted in the first hearing herein as employees are now supervisors whose employment should be utilized to reduce the available unit work. As shown above, evidence was taken and determinations were made not only with regard to their supervisory status in connection with the Respondents' defense in the underlying proceeding, but also in response to counsel for the General Counsel's contention that Respondent's hiring practices were discriminatory. Having lost the argument once, it is now trying to raise the same argument simply viewed from a different angle. For reasons already expressed above, I find that Respondent will not be afforded "credit" for the consequences of discriminatory hiring decisions.

Next, Respondents contend that it is not appropriate to compute backpay as if it continued to run after a discriminatee was reinstated. Respondent's argument would be correct only if it properly reinstated the discriminatees and ceased violating the Act subsequent to reinstatement. Counsel for the General Counsel does not concede that this occurred, and the record does not support such a conclusion. Respondents have not offered to reinstate the discriminatees to their rightful positions with seniority and benefits appertaining to a nondiscriminatory date they would have been hired by GLC. GLC acknowledges that it credited former Syntex employees with seniority only from the date it actually hired them.

Further, in Case 10-CA-24463 it was found that Respondent laid off Tommy McGaha, Gary Watts, Larry Rines, Eugene Lawson, and Bartley Thornton in violation of the Act. (300 NLRB 1024 (1990).) By computing backpay in a continuing manner, discriminatees are compensated for their losses resulting from Respondents' continuation of its unfair labor practices and failure to comply with the Board's Order, but the computation is not punitive because it does not award backpay beyond that to which the discriminatees are equitably entitled. This is because those earnings that some of them received during the periods when they were working for the Respondents are deducted as interim earnings. In contrast, Respondents have failed to offer a formula to compensate the discriminatees in Case 10-CA-24463 as required by the Board's Order. Indeed Respondents' formula, providing for reinstatement and backpay only where replacement employees have been hired would leave this unfair labor practice without remedy.

For all the reasons stated above, therefore, I find that, except as otherwise specifically found here, the method proposed by counsel for the General Counsel is a reasonable formula for ascertaining the identity of discriminatees and a reasonable approximation of the backpay owed to the discriminatees in this matter.

#### Inclusion of laid-off Syntex employees as discriminatees

At the hearing, the parties agreed to broaden the scope of the initial phase of this proceeding to obtain a determination whether nine named individuals are eligible for backpay. While counsel for the General Counsel addresses this issue in his posthearing brief, Respondent does not.

The nine individuals, Donald David Ethier, Robert E. Edmonds, Eugene Lawson, Sharon K. (Workman) Jenkins, Delores A. (Norton) Holt, Linda Sisk, Annis I. Bible, Robin L. (Switzer) Dawson, and Donna McCardle Jones, were former Syntex employees who had been laid off from, and had last worked for, Syntex in 1979. These employees were not subject to recall at Syntex pursuant to the terms of any collective-bargaining agreement when GLC became a successor employer. They were simply former employees of Syntex.

As counsel for the General Counsel notes, the administrative law judge found that GLC violated the Act by refusing to consider for hire or refusing to hire its predecessor's employees, and included a provision in his recommended Order extending the recommended remedy to "all former employees" of Respondents' predecessor. The Board adopted this recommended order and included in its notice to employees the following provision:

WE WILL offer to *former employees of Syntex Chemical, Inc., including but not limited to those whose names are set forth on Appendix C*, employment to positions for which they would have been hired but for the Respondents' unlawful discrimination or, if those positions no longer exist, in substantially equivalent positions, dismissing, if necessary any employees not in the group of former Syntex employees, and make them whole, with interest for any loss of earnings and benefits they may have suffered as a result of the discriminatory refusal to hire them. [Emphasis added.]

I agree with counsel for the General Counsel that the administrative law judge and the Board intended for the remedy to extend beyond those employees known to the parties at the time of the hearing, and to other employees employed by GLC's predecessor, Syntex. However it is most logical to conclude that both the judge and the Board were referring to "all former Syntex employees," both known and unknown, who were reasonably the target of discrimination by GLC.

As counsel for the General Counsel argues, the administrative law judge found that GLC evidenced a desire to acquire their employee pool from that of its predecessor (298 NLRB at 617) and that, absent its unfair labor practices, it would have done so (298 NLRB at 624). The employees targeted by GLC's discrimination, however, were those whose hire would have made it a successor of Syntex, thereby requiring GLC to recognize and bargain with the Union. I conclude, therefore, that by "former employees of Syntex," the Board was referring to employees actively on the payroll at the time Syntex closed the plant in February 1984, and those who at that time might have had some reasonable expectation of recall by Syntex.

There is absolutely no reason to believe that GLC hiring any of these nine individuals, who last worked for Syntex in 1979, would have contributed to a finding that GLC was a successor to Syntex. Therefore, there is no reason to believe these nine individuals were in the class of people discriminated against by GLC. I agree with counsel for the General Counsel that in determining whether such individuals were in the class of discriminatees, the issue is whether GLC, in a context free of unfair labor practices, would have offered positions of employment to these nine individuals. I agree, too, that if there is any doubt, the doubt should be resolved in

favor of the employees and against the Respondents for they are the wrongdoers in this matter. *Intermountain Rural Electric Assn.*, supra. However, in this situation there is not so much doubt as there is room for misconstruction by a too-literal interpretation of the Board's language.

I find the facts do not support a conclusion these nine individuals were in the class of individuals discriminated against by Respondent. Accordingly, it is not appropriate to include them in the group of discriminatees eligible for backpay.

#### CONCLUSIONS OF LAW

1. GLI, Inc. is not a single employer with, and/or alter ego of, GLC. The operations of GLI do not constitute an expansion of GLC's manufacturing operations at its Newport, Tennessee facility and/or an expansion of the collective-bargaining unit represented by the Union at that facility. Therefore, GLI, Inc. is not jointly responsible with GLC for remedying the unfair labor practices found by the Board in the underlying decisions here.

2. The method proposed by counsel for the General Counsel is a reasonable formula for ascertaining the identity of discriminatees and a reasonable approximation of the backpay owed to the discriminatees in this matter.

3. The facts do not support a conclusion that Donald David Ethier, Robert E. Edmonds, Eugene Lawson, Sharon K. (Workman) Jenkins, Delores A. (Norton) Holt, Linda Sisk, Annis I. Bible, Robin L (Switzer) Dawson, and Donna McCardle Jones were in the class of individuals discriminated against by Respondent. Accordingly, it is not appropriate to include them in the group of discriminatees eligible for backpay.