

**Hebert Industrial Insulation Corp. and Its Alter Ego Brown's Race Insulation Services, Inc. and The International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL-CIO.** Case 3-CA-17811

October 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On December 23, 1994, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs and cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hebert Industrial Insulation Corp. and Its Alter Ego Brown's Race Insulation Services, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except the attached notice is substituted for that of the administrative law judge.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We find merit in the General Counsel's and Charging Party's exception with respect to the judge's inadvertent error in the language of the notice. We correct this error and substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

319 NLRB No. 71

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

WE WILL NOT refuse to recognize and bargain with the International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL-CIO, as the exclusive representative of our employees in the appropriate unit as defined in the collective-bargaining agreement between the Union and The Master Insulator's Association of Rochester, New York, by failing and refusing to apply the terms of the collective-bargaining agreement to unit employees employed by our alter ego Brown's Race Insulation Services, Inc. and by instituting changes in the wages, hours, and other terms and conditions of employment of our employees in the unit during the effective term of the agreement without complying with the provisions of Section 8(d) of the Act.

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

WE WILL, on request, bargain with the above-named Union as the exclusive representative of all the employees in the appropriate unit concerning rates of pay, wages, hours of work, and other terms and conditions of employment.

WE WILL apply to all of the employees in the appropriate unit employed by our alter ego Brown's Race Insulation Services, Inc., the terms of the collective-bargaining agreement between the Union and The Master Insulators' Association of Rochester, New York.

WE WILL make whole, with interest, our unit employees, including all employees who would have been referred to us for employment by the Union pursuant to the exclusive referral practice in effect between us but for our failure to apply the terms of that exclusive practice, for any loss of pay or benefits due them by reason of our unfair labor practices.

HEBERT INDUSTRIAL INSULATION CORP.  
AND ITS ALTER EGO BROWN'S RACE  
INSULATION SERVICES, INC.

- Doren G. Goldstone, Esq.*, for the General Counsel.
- Carl R. Krause and Andrea M. Terrillion, Esqs. (Harris, Beach & Wilcox)*, for Respondent Hebert Industrial Insulation Corp.
- Richard S. Mayberry, Esq. (Mayberry, Licht, Goldman & Leone)*, for Respondent Brown's Race Insulation Services, Inc.
- James R. LaVaute and Amy M. Bittner, Esqs. (Blitman & King)*, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on November 8, 9, 10, 1993, and January 25, 26, and 27, 1994, in Rochester, New York. The complaint alleges that Respondent Herbert Industrial Corp. (Herbert Insulation or Herbert) established Respondent Brown's Race Insulation Services, Inc. (Brown's Race or BR) as its alter ego, and that the two companies constitute a single employer under the Act, and although prior thereto and subsequently Hebert had a collective-bargaining relationship with International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL-CIO (the Union or Local 26), it failed and refused to apply the terms of its most recent collective-bargaining agreement to unit employees employed by Brown's Race, and instituted changes in the wages, hours, and other terms and conditions of employment of the unit employees without complying with the provisions of Section 8(d) of the Act, all in violation of Section 8(a)(1) and (5) of the Act.

Respondent Hebert filed a timely answer contesting the allegations of unfair labor practices. Respondent Brown's Race initially appeared specially by Counsel Richard Mayberry to contest the breadth of certain subpoenas served on its president, James M. Riesenberger,<sup>1</sup> and subsequently that counsel entered a general appearance and filed answer similarly contesting the conclusionary allegations of the complaint. Brown's Race's counsel did not thereafter participate in the hearing although provided opportunity to do so.

Thus, each party was represented by counsel and all were provided a full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, to make opening and closing statements and to file briefs with me. Each of the parties has filed a timely posthearing brief all of which have been carefully considered.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

## FINDINGS OF FACT

## I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Respondent Hebert, a New York State corporation, with an office and place of business at 192 Mill Street, Rochester, New York (Respondent Hebert's facility) has been engaged in the building and construction industry as a commercial insulation installer.<sup>2</sup> Annually, in

<sup>1</sup>Brown's Race, although not initially served with a copy of the complaint prior to hearing, was served at the hearing during its early stages. The initial failure to serve the alleged alter ego not procedurally defective under General Counsel's theory of the case, so long as Respondent's liability hinges on its creation by and identity with Respondent Hebert. *Mid-Hudson Leather Goods Co.*, 291 NLRB 449, 453 (1988). In any event, Respondent Brown's Race received actual notice of the proceeding by virtue of the subpoena served on its president, his response thereto and his and his attorney's understanding of the issues raised by the complaint from the opening of the hearing. See *Sturdevant Roofing Co.*, 238 NLRB 186, 188 (1978).

<sup>2</sup>The record disclosed that there exists a second Hebert entity, Hebert Construction Company, a corporation engaged in the business of insulation and asbestos removal, which Respondent Hebert stipu-

conducting its business operations, Hebert performs services valued in excess of \$50,000 for firms located outside the State of New York. Respondent Hebert admits these facts, and I accordingly find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Respondent Brown's Race, a New York State corporation, with an office and place of business at Respondent Hebert's facility in Rochester, has been engaged in the building and construction industry as a commercial insulation installer. Although Brown's Race denies that in conducting its business operations it annually purchases and receives at Hebert's facility goods valued in excess of \$50,000 directly from points located outside the State of New York, based on the facts adduced in this proceeding respecting Brown's Race's conduct of its business operations, in particular, its performance of services valued in excess of \$50,000 to firms either located outside the State of New York or which themselves are directly engaged in interstate commerce, I conclude that Respondent Brown's Race independently meets the Board's standard for assertion of jurisdiction, apart from its alleged status as an alter ego of Hebert.

Respondent Hebert admits, and I find, that Local 26 is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Hebert's Organization and Collective-Bargaining Relationship*

Hebert Construction was formed in 1983 by John B. Biemiller. Lee D'Amico joined the firm in 1984 and became a shareholder in 1985. Hebert Insulation was formed in 1988, with Biemiller as chairman and treasurer and D'Amico as president. Both are its directors and shareholders with Biemiller holding 51 percent of the shares and D'Amico 49 percent.

Both Hebert Corporations maintain common offices and warehouse facilities at 192 Mill Street in Rochester, New York. Hebert Insulation performs insulation installations on air conditioning, heating and cooling systems, and equipment as subcontractor to mechanical contractors or directly for industrial and institutional customers and Hebert Construction performs asbestos removal work for similar customers. All office employees including the common officers are paid on the Hebert Insulation payroll.

Hebert Insulation has a collective-bargaining relationship with Local 26 arising under Section 8(f) of the Act covering employees in the building and construction industry. Hebert Insulation, as a member of the Master Insulators' Association of Rochester, New York (Association) has been an employer party, along with other employer-members, to a collective-bargaining agreement with Local 26, effective from September 16, 1990, to April 30, 1992, covering a unit of all mechanics and apprentices involved in insulating work<sup>3</sup> within the jurisdiction of Local 26. The geographic work jurisdic-

lated was a single employer with it within the meaning of the Act. Its conduct is not alleged nor at issue in this proceeding.

<sup>3</sup>The precise nature of that work need not be spelled out here but is described in detail in art. II of the agreement.

tion of the Union is spelled out in article I and includes Monroe County (in which the city of Rochester is located) and seven surrounding and nearby counties. Under that agreement, the parties had a practice under which the Union was the exclusive source of referrals of new unit employees employed by the Association employer-members.

Hebert Construction is also party to the same agreement with Local 26 covering asbestos removal work. The agreement referred to had been extended day to day, at least to the close of hearing, and although negotiations had not been held for over 6 months as of November 1993, neither party had terminated negotiations over a successor agreement.

#### *B. The Creation and Operations of Brown's Race*

James Riesenberger, the president and a shareholder of Brown's Race testified at length, both as a witness for General Counsel and for Respondent Hebert, as to the creation of Brown's Race, its operations and its relations to Hebert and to Hebert's sole officers and shareholders, Biemiller and D'Amico.

Riesenberger had been an insulation mechanic and member of Local 26 for some years, referred by the Local to various insulation contractors, indeed, working for Hebert from 1966 to 1973, when in 1985 he withdrew from membership and took a management position as vice president with Flower City Insulation Sales and Contractors, Inc. (Flower City), an employer-member of the Association and a union contractor.

Beginning early in 1991, Riesenberger began consideration of starting his own insulation company. He lacked the financial resources to form a company on his own. In the late spring of 1991, Riesenberger arranged a meeting with D'Amico whom he had gotten to know well through their membership, on behalf of their respective companies, on the board of the Eastern States Contractors Association.

Riesenberger informed D'Amico of his interest in forming an insulation company to enter the area of the market no longer open to a union contractor because of competition from nonunion or open-shop contractors. Riesenberger knew from his own experience at Flower City of the general unavailability of this market to union firms because of his lack of success in outbidding nonunion contractors in the Rochester area over the last 6 or 7 years. Flower City's higher labor costs had resulted in its inability to underbid nonunion contractors for this portion of the market. In essence, Riesenberger was seeking D'Amico's support for the feasibility of creating a company to compete in the nonunion market as well as making D'Amico aware of his inability to capitalize such a business on his own. Riesenberger knew that D'Amico was aware of the problem union firms were facing because it was an industrywide problem that had been the subject of discussions at Eastern Conference meetings.

Following the initial meeting, D'Amico arranged a second meeting with Riesenberger attended as well by his partner, Biemiller. At the second meeting Riesenberger again expressed his interest in starting an open-shop business, disclosed his weak financial situation, but stressed that his contacts, experience, and reputation as an executive of a union firm would enable him to compete effectively against other open-shop contractors.

According to Riesenberger, at or following this second meeting, by July 1991, a decision was reached by D'Amico

and Biemiller to finance a new business. But they did more than finance the business. As Riesenberger later agreed, he was looking to John Biemiller, in particular, to lend his expertise and experience in financial matters to those aspects of starting and operating the new business (Tr. 384). Furthermore, D'Amico and Biemiller became the majority shareholders, officers, and members of the board of directors of Brown's Race. The participants agreed to set an initial capitalization of the business at \$25,000. They agreed the new firm would be a nonunion insulation contractor. Riesenberger contributed \$2750, D'Amico and Biemiller each determined to contribute \$8375, and Biemiller and D'Amico brought in two loyal employees of Hebert, John Owens, an estimator, and Stephen Martins, labor superintendent, to contribute another \$2750 each. On the formation of the new corporation, Brown's Race Insulation Services, Inc., the common shares of stock were offered to these subscribers at \$125 per share, with the consequence that Riesenberger, Owens, and Martins subscribed to and received 22 shares each, and Biemiller and D'Amico subscribed to and received 67 shares each. The shares of stock were issued pursuant to Section 1244 of the Internal Revenue Code of 1954, enabling shareholders who suffer a loss on the sale or exchange of their shares to treat that loss as an "ordinary loss" on their personal income tax return. Testimony also revealed that the Corporation was qualified as a subchapter S corporation under the IRS permitting all profits and losses incurred by a shareholder in the operation of Brown's Race to be passed through to their personal income tax returns. The shareholders had equal voting rights in accordance with the number of shares of stock they each held. Thus, Biemiller and D'Amico together held a substantial majority and controlling interest in the affairs of the new corporation.

Each of the shareholders became a member of the board of directors. At the first meeting of the board held on July 17, 1991, at which Riesenberger was designated to act as chairman and D'Amico as secretary, by proclamation, Riesenberger was elected president; Owens, vice president; D'Amico, secretary; and Biemiller, treasurer. The rationale for these decisions was that Riesenberger would be running the Company; Biemiller, with banking and business experience, was the logical choice to handle money matters; and D'Amico got the remaining position.

According to Riesenberger, he could recall no discussion of limiting the roles of Biemiller and D'Amico to that of investors only, rather than including them as officers and directors.

Without investigating any other possible business locations, it was early determined to locate Brown's Race in the same building that housed the two Hebert corporations. Brown's Race occupied a portion of the space on the second floor of the five-story building leased by Hebert from third-party owners. It consisted of an office area where Brown's Race stored supplies and also fabricated some insulation materials; much of its insulation materials were purchased pre-cut from suppliers.

Some remodeling of the space Brown's Race occupied was performed after it moved in. Brown's Race paid for carpentry work to cut the office space in half, close it off with drywall, close off the entry with drywall, build an extension on an office used by Riesenberger, and build a drafting table. Brown's Race paid for this remodeling and used as a car-

penter an individual named Joe Bertini, an employee of the Hebert companies who was referred to Riesenberger by D'Amico. Bertini was helped in performing this work by Jody D'Amico, D'Amico's son (age 23 or 24), who was also referred by his father. D'Amico also asked Riesenberger if Jody could be trained as an insulator for Brown's Race. Riesenberger was aware that Jody had been working off and on for some time for the Hebert companies, but that D'Amico was not able to offer Jody full-time employment with them.

Even before performing this remodeling work for Brown's Race, according to Hebert's full-time and Brown's Race part-time bookkeeper, Sheila Montgomery, both Bertini and Jody D'Amico had spent some time on Hebert's payroll building a ramp to the Hebert warehouse and garage area. During one pay period, probably in September 1991, she received from both of them indication that part of a workweek had been spent on Hebert work and the balance on Brown's Race work.

After a week performing the carpentry, Bertini and D'Amico continued their employment with Brown's Race as the sole insulation employees at the time. Bertini had told Riesenberger he was an experienced insulation worker, and Riesenberger had confirmed with Biemiller or D'Amico that Bertini could handle insulation work and had some experience, although he apparently was not a member of Local 26.

Records later introduced establish that Hebert Insulation reported to the Local 26 benefit funds that Joseph Bertini had performed 2,823.50 hours of insulation work from December 1988 to July 1991. According to Union Business Manager William Urgerhart, Hebert Insulation Superintendent Stephen Martins informed him that Bertini had been asked to do insulation work and Lee D'Amico had told him Bertini did some carpentry work but had some experience in insulation and Hebert wanted to put him on permit. Jody D'Amico worked with Bertini. Riesenberger ran the corporation from the office but also kept a close eye on the two insulators in the field.

As Riesenberger described it, mechanical insulation is installed around pipes for thermal and anticondensation control of heating systems and is also installed for process piping in food service plants and for pipes in generating facilities and plumbing systems. This is the same work that journeymen members of Local 26 perform under their collective-bargaining agreement with the Association. Local 26 also has an apprenticeship training system to train workers to perform at the journeyman level. The common tools of the trade used both by Brown's Race Insulators and Local 26 journeymen or apprentices include a knife, a ruler, and an outward clenching staple gun. On occasion, insulators use a rope to lift or place insulation material.

Shortly after starting up Riesenberger realized that \$25,000 was insufficient to capitalize the business. The business was experiencing a cash-flow problem. He then turned to both Hebert Construction and Jack Biemiller for loans to sustain the business. At the time the new corporation was formed, an understanding was arrived at that should the new venture be short of cash "the stockholders would take care of it." (Tr. 164.) In essence this meant Biemiller and D'Amico, since they owned Hebert and Biemiller, proved ready and willing to advance necessary moneys.

James Riesenberger, as president of Brown's Race, signed a series of demand notes to cover the loans made to it by Hebert Construction Corp. The notes were dated October 16

and November 6, 1991, and April 14 and July 15, 1992, covering loans of \$6000, \$1000, \$15,000, and \$4000, respectively, each payable on demand with interest at the prime rate plus 1 percent. On October 7 and 11, 1991, Riesenberger, as Brown's Race's president, signed demand notes in favor of John Biemiller covering loans of \$2500 and \$2000, respectively, to be repaid also with interest at prime rate plus 1 percent.

In each case, Riesenberger informed Biemiller of a cash-flow problem, Biemiller assented to the loan and caused the money to be deposited in Brown's Race's checking account. After a period of time, Biemiller informed Riesenberger that he was rounding off the interest rate specified in these series of loans from prime plus 1 percent to 6 percent.

The parties stipulated that the monthly average for the prime interest rate for February to June of 1992 was 6.5 percent, for July 1992 it was 6.02 percent, and for August through October 1992 it was 6.0 percent. Thus, Biemiller unilaterally reduced the interest rate on the loans due and payable from Brown's Race to Hebert and to himself by anywhere from 1-1/2 percent to 1 percent.

Riesenberger also lent money to Brown's Race to cover shortfalls in cash-flow. He did not provide himself with promissory notes from the corporation. He generated the moneys deposited in the Brown's Race corporate account from loans he made on personal credit accounts he maintained.

Biemiller had initially suggested the prime plus 1-percent interest rate and Riesenberger had readily agreed without suggesting alternate terms. Riesenberger was well aware that it would have been virtually impossible for him to have arranged a line of credit from a lending institution as a small, startup contractor without putting up enormous amounts of security, and he made no effort to secure such a line of credit or commercial loan.

Although the notes were payable on demand, Riesenberger secured an understanding from Biemiller that he would make principal payments as receivables allowed, and interest payments on the unpaid balance. In fact, there were periods of time when no payments were being made on the loans. Riesenberger knew he was negotiating a deal with Biemiller that was not available to him on the commercial market.

In financial statements for 1991 and 1992 prepared by a firm of certified public accountants, after a review of Brown's Race's financial records, the loans received from Hebert and Biemiller are each listed as being represented by unsecured noninterest bearing note(s) payable to stockholder (in the case of Biemiller) or to Hebert Construction Co. (in the case of the loans from Hebert).

Riesenberger was unaware how the interest he paid periodically on these loans to Brown's Race were being computed, whether compounded daily, monthly, or not at all.

At the end of 1992, Brown's Race had outstanding loans and was indebted to Hebert and Biemiller in the amount of \$32,215. In spite of the fact that this amount was payable on demand, Riesenberger would have been unable to pay it off if these loans were called on December 31, 1992. In fact, these demand loans continued into 1993 without being called.

With respect to the leased space, by a letter dated August 15, 1991, addressed to Riesenberger, president, Brown's Race, listing its address at 190 Mill Street, Biemiller con-

firmed that he and D'Amico were agreeable to rent space at the listed address for \$500 a month starting September 1, 1991, and to continue the arrangement on a month-to-month basis as long as their lease was in effect with the building owners. Hebert is the prime lease holder for all floors of the building. Brown's Race was given the option to terminate on 60 days' notice. The rent would not increase, at least to September 1, 1992. Riesenberger simply agreed to these terms as proposed by Biemiller and without investigating the suitability of any other rental location.

No lease was ever drawn up or executed. Brown's Race has continued to occupy the same space in the building through the close of hearing without any change in the amount of the rent.

Brown's Race's entrance to the common building is on Mill Street. After entering a door up a few feet from the street level one can proceed up a flight of stairs to Brown's Race's office or go through a swinging door and into a hallway to the Hebert Company offices through a door off the hallway. On the left off the hallway are two freight elevators and straight ahead down the hallway is the Hebert first floor warehouse area. The Hebert companies have a separate outside entrance to their offices in the same building on the corner of Mill Street and Commercial Street. Brown's Race also has access to Hebert's loading and warehouse area, which is entered from a ramp leading up from Commercial Street. Riesenberger parks his own vehicle there on occasion as do Brown's Race's own employees at times.

Riesenberger for Brown's Race has occasionally been late in making rent payments, a couple of times up a couple of times up to 3 months late, and other times for lesser periods. On none of these occasions has Brown's Race been charged a penalty.

Riesenberger testified to Brown's Race's employment of a bookkeeper as follows. Sheila Montgomery was and continues to be the bookkeeper and a full-time employee for the Hebert companies. Riesenberger had been introduced to her at one of his meetings with Biemiller and D'Amico. Shortly after starting up Brown's Race's operations on August 15, 1991, he was discussing staffing with them and either one suggested that Montgomery could work for Brown's Race part-time. Without interviewing anyone else or advertising for the position, Riesenberger agreed to employ her part-time. He agreed to pay the rate she said she wanted, of \$10.82 per hour.

Montgomery reports her own time on a monthly basis. She takes care of, keeps current, and balances accounts payable, accounts receivable ledgers, the payroll account, checking account, and the operating account in general. She works approximately 20 hours a month for Brown's Race. She has a desk in the Brown's Race's office, but she also inputs Brown's Race's accounts payable and accounts receivables into the Hebert computer that is located downstairs next to her desk on the first floor in the Hebert Company offices. Both Biemiller and D'Amico have offices located there. Brown's Race pays Hebert nothing for use of its computer system. Hebert was billed and Brown's Race paid Wilcomp Computerized Accounting System (Wil-Com) for August 1991 startup services in creating a data base for Brown's Race and installing software, totalling \$300. Riesenberger does not supply any software for use on this computer. Although Montgomery keeps employee hours on the computer,

a company called Pay Chex, Inc. handles the issuance of Brown's Race's salary checks.

Periodically, Montgomery provides Riesenberger with printouts showing with respect to accounts receivable, the name of the customer, invoice number, job number, invoice date, the due date, and the aging sequence of the account. Montgomery also provided Riesenberger with periodic computer reports on accounts payable showing vendor, invoice number and date, amount, and due date. Montgomery also provides computer generated, job costing reports as well as information regarding the nonpayroll Brown's Race checking account.

Montgomery works for Brown's Race approximately 2 hours each for 3 days a week, generally coming upstairs to the Brown's Race office after lunch on Monday, Wednesday, and Friday and also inputting information for Brown's Race into the computer downstairs at other times. Riesenberger acknowledged he doesn't know how long she takes to input material into the Hebert computer (or to produce printouts that he is periodically provided). He also acknowledged that the 20-hour-a-month figure he provided for Montgomery's work hours does not accord with the 6 hours per week, or 24 hours or more a month, of time she spends at Brown's Race business. He merely signs her paycheck every month, which is \$200 plus, without asking any questions about her time. There are also times when Riesenberger will talk by telephone with Montgomery downstairs at her desk in the Hebert offices.

Another Hebert office employee whom Brown's Race employed, but for only one payroll period in early February 1992, as a receptionist-secretary, to perform typing, under a similar setup to Montgomery's, was Margaret Kasper. For the week she did her typing downstairs.

Brown's Race also hired a second son of Lee D'Amico, Christopher D'Amico, 25 or 26 years old, in June 1993, as an insulator. Riesenberger learned from Lee D'Amico that Christopher was unemployed. At the time Brown's Race had gotten in a number of fair sized contracts with early starting dates. Riesenberger knew that Christopher had been on the Hebert payroll from time to time. In discussions with him, Riesenberger learned he was a helper who had been doing Local 26 insulation work for Hebert, but was not a member of the Union. Riesenberger did not know Christopher's skills but decided to give him a try. Although Brown's Race advertised for insulators two or three times, Riesenberger could not recall if he did so that June.

Brown's Race entered a rental agreement for use of a Hebert truck, and ultimately purchased a used truck from Hebert. By letter dated August 15, 1991, Biemiller, chairman of Hebert's board of directors, offered Brown's Race the ability to rent their truck, from time to time, at a rate of \$10 an hour, availability to depend on the needs of Hebert that came first. This letter comprised the rental agreement according to Riesenberger. Use of the truck first came up in discussions with Biemiller and D'Amico regarding the startup capitalization. When Riesenberger referred to his need for a truck, and capitalization would have to include the cost of its purchase, Biemiller or D'Amico told him they had two trucks sitting out back that nobody uses, and "why don't we rent you one." Biemiller proposed the \$10-an-hour rate and Riesenberger agreed. Riesenberger asked for and received

some flexibility on payments for its use; he would keep records of use and make periodic payments.

In practice, Riesenberger ended up paying every 3 or 4 months. He also understood insurance on the vehicle would be provided by Hebert who continued to own the vehicle. Riesenberger's own vehicle, a Ford Bronco II, which he insured personally, had in its insurance policy, a rider that Riesenberger was advised would cover other leased vehicles.

The general liability insurance carrier for Brown's Rice also covered Riesenberger's vehicle when used on occasion as a work vehicle. Riesenberger did not explore the rental of a truck from any other source, since, as he acknowledged, for the shorter mileage deliveries of materials to jobs for that the truck was used, a formal rental from Hertz or any other supplier would be too costly and therefore didn't make any sense. Sometimes Brown's Race used Hebert's rack truck, which could carry Brown's Race's 10-foot ladder, and other times Brown's Rice used Hebert's other pickup truck. The August 15, 1991 agreement did not reflect the informality of this arrangement.

By April 1992, Riesenberger had sufficient jobs to hire an outside field superintendent, Robert Carr, who had his own truck. Brown's Race purchased that truck and ceased the Hebert truck rental. However, the truck was destroyed in an accident after a few months, and Riesenberger now arranged with Biemiller to rent the Hebert truck, this time for \$200-a-month rent, a figure proposed by Riesenberger, which arrangement continued from September 1992 to January 1993. During this period, Brown's Race had unlimited use of the vehicle. There is no evidence this lease arrangement was put in writing. Hebert continued to insure the vehicle, and Riesenberger covered the truck as well under a rider to the general liability coverage Brown's Race maintained.

Riesenberger acknowledged, after being shown a subpoenaed invoice, that because payment of rental use at \$10 an hour would have resulted in a charge for use from September through December 1991 of \$1250, and beyond his ability to pay, he arranged a lesser rate with Biemiller of \$6.25 an hour, resulting in a lesser actual charge of \$781.25 for the same period. This lesser rate of \$6.25 an hour continued for the first and second quarter of 1992. A document showing a computer summary of 64 hours of use of the Hebert truck at \$6.25 per hour totalling \$400 for the second quarter 1992, April through June, which was reported to Hebert, was not paid until October 27, 1992. Riesenberger was still experiencing a cash-flow bind during this period.

Riesenberger agreed that Brown's Race typically bids for jobs in Monroe County and the five surrounding counties, with a good majority of its work being performed in the metropolitan Rochester area. This area is within the geographic area covered in the Local 26 collective-bargaining agreement.

Since the employment of the field superintendent, Robert Carr, in April 1992, Carr has acted as a rover for Brown's Race, having responsibility for the proper performance of all Brown's Race insulation jobs. He is paid a salary, on a full-time, 40-hour-a-week basis. Carr answered a blind ad for superintendent. Riesenberger knew him as a member of Local 26, and he and Carr worked together for Hebert sometime in the 1960s into the 1970s, before the present owners bought Hebert. Besides overseeing projects, Carr does not typically work with the tools of the trade, and would not come under the Local 26 contract. Carr as superintendent

provided advise on hiring of applicants, and had authority to direct and discipline employees on the jobsite. Riesenberger agreed that the function of his field superintendent was similar to that of the superintendent at Flower City when he worked there.

Regarding the purchase of a Hebert truck, Riesenberger informed Biemiller in January 1993 that he was tired of the rental arrangement and now wanted to buy the truck Brown's Race had been renting. The truck was a 1988 Chevrolet half-ton pickup, with 85,000-90,000 miles use. Riesenberger agreed to pay Biemiller's figure of \$2500 with 20 percent down and the balance payable by July 1, 1993. A bill of sale was drawn up, signed by Biemiller, and identifying the truck and showing the basic terms but there is no agreement signed by Riesenberger for Brown's Race. There was no chattel mortgage securing the payment of the considerable balance due and there was no provision for interest on the installment payments. Riesenberger did not make the final payment until August 30. The truck was registered and insured in the name of Brown's Race.

Carr actually came to Brown's Race from an open-shop (nonunion) contractor. He proved useful to Riesenberger in evaluating the applicants who were hired by Brown's Race on an as needed basis. Since its inception, Riesenberger has not hired any insulators for Brown's Race who are Local 26 members. Some, Joe Bertini is an example, did work on union jobs but did not become Local 26 members. It was and remains Riesenberger's intention, which was achieved, to operate Brown's Race nonunion and to hire only nonunion insulators. All employees were told of this policy. This has not stopped Riesenberger from successfully bidding in at least one instance, on a prevailing rate job that he understands uses the union rate in determining the prevailing area wage and fringe rates under existing Federal and New York State law. On this job Brown's Race paid its employees an amount equivalent to what they would have received under a Local 26 contract.

Brown's Race has also performed jobs as a subcontractor on buildings owned by *Rochester Gas & Electric* as well as *Eastman-Kodak Co.*, for one of whom Hebert had performed work in the past (Kodak) and for the other of whom Hebert continues to perform insulating work.

In terms of supplies, Brown's Race uses the same three insulation suppliers who furnish materials used in the trade locally by union and nonunion insulation contractors alike.

The facts show that at least nine of Brown's Race customers were also customers of Hebert. They include both owners of industrial enterprises as well as general contractors for whom these insulation firms were subcontractors. For these nine customers, Brown's Race performed approximately 69 out of a total of 165 jobs during the period August 1991 through the end of February 1993. Several other large educational institutions and enterprises were also clients of both Brown's Race and Hebert, among them being Rochester Institute of Technology, Bausch and Lomb, Monroe Piping, Genesee Hospital, Hobart-William Smith Colleges, and the University of Rochester.

In one instance, Riesenberger discussed with Martins of Hebert a business relationship under which Brown's Race would do metal fabrication in its shop for Hebert on those occasions when Hebert needed the material and Brown's Race was not busy. The project, however, never went ahead.

Over its existence, Brown's Race has averaged five insulators on its payroll, varying from as few as two and going as high as eight or nine. Insulation pay ranged from \$7 an hour to a high of \$15, depending on experience. Supervisor Carr was at first paid \$550 and then later \$600 weekly salary. Brown's Race provides an IRS Section 125 savings plan for employees with Pay Chex, Inc., Human Resources Services, under which employees may contribute toward medical insurance coverage on a before-tax basis as well as paying full-time employees \$105 per month toward the employees' premium with the medical insurer Blue Choice. Employees after 6 months also receive 1-week paid vacation after 1 year of service and five paid holidays per year.

Brown's Race had been invited to bid on a number of jobs by Eastman Kodak, a nonunion employer. When associated with Flower City, Riesenberger had seen the Hebert estimator on visits to Kodak jobsite for the purpose of estimating. Riesenberger readily acknowledged that the jobs Hebert estimated for Kodak were of a similar type to jobs Flower City had done and Brown's Race was now doing. Riesenberger agreed that Brown's Race was able to get work primarily because it can offer a reduced wage rate in its estimates. As explained by Riesenberger, the jobs Flower City had performed at Kodak when he was its vice president, resulted in financial losses for Flower City because of the higher union wage scales. In his initial discussion with D'Amico Riesenberger had discussed the possibility of securing work from Kodak.

Sheila Montgomery testified that she volunteered her bookkeeping services to Riesenberger when he asked if she knew of anyone looking for work. She obtained permission from Biemiller to work part-time for Brown's Race after telling him she could do the work around her lunch hour and off hours. She normally took from 12 to 1:30 p.m. to eat lunch and perform banking and other business for Hebert. In quoting her wage of \$10.82 per hour to Riesenberger, she took her weekly salary and divided it by 40 hours. After keeping track of her time over some period, showing that she spent between 20 and 25 hours a month on Brown's Race business, Riesenberger agreed to average out her time and to pay her at the rate of 25 hours per month.

Montgomery had previously set up, as previously noted, with the assistance of Wil-Com, a computer bookkeeping system for Hebert. Because of her familiarity with the system, Montgomery had Wil-Com program an identical data base for Brown's Race. The computer Montgomery uses is on line with the one used by Margaret Kasper, the Hebert secretary, and the one Biemiller maintains in his own office for his personal use. Biemiller can and did access Brown's Race's job-costing and job-listing data on his own computer but could not, without Montgomery's assent, access other Brown's Race financial information because of a coding system instituted by Montgomery. At his request, every once in a while, Montgomery has provided Biemiller with Brown's Race reports on accounts receivables and accounts payables. In fact, Biemiller himself acknowledged receiving this data when he provided Riesenberger (Brown's Race) with Hebert and personal loans. In providing this information to Biemiller about once a month, Montgomery did not invariably inform, or ask permission of, Riesenberger.

Montgomery maintains in the Hebert and Brown's Race data bases the information regarding the outstanding loans made by Hebert to Brown's Race. Periodically, Riesenberger provided her with the amounts Brown's Race will be paying for principal or interest on the loans and she will write the check from the Brown's Race check register.

Hebert maintains a postage machine, and Montgomery maintains a running total of the Brown's Race outgoing mail and writes a check monthly to Hebert to cover these costs. She and Margaret Kasper operate the machine on Brown's Race mail.

Besides the Hebert computer and postage machine, on which Brown's Race pays no rental fee for their use, Riesenberger makes use of the Hebert copier when making multiple copies of documents, also without charge.

John Biemiller testified as an adverse witness called by counsel for General Counsel. He explained that when Brown's Race was formed "as an investment vehicle" (Tr. 417) he gave an opportunity to people who had been with Hebert for a while a chance to purchase stock if they so wished. That offer was made available to John Owens, Stephen Martins, and Lee D'Amico. In essence, the offer was a reward for a job done well "in the corporation which presently exists" (Tr. 418). Neither Martins nor Owens had an ownership interest in Hebert. Owens was then senior estimator for Hebert and Martins was a field superintendent. Neither was provided an opportunity to become part of management of Brown's Race, although they became directors and Owens also became vice president of record. There is every reason to believe that inasmuch they owed their continued job status with Hebert and their stock ownership to the good graces and kindness of their superior in Hebert, John Biemiller, they would look to Biemiller and be guided by him in their voting their shares and their participation in corporate ownership of Brown's Race.

Biemiller did not anticipate any breach of his fiduciary responsibilities to Brown's Race shareholders in assuming a directorship and officer position with Brown's Race. Although neither he nor the other directors and officers of Brown's Race, aside from Riesenberger, were going to be involved in its day-to-day operations, he recognized that as a director and officer he could have control over who was operating the corporation on his behalf and that Riesenberger, as chief executive officer, was serving at the pleasure of himself and the other officers. He, along with D'Amico, in fact, had majority control.

Because of his own background in finance, having previously worked in banking for some years, Biemiller had the most input on establishing the capitalization for the new enterprise. He and D'Amico put up 35 percent each of the money to form Brown's Race because the others couldn't. The others' more limited contributions were determined by their constrained financial resources.

In forming the new corporation and seeking a fair return on his investment, Biemiller was intent on entering a market place that had become closed to his union firm, Hebert. The segment of the market Hebert could not enter was growing very rapidly and the nonunion firms were underbidding Hebert because they knew its wage rates and were bidding less. Most insulating contractors used the same suppliers of materials. Labor costs had thus become the big difference in estimates submitted competing insulating firms. Most con-

tracts let in the industry were "hard money" contracts in which the customers selected the most economical proposals; very few were based on time and materials with a guarantee of a predetermined profit.

The lease on the building housing Hebert's and Brown's Race operations is held by Hebert Construction. At Biemiller's direction Riesenberger for Brown's Race pays himself and D'Amico \$250 each monthly. He permits Riesenberger to park free in the garage area created in the first floor warehouse area by the building of the ramp. At present, the only space in the six-story building that Hebert sublets is Brown's Race's space on a portion of the second floor.

Biemiller was asked a number of questions about variances between his testimony and information provided in affidavits he submitted to the Board and records he had produced for the General Counsel. The subject matter had to do with Hebert customers for insulation work. In one case Biemiller had listed in an August 12, 1992 affidavit, Frey and Campbell as a customer of Hebert who may have been or now was a customer of Brown's Race. In his testimony now Biemiller denied that Frey and Campbell was a customer of Hebert but could not explain its inclusion in his affidavit. In another instance, Biemiller had denied that R. I. T. (Rochester Institute of Technology) had been a customer of Hebert within the last 5 or 6 years. Brown's Race had performed a job at R. I. T. Day Care Center for Cassidy Mechanical as a subcontractor. Not only had Hebert done work as a sub for three contractors at R. I. T. in 1991 to 1992 totalling \$5685, but in November 1991, it completed a \$8795 job working directly for R. I. T.

Biemiller also had sworn in a January 28, 1992 affidavit that, to the best of his knowledge, the two Hebert companies have never bid on a job on which Brown's Race was also a bidder. In his testimony Biemiller agreed that Hebert probably had bid competitively against Brown's Race for various jobs and that Brown's Race would have under bid Hebert. Indeed, 2 or 3 months before his testimony, both companies had bid on a job for Cadbury Schwepps. Biemiller said his testimony was based in part on a conscious decision by Hebert by 1992 to only bid on posted (prevailing) rate work and power house work for utilities, Niagara Mohawk, New York State Electric and Gas and Rochester Electric and Gas that only use union labor, and where its profit margins are higher. Yet, Hebert continued to perform private insulation installations, including one on which it was a successful bidder for a large job as sub to Monroe Piping at Bausch & Lomb, a contractor for whom Brown's Race has also performed work.

Biemiller explained the change in the loan interest rate on Hebert loans to Brown's Race to a fixed 6-percent rate from prime plus 1 percent as being easier to apply, since the prime rate was moving around frequently. This change was made in early or mid-1992, but was not memorialized in writing. In his August 12, 1992 affidavit Biemiller referred in error to the interest rate on an additional \$18,300 in loans from Hebert to Brown's Race as being 7-1/2 percent, even though by July 1992 he and Riesenberger had changed the rate orally to a straight 6 percent, and Respondent stipulated that the prime rate had dropped to 6.02 percent for July 1992 and 6.0 percent by August. The affidavit thus misstates the interest rate on substantial outstanding loans at the time as being higher, by 1-1/2 percent, then the rate was in actuality, an

error that tended to minimize what could otherwise be viewed as a less than arm's-length relationship between Hebert and Brown's Race.

Consistent with the treatment of the loans in Brown's Race financial statements for 1991 and 1992, the Hebert Construction financial statement for 1991-1992 lists the loan receivables from Brown's Race of \$7000 in 1991, and \$25,300 in 1992 as "non-interest bearing demand loan[s]."

Biemiller explained that he ceased making personal loans to Brown's Race, and arranged to make the loans from Hebert because he was involved in a divorce suit and his personal funds became depleted.

Biemiller also confirmed to union counsel that Hebert procured its bargaining unit workers through the Union. In many instances, Hebert employed union members who have been working for the company for 5 or 10 years. These members were hired directly with the Union's assent and others were referred to Hebert on a call to the Local 26 business agent from the job superintendent. Brown's Race employees were not hired through the Union. The only exceptions on Hebert hires through the Union, were the instances of its employment of Christopher D'Amico for summer work and Bertini's employment as a carpenter, and in those cases the Union knew of their employment, Bertini in particular being a member of Asbestos Workers Local 202, a sister local to Local 26.

As a final witness the General Counsel called Union Business Manager William Urquhart. Urquhart is also administrative manager of the Local 26 Pension, Welfare and Annuity Funds, as well as, since its founding in 1988, manager of the Asbestos Removers Local 202 Welfare, Training and Annuity Funds.

Urquhart explained that the Union has provided a referral service to the insulation contractors in collective-bargaining relationship with it, including the Hebert companies, for over 20 years. Under this arrangement, when a contractor requires workers beyond their basic work force, they request and the Union provides a list of out-of-work Local 26 mechanics. In his experience, aside from employment from time-to-time of relatives, Hebert has invariably hired off the list that he supplied. In contrast, Brown's Race has not contacted Urquhart for referral of workers to any of its jobs.

Commencing with a letter request that Local 26 made on November 11, 1991, of Hebert, seeking information relative to its ownership interest or relationship with Brown's Race such that Brown's Race may be doing bargaining unit work, the Union engaged in a series of correspondence with both Hebert's and Brown's Race counsel, which resulted in an unfair labor practice proceeding and a Board Decision and Order in *Hebert Industrial Insulation Corp.*, 312 NLRB 602 (1993). In this decision, the Board affirmed the administrative law judge, but modified his order. The Board concluded Hebert had violated Section 8(a)(5) and (1) of the Act, in that by delaying unduly in furnishing certain data requested by the Union and by failing to furnish the remainder of the data sought, Respondent Hebert had failed to bargain collectively with the Union. The Board, inter alia, ordered Hebert to cease and desist from refusing to bargain collectively with Local 26 by unduly delaying in furnishing responses to the Union's requests for information as to the possible single employer/alter ego status of the Respondent and Brown's Race and by failing to furnish all data the Union sought.

The correspondence, in particular affidavits and information furnished by Hebert to the Union and the General Counsel, have been relied on by Respondent Hebert in the instant proceeding to assert as an affirmative defense that the charge the Union filed herein, on April 26, 1993, was untimely under Section 10(b) of the Act. That defense will be considered infra.

Witness Urquhart testified further that in the month following the Union's initial written request for information, sometime in mid-December 1991, he received a telephone call in his office from Lee D'Amico. D'Amico started by asking, "[A]re you mad at me, I haven't heard from you in a month or two." Urquhart replied, "[N]o, I'm not mad at you, why would I be? I was just busy, and you haven't caused me any problem, we haven't any reason to communicate." D'Amico then said, "I know you're in discovery with Brown's Race." D'Amico added, "I know I'm not saying Brown's Race is our company, but if it was, we're doing it legal." Urquhart responded, "[W]ell, what are you saying, are you saying if you camouflage it well enough it becomes legal?" D'Amico said "[Y]es, something like that." Urquhart said, "[W]ell, I don't think so. That's one of the reasons Local 26 has asked me to take this whole matter to an attorney and pursue this issue." D'Amico then said, "[Y]ou know, it's like a car dealer being down the street saying, nobody can have two different dealerships. I don't think we're talking apples to apples or oranges to oranges." Urquhart now said he didn't want to talk about it any further and suggested it was not smart for D'Amico to discuss it with him, but added he didn't believe it was legal.

Then, in June 1992, during a negotiating session Local 26 held with the insulation contractors, attended by Urquhart and D'Amico, among others, they had started talking about nonunion competition as a preface to the negotiations when D'Amico brought up Brown's Race again. Urquhart took this as an opportunity to ask seeing that your company as well as the Master Insulators Association had a long historic association with Carl Krause as your attorney, why does this Mayberry represent Brown's Race. D'Amico replied that Mayberry had done work for a friend who operates Fairport Mechanical. Wegman, who owns and operates Wegman Supermarkets apparently agreed with Local 13, Plumbers and Pipefitters in Rochester to employ only union contractors. Wegman's favorite contractor had been Fairport Mechanical, but it was nonunion. Mayberry was retained by Fairport to organize a separate company, Union Mechanical, to be owned by Fairport that obtained the Wegman Supermarkets plumbing work. Local 13 did not raise any objections to the establishment of this double-breasted operation.

Urquhart said there was a significant difference in what happened with Fairport and Wegman. There, the Plumbers Union was getting work out of what happened; here Local 25 is going to lose work if they haven't already. D'Amico replied that "[W]ell, we had to go back with Krause then and Krause told us we made three mistakes. One was using the same board of directors, officers, and owners. The second mistake was having the office in the same building. If we had it in Fairport or some place way out like that or further away from the center of Rochester, it would probably take you two years or more to make this connection." D'Amico did not mention the third mistake.

Lee D'Amico was not called by Respondent as a witness to rebut any of the comments attribute to him by Urquhart. Although Urquhart did not refer to either of these conversations held with D'Amico when asked as a witness in the earlier unfair labor practice proceeding for the basis of suspicion Brown's Race was an alter ego of Hebert, the General Counsel's questioning of him had to with events that preceded his November 11, 1991 letter to Hebert, and he was not asked specifically about later events in mid-December 1991 and June 1992, which may have strengthened that suspicion. Respondent sought and received production of Urquhart's affidavits submitted in the earlier proceeding, but did not question him about them. Later stipulations between the parties establish that Urquhart informed the Board agent in those affidavits of the substance of his conversations in December 1991 and June 1992 with D'Amico to which he testified without contradiction in the instant proceeding. I am persuaded that these conversations with D'Amico did take place and that Urquhart reported them accurately.

*C. The Evidence Offered by Respondents in Support of Their Substantive Defenses to the Alter Ego Allegations*

Riesenberger was now called as a witness by Respondent Hebert's counsel. He testified to opening Brown's Race's separate bank account, on which he is the only authorized representative, and retaining legal counsel and accountants separate from Hebert. He also produced a photograph taken in January 1994 showing Brown's Race's separate entrance to the building commonly shared with Hebert, with a 190 Mill Street number appearing in gold lettering on the door, as well as a printed notice, to ring bell for second floor for Brown's Race Insulation Services, Inc. Although Brown's Race has a business advertisement in the yellow pages, listing its address as 192 Mill Street, Riesenberger claims this address is a mistake and he has taken steps to correct it.

Riesenberger also asserts that as chief operating officer for Brown's Race, he has the responsibility for labor relations, hiring, firing, and makes all the determinations with regard to wages, hours, and benefits. Furthermore, he set forth Brown's Race employment policies in an employee handbook that he caused to be prepared and that was prepared by Pay Chex, Inc., human resource services, at his direction, and without consultation with or input from Hebert. Preparation commenced in February 1993 and a handbook was produced in April 1993 and pages were updated in July 1993.

Riesenberger also placed and paid for newspaper advertisements for employees, the first on April 3, 1992, seeking an insulation superintendent and later ones on November 13, 1992, and January 30, 1993, seeking insulation installers and mechanics, and listing Brown's Race's office telephone number for responses. No Local 26 members applied for jobs. There was no input from Hebert on these hirings.

Riesenberger explained that Brown's Race obtained jobs through bidding, negotiating a price with contractor or owner, and repair work performed on a times and material basis. It is common practice for Rochester area union mechanical contractors to allow bids from both union and non-union insulation installers. Neither Hebert nor Brown's Race nor any of its employees had ever referred a customer to the other.

Riesenberger also engaged in a campaign to solicit work. In a letter dated October 14, 1991, wrote various industrial

firms such as Eastman Kodak and education institutions such as R. I. T. In it, Riesenberger refers to Brown's Race's status as a "merit shop contractor" that "allows us to provide a high standard of work at very competitive prices, both on fixed price and cost plus contracts." In the letter to Kodak Riesenberger refers to various projects recently completed or underway at individual Kodak buildings other than the plant to which the letter is addressed. He attaches examples of related work, including the nature of the work, owner, contractor, project manager, architect, or engineer and contract amount.

Although, as earlier noted, the Brown's Race financial statement for the years ending December 31, 1991, and 1992, lists unsecured noninterest-bearing demand notes payable to Hebert, totalling \$32,215, and payable to stockholder (Biemiller) totalling \$12,000, the same financial statement shows interest payments of \$304 in 1992 corresponding to entries on check stubs evidencing payments of interest on the loans to both Hebert and Biemiller.

Riesenberger also loaned a total of \$23,694.21 of his own funds to Brown's Race. He did so by using money borrowed from personal lines of credit. Periodic repayments by Brown's Race had reduced the loan outstanding to \$7500 by the end of January 1994.

In an agreement dated March 1, 1993, Biemiller and D'Amico agreed to sell to Riesenberger their outstanding shares in Brown's Race, representing two-thirds of all issued and outstanding shares, and Riesenberger agreed to pay \$125 per share for them. Five percent of the purchase price was to be paid at closing, the remainder in equal payments monthly beginning May 1, 1993, for 48 consecutive months, payments reflecting amortization of principal plus interest at 6 percent per annum. The sellers agreed to resign as officers and directors.

In minutes of a special combined meeting of the shareholders and directors of Brown's Race held on March 26, 1993, the buy-and-sell agreement was unanimously approved. The minutes reflect that the participants were made aware of the status of current disputes involving Local 26 and the National Labor Relations Board. The view was expressed in the minutes that although no violation of the Act took place, since Brown's Race is not large or strong enough to withstand litigation, it is in the best interests of the corporation and its shareholders that the corporation and Martins, Owens, and Riesenberger disengage all formal activities as participants in ownership and management with Biemiller and D'Amico.

The minutes also include a resolution that John Owens is elected secretary; Riesenberger, treasurer; and Attorney Richard Mayberry, who was present, is elected assistant secretary.

Both Biemiller and D'Amico submitted letters of resignation as officers and directors dated March 1, 1993.

Riesenberger made downpayments of \$418.75 representing 5 percent of the purchase price to each of Biemiller and D'Amico at closing and has continued to make monthly payments of \$186.85 to each starting May 1, 1993. At the time of the hearing held on January 27, 1994, Riesenberger had not yet finished paying off these shares. It appears that D'Amico did not cash his first check of \$418.75 until in or about October 1993.

John Biemiller took the witness stand for Respondent to testify that since he and D'Amico wanted to remain a union

company, although they felt they had no involvement in the operations of Brown's Race, it was pointed out to them that they could have some financial liability in the present litigation claiming Brown's Race was Hebert's if they remained shareholders, so they sold the company at the time to the principal.

Although Biemiller claimed financial expertise, he failed to anticipate at Brown's Race's formation that it would need additional funds to operate. Regarding supplying Brown's Race additional operating funds, Biemiller acknowledged that he requested from Montgomery, and then reviewed, Brown's Race's records of receivables and payables to ascertain whether there was sufficient cash-flow to repay the loans he authorized from Hebert and that he himself made. Biemiller acknowledged that there were no set times or dates for repayment of interest on the loans. Periodically he would use his calculator to compute the interest by figuring how many days the particular loan was outstanding, what was the principal amount and then applying the interest rate.

As to the truck sold to Brown's Race, Hebert's depreciation schedule shows that \$10,363 was taken in depreciation, 20 percent a year, over the 5 years Hebert owned the vehicle, listed as a 1989 Chevy pickup, from an initial cost of \$11,515.16, leaving a residual value of approximately \$1100, less than the purchase price paid by Brown's Race.

Inasmuch as Hebert is a subchapter S corporation, all income and losses are passed through to individual shareholders, making Biemiller's and D'Amico's direct receipt of the rent payments made by Brown's Race of no consequence from a tax viewpoint.

Biemiller also claimed that the separate entrances in the Mill Street building jointly housing Hebert and Brown's Race have always been numbered separately, as 192 and 190 Mill Street. Neither did Hebert pay, nor did Hebert charge another subtenant on a month-to-month tenancy for a 20-percent portion of the second floor in the summer and fall of 1993, a late fee, although both had been late in paying their respective rents.

Biemiller also noted that Hebert's business suffered a reversal between 1992 and 1993, of approximately \$1 million, down from \$2.9 million, primarily because of a major decrease in utility work from the three large energy suppliers previously described. During this period, Brown's Race was not working for utilities.

On cross-examination, Biemiller contradicted Montgomery's testimony that he had access to and did review Brown's Race data other than receivables and payables through his own computer and that he was supplied Brown's Race financial data on a regular basis. Although not specifically denying access to Brown's Race job-costing and job-listing data, Biemiller denied that he could access any Brown's Race data. I credit Montgomery that Biemiller could and did access without necessity of use of a code privy only to Montgomery herself for financial data, Brown's Race job-costing and job-listing information, and that he regularly asked Montgomery for Brown's Race financial data. I have previously noted instances in which Biemiller's testimony varied in significant respects from his pretrial affidavits as well as Hebert's records. On the basis of these conflicts as well as Biemiller's inability to square his and D'Amico's participation as majority shareholders, directors, and officers of Brown's Race with his and Riesenberger's understanding that

Hebert was only supplying financial support for the new business, I do not credit Biemiller's denials as against Montgomery's frank narrative recital of the conduct of her book-keeping responsibilities for both Hebert and Brown's Race.

Biemiller even denied any knowledge of the fact that virtually every aspect of Brown's Race's business was inputted on Hebert's computer system until at some point in October 1991 when Riesenberger asked for his first loan and then informed Biemiller when he asked, that Montgomery had his receivables and payables and Montgomery provided him with a printout. Yet, he never thereafter asked Riesenberger for any moneys to cover Brown's Race's business use of Hebert's system, including its hardware and software. Neither did he question Montgomery's authority to commit Hebert's resources to assisting Brown's Race. Biemiller's testimony here is suspect inasmuch as he would have been aware as an executive with financial acumen that Brown's Race was initially under capitalized and lacking in the resources to equip itself with sophisticated office equipment, much less a computer and accounting system.

Biemiller admitted he failed to inquire as to any loans Riesenberger or Brown's Race had outstanding when he was approached to provide additional financing to Brown's Race. At the same time he was borrowing significant sums—in one case \$200,000—to finance Hebert. In addition, at the same time in 1992 when Hebert and Biemiller were loaning Brown's Race large sums to continue to operate, and Brown's Race owed money from previous loans, Hebert itself was in arrears in fringe benefit contributions to the Local 26 funds. In an agreement dated March 31, 1992, and signed by Biemiller for Hebert, and the joint union and employer trustees for the Local 26 Pension, Annuity and Welfare Funds, extending Hebert's time to pay delinquent contributions to the funds, Hebert recognized that from December 1991 through January 1992 it was delinquent \$12,242.50 to the Pension Fund, \$10,882.30 to the Annuity Fund, and \$10,471.13 to the Welfare Fund.

Brown's Race's ability to repay its outstanding loans to Hebert and to Biemiller depend on its success in its insulation installation business. Neither Biemiller nor D'Amico insisted on full payment for the shares of stock they resold back to Riesenberger in March 1993. Although Biemiller claimed that there exists a promissory note evidencing the terms under which Riesenberger agreed to pay for the stock as reflected in the Brown's Race minutes of March 26, none was produced at the hearing, although Biemiller promised to do so. Respondent subsequently conceded that there was no promissory note signed by Riesenberger pursuant to which Riesenberger's obligation to pay the moneys in full could be enforced.

During Biemiller's cross-examination by union counsel he was unable to adequately explain significant discrepancies between his testimony given at the hearing in Case 3-CA-1679 and his testimony in the instant proceeding. At the earlier hearing, on October 27, 1992, Biemiller had denied any knowledge of what was going on in the Brown's Race Company. He went on to testify he really didn't know what type of work Brown's Race was doing, who their customers were or with whom they were working. He also denied seeing any Brown's Race's financial information other than its financial statements dated December 31, 1991. Yet, by virtue of his review of Brown's Race receivables that he acknowledged

on this record, Biemiller conceded he became fully knowledgeable as to the mechanical contractors for whom Brown's Race was providing insulation services and agreed that he had (Tr. 856). Among these contractors were ones such as Dineen Mechanical, Postler & Jackle, and J. P. Bell & Sons who were also and still are customers of Hebert. Biemiller also conceded that the receivables were part of Brown's Race's financial information that he reviewed. Biemiller was also less than forthcoming, evasive, and argumentative when he denied any understanding that the Union was placing him on notice of potential liability flowing from Hebert's relationship to Brown's Race in its November 11, 1991 letter to Hebert when it claimed, *inter alia*, "that Hebert may have been violating its contractual and bargaining obligations by reason of Brown's Race's nonunion operation." (Tr. 872-878.) These contradictions and evasions seriously undermine Biemiller's credibility as to his motives and interests in financing and participating in the creation, funding and, through Hebert, providing uncompensated assistance to Brown's Race in its operations.

During Riesenberger's continued cross-examination by counsel for the General Counsel, he noted that he did not put up the 190 Mill Street sign on Brown's Race's entrance door until early 1993. In fact, the owner of the building is 192 Mill Street, Inc. The number, 192 Mill Street, also still accompanies Brown's Race's telephone listing in the Rochester yellow pages.

Riesenberger did not independently check the interest amounts that Biemiller was assessing against Brown's Race on his and Hebert's loans. Riesenberger was unaware of the formula used to compute the interest. Riesenberger did not make a conscious decision to pay off his own revolving line of credit on loans he made to Brown's Race first, Biemiller second, followed by Hebert, third. This was not discussed with Biemiller even though Hebert held the largest and oldest loans. In contradiction to Biemiller's testimony, Riesenberger asserted that he received agreement early on, in August 1991, from Biemiller or D'Amico, to use the Hebert computer system for Brown's Race's accounting needs. And he readily agreed that he would not have used the Hebert computer system without receiving advance permission.

It was also Riesenberger's testimony that he had assurances from Hebert, Biemiller, and D'Amico that if he was late on the rent it would not be a problem. Riesenberger normally arranged to have Brown's Race make a payment on his own personal credit accounts to reduce his borrowing in favor of Brown's Race, ahead of Brown's Race's rent payments. In June 1993, Riesenberger approached Biemiller. He was in dire need of \$9500 for the business. He was putting in \$4500 himself and needed help with \$5000. Biemiller agreed and gave him a Hebert Construction check. Riesenberger did not recall preparation of loan document and none was produced at trial. Riesenberger assumed, as with his other loans, it would be repayed as receivables allowed with interest charged. There was no discussion of the length of the loan. On December 27, 1993, Riesenberger got another \$1500 from Hebert under the following circumstances. Riesenberger was on vacation in Florida from December 20-29. During his absence Montgomery discovered that a monthly withholding payment for employee taxes had to be paid directly to the bank on December 27. She went to Biemiller with the problem and he gave her the money. No note was

signed. After Riesenberger's return, on January 5, 1994, he paid back Hebert in full on this \$1500 loan. Whether interest was billed and paid for the days involved was unclear at the trial. Riesenberger clearly understood that credit of this nature was not otherwise available to Brown's Race as a start-up construction company.

Riesenberger also acknowledged that as of March 27, 1993, he took possession of the 134 shares of stock from Biemiller and D'Amico even though he had only made downpayments to each and owed considerable amounts that were payable over a 4-year period, on which he is still paying.

*D. The Evidence Regarding Respondent's Defense that the Allegations Are Time-Barred*

Respondent argues that in responding to the Union's information requests, Hebert supplied sufficient information to the Union on three separate occasions, January 29, February 15, and August 29, 1992, regarding its relationship with Brown's Race, forming the basis for filing of the instant charge, which, however, was not filed until April 25, 1993, more than 6 months after the last information was supplied, and was thus time-barred under the Act. Union Business Agent Urquhart's November 11, 1991 request to Hebert and the subsequent responses and correspondence between the Union, Brown's Race, Brown's Race Counsel Mayberry, Hebert, and Hebert's counsel, Carl Krause, are set forth in the decision of Administrative Law Judge James F. Morton in Case 3-CA-16797, affirmed by the Board in *Hebert Industrial Insulation*, 312 NLRB 602 (1993). As noted earlier, the Board concluded that Respondent Hebert had committed unfair labor practices by unduly delaying furnishing responses to the Union's requests for information as to the possible single employer/alter ego status of Respondent and Brown's Race and by failing to furnish all data the Union sought. In responding to the Union's request the Respondent and its also supplied incorrect and misleading information. By letter dated November 21, 1991, Brown's Race's attorney, Mayberry, incorrectly informed the Union that Brown's Race had different officers, directors, and shareholders than Hebert. In a January 28, 1992 affidavit supplied to the Union, Biemiller made a number of errors of fact. He was incorrect in responding that no former Hebert employees except Montgomery had been employed by Brown's Race. He was incorrect in stating the truck rental was the only equipment transaction, and in stating that Hebert provided no services except the ones noted, thereby omitting any mention of the Hebert copy machine, postage machine, and computer. Biemiller also falsely denied being familiar with Brown's Race suppliers. In a letter dated February 12, 1992, sent to the Regional Office, Attorney Krause incorrectly denied the two companies had interrelated operations, common management, centralized control of labor relations, or common ownership.

Biemiller's February 13, 1992 affidavit omitted Martins as an officer of Brown's Race, incorrectly stated that the interest rate on the Hebert loans to Brown's Race was 7.5 percent and again improperly concluded that Biemiller did not know Brown's Race's suppliers. In his August 12, 1992 affidavit, Biemiller omitted both Martins and Owens as officers of Brown's Race, omitted information concerning jobs or projects of Brown's Race, incorrectly omitted the use by Brown's Race of Hebert's computer, copy machine, and

postage machine, as well as details regarding the business arrangement for their use. Other errors in this affidavit include an incorrect statement that Montgomery did not perform bookkeeping work for Brown's Race on Hebert time, an incorrect statement that Biemiller did not know the calendar period, dollar volume or actual customers of Brown's Race, and an incorrect omission of Martins and Owens as directors of Brown's Race.

In a supplemental affidavit of August 12, 1992, Biemiller now recants including Martins in his February 13 affidavit as a director of Brown's Race and unequivocally states in error that Martins is not now, nor has he ever been a director of Brown's Race. Attorney Krause, who was representing Hebert, has errors in a letter dated October 8, 1992, in response to Union Attorney James La Vaute's September 30, 1992 letter. Krause errs in asserting that Biemiller's previous listing of Brown's Race's officers, improperly excluding Owens who was designated as vice president, was accurate. Krause also incorrectly asserts that Montgomery did no work for Brown's Race on Hebert time, that Biemiller and D'Amico rented their building individually from the owners, and that the principal of Hebert did not have knowledge of Brown's Race's operations.

In the hearing held in Case 3-CA-16797, at page 45, lines 10-23, Attorney Krause characterized Hebert and Biemiller's responses to the Union's information requests, and relations of them to Brown's Race, in the following language:

Well, I submit that his [Biemiller's] relationship is in evidence because he's given affidavits with regard to all of the information that has been requested. And he stated in those affidavits that this is all the knowledge that he has. He's told them what portion of what he owns of these companies is. He's told them everything that they've asked for except he hasn't given them that information about Brown's Race that he doesn't have. And he doesn't have that information because to have it would put him in a posture where he's been participating in the active operations of Brown's Race that is a violation of his contract. This is a Union contractor who is trying to invest in a nonunion portion of the industry, legally.

The facts also show the union charge filed April 26, 1993, was not the first one in which the Union alleged a refusal to bargain against Hebert and its alter ego Brown's Race arising from Hebert's failure to apply the existing collective-bargaining agreement to the operations of Brown's Race. In a second amended charge the Union filed in Case 3-CA-16797 on December 28, 1992, well within 6 months from union receipt of Biemiller's eight-page August 12, 1992 affidavit, the Union added Brown's Race as alter ego, and, to its outstanding allegation of refusing to provide relevant information, a refusal-to-bargain allegation arising from Hebert's failure to apply the existing agreement to Brown's Race.

The hearing in Case 3-CA-16797 was heard on October 27, 1992. On February 17, 1993, Judge Morton issued his decision. In order to incorporate this new allegation in the existing proceeding the General Counsel would have had to move Judge Morton to open the record, and after February

17, 1993, it would have had to move the Board to remand the proceeding to Judge Morton for that purpose. Ultimately, with input from the Board's Division of Advice in Washington, the Region decided that soliciting a new charge alleging the relationship was preferable to seeking to reopen the record. The Union complied with the Region's view of the matter, filed the instant charge on April 26, 1993, and filed a third amended charge in Case 3-CA-16797 on May 12, 1993, withdrawing the allegation. Thus, at all relevant times, and within the 6-month period claimed by Respondent, a charge has been pending alleging the relationship between Hebert and Brown's Race.

On rebuttal, Union Business Manager Urquhart explained that the Union deemed the suspected relationship between Hebert and Brown's Race a serious matter, and, inasmuch as it didn't want to sour its relationship with Hebert without adequate proof, it tried to get some facts first by making its information requests. In Urquhart's understanding, other than the information supplied by letter and affidavit, some of which was misleading, no other information had been supplied to the Union regarding customers, suppliers, and employees of Brown's Race.

### III. ANALYSIS AND CONCLUSIONS

The proper standard utilized by the Board and the courts to determine whether the two Respondents constitute alter egos for purposes of the Act has been succinctly described by the Board, in *Advance Electric*, 268 NLRB 1001, 1002 (1984), as follows:

The legal principles to be applied in determining whether two factually separate employe[e]s are in fact *alter egos* settled. Although each case must turn on its own facts, we generally have found *alter ego* status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.

The Board, in *Advance Electric*, *id.*, went on to note that other factors that must be considered in determining whether an alter ego status is present in a given case include "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." *Fugazy Continental Corp.*, 265 NLRB 1301 (1982). Not one of the factors is controlling or determinative, *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971). Such single-employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's-length relationship found among unintegrated companies." *Operating Engineers Local 627 (South Prairie Construction) v. NLRB*, 518 F.2d 1040, 1045-1046 (D.C. Cir. 1975), *affd.* on this issue *sub nom.*

I conclude that the standard necessary to establish the status of Respondents, based on application of the foregoing criteria, has been met. I also conclude, in particular, that by virtue of Brown's Race dependency on the Hebert's financial and operational assistance, Brown's Race's independence as a business entity has been undermined to such a degree that it constitutes an alter ego of Hebert under the Act. Finally, the facts and circumstances surrounding the Respondents' responses to the Union's information requests, the testimony of

one of Hebert's owners and officers during the hearing, the statements attributed to the other of Hebert's owners made to the Union's business manager, as well as the circumstances surrounding Brown's Race's formation, establish that the purpose in forming Brown's Race was an illegitimate one of evading the application of the Union's collective-bargaining agreement to its employees and its operations, thus strengthening the conclusion that the two Respondents are one under the Act.

As to ownership, during the initial year-and-a-half of its operation, the Hebert owners, Biemiller and D'Amico, directly owned 70 percent of the Brown's Race stock, and through their direction of Hebert employees Owens and Martins as well as favoring them with the opportunity as loyal employees to purchase Brown's Race's stock, Biemiller and D'Amico effectively controlled 90 percent of Brown's Race's stock. Hebert's control of Brown's Race was demonstrated most directly in the way Brown's Race's continued operations was dependent on Hebert's and Biemiller's infusion of fresh operating capital to the point that when an emergency arose late in December 1992, Brown's Race was provided with the necessary funds to meet a bank-imposed deadline without the participation of its ostensibly independent chief executive officer, Riesenberger, and without the execution of a promissory note or any document recognizing Brown's Race's indebtedness.

This element of financial control was essential to Brown's Race's viability as an insulation contractor, since as a newly created entity it was not in the position to obtain commercial credit. Brown's Race's financial dependency on Hebert and Biemiller was established early in the planning for Brown's Race's creation when Biemiller became the firm's financial manager and treasurer and the founding participants agreed to a severe underfunding and under capitalization of the enterprise. That decision made Riesenberger totally dependent on Hebert for its very survival. As Hebert and Biemiller controlled Brown's Race's purse strings, so they controlled the direction, growth, and purpose of the new company.

The circumstances surrounding the repurchase of Biemiller's and D'Amico's stock by Riesenberger provides additional evidence of the Respondents' interrelationship. Riesenberger received the immediate benefit of possession of the shares and all rights of ownership including full voting rights—the shares were not placed in escrow—despite the fact that he made only a 5-percent downpayment of the purchase price to each prior shareholder and was to pay monthly installments to each over a 4-year period. Neither was the transaction made enforceable by any form of promissory note running from Riesenberger to the sellers. The price of the shares remained the same as on their original issuance, were not subject to any appraisal and failed to reflect any increase in value by virtue of Brown's Race's continued operations, thereby resulting in a possible windfall gain to Riesenberger and a loss to Biemiller and D'Amico. Brown's Race's financial statement for 1991-1992 as well as its jobs report show revenues of close to \$300,000, assets of over \$75,000, and increasing sales of its services into 1993. Yet, the stock for purposes of resale does not reflect any increase in value. The agreement thus hardly represents an arm's-length relationship between the Brown's Race organizers.

Hebert's continuation of loans to Brown's Race after the stock sale also shows a continued financial dependence on

Hebert and Biemiller that belies Riesenberger's and Brown's Race's independence from Hebert influence and control.

Regarding business purpose, both firms, Hebert and Brown's Race, operate in the construction industry performing only insulation installation. Riesenberger also conceded that the work performed by Brown's Race came under the coverage of the Local 26 collective-bargaining agreement.

In terms of management, for the initial 1-1/2 years of Brown's Race's existence, Biemiller and D'Amico served as officers and directors of Brown's Race. Biemiller failed to provide any coherent reason as to why he and D'Amico took on these responsibilities if, as Riesenberger claimed, their participation was to be limited to that of investors.

Biemiller and D'Amico participated directly in such important business decisions as the segment of the market Brown's Race would enter, including such potential customers as Eastman Kodak that it would solicit, and that it would operate nonunion. Riesenberger accepted Biemiller's and D'Amico's offer of business premises in Hebert's own facility, and their setting of the rental cost, the use of a Hebert truck and its cost, and permitted Brown's Race to meet its bookkeeping needs with its own bookkeeper, Montgomery, and authorized Montgomery to provide services on Hebert's own time.

Either Biemiller or D'Amico determined Brown's Race's books would be maintained on Hebert's computer system and that Hebert's photocopying machine and postage meter would be available for Brown's Race's use without charge for their use.

Biemiller regularly reviewed the operations of Brown's Race through the computer reports he received from Montgomery. That Montgomery provided these reports to Biemiller at times without Riesenberger's knowledge demonstrates Biemiller's managerial authority. Biemiller also had access to Brown's Race's job cost information through his personal computer.

A basic labor relations decision to operate nonunion was a joint management decision of the Hebert owners and Riesenberger and necessarily influenced and determined the nature and manner of Brown's Race's solicitation of job applicants through newspaper advertisements and interviews stressing Brown's Race's open-shop policy as well the wages and size of benefits provided its employees.

Brown's Race looked to Hebert for its initial staffing requirements, including its first two regular insulation installers, both of whom came from Hebert's payroll, as well as its employment of its key office employee, bookkeeper Montgomery, who, because of her handling of Hebert's books and records was ideally suited to take on Brown's Race's bookkeeping responsibilities and to integrate them into Hebert's computer system. In Brown's Race's later hires of employees, to wit, its field superintendent, Carr, and Lee D'Amico's son, Christopher, Brown's Race's also turned to ex-Hebert employees.

Hebert and Biemiller's influence over Brown's Race's financial management was such that when an emergency in funding Brown's Race's operations arose at the end of December, Montgomery, as joint employee of the two firms, was able to turn to Biemiller for financial management in increasing Brown's Race's debt without Riesenberger's knowledge or involvement.

Although Hebert and Brown's Race employed separate field superintendents, the record supports the conclusion that direct supervision at the jobsite was limited and that both entities used the same method of supervision, a criterion that the Board deemed worthy of inclusion in its analysis of the issue in *Advance Electric*, supra at 1003, in concluding there was a substantial identity of supervision. See also *NLRB v. Campbell-Harris Electric*, 719 F.2d 292 at 295 (8th Cir. 1983). That method consisted of a superintendent who circulated among the various jobs overseeing the progress of the work, and having the authority to assign work, discipline, and otherwise direct the work. Superintendents of both entities were also involved in the hiring process to the extent of evaluating and advising on the suitability of applicants for employment.

With respect to the customer base of both contractors, Hebert and Brown's Race share the same job market—the general contracting, institutional, and industrial customers located in the greater Rochester area and surrounding counties in New York State. This commonality satisfied the customer criteria in *Samuel Kosoff & Sons*, 269 NLRB 424 (1984).

It is evident, however, that the two entities share to a significant degree the same customer base. As noted by counsel for the General Counsel in his brief, approximately 42 percent of Brown's Race's work during the period August 16, 1991, through October 29, 1993, was performed for customers that were also customers of Hebert. Brown's Race, like Hebert, was actively soliciting prevailing rate work. And many of Brown's Race's jobs were performed at jobsites where Hebert had also worked, including R.I.T., Bausch & Lomb, and Rochester General Hospital. Such an identity of customers and work locations amply satisfies this criterion, *Advance Electric*, supra; *Samuel Kosoff & Sons*, supra; *Regional Import Trucking Co.*, 292 NLRB 206 (1988), enfd. 914 F.2d 244 (3d Cir. 1990).

The sharing of the same business premises also supports the conclusion that the two entities had closely related operations. No lease for Brown's Race's rental of space in the common building was ever prepared or executed and Hebert tolerated significant arrearages in payment of rent without penalty or even any expression of concern. To have insisted on timely rent would have placed Brown's Race's continued operation at risk and made Hebert and Biemiller an even greater financial insurer of Brown's Race's continued existence.

Not until January 1993, 1-1/2 years after business operations commenced, did Riesenberger feel compelled to place a sign and numbered address separating itself to the public from Hebert. In spite of the fact that Brown's Race's yellow pages listing had Hebert's 192 Mill Street address, Riesenberger showed little concern in correcting the matter, confident that he could easily receive mail forwarded to Hebert. In fact, Biemiller in his August 12, 1992 affidavit acknowledges that Hebert's and Brown's Race's addresses are identical.

The absence of business formality between the two also supports the conclusion that there exists a less than arm's-length relationship between them. Riesenberger did not investigate any other business locations. He could regularly park his own vehicle up the ramp into Hebert's warehouse/garage space without charge or reservation. The absence of a lease, promissory notes and/or liens on the sale

of the truck, documents reflecting changes in the terms of the loans made by Hebert and Biemiller to Brown's Race or in the rental of the truck, and the lack of formality on the June 22 and December 27, 1993 Hebert loans to Brown's Race are all reflective of relations between integrated companies. *Regional Import Trucking Co.*, supra at 225, and cases cited there.

In this connection the sharing of office equipment, vehicles, bookkeeping functions, and business information, such as Brown's Race's job-costing data, are particularly telling items of evidence of the interrelated nature of the two businesses. Riesenberger's reliance on Hebert's computer equipment and services, photocopy services, and postage meter services at no cost demonstrate a cozy and close relationship hardly reflective of unintegrated operations.

That Montgomery had no obligation to report her extra worktime for Brown's Race to Biemiller who assured her of Hebert's flexibility in this regard is also further evidence of an accommodating and integrated relationship between the two companies.

Finally, the evidence to which I have previously alluded amply supports the conclusion that in creating Brown's Race, the owners of Hebert were motivated by a desire to enter the nonunion market in the greater Rochester area with a business entity that would be able to avoid becoming subject to union terms and conditions of employment for its work force.

This motivation is apparent in the inordinate delays in providing facts and in the misleading information it did supply to the Union. Hebert's failure to ever supply the requested information regarding Brown's Race's customer base and related information in spite of its knowledge of this data was explained by Hebert's counsel on the record in the earlier proceeding in Case 3-CA-16797 in terms that provide a key to its unlawful intent. Attorney Krause there excused Hebert's and Biemiller's failure to provide Brown's Race information by saying that he doesn't have it because to have it could put him in a position where he's been participating in the active operation of Brown's Race that is a violation of his contract (Tr. 863-864).

In finding and concluding that Biemiller's contradictions and evasions seriously undermine his credibility, I have also concluded that Biemiller was less than open and forthcoming in seeking to shield his true motive for creating, financing, and assisting in the operations of Brown's Race that I conclude were to avoid the application of Hebert's collective-bargaining agreement to Brown's Race's employees. By maintaining a substantial degree of control over Brown's Race's business, Hebert and Biemiller had established a close and potentially lucrative relationship with an entity from which he and his partner could expect to reap rewards in the nonunion segment of the insulation installation market.

The indirect method Biemiller and D'Amico selected to achieve this objective was also designed to avoid disputes and confrontation with Local 26 with whom they hoped to continue a bargaining relationship through Hebert. D'Amico's comments to Union Business Manager Urquhart confirm this scheme to deceive the Union and the risks to its successful achievement arising from such business decisions as the common location of the new and existing enterprises and the provision for common officers and directors.

Central to establishing Hebert's unlawful motivation were the meetings during which the plan to create Brown's Race were hatched and agreement was reached to have Hebert's owners play a central role in forming, and exercising financial control over, a new enterprise whose sole purpose was to compete successfully in the nonunion segment of the market against Hebert among other union contractors, who were having difficulty retaining such business. The many instances of informality, interrelationship, rendering of free services, and intimate dealing that appeared in the relationship between the two enterprises following Brown's Race's creation were merely manifestations of the plan to use the new enterprise to achieve a business success that would have been denied it had Hebert early disclosed its true relationship to Brown's Race and accepted the consequences of that relationship. I accordingly conclude that counsel for the General Counsel has shown that Brown's Race was established by Hebert as a disguised continuation of Hebert, and is Hebert's alter ego. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). *Samuel Kosoff & Sons*, supra; *Advance Electric*, supra; and *Regional Import & Export Trucking Co.*, supra.

The General Counsel alleges, alternatively, that Respondents constitute a single employer within the meaning of the Act.

The Board has set forth the standard governing the finding of such status between two entities, as follows.

To determine whether two entities are sufficiently integrated to be considered a single employer, the Board and courts examine four principal factors: (1) common management, (2) centralized control of labor relations, (3) interrelation of operations, and (4) common ownership. *Radio Union v. Broadcast Service*, 380 U.S. 255, 256 (1965); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982); *Shellmaker, Inc.*, 265 NLRB 748, 754 (1982). Although none of these factors, viewed separately, has been held controlling, the Board has stressed the first three factors, particularly centralized control of labor relations. *Parklane Hosiery Co.*, 203 NLRB 597, 612 (1973). Single employer status depends on all of the circumstances and has been characterized as an absence of the "arm's-length relationship found among unintegrated companies." *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980). *Fedco Freightlines*, 273 NLRB 399 fn. 1 (1984).

Financial dependency, such as exists herein, has also been found by the Board to warrant the conclusion that ostensibly separate employers constitute a single enterprise under the Act. *Edward C. Kelly Co.*, 230 NLRB 337 fn. 2 (1977).

I have previously discussed and analyzed the factors relating to common management, centralized control of labor relations, the interrelation of operations, and common ownership. That analysis is equally applicable to determining that Respondents are a single-integrated enterprise. When Brown's Race's financial dependency is also factored in, the conclusion of single employer status is strengthened. Just as in *Edward C. Kelly Co.*, supra, without the infusion of capital by Hebert and Biemiller, Brown's Race would not have been able to operate. As noted previously, the loans were also unsecured, the interest rate was unilaterally reduced to Brown's Race's benefit, and payments were not subject to any schedule or regularity, but were made to suit Brown's Race's needs and not those of the lender. They were also made at a time when Hebert was in financial difficulty of its

own, having defaulted on contractual payments to the Union's funds.

Accordingly, I conclude that counsel for the General Counsel has established that Respondents constitute a single employer under the Act. However, before the Board can require the collective-bargaining agreement to be applied to the Brown's Race employees under this theory, a determination must be made that the two sets of employees comprise a single bargaining unit. *South Prairie Construction Co. v. Operating Engineers (Peter Kiewit Sons' Co.)*, 425 U.S. 800, 805 (1976).

In order to comprise an appropriate bargaining unit the employees must be shown to share a sufficient community of interest. *Al Bryant, Inc.*, 260 NLRB 128 fn. 2 (1982), *enfd.* 711 F.2d 543 (3d Cir. 1983), *cert. denied* 464 U.S. 1039 (1984); *Peter Kiewit Sons' Co.*, *supra*. The factors relevant to such a finding include the bargaining history, functional integration of operations, differences in type of work and skills of employees, the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations, and the extent of interchange and contact between the groups of employees. *Bryan Infants Wear Co.*, 235 NLRB 1305 (1978).

Although there is no bargaining history for Brown's Race, there is some functional integration between the two companies. They share the same building, and such facilities as freight elevator and loading dock. For a time, they shared the Hebert vehicle and had to coordinate its use. Employees of both companies report their work hours to the common bookkeeper, Montgomery, who splits her work hours between them. Montgomery also coordinates her use of the Hebert computer, to produce periodic printouts for both companies.

The skills of the insulation installers are the same for both sets of employees and they use the same set of tools and materials in performing the similar work of the trade.

As previously discussed and analyzed, the basic labor relations policy and management decision to operate Brown's Race as a nonunion employer was proposed and determined jointly by Hebert's owners and Brown's Race's chief operating officer, and was enforced in conformity with that policy. When Brown's Race also commenced operations it looked to Hebert to supply its work crew from recently employed Hebert personnel. As previously discussed the two companies shared for a substantial period overlapping shareholders, directors, and officers, and Hebert has continued to control Brown's Race's financial affairs to the extent of providing its necessary operating funds.

There can also be little doubt that the employees of each company have daily or frequent contact arising from use of the common freight elevator and loading dock and when personally reporting their work hours to the bookkeeper.

Although the wages and benefits received by Brown's Race employees are less than those provided Hebert employees, the Brown's Race wage scale up to \$15 an hour is competitive with Hebert's and the Brown's Race benefits that include health insurance, holiday pay, and pension coverage is not dissimilar from Hebert's benefit package. The employees thus share a community of interest arising from their terms and conditions of employment. I therefore conclude that a single bargaining unit consisting of the employees who perform the insulation fabrication, assembling and installation

on site, as more fully described in the collective-bargaining agreement currently expired but continued in effect between Local 26 and Hebert, is appropriate within the meaning of the Act. Accordingly, Brown's Race is obliged to recognize the Union and to apply the terms of the agreement to its unit employees. Its failure to have done so constitutes an independent violation of Section 8(a)(5) and (1) of the Act. See *Safety Electric Corp.*, 239 NLRB 40 (1978); *Walter N. Yoder & Sons*, 270 NLRB 652 (1984).

In spite of the foregoing, Respondent nonetheless argues, as noted previously, that the instant proceeding is barred under Section 10(b) of the Act.

Section 10(b) of the Act prescribes that "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." Respondent argues that since the charge was not filed until April 25, 1993, the proceeding is barred because the information supplied to the Union in response to its requests gave the Union sufficient facts on which to base a charge of no later than on or about August 12, 1992, when Biemiller executed and provided the Union with his third affidavit, a detailed and unlawfully delayed supplemental response to the Union's November 11, 1991 letter.

Board law makes clear that the 6-month limitations period does not start to run until the party affected by the unfair labor practices is on actual or constructive notice of the material events giving rise to a charge. *Truck & Dock Services*, 272 NLRB 592 at 593 (1984), and cases cited. And when a wrongdoer fraudulently conceals the evidence of his unlawful conduct, such concealment necessarily precludes notice to the adversely affected party, and thereby tolls the running of the 6-month limitation period. The wrongdoer is thus effectively estopped from raising a 10(b) defense. *Don Burgess Construction Corp.*, 227 NLRB 765, 766 (1977), *enfd.* 596 F.2d 378, 382 (3d Cir. 1979), *cert. denied* 444 U.S. 940 (1979); *AMC Industries*, 231 NLRB 83, 91 (1977), *enfd.* 592 F.2d 422 (1981); *Crown Cork & Seal, Inc.*, 255 NLRB 14, 22 (1981), *enfd.* 691 F.2d 506(T) (9th Cir. 1982). The notice must also be clear and unequivocal and since Section 10(b) is a defense, the burden is on Respondent to establish it. *Crown Cork & Seal, Inc.*, *id.*; *Strick Corp.*, 241 NLRB 210 fn. 1 (1979).

Applying these principles to the facts, I conclude that by unduly delaying its responses, by failing to furnish the remainder of the data sought, to which I have concluded it was privy, and by providing incorrect and misleading information as I have previously found, Respondent is estopped from asserting a 10(b) defense.

The facts are clear that not only did the Respondent supply misleading information, up to and including its attorney's October 8, 1992 letter to the union attorney, it never supplied any information about Brown's Race's operations and customers to which it had access. I have also previously concluded that based on the instant record Respondent Hebert's failure to provide correct and complete data was motivated by an intent to conceal the true nature of its relationship to Brown's Race. It would thus be a miscarriage of justice to permit the wrongdoer here to successfully assert that the Union should be time barred from pursuing the relief to which it is otherwise entitled in this proceeding.

There are other grounds on which I dismiss Respondent's defense. In the context of a pros information proceeding, the Board has noted that although a union could have filed a charge alleging a relationship earlier when it acquired information that caused it to have a reasonable belief that the Respondents were related companies, its pursuit of additional information in order to determine whether a charge or grievance would likely have merit was a reasonable alternative course. *Barnard Engineering Co.*, 295 NLRB 226 (1989). See also *Wilson & Sons Heating*, 302 NLRB 802 (1991). And where there has been a fraudulent concealment of key details regarding that relationship, as there was here, the Union's delay in filing its charge may fairly be attributed to the Respondent's unlawful conduct. *Barnard Engineering Co.*, id.

Here, the Union had an ongoing collective-bargaining relationship with Respondent, and was reasonably exercising care in determining whether it had a valid claim to seek the relief of having the agreement apply to Brown's Race's operations. Although it promptly placed Respondent on notice of the issue by making its November 1991 information request, it was not until the hearing in the information case on October 27, 1992, provided evidence through Attorney Krause's statements regarding the reasons for Hebert's investment in the nonunion segment of the business, as well as Biemiller's testimony that he and other investors created Brown's Race to perform industrial insulation work, that the Union had sufficient information to support its suspicions that the Respondents were alter egos so as to be in a position to file and pursue a successful charge.

Finally, as to Respondent's defense, it is clear that at all times material, there was pending a valid charge alleging the relationship, starting with the Union's amended charge filed on December 28, 1992, in Case 3-CA-16797, down to the present. That the Union later complied with the Region's desire to litigate the issue in a separate proceeding should not detract from the fact that there was a timely and properly served charge on file at all times material to resolution of the Section 10(b) issue, negating any right Respondent could otherwise assert that its liability is extinguished. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988); *Koppers*, 163 NLRB 517 (1967).

Accordingly, I deny Respondent's affirmative defense.

#### CONCLUSIONS OF LAW

1. Respondents Hebert Industrial Insulation Corp. and Brown's Race Insulation Services, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Association of Heat and Frost Insulators and Asbestos Workers Local No. 26, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents Hebert and Brown's Race constitute a single-integrated enterprise and have been at all material times alter egos and a single employer within the meaning of the Act.

4. The following employees of Respondent Hebert and Respondent Brown's Race (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All mechanics and apprentices of Respondent engaged in the preparation, fabrication, alteration, application, erection, assembling, molding, spraying, pouring, mixing, hanging, adjusting, repairing, dismantling, asbestos removal and encapsulation, reconditioning, maintenance, finishing, and/or weatherproofing of cold or hot thermal insulation with such materials as may be specified when these materials are to be installed for thermal purposes in voids, or to create voids, or on either piping, fittings, valves, boilers, ducts, flues, tanks, vats, equipment, or on any cold or hot surface for the purpose of thermal control, including all labor connected with the handling and distribution of insulating materials on job premises and all other such work that is within the jurisdiction of Local No. 26.

5. At all times material, Local No. 26 has been and is now the exclusive collective-bargaining representative of the employees in the unit described above in paragraph 4 without regard to whether the majority status of Local No. 26 has ever been established under the provisions of Section 9(a) of the Act.

6. At all times material, Local No. 26 and Respondent Hebert, by virtue of its membership in The Master Insulators' Association of Rochester, New York, and its agreement to be bound by the terms of the current agreement between the Association and Local No. 26 have maintained in effect a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of the employees only of Respondent Hebert in the unit described in paragraph 5, above.

7. By failing and refusing to apply the terms of the collective-bargaining agreement described in paragraph 6, above, to employees in the unit described in paragraph 4, above, employed by Respondent Brown's Race, and by instituting changes in the wages, hours, and other terms and conditions of employment of its employees in the unit described while the collective-bargaining agreement described in paragraph 6, above, continues in effect, without complying with the provisions of Section 8(d) of the Act, Respondents Hebert and Brown's Race have failed and refused to bargain collectively with Local 26 and thereby have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondents have committed certain unfair labor practices, I will recommend that they be required to cease and desist therefrom and to take other affirmative action designed to effectuate the purposes and policies of the Act. The recommended Order will provide that both Respondents be required to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of their unit employees, that they be required to apply to all of these employees the terms and conditions of employment of the current collective-bargaining agreement between the Union and the Master Insulators' Association of Rochester, New York. The Order will also require both Respondents, jointly and severally, to make whole the unit employees of Respondent Brown's Race, from the inception of

Respondent Brown's Race, for any loss of wages and benefits they may have suffered by reason of the Respondents' failure to apply the terms of the collective-bargaining agreement to them, including regular pay, holiday and vacation pay, travel pay, overtime pay, and payments of contributions to the Union's welfare, pension, annuity, and apprentice training funds required under the terms of the collective-bargaining agreement or under the practices of the parties together with any liquidated or other damages or other interest or penalty charges as required by the aforesaid agreement and/or the applicable fringe benefit trust funds' documents. Employees shall also be reimbursed for any expenses caused by Respondents' failure to make fringe benefit contributions on their behalf, including premiums they may have paid to third-party insurance companies under Brown's Race's benefit package and for any medical or dental bills they have paid directly to health care providers that the contractual policies would have covered. All payments made to employees shall be computed in accordance with the method prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>4</sup> Inasmuch as determination of the amounts due to fringe benefit funds, both in contributions and penalties, may be more difficult to compute, I will leave the determination of interest due on such payments to the compliance state of this proceeding. *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Respondents shall in the same manner also make whole all employees who would have been referred to the Respondents and been employed by Respondent Brown's Race pursuant to the established exclusive referral and hiring practice in effect between Respondent Hebert and the Union but who were deprived of such opportunities by virtue of the failure of Respondents to apply the exclusive referral service to Respondent Brown's Race.<sup>5</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

<sup>4</sup>Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>5</sup>Respondent objects to applying the make-whole remedy to employees who would have been hired in referral under the exclusive referral arrangement because the "Union's hiring hall was found to be unlawful and they were ordered to grant membership to an employee who they refused." (Tr. 1026-1027.) Although the Union was found to have violated Sec. 8(b)(1)(A) and (2) in *Asbestos Workers Local 26 (Griffin Insulation)*, 311 NLRB 969 (1993), by failing to refer the charging party for employment to two employers—*Griffin* and *Frontier*—the Board limited the reach of the violation to the two employers mentioned. *Id.* at 969 fn. 3. Furthermore, the Board's Order required the Union to cease giving effect to provisions in its contract with the Association that gave an unlawful preference to members. There is thus nothing in *Griffin Insulation* that would preclude the lawful application of the exclusive referral arrangement to Respondent Brown's Race in the instant proceeding.

<sup>6</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, Herbert Industrial Insulation Corp., and its alter ego Brown's Race Insulation Services, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Refusing to recognize and bargain with the International Association of Heat and Frost Insulation and Asbestos Workers Local No. 26, AFL-CIO as the exclusive representative of all of its employees as defined in the collective-bargaining agreement between the Union and The Master Insulators' Association of Rochester, New York, by failing and refusing to apply the terms and conditions of employment contained in the collective-bargaining agreement, to unit employees employed by its alter ego Brown's Race Insulation Services, Inc. and by instituting changes in the wages, hours, and other terms and conditions of employment of the unit employees, during the effective term of the agreement without complying with the provisions of Section 8(d) of the Act.

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

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

(a) On request, bargain collectively with International Association of Heat and Frost Insulation and Asbestos Workers Local No. 26, AFL-CIO, as the exclusive collective-bargaining representative of all of its employees in the appropriate unit concerning rates of pay, wages, hours of work, and other terms and conditions of employment.

(b) Apply to all of the employees in the appropriate unit employed by its alter ego Brown's Race Insulation Services, Inc. the terms of the collective-bargaining agreement between the Union and The Master Insulators' Association of Rochester, New York.

(c) Make whole all of the employees of Respondent Brown's Race Insulation Services, Inc., including all of these employees who would have been referred to and employed by it pursuant to the established exclusive referral and hiring practice in effect between Respondent Hebert and the Union but for the failure of Respondent to apply the terms of that exclusive practice to Respondent Brown's Race, for any loss of pay or benefits that they have suffered by reason of the unfair labor practices found herein, including regular pay, holiday and vacation pay, travel pay, overtime pay, and by making contributions owed to the Union's welfare, pension, annuity, and apprentice training funds on behalf of employees of its Brown's Race Insulation Services, Inc., in the manner described above in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay benefits, contributions, and reimbursement of expenses due under the terms of this Order.

(e) Post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the no-

<sup>7</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

*Continued*

tice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in con-

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National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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