

Bufco Corp., Corbett Electric Company, Inc., and its alter egos Mar Beck, Inc., Bill W. Corbett, Lucinda Corbett and Mark Corbett; and Bill W. Corbett, Lucinda Corbett, and Mark Corbett, individually and International Brotherhood of Electrical Workers, AFL-CIO, Local 16. Cases 25-CA-15111, 25-CA-15547, and 25-CA-15570

April 30, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 24, 1996, Administrative Law Judge John H. West issued the attached supplemental decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The General Counsel filed a brief in support of the decision and an answering brief. The Charging Party filed a cross-exception, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Bufco Corp., Corbett Electric Company, Inc., and its alter egos Mar Beck, Inc., Bill W. Corbett, Lucinda Corbett, and Mark Corbett, and Bill W. Corbett, Lucinda Corbett, and Mark Corbett, individually, Evansville, Indiana, their officers, agents, successors, and assigns, shall take the action set forth in the Order, and shall pay the individuals listed in the appendix to the judge's decision a total of \$136,556, plus interest.

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

Steve Robles, Esq., for the General Counsel.
William E. Statham, Esq. (Statham, Johnson & McCray), of Evansville, Indiana, for the Respondents.
Charles L. Burger, Esq. (Berger & Berger), of Evansville, Indiana, for the Charging Party.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge. The National Labor Relations Board (the Board) in its Decision and Order here, *Bufco Corp.*, 291 NLRB 1015 (1988), affirmed the

findings of the administrative law judge in part and reversed in part.¹ (In this supplemental decision the Respondents are Bufco Corp., Corbett Electric Co., and its alter egos Mar Beck, Inc., Bill W. Corbett, Lucinda Corbett and Mark Corbett; and Bill W. Corbett, Lucinda Corbett, and Mark Corbett, individually,² and the Union is International Brotherhood of Electrical Workers, AFL-CIO, Local 16.)³ More specifically, the Board, in applying the principles of two decisions which were issued subsequent to the judge's decision, *John Deklewa & Sons*⁴ and *Brannan Sand & Gravel Co.*,⁵ found 291 NLRB at 1017 as follows:

[W]e find it clear that the collective-bargaining relationship between Respondent Corbett and the Union was entered into without regard to whether the Union had the support of a majority of the employees. The record shows that the Respondent's employees at no time designated the Union as their collective-bargaining representative by means of a Board-conducted election, nor is there any contention that the Union requested or was granted recognition based on a showing of majority support. We therefore find that there has been no showing that the agreements between Respondent and the Union were anything other than relationships governed by Section 8(f) and that the appropriate units remained those of Respondent employees. [Fn. omitted.]

¹ As indicated by the Board at 1015-1016 of its decision, Administrative Law Judge Nancy M. Sherman, in her May 4, 1984 decision,

... found Respondent Bufco to be an alter ego of, and a single employer with, Respondent Corbett Electric, and that the reactivation of Bufco was for avoiding the collective-bargaining agreements that Corbett was obligated to enforce. She also found that the Board has jurisdiction over Respondents Corbett and Bufco by virtue of Corbett's membership in the [involved] multiemployer association, and that the appropriate units under both the inside and residential collective-bargaining agreements with the Union consisted of all employees employed by all members of the association performing work under the respective agreements. The judge further found that the Union enjoyed 9(a) status as the bargaining representative through the conversion and merger doctrines, and that the bargaining agreements were not terminable at will because both of them were "succeeding agreements."

In the remedy section of her decision Judge Sherman indicated as follows:

In addition, Corbett Electric/Bufco will be required to post appropriate notices. Because some of the beneficiaries of the Order may be employees who will never work for Corbett Electric/Bufco but who work out of the Union's hiring hall and would have been referred to jobs with Corbett Electric/Bufco if the bargaining agreement had been honored, Corbett Electric/Bufco will be required to furnish signed copies of the notice to the Regional Director for posting by the Union, if it is willing, at all locations where notices to employees who work out of the hiring hall are customarily posted.³⁰ [291 NLRB at 1033.]

³⁰ I note that the bargaining agreements, which forbid discrimination against nonmembers in referral, require the Union to post the referral procedures on the bulletin board in its offices.

² Hereinafter referred to as Respondents.

³ Hereinafter referred to as the Union.

⁴ 282 NLRB 1375 (1987).

⁵ 289 NLRB 977, 980 fn. 12 (1988).

Under the first principle of *Deklewa*, the collective-bargaining agreements in effect here, although governed by Section 8(f), are nevertheless normally enforceable through the mechanisms of Sections 8(a)(5) and 8(b)(3), under the strictly limited 9(a) status that the Union enjoys during the term of that agreement, absent some exception not present here. [Fn. omitted.] Hence, Respondent Corbett and its alter ego Bufco were not privileged to repudiate or fail to comply with the inside agreement [covering commercial electrical work] with the Union effective June 10, 1982, through March 31, 1985, or the residential agreement with the Union effective October 1, 1981, until September 30, 1983, during the term of those agreements. [Fn. omitted.]

Accordingly, we find that Respondent Corbett Electric violated Section 8(a)(5) and (1) of the Act by repudiating and thereafter refusing to abide by its collective-bargaining agreements with the Union since about July 2, 1982, that Corbett Electric/Bufco Corp. similarly violated the Act beginning about January 1, 1983, and by transferring electrical work from Corbett to Bufco in order to avoid Corbett's obligations under the collective-bargaining agreements then in effect. [Fn. omitted.]

The following appears at page 1017 of the Board's decision:

THE REMEDY

Having found that the Respondents engaged in certain unfair labor practices, we shall order that they cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondents to make whole, as prescribed in *Ogle Protection Services*, 183 NLRB 682 (1970), and *Kraft Plumbing*, 252 NLRB 890 (1980),¹¹ employees for any losses they may have suffered as a result of the Respondents' failure to adhere to the inside and residential agreements then in effect from about January 1, 1983, until their expiration,¹² with interest, as computed in the manner prescribed in *New Horizons for the Retarded*.¹³

¹¹ The judge ordered a quarterly computed backpay remedy. As we find that Bufco is the alter ego of Corbett, that the two entities constitute a single employer, and that the appropriate units include the employees of both companies covered by the inclusionary language of the residential and inside agreements with the Union, we conclude that the appropriate remedy is to require Respondent to apply the contracts retroactively and to make its employees whole for any losses they may have suffered as a result of Respondent's failure to apply the contracts. When, as here, the amounts due employees result from a Respondent's repudiation and failure to apply the terms of a collective-bargaining agreement, and does not involve cessation of employment status or interim earnings, a quarterly computation is unnecessary and unwarranted.

¹² As noted above, the original charge in this proceeding, Case 25-CA-15111, was filed against Respondent Corbett Electric on December 9, 1982. Thereafter, the parties in February 1983 entered into a settlement agreement under which Respondent Corbett made whole its employees by making the appropriate fund contributions. The General Counsel concedes that Corbett made all those payments that had not been made for 1982, and Bufco began operating as an electrical contractor about January 1983.

¹³ In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be 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.

Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Because the provisions of employee benefit fund agreement are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawful withheld fund payments. Therefore, any additional amount owed regarding fringe benefit and pension funds shall be determined in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

And the Board's Order reads, in part, as follows:

(a) Make whole employees covered by the residential and inside agreements, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's failure to adhere to the contracts until they expire on September 30, 1983, and March 21, 1985.

(c) Post at its Evansville, Indiana office copies of the attached notice marked "Appendix." [Fn. omitted.]

(d) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by International Brotherhood of Electrical Workers, AFL-CIO, Local 16, if willing, in conspicuous places where notices to employees and members are customarily posted. [Id. at 1017-1018.]

On review, the court in *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990), granted the Board's petition for enforcement of its order. Thereafter, on December 30, 1993, a compliance specification and notice of hearing (specification) issued alleging the amount of backpay due to specified employees and hiring hall applicants⁶ and the amount of fringe benefit contributions due on their behalf, General Counsel's Exhibit 1(a).⁷ On January 31, 1995, the Regional Director for Region

⁶ As pointed out in the specification, these are the individuals who would have been referred to the Respondent for hire if the Respondent had not illegally bypassed the hiring hall. Also as pointed out by the specification, there are 12 hiring hall applicants who are the counterparts of 12 unit members and 2 hiring hall applicants who are entitled to be paid for the time Respondent Owners William Corbett and Mark Corbett spent performing unit work which was prohibited by the commercial contract.

⁷ The Respondents named in the specification are Bufco Corp. and Corbett Electric Company, Inc. A verified answer, G.C. Exh. 1(d) which is dated January 17, 1994, was filed to the specification. In it is asserted, among other things, that backpay is not owed to any alleged "hiring hall applicants who would have been hired by the Respondent but for the Respondent's illegal bypassing of the hiring hall"; that the Board's Decision and Order specifically finds that "a quarterly computation is unnecessary and unwarranted"; and that it would be manifestly unjust for Respondent to be required to pay interest on the amount of the backpay for the reason that there has been an inordinate and unnecessary delay on the part of the Region and the Board in pursuing this matter and it would be unjust for interest to be assessed during the whole period of time for which interest is being sought by the specification. Respondents Bufco Corp. and Corbett Electric Company, Inc. filed an amendment to this verified answer, which amendment is dated February 9, 1995. In it alternative gross and net computations are provided, Respondents' argument regarding the hiring hall applicants is reiterated, alternatively it is argued that hiring hall applicants would only be entitled to receive the same wage rate as actual employees, and it is argued that William Corbett was not an owner of Bufco Corp. and therefore

25 issued an amendment to the compliance specification (amended specification), General Counsel's Exhibit 1(m), which named those additional Respondents set forth above and in which it is alleged, inter alia, as follows:

52. (a) At all material times, Respondent and Mar Beck, together with Bill W. Corbett, individually, Lucinda Corbett, individually, and Mark Corbett, individually, by virtue of the acts and conduct set forth below in paragraph 53, have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise.

(b) Based on the operations described above in paragraph 52(a), Respondent; Mar Beck; Bill W. Corbett, individually; Lucinda Corbett, individually; and Mark Corbett, individually, constitute a single business enterprise and a single employer within the meaning of the Act.

53. (a) At all material times, Respondent and Mar Beck have intermingled their assets with and have made unwarranted conveyances back and forth to one another and to Bill W. Corbett, Lucinda Corbett, and Mark Corbett, individually, and otherwise siphoned off the assets of the Respondent.

(b) At all material times, Bill W. Corbett, individually, Lucinda Corbett, individually, and Mark Corbett, individually, have been in control of the assets of Respondent and Mar Beck and have treated said assets as their own personal property.

(c) Since on or about May 4, 1984, Bill W. Corbett, Lucinda Corbett, and Mark Corbett, have dissipated the assets of Respondent in order to avoid and evade the obligation of Respondent to pay backpay to employees in the above cases.

54. Mar Beck, Bill W. Corbett, individually, Lucinda Corbett, individually, and Mark Corbett, individually, are obligated as alter egos and/or as a single employer with Respondent to remedy the unfair labor practices as found by the Board and enforced by the Court of Appeals, as described in the introductory paragraph of the Compliance Specification and Notice of Hearing.

55. Bill W. Corbett, Lucinda Corbett, and Mark Corbett are obligated as officers and agents of the entities described above in paragraphs 46 through 48 [and also in the caption of this proceeding as set forth in the Amendment to the Compliance Specification and as set forth above] to remedy the unfair labor practices as found by the Board and enforced by the Court of Appeals as described in the introductory paragraph of the Compliance Specification and Notice of Hearing.

56. Because of the acts and conduct described above in paragraphs 53(a), (b), and (c), Bill W. Corbett, individually, Lucinda Corbett, individually, and Mark Corbett, individually, are jointly and severally person-

ally liable for remedying the unfair labor practices as found by the Board and enforced by the Court of Appeals, as described in the introductory paragraph of the Compliance Specification and Notice of Hearing.

A verified answer to the specification as amended was filed by Bufco Corp. and Corbett Electric Company, Inc. In it they reiterate prior positions, deny that which is asserted in the amended specification, and affirmatively plead that it would be "manifestly unjust . . . for Respondents to be required to pay interest in the amount of the backpay being sought . . . for the reason that there has been an inordinate and unnecessary delay on the part of the . . . Board in pursuing this matter." The same pleading was also filed by the remaining Respondents, except that it contains different affirmative defenses. More specifically, it is argued by the remaining Respondents that the allegations in the amended specification are barred as to the remaining Respondents for a number of reasons, namely, because the Regional Director failed to name any of them as a party, serve them with notice, or allege any violations of the Act by them in the original complaint, because of Section 10(b) of the Act, because of laches, estoppel, and equitable considerations because of the time that has elapsed and the failure to take action within a reasonable time. The hearing herein was scheduled to commence on February 21, 1995. Before it commenced, however, the General Counsel agreed to present evidence regarding the specification at one session, and then continue the hearing to a later date to allow the Respondents the opportunity to prepare a defense regarding the individual liability and dissipation allegations first made in the amended specification just 21 days before the hearing was to commence.

A supplemental hearing was held on this backpay proceeding on February 21, 22, and 23, 1995, at which time it was continued for the reason described above. The continued supplemental hearing commenced on May 8, 1995, and on the 5th day of this session of the hearing it had to be continued again when counsel for Respondent was unexpectedly admitted to a hospital on May 12, 1995. The third and final session of the supplemental hearing herein commenced on August 7, 1995, the earliest that the involved attorneys were available for what was anticipated would be a 3- or 4-day session, and the hearing closed on August 8, 1995. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed on or before September 13, 1995, by the General Counsel, the Charging Party, and the Respondents,⁸ I make the following findings of fact and conclusions of law.

SPECIFICATION

At the outset of the supplemental hearing counsel for Respondents pointed out that Respondents had filed a motion to strike, which motion takes the position that allegations in the specification which are based on quarterly computations do not comply with the above-described following language in footnote 11 of the Board's decision herein:

When, as here, the amounts due employees result from a Respondent's repudiation and failure to apply the

could perform residential and commercial work and Mark Corbett's work during the time in question was all residential.

⁸ The Federal Government was shut down a total of approximately 4 weeks in November and December 1995 and January 1996.

terms of a collective-bargaining agreement, and does not involve cessation of employment status or interim earnings, a quarterly computation is unnecessary and unwarranted.

The General Counsel took the position that this language does not refer to hiring hall applicants who are also considered by the Board to be "employees." Citing a number of cases, the General Counsel pointed out that the collection of backpay for such individuals is a standard remedy in cases involving employer repudiation and contractual hiring hall referral conditions; that interim earnings would be involved with the hiring hall applicants and quarterly computations were necessary; and that, with respect to the Board decision, "[i]t did not address hiring hall applicants, but neither did it exclude them." Respondents argue that hiring hall applicants should not be included in the specification. Citing the Board's fn. 3 in *Wayne Electric, Inc.*, 226 NLRB 409 (1976);⁹ *J. E. Brown Electric*, 315 NLRB 620 (1994); and *Williams Pipeline Co.*, 315 NLRB 630 (1994), I ruled that while the Board only recently began ordering an employer to offer employment to hiring hall applicants, it has for many years made them whole in situations such as the one at hand and, accordingly, hiring hall applicants should be included in the specification;¹⁰ and that it is proper, as to them, to make the computations on a quarterly basis.

Also, at the outset of the supplemental hearing the Respondents stipulated that they are in agreement with the number of hours the actual employees are shown to have worked in the specification and the wage rates used for the actual or direct employees up to September 30, 1983, but not after this date because everything after that date is computed at the commercial wage rate and assertedly not all of the involved work was commercial;¹¹ that General Counsel's Ex-

⁹ The footnote reads as follows:

³ Local 441 has excepted to the Administrative Law Judge's failure to recommend that Respondent be ordered to make whole all employees who were denied an opportunity to work for Respondent because of the latter's refusal to abide by its collective-bargaining agreement with Local 441. We find it unnecessary to modify the recommended Order as requested, inasmuch as we find that, if there are employees who would have been referred but for Respondent's misconduct the make-whole order herein encompasses them, and that a determination as to whether or not there are such employees is best left to the compliance stage of this proceeding.

The administrative law judge therein ordered the Respondent therein to make whole all of its employees in the appropriate unit.

¹⁰ As noted above, both the remedy portion of Judge Sherman's decision, and par. 2(d) of the Board's Order, refer to the posting of the notice by the Union for the benefit of those who work out of the hiring hall.

¹¹ Respondents assert that not all of Bill Corbett's hours were commercial but rather 10 percent of his hours were residential, and not all of Mark Corbett's hours were commercial but rather 15 percent were residential; that Bill and Mark Corbett did not illegally perform work under the contract; and that three actual employees did not perform unit work, Newman Corbett, Roger Hart, and Timothy Stewart and, therefore, there should not be hiring hall counterparts for these three. Respondents take the position that not all of the hours worked after September 30, 1983, should be computed at the commercial wage rate. It was stipulated by Respondents that the total number of hours shown for actual employees Tom Strupp, Jeffrey Walts, and Kevin Wimpelberg are accurate. But Respondents

hibits 2-15, which are weekly time and distribution reports for Bill and Mark Corbett and 12 actual or direct employees of Bufco Corp. are records maintained by Bufco Corp. during the period of time indicated on the records and they are authentic;¹² that General Counsel's Exhibits 16-18, which are earnings records for 1983-1985, respectively, for the involved direct employees are records maintained by Bufco Corp. in the usual course of business and they are authentic; that General Counsel's Exhibit 19, which is a work order ledger covering the period from January 12, 1983, to April 5, 1985, with a cover sheet which explains account numbers used therein, are authentic documents kept in the regular course of business by Bufco Corp.;¹³ and that while Respondents do not believe that hiring hall applicants should be included in the specification, Respondents accept their, the hiring hall applicants', interim earnings figures and will not contest the figures.

The General Counsel's first witness, Darwin Collins, who is the business manager and financial secretary of the Union, testified that as a journeyman and a member of the Union he signed the local out-of-work book in 1983 to 1985.

Michael Herron, who was the assistant business agent of the Union from June 1990 to July 1993, testified that, with respect to the involved backpay matter, it was his job to go back through the out-of-work list for the time involved and determine who would have been on the out-of-work list and what position they would have been on that list for that time; that he reviewed the out-of-work list and the referrals for the involved time; that General Counsel's Exhibit 20(c)-(oo) is a copy of the Union's out-of-work list from March 25, 1982, to April 19, 1985; that at the behest of the Union's attorney he compiled a list (G.C. Exh. 21) of the people who were on the out-of-work list at the involved time, what position they held on the list and how long they were out of work; that in compiling this list he reviewed the out-of-work list and the referral list; that the list he compiled was sent to the Board's Regional compliance officer; that he prepared the response (G.C. Exhs. 34(b)-(z)) to the Region's March 12, 1992 inquiry (G.C. Exh. 25) regarding who would be the proper hiring hall employee;¹⁴ and that in preparing this re-

went on to assert that, contrary to the specification, the hours of Tom Strupp, Jeffrey Walts, and Kevin Wimpelberg should not be computed at the commercial journeymen wage rate because Strupp worked 70-percent residential and 30-percent commercial, Wimpelberg did residential work and Walts' hours should not be computed at the commercial rate; and that if hiring hall applicants are included, which Respondents oppose, their wage rates should be computed at the same wage rate as the individuals for whom they are alleged to be counterparts.

¹² Subsequently, Respondents qualified the stipulation to exclude any notations made thereon by an agent of the Board.

¹³ Each job has a "C" or "R" next to the date.

¹⁴ The Region's letter contains the following:

I concluded that the appropriate "pool" of replacement employees consisted of those who signed the Out of Work List in the 30 days immediately prior to the first day of work of each Bufco employee. Within that pool, I then eliminated from it any employees who were referred out prior to the first day of work of each Bufco employee. The remaining names comprise those who potentially could have been referred out each time Bufco hired someone without using the hiring hall. The un-referred person who signed the Out of Work List on the earliest date is the person I propose to establish as the 'replacement' employee.

sponse he reviewed the out-of-work list and the referrals for the involved time period. On cross-examination, Herron testified that the out-of-work list that he referred to in preparing General Counsel's Exhibit 21 covered only inside journeymen in group 1 as described in section 5.05 in article V of the involved inside commercial collective-bargaining agreement (R. Exh. 2); that there are residential sign-up books but he did not include any residential wiremen who were in these books; and that in compiling his list he did not take into consideration the contract rule which indicates that if an employer has five or more journeymen, at least one of the five must be over 50 years old.

Patricia Nachand, who has been the compliance officer for Region 25 of the Board since 1991, testified that she drafted the narrative part of the specification; that she reviewed the computations made by other agents working under her direction and, with some minor changes which she made, these computations were attached as appendices to the specification; that the provisions of the involved collective-bargaining agreements were applied in computing the backpay; that with respect to the direct or actual employees, the beginning and ending dates of their backpay periods are the beginning and ending dates of their employment or the expiration of the pertinent contracts, whichever occurred first;¹⁵ that in working on the specification she reviewed certain documentation,¹⁶ including the Employer's weekly time and distribution

¹⁵ Respondents stipulated that the direct employees were employees before the backpay period in the specification.

¹⁶ This witness sponsored G.C. Exhs. 25-34. G.C. Exh. 25 is a letter dated March 12, 1992, from the Board's Region 25 office to the Union's attorney requesting certain information. G.C. Exh. 26 is a letter dated May 28, 1992, from Region 25 to the Union's attorney, which letter, inter alia, reiterates the aforementioned March 12, 1992 request for information, pointing out that there was only a limited amount of work that could be done until the information was provided or it was indicated that the information no longer exists. This letter also contains the following:

Our Region has received a response from Washington regarding backpay on the individuals who should have been hired/referred from the IBEW hiring hall. We have been informed that the Region is to follow established remedy principles and deduct interim earnings from the hiring hall discriminatees.

The union attorney elicited testimony from this witness that the Board refused the Union's request not to deduct interim earnings from the hiring hall applicants even though there were always people available to be referred to work. G.C. Exh. 27 is a letter dated June 5, 1992, from Region 25 to the Union's attorney expressing appreciation for the information which was provided on June 1, 1992, and specifying the hiring hall discriminates, except for three who had not yet been determined. G.C. Exh. 28 is a letter dated June 5, 1992, from the Region to the Union requesting certain information and G.C. Exh. 29 is the reply. G.C. Exhs. 30 and 31 are letters dated June 19 and July 2, 1992, respectively, from the Region to the Union's attorney indicating certain conclusions which the Region reached regarding certain of the hiring hall applicants. G.C. Exh. 32 is a letter dated July 10, 1992, from the Region to the Union's attorney requesting a choice between two hiring hall applicants to replace Bufco Corp.'s direct employee Newman Corbett and G.C. Exh. 33 is the reply. And finally G.C. Exh. 34 is a letter dated May 29, 1992, from the Union's attorney to the Region providing compilations for the lost time from work for hiring hall applicants. This letter also questions how the Board could, as it indicated in its above-described May 28, 1992 letter, deduct interim earnings from hiring hall discriminatees.

reports (G.C. Exhs. 2-15), and earnings records for the employees (G.C. Exhs. 16-18); that backpay is being sought for two groups, namely, those who were actually hired by Bufco Corp. but were not paid the contract rate and those hiring hall applicants who would have been hired had Bufco Corp. not bypassed the hiring hall procedure; that the hiring hall applicants include those who are essentially counterparts for Bufco Corp.'s rank-and-file employees and those counterparts for Bill and Mark Corbett regarding their performance of unit work; that the backpay owed to direct employees is computed on a weekly basis, except for weeks that fall in 2 months; that while the specification seeks apprentice level backpay for certain of the direct employees, the backpay for all of their hiring hall counterparts was computed on a commercial journeyman level because according to Bufco Corp.'s records, sometimes on a given day, individuals are required to perform both residential and commercial work and the only hiring hall applicants who are qualified to do this are commercial hiring hall applicants; that, with respect to General Counsel's Exhibit 19, which is the work order ledger, the "R's" and the "C's" were in the document when it was received by the Region and Lucinda Corbett, who is the wife of Bill Corbett and who is the vice president and secretary of Bufco Corp., told Nachand that the former represents residential and the latter represents commercial; that the wage increases provided for in the involved collective-bargaining agreements and the apprentice rates therein were factored into the computations in the specification; that residential hours for direct employees were not counted after the expiration of the residential contract; that the computations of the specification are summarized by quarters, which is always necessary for interest computations and for ease of presentation, but as set forth in appendix A to the specification, the computations are weekly computations; that payments to direct employees from the Employer in excess of the rate specified in the involved collective-bargaining agreement were not carried over into the next computation period as an offset and any such overpayment by the Employer did not reduce or eliminate the fringes owed; and that in her experience in Section 8(a)(5) of the National Labor Relations Act (the Act) cases when the Board indicates that quarterly computations are unnecessary and unwarranted that has not meant taking the total period but rather that has meant going on a daily or weekly basis as was done here.

On cross-examination, Nachand testified that with respect to the direct employees, the Region obtained the records from the Company showing the number of hours actually worked by these employees, the Region applied the union contract and the union wage rate and a union wage total was developed, which total was compared to what the Company's records showed these employees earned in a given week, and if the union wage total was greater, than the Bufco Corp. wage total was deducted from it; that this was how the net backpay total for the week was obtained; that nothing was carried over; that she forwarded a letter, dated December 2, 1992, to counsel for Respondents (R. Exh. 3) explaining how the Region computed backpay; that since then there have not been any changes in the manner in which she computed backpay; that the interest on the backpay for the direct employees was computed on a quarterly basis while the wages were computed on a weekly basis; that paragraph "6" of the specification should have indicated that the backpay was

summarized according to calendar quarters; that a strictly quarterly computation could be different than a weekly computation; that the backpay of the hiring hall applicants was computed on a quarterly basis instead of on a weekly basis because of prior case precedent; that another Board agent who worked under her direction determined that direct employees Norman Corbett, Roger Hart, and Timothy Stewart were performing unit work; that while she personally did not review the work order ledger, she saw the daily timesheets and a Bufco Corp. annual summary of earnings and she was aware that at the underlying unfair labor practice hearing one of the Corbetts testified that Stewart did unit work;¹⁷ that these three direct employees were never interviewed in the course of the compliance investigation; that the Board does not usually take affidavits in backpay investigations; that she reviewed the weekly time and attendance reports which sometimes show charts of accounts, identifying particular work in preparing the specification in order to check the computations for the direct employees; that, with respect to Mark Corbett, if he did work that was charged to a job as reflected on the weekly timesheets, it was counted 100 percent in computing the time for his hiring hall counterpart, unless there was a chart of account numbers showing that he was doing office-type work; and that the fringe benefit payments from the Employer would not be included in the employee's paycheck.

Bill Corbett testified that he, his wife, Lucinda, and his son, Mark, participated actively in preparing Respondents' answer to the specification; that former employee Newman Corbett, who at the time of the hearing herein has passed away, was his brother; that Newman Corbett had retired from another job and he was working for Bufco Corp. during the period involved herein; that Newman Corbett was sort of the general manager of production, he was not an electrician and he did not perform any type of electrical work for Bufco Corp.; that former Bufco Corp. employee Roger Hart, who worked for Bufco Corp. during the period involved herein, was a journeyman carpenter and he did not perform any electrical work for Bufco Corp.; that Clifford Russell worked for Bufco Corp. during the period of time involved herein but he performed work other than as a journeyman or apprentice electrician; that Bufco Corp. employed Tom Strupp during the involved period and he performed residential and commercial electrical work; that at no time did Bufco Corp. employee Tim Stewart perform any commercial electrical work; that Bufco Corp. employee Timothy Buente was not a journeyman electrician; that if Buente's backpay was computed on a total period of time vis-a-vis the above-described approach taken by the compliance officer, the amount involved would be less than what is sought;¹⁸ that under the involved

¹⁷The Union took the position at the supplemental hearing herein that the work done by these three direct employees would be presumed to be bargaining unit work because Bufco Corp. did not have a contract with any other union.

¹⁸An adding machine tape was sponsored by this witness, R. Exh. 4. It shows what Respondents argue is the backpay owed to Buente on a total period basis, accepting the hours and wage rates arrived at by the Region. Total period computations for the other employees were supplied by the Respondents. Bill Corbett sponsored R. Exh. 5, which is a reiteration of attachments B through M to the answer of Bufco Corp. and Corbett Electric, Co., dated February 15, 1995, and which covers fringes. Adding machine tapes are attached to each

collective-bargaining agreement when payments were made to the involved funds they were made directly to the funds and they were not paid to the individual employees; that it is Bufco Corp.'s position that the contributions to the funds should not be included in the backpay to any of the employees in this case; that employee Tom Strupp was never a commercial journeyman¹⁹ and the specification assertedly unfairly computes his backpay, after the residential agreement expired, at the commercial rate; that during the period of time in question, January 1, 1983, through 1985, he was not (1) an owner, (2) a shareholder, or (3) an officer or director of Bufco Corp. but during this period he was an employee of Bufco Corp.; that as an employee of Bufco Corp. during this period he would have spent 40 to 50 percent of his time doing unit work and only 10 to 15 percent of the unit work was spent on residential work; that during the involved period he worked with tools as a journeyman electrician, interpreted plans, laid out work, expedited materials and tools, and constantly sought out other contracts; that it is not accurate to compute all of his time, except that which he spent in the office, as unit work since he might have been doing administrative or supervisory field work, which is not covered by the agreement;²⁰ that you cannot tell from looking at the job sheets how many actual hours he worked during the involved period using tools; that if he worked 12 hours on a job, he would probably turn in 8 hours because he was not concerned about overtime and he wanted to make the job look good on paper; that during the involved period of time he was paid a salary;²¹ that employee Patrick Reisinger was "a college boy who was hired as support labor" who might have assisted in some areas of commercial work and who did do some residential work; and that during the period involved Bufco Corp. did residential work albeit it was a small portion of Bufco Corp.'s overall volume.²²

On cross-examination, Bill Corbett testified that at the time of the supplemental hearing herein he was the president of Bufco Corp.; that he became president of Bufco Corp. in January 1993; that from 1983 to 1993 he was just an employee of Bufco Corp. and he had no ownership interest in Bufco Corp.; that he testified at the underlying unfair labor practice hearing that one of the reasons he wanted to leave the contractual relationship with the Union was so that he could do work with his hands; that he gave "Bufco" to his son Mark in January 1983; that in 1982 and 1983 Corbett Electric Company did not have a contract with any other union; that to his knowledge, he never had any electricians refuse to perform any job functions in 1983 and there were

of the appendices. Bill Corbett also testified about how he arrived at Respondents' computations regarding the hiring hall applicants.

¹⁹According to Bill Corbett's testimony, (1) Strupp performed mostly residential electrical work and he was not a journeyman, and (2) none of Bufco Corp.'s actual employees, during the period involved here, were journeymen.

²⁰He testified that the same would be true with respect to his son Mark.

²¹He testified that his son Mark was also paid a salary.

²²Bill Corbett testified that the following actual employees did a substantial amount of residential work: Tom Strupp, Kevin Wimpelberg, Harold Roeder, Patrick Reisinger, and Daniel Edwards. Bill Corbett was not sure how much residential work Jeffrey Walts did but he, Corbett, was sure that Gary Johnson did very little residential work and Buente did some residential work; and that both of these individuals did mainly commercial work.

times where employees covered by the electrical contracts would occasionally do nonunit work;²³ that he did not believe that under the contract which was in effect in 1982 and 1983 that an employer was allowed to have one apprentice for five journeymen; that the actual employees performed electrical work for Bufco Corp. during the involved period;²⁴ that Strupp worked on the Crane Ammunition Depot job in 1983 which he could not describe as commercial because the job was "figured on a prevailing wage"; and that he and his son Mark were the only two involved people at Bufco who had the skills to be journeymen electricians.

Amended Specification

At the outset of that part of the supplemental hearing dealing with the amended specification, the parties stipulated that a number of exhibits²⁵ which deal with Bufco Corp. and Marbeck Development Company are records kept in the regular course of business and these and certain of Respondents' exhibits were received.²⁶ Counsel for the General Counsel and the Respondents also stipulated to the following facts:

First, that on December thirty-first, 1984, Bufco issued a check in the amount of \$5,000 to Mark Corbett that Bufco characterizes as a bonus check.

Two, that on December thirty-first, 1987, Bufco issued a check in the amount of \$30,000 to Bill Corbett that Bufco characterizes as a bonus check.

Three, that on January seventh, 1988, Bufco issued a check in the amount of \$10,000 to Mark Corbett which Bufco characterizes as a bonus check.

Four, that in April of 1989 Bufco issued a check in the amount of \$2,500 to Mark Corbett which Bufco characterizes as a bonus check.

Five, that in November of 1989 Bufco issued a check in the amount of \$20,000 to Lucinda Corbett which Bufco characterizes as a bonus check.

Six, that on May thirty-first, 1990, Bufco issued a check to Mark Corbett in the amount of \$18,470 which Bufco characterizes as a bonus check.

Seven, that on January thirty-first of 1990, Bufco issued a check in the amount of \$50,000 to Bill Corbett, d/b/a Marbeck, and that Bufco characterizes this check as back rent and interest.

Eight, that Bufco and Marbeck share a common facility or site at 2305 North Kentucky Avenue in Evansville, Indiana.

Nine, that Marbeck, Incorporated, was incorporated in 1990, and its president is Bill Corbett and its secretary is Lucinda Corbett.

In addition, Bill Corbett has continued to operate Marbeck Development.

When called by the General Counsel during this part of the case, Bill Corbett testified that he has been president of Bufco Corp. since August 1992;²⁷ that at the time of the supplemental hearing herein he and his wife Lucinda were the officers and on the board of directors of Bufco, his wife was the secretary and treasurer of Bufco Corp. and the sole shareholders of Bufco Corp. are his wife Lucinda and his son Mark; that Bufco Corp. operates out of a facility on North Kentucky Avenue in Evansville; that Marbeck Development has a couple of drawers and a file cabinet at the same facility; that Bufco Corp.'s and Marbeck, Inc.'s books are maintained by his wife at this facility; that Bufco Corp. maintains a checking account at Old National Bank; that he and his wife are the officers, the sole shareholders and on the board of directors of Marbeck, Inc.; that he believed that Marbeck Development and Marbeck, Inc. share the same bank account and there is only one bank account; that Marbeck, Inc.'s only function is to receive rents; that there is only one telephone in the office and it is Bufco Corp.'s; that he, Lucinda and Mark are paid on a weekly basis; that the payment of the December 31, 1987, Bufco Corp. check for \$30,000 to him as a bonus was discussed at a corporate meeting and the corporation decided to issue the check; that while he was not an officer or director in Bufco Corp. at the time of this bonus, in his November 15, 1994 affidavit to the Board it is indicated "This was a bonus to me; the officers and directors of Bufco (Cindy Corbett and me; I do not recall whether Mark, my son, was an officer at the time) decided that I should receive the bonus";²⁸ that this portion of his affidavit to the Board is not accurate in that he was not an officer or director of Bufco Corp. at the time; that it was correct to state that bonuses take place when and if financial conditions warranted; that around \$16,000 of the December 31, 1990, Bufco Corp. \$50,000 alleged back rent check to Bill Corbett d/b/a Marbeck was for interest; that he believed that the back-rent payment covered a period running from the commencement of the lease period, namely, December 15, 1982, to the date of the check;²⁹ that after this \$50,000 payment was made there was still back rent owed; that he did not know why "Marbeck's" rent receipt ledger (G.C. Exh. 49) does not have an entry for the \$50,000 rent payment and he did not know who wrote the entries in the ledger albeit he assumed that his wife maintains the document; that, with respect to the \$18,470 bonus given to Mark Corbett on May 31, 1990, Bill Corbett, participated in the discussions, even though he was not a corporate official, on how much could be paid which was dependent on how much was available and still keep the Company in a liquid position to do business;³⁰ that there are occasions when Bufco Corp. finds it

²³ After Respondents' counsel objected, Bill Corbett testified that he did not recall electrical employees performing nonelectrical work in the same day.

²⁴ Daniel Edwards, Timothy Buente, Gary Johnson, Patrick Reisinger, Harold Roeder, Tom Strupp, Jeffrey Walts, and Kevin Wimpelberg. According to Bill Corbett's testimony in response to questions regarding specific individuals on cross-examination, Newman Corbett and Roger Hart did not perform any electric work for Bufco Corp.

²⁵ G.C. Exhs. 46, 49-58, and 60-72.

²⁶ R. Exhs. 6-18.

²⁷ He also testified that he was president of Bufco Corp. from its incorporation in 1972 until the early 1980s when he turned this business over to his son Mark.

²⁸ At p. 1, par. "3." of G.C. Exh. 73.

²⁹ The lease, G.C. Exh. 46, is dated December 15, 1982, and it is signed by Mark Corbett as president of Bufco Corp.

³⁰ Bill Corbett testified that there was not any discussion with respect to specific accrued amounts. At p. 2 in par. "6." of the above-described affidavit, Bill Corbett indicates as follows:

Continued

necessary to loan money to "Marbeck"; that "Marbeck" struggled with taxes for several years; that Bufco Corp. paid the personal medical bill for Mark Corbett's wife when she delivered a baby because Mark's medical insurance policy, which was an employee benefit paid for by Bufco Corp., mistakenly omitted a maternity clause; that there are times when if Bufco Corp. does not have money to meet a payroll, money is borrowed from "Marbeck"; that Bufco Corp. issued a check to Bufco Corp. on December 29, 1987, in the amount of \$6038, General Counsel's Exhibit 67, to close out a National City Bank account, and the funds were moved to Old National Bank; that Bufco Corp.'s check to him dated April 19, 1991, in the amount of \$6600 (G.C. Exh. 68) was the repayment of a loan; that Bufco Corp. has performed work for "Marbeck" on "Marbeck" properties; that some of this work was paid for and some of it was carried by Bufco Corp. as a receivable; that when one of these companies did work for the other, the amount charged for the work was less than the amount that would normally be charged to a customer; that he was aware that the aforementioned \$50,000 back rent and interest payment was put in a savings certificate in his wife's name; that his personal accountant is Riney Hancock who bought out his, Bill Corbett's, former accountant, Roy Cobb; that Bufco Corp. also used Roy Cobb and then Todd Forbes who worked for the Riney Hancock firm; that Corbett Electric Company, Inc., Bufco Corp. and "Marbeck" all had the same accountant for the last 10 years; that Bill Corbett d/b/a Marbeck, Inc. had seven other tenants at the time of the supplemental hearing herein; that while the involved lease with Bufco Corp. (G.C. Exh. 46) specifies 2307 North Kentucky Avenue, the correct address is 2305 after these two were combined; that he is the sole owner of Marbeck, Inc.; that Marbeck Development or Bill W. Corbett, d/b/a Marbeck leases the property; that all of the seven other aforementioned tenants signed the same lease and the rents are not based on square footage or a percentage of gross sales but rather the rents were negotiated and the amounts were determined by comparables; that his law firm suggested that the basis for the involved lease with Bufco Corp. would be 2.5 percent of Bufco Corp.'s gross sales; that there is no definition in the lease of what gross sales are; that there were minutes made of the meetings that led up to the \$50,000 back rent and interest payment by Bufco; that he would be surprised if there was no such minute for January 31, 1990; that he has a checking account at Old National Bank for "Marbeck"; that he has been married to Lucinda for 14 years and General Counsel's Exhibit 49 resembles her handwriting; that he could not find on General Counsel's Exhibit 49 an entry for the \$41,381 where he forgave Bufco Corp. that amount in rent on June 13, 1990; that the \$41,381 was a receivable that Marbeck owed Bufco Corp.; that to his knowledge Bufco Corp. did not pay any deductibles for any other employees other than the one payment for his granddaughter; and that he did not know whether Bufco Corp. received the February 14, 1990 \$40,000 loan covered by General Counsel's Exhibit 55.

This was an accrued bonus payment to Mark; when I say accrued, I mean overdue or accumulative. There was no bonus formula used to determine the amount other than Cindy, Mark, and I decided that \$18,470 was the amount available for the bonus.

Lucinda Corbett, when called by the General Counsel, testified that she is vice president and secretary/treasurer of Bufco Corp. and "Marbeck"; that she is the only one in the office and she performs all of the secretarial functions; that she maintains the in-house financial documents; that she and Mark would discuss financial decisions with Bill Corbett even though he did not hold an office or ownership position in Bufco Corp.; that the handwriting on the "Marbeck" ledger regarding rent payments from Bufco Corp. (G.C. Exh. 49) is hers; that under Marbeck Development she takes in the rents and posts them; that Bill Corbett owns Marbeck, Inc. and he is president, and she is the secretary/treasurer of the corporation; that the boards of directors for Bufco Corp. and Marbeck, Inc. meet at least once a year, as required by law, and otherwise when topics need to be addressed; that normally she telephones Respondent's attorney, Statham, tells him what occurred at the meeting and he prepares the minutes of the meeting; that on occasion she, Mark or Bill will use Bufco Corp.'s trucks for personal use over the weekend; that Bill and Mark Corbett do regular electrical and other nonsupervisory work on a daily basis; that, with respect to the December 31, 1987, \$30,000 "bonus" check to Bill Corbett, there was no triggering event; that prior to January 31, 1990, Bufco Corp. had not paid back or accrued rent; that Bill Corbett requested the payment of the back rent indicating that it was accumulating; that she did not record the \$50,000 payment in the receipt ledger because "Mr. Forbes was keeping track of that"; that in the 3 or 4 years prior to the payment of this back rent with interest, the regular monthly payments of rent were between \$500 and \$600; that she put the \$50,000 back rent and interest payment into a certificate of deposit (CD) in her name; that, with respect to the January 7, 1988 \$10,000, the April 1989 \$2500, and the May 31, 1990 \$18,470 "bonus" checks to Mark Corbett, she and Mark made the decision to give these "bonuses";³¹ that, with respect to the November 1989 \$20,000 "bonus" check to her, she and Mark Corbett decided to give the bonus and it was to make up for the fact, as demonstrated by the involved payroll records, that in the past she was not paid for a month or a quarter, and it was for back wages; that regarding the aforementioned \$18,470 "bonus" payment, she and Mark Corbett did have some discussion about it with Bill Corbett; that it was accurate to state that with respect to any significant financial or business decisions on either Marbeck's part or Bufco's part, Bill Corbett would be consulted or take part in the discussions; that she did not recall making any decisions to commit money when Bill Corbett was against it or had expressed disagreement; that she thought that the \$41,381 "PAYMENT OF BUFCO BACK RENT," which is covered in General Counsel's Exhibits 53 and 54, was Forbes' suggestion but she did not know whether Bill Corbett discussed this with him before the suggestion was made; that there had been no subsequent payments of back rent and interest that she knew about and she was not aware of any previous cancellations of a debt owed by Bufco Corp.; that she and her husband used the aforementioned \$50,000 CD to secure a \$35,000 loan from Old National Bank so that they could payoff the estate of a creditor; that, other than the Bufco Corp. payment to the doc-

³¹ Lucinda Corbett could not recall why the check was made out for the exact amount of \$18,470.

tor for maternity services rendered regarding Mark's daughter, she did not recall any other time when Bufco Corp. issued checks to pay personal bills or liabilities of its employees or officers; that this payment was made because Bufco's Corp.'s insurance agent omitted the maternity clause in the group coverage; that Bufco Corp. has performed work on Marbeck properties, i.e., water heater elements, lift stations and electrical work; that Bufco Corp.'s and Marbeck's records are kept in different ledger books and in different file cabinets; that she did not recall why Bufco Corp. borrowed \$40,000 on February 14, 1990, from Old National Bank; that perhaps five or six times she and her husband have made unsecured loans to Bufco Corp.; that with respect to the aforementioned May 31, 1990, Bufco Corp. check made payable to Mark Corbett in the amount of \$18,470, she endorsed the check after Mark endorsed it because it was deposited into the personal account of her and her husband, Bill;³² that the rental agreements that Bill Corbett d/b/a Marbeck Development has with the seven other tenants were set by negotiating from a square footage base; that none of these seven tenants pays the rent on a percentage of gross sales; that she signed corporate minutes regarding the \$50,000 Bufco Corp. payment of back rent and interest; that Bufco Corp. paid \$1250 on February 20, 1990, to Southern Farm Bureau Insurance Company for "a life insurance policy on an officer," namely, Bill Corbett; that Bill Corbett was not an officer of Bufco Corp. in 1990; that the \$20,000 check she received in November 1989 was net in that the taxes had already been paid for by Bufco Corp. before she receive the \$20,000; that this \$20,000 payment was for some wages that she was not paid and extra hours that she worked; and that no records were maintained regarding the extra hours that she worked.

Todd Forbes, a certified public accountant called by Respondents, testified that he works for Riney Hancock and Company (Riney); that previously he worked for Roy Cobb, CPA (Cobb), a sole proprietorship which merged with Riney; that for a number of years Riney has been Bufco Corp.'s accountant and prior to that Cobb filled this role; that for a number of years Riney has been the accountant of Bill and Lucinda Corbett and also an unincorporated company under which they do business, Marbeck Development Company; that Riney has prepared annual tax returns for Marbeck, Inc., which was incorporated in December 1990, to manage the rental properties which are in the name of Bill Corbett d/b/a Marbeck Development and which has not really been active and has no real assets of its own; that in his opinion the funds of Bufco Corp. and Marbeck Development are kept separately and distinguishable in regard to the accounting records that are maintained; that all records pertaining to Marbeck Development and Bill Corbett are kept separate from the records in regard to Bufco Corp. and they have completely separate general ledgers and separate bank accounts; that he prepared Respondents' Exhibit 19 which is list of loans from Lucinda and Bill Corbett to Bufco Corp. from 1983 to 1990 and payments on these loans;³³ that with an electrical contracting business such as Bufco Corp. money

³² Lucinda Corbett testified that Mark Corbett was not a part of that bank account.

³³ Listed thereon is a March 1983 \$10,000 loan from Lucinda Corbett and an April 1985 \$5000 loan from Bill and Lucinda Corbett. The remainder of the entries on this exhibit are payments on these loans and the balance of the account after each payment.

does not come in on a weekly or monthly basis and cash management is not always an easy function; that it is not uncommon for small contractors in the Evansville area to have to wait for the money that is due to them for work they have performed; that he prepared Respondents' Exhibit 20 which lists a \$10,670 loan from Mark Corbett to Bufco Corp. in September 1993, and payments on that loan from 1993 to 1994; that he prepared Respondents' Exhibit 21 which lists nine loans from Marbeck Development to Bufco Corp. from July 1991 to April 1994, and payments on these loans up to May 1985; that he prepared Respondents' Exhibit 22 which lists a \$6500 loan from Mark Corbett to Marbeck Development in May 1993, and the payment of that loan on June 2, 1993; that he prepared Respondents' Exhibit 23 which is list of loans from Lucinda and Bill Corbett to Bufco Corp. from 1985 to 1993, with some overlap with Respondents' Exhibit 19, and payments on these loans;³⁴ that to his knowledge, Bufco Corp. has never made any loans to "Marbeck"; that Respondents' Exhibit 24 reconciles a \$500 coding mistake in a Bufco Corp. financial statement regarding loans from Bill and Cindy Corbett; that before he testified herein he prepared Respondents' Exhibit 25(a), which is a computer printout which is a calculation of back rent due from Bufco Corp. to Bill and Cindy Corbett;³⁵ that he prepared Respondents' Exhibit 25(b) on "1/31/90," which document is a handwritten calculation of the back rent due by Bufco Corp. through 1989; that he prepared Respondents' Exhibit 25(c) on "2-28-90," which document is a handwritten calculation of the interest on the back rent due by Bufco Corp. to "12/31/89";³⁶ that in late 1989³⁷ Bill Corbett showed him a lease which indicated that the rent on the involved property would be 2-1/2 percent of sales; that Bill Corbett told him that Bufco Corp. had only been paying a lower sum throughout the years;³⁸ that before this he, Forbes, had no knowledge of the lease; that since he had no knowledge, earlier financial reports prepared by him would not have any information with respect to accrued rent or interest but rather would just show the rent that was actually paid; that for the involved December 1989 financial statements he included the fact that the corporation accrued rent of \$73,929 and accrued interest of \$16,630 and it went through both rent expense and interest expense on that years financial statements; that in January 1990 an accrued rent payment of \$50,000 was made from Bufco Corp. to Marbeck Development and he made accounting records in regard to that payment; that since the \$50,000 was not deposited into the Marbeck account, the Marbeck journal did not include it and "the funds, basically flew through to the Corbetts"; that later in 1990 there was a large receivable on Bufco Corp.'s balance sheet and a corresponding payable on Marbeck's books for con-

³⁴ As indicated thereon, as of May 1995 the loan balance was \$16,076.

³⁵ The printout covers the period from 1983 to "03/31/95."

³⁶ Forbes testified that he calculated the interest at 10 percent on the unpaid rents through "12/31/89" and he also accrued the \$16,630.

³⁷ C.P. Exh. 3 is a "NOTICE OF ORAL ARGUMENT" regarding this case before the United States Court of Appeals for the Seventh Circuit, dated November 30, 1989.

³⁸ On voir dire with respect to R. Exh. 25, Forbes testified that Bill Corbett said that there would be money available to be taken out.

struction which Bufco Corp. had done over a number of years and he took the receivable and offset the amount of rent due; that while Cobb and Riney did prepare financial statements for Marbeck Development, they did not prepare personal financial statements for Bill and Cindy Corbett; and that after 1990 the rents were collected and bills paid out of the Mar Beck, Inc. checking account and they were reported at the end of the year on schedule E on the individual returns of Bill and Cindy Corbett as Marbeck Development.

On cross-examination Forbes testified that before 1989 there was never any journal entry kept by Bufco Corp. that it owed more rent than what showed on its books; that there was never any document provided to him before late 1989 which showed that Bill Corbett, d/b/a Marbeck Development was owed any more rent than what had been shown on an annual basis; that with respect to the \$50,000 back rent and interest payment, he did not consult with any officer or director of Bufco Corp. about whether or not they wanted to pay this back rent; that in talking with Bill Corbett the purpose of the accrual was to pay it but it was not indicated at the time that Bill Corbett was neither an officer nor director of Bufco Corp. in 1990; that interest on the back rent was not calculated at any time before 1989 because that was the first time the principal or rent was calculated; that the accrual of unpaid rent does not appear on the books or ledgers of Bufco Corp. or Bill Corbett, d/b/a Marbeck Development since January 31, 1990; that there was no compilation of the 2-1/2 percent of gross sales since January 1990 until the week before he testified herein; that he became aware that 14 days after Bufco Corp. paid out the \$50,000 to Bill Corbett it borrowed \$40,000 from Old National Bank; that no one consulted with him at the time about the business practice of paying out \$50,000 and then 14 days later borrowing \$40,000; that the involved lease did not address the issue of interest and the 10 percent was based on what the interest rate was at that time period; that with respect to Respondents' Exhibit 19, the July 1987 payment of \$4068 was made, as indicated by Charging Party's Exhibit 2 (a copy of part of Bufco Corp.'s disbursement journal), by check dated "7/30/87" to Bill Corbett for \$8500; that the difference between these two sums, \$4432 was then set up as a receivable from Bill Corbett; that the \$4432 was coded to an account different than the loans from Bill Corbett to Bufco Corp.; and that at the time he initially³⁹ testified herein he did not know whether Bill Corbett ever repaid the \$4432 to Bufco Corp. but Forbes believed that this sum was repaid because he believed that the receivable balance in the latest Bufco Corp. financial statement is zero. When called on redirect by Respondents in August 1995, Forbes testified that the aforementioned sum of \$4432 which became a receivable to Bufco Corp. from Bill Corbett in July 1987 was put into account number 112201, "receivable to shareholder," in December 1987 it was combined with account number 112103—which is accounts receivable from Marbeck which is Bill Corbett doing business, and in June 1990 this became part of the \$41,381 offset that was used to pay the accrued rent that was owed by Bufco Corp.; and that the aforementioned February 1990 \$40,000 Bufco loan was repaid by June 1992.

³⁹ On May 11, 1995. As noted above, the hearing had to be continued. Forbes testified at the continued session on August 7, 1995.

Kenneth Hanson, who was called by Respondents, testified that he is a commercial and industrial investment real estate broker and an independent certified appraiser who, at the time of the hearing herein, had engaged in appraising for a fee in the Evansville area for about 20 years; that he personally measured the involved space on North Kentucky Avenue which is leased to Bufco Corp. and it measures a total of about 3850 square feet, including 880 square feet of office space; and that, in his opinion, the fair market leased value of that property during the years 1983 to and including 1989, based on the comparable sales that he analyzed and his personal knowledge, is, on the average for the entire parcel, \$4 per square foot plus or minus five percent.⁴⁰ On cross-examination, Hanson testified that approximately 80 percent of the involved space is storage space; that the fair market value for storage space on North Kentucky Avenue in 1983 and 1984 based on comparables was between \$3 and \$3.40 a square foot and for office space between \$6 and \$6.80 a square foot;⁴¹ that it is unusual to base the rental of warehouse space on a percent of gross sales;⁴² and that the warehouse property which is directly behind the subject property and which has less than 10-percent office space, rented, before it was sold, for \$3.50 a square foot with the tenant paying taxes, insurance, and maintenance.

Bill Corbett, when called by Respondents, testified that he is a master electrician; that when he became an employee of Bufco Corp. he no longer was an officer, director, or shareholder in that corporation and his title was superintendent; that on Bufco Corp. projects he functioned both as a project manager and worker; that he worked some jobs for Bufco Corp. where he had to stay away from home for periods of time; that in 1983 he made \$10,357, in 1984 he made \$34,220, in 1985 he earned \$11,220 and in 1986 he made \$34,320 working for Bufco Corp.; that regarding compensation, he and the officers of Bufco had an understanding that at the outset they would just get a living wage and if Bufco could make some money, their wages would be brought up to an industry accepted level; that this is what occurred; that he did not believe that he was reasonably compensated by Bufco Corp. for the years 1983 to 1986; that in 1987 he was paid \$66,630 by Bufco Corp., which included a \$30,000 bonus; that during the years 1983 through 1993 when his wages and his bonuses are all averaged out, he earned an average of \$39,266 from Bufco Corp.; that he did not believe that under the circumstances which existed at the time that this was adequate compensation; that in the late 1980s he sought legal advice regarding the validity of the involved lease; that he requested Bufco to pay back rent plus interest;

⁴⁰ The total would therefore be \$15,400.

⁴¹ At \$3.20 a square foot for the office space and \$6.40 a square foot for the storage space, the total would be \$15,136.

⁴² Indeed the witness testified that this was the first time that he had ever seen a gross sales lease involving an office/warehouse rental. Another witness called by Respondents in an earlier attempt to establish the fair market rental cost, Dennis Conwell—who is a commercial real estate agent in Evansville, testified that normally with the rental of real property to an electrical contractor there would be a fixed lease because unlike a lease involving a retailer, there is no base so that the owner does not know that he would receive at least the base along with the possibility of also receiving a percentage of the gross sales over and above the base; and that usually, unlike here, a gross sales lease has a base.

that subsequently Forbes advised him about how the \$41,381 which Marbeck Development owed to Bufco Corp. could be applied to the back rent plus interest; that Bufco Corp. still owes him back rent; that he made personal loans to Bufco Corp. over the years because he wanted to keep the company solvent and protect his job; that Bufco Corp. still owes him and Lucinda a substantial sum of money; that but for these loans Bufco Corp. would not be in business; that he personally guaranteed some of these loans; that in February 1990 when Bufco Corp. borrowed \$40,000 (just after making the \$50,000 back rent payment) it had accounts payable of \$40,000, accounts receivable of \$140,000 and underbillings where work was performed by Bufco Corp. but not billed for yet of about \$30,000; that as he recalled the underbillings at the time was in the \$35,000 or \$40,000 range; that in the past Bufco Corp. has borrowed as much as \$70,000 in similar circumstances and it was able to pay it back within a period of months; that he performed work at Bufco Corp. as an electrician daily and it was a normal function of his job; and that since 1992 when he again became president of Bufco Corp. he still does whatever is necessary to get the job done. On cross-examination, Bill Corbett testified that none of his other tenants during the 1980s had a percentage of gross sales lease like the one he had with Bufco Corp.;⁴³ that there are no corporate minutes and nothing in writing to reflect the understanding that he had with the officers of Bufco Corp. that bonuses would be paid some time in the future to make up for the inadequate pay in the early 1980s; that he spoke to the owners of Bufco Corp. about the back rent before he sought legal advice regarding the validity of the involved lease; that the owners of Bufco told him that there was some money which could be paid toward what was owed; and that Bufco Corp. has taken out another "\$40,000" loan and he signed personally for the loan.

Mark Corbett, when called by Respondents, testified that he became a journeyman electrician in 1977 or 1978 and a master electrician in 1990; that in the early 1980s he took over the operation of Bufco Corp.; that he became president of Bufco Corp. and his stepmother, Lucinda Corbett, also became an officer of the corporation, namely secretary; that he and Lucinda were the directors of Bufco Corp.; that his father, Bill Corbett, signed over his shares to him, Mark, and Lucinda; that his father then worked for Bufco Corp.; that his average income for the years 1983 to 1993, including bonuses, was \$39,292; that he and Lucinda would make the corporate decisions and he would consult with his father regarding how to operate "Bufco"; that during specified years Lucinda did not receive reasonable compensation from Bufco Corp.; that during the years from 1983 to 1993 Lucinda received, with bonuses, an average of \$15,118 from Bufco Corp.; that he, along with his father and stepmother, have made loans to Bufco Corp. so that it could continue its operations; that sometimes when money came into Bufco Corp. as a result of a job being finished, its officers and directors decided to pay its key employees, namely, him, Lucinda and his father, bonuses; that the prior testimony of Lucinda that the bonuses were based on the low compensation in previous years was accurate; that, with respect to wages, there was an understanding among the overall management group that

⁴³ On redirect, he testified that none of his other tenants leases warehouse space as Bufco Corp. does.

"being a family-oriented business, that we would try to—we would start out low and try to do better"; that during the involved period he worked numerous hours of overtime and he believed that he was working for less than the journeyman rate with fringes; that it was usual for him to perform hands on work; that the bonuses were based on the corporation having money and the need to reward for long hours of hard work; that there were corporate minutes prepared in regard to the bonuses; that the minutes reflected the action of both the board of directors and the shareholders in regard to the bonuses; that his father expressed concerns that Bufco Corp. needed to work towards carrying out the terms of the lease; that with respect to the amount of principal and interest which was paid, he relied on the accountant; and that he stepped down as president and director of "Bufco" because he no longer wanted the responsibility. Subsequently, he testified that he did not recall that the word bonus ever came up specifically in the aforementioned discussions.

Lucinda Corbett, when called by Respondents, testified that she managed Bufco Corp.'s office, took care of the bookkeeping, and wrote proposals on estimates; that when payments came into Bufco Corp. the money would be deposited into the bank account of Bufco; that when Bufco Corp. made payments they were made out of the Bufco Corp. bank account; that between 1983 and 1986 she worked 5 to 6 days a week at Bufco Corp., 8 to 10 hours a day; that in the years before she received any bonus payments she was inadequately paid; that Bufco Corp.'s managerial employees discussed taking lower salaries and at some point in time, possibly, paying themselves a bonus for the hours they put in; that Bufco Corp. subsequently was able to make bonus payments; that it was just a coincidence that Bill's and Mark's annual Bufco Corp. income both averaged out to be approximately \$39,000; that she and her husband have loaned Bufco Corp. money to keep it in operation; that as an officer and director of Bufco Corp. she was aware of the written lease between Bufco Corp. and Marbeck Development; that during the 1980s payments were not made according to the lease because the money was not there and while Bufco Corp. paid monthly, it did not know what the sales would be until the end of the year; that eventually there was some money and her husband brought up the back rent and "I contacted Mr. Forbes"; that she did not contact legal counsel about the lease and she was not present at any meeting with legal counsel; that there was a corporate decision made by the officers and directors of Bufco Corp. in January 1990 to pay the sum of \$50,000 to Marbeck Development; that when this back rent payment was made it was not anticipated that about 2 weeks later Bufco Corp. would have to borrow \$40,000⁴⁴ for expenses but in the past Bufco Corp. has had to borrow money because of an unanticipated need for cash; that she maintains the documents on the bank accounts of

⁴⁴ Bufco Corp.'s copies of the loan papers were received as R. Exhs. 37(a)-(m). This witness also sponsored R. Exhs. 38 and 39 which are copies of promissory notes for two short-term loans (\$70,000 and \$22,000, respectively) which Bufco took out on two different occasions to obtain a 2-percent discount on materials for jobs. When Bufco was paid for the jobs shortly thereafter, the loans were paid off. Lucinda Corbett also sponsored R. Exh. 40, which is Bufco Corp.'s copy of the loan papers for a loan of \$30,750 with the first promissory note dated June 16, 1994, which loan Bill Corbett mistakenly referred to as a "\$40,000" loan.

Bufco Corp. and Marbeck, Inc. and they are kept separately; that before Marbeck Inc. was incorporated there was a checking account under Marbeck Apartments, and rents from tenants were deposited into that account; that after Marbeck Inc. was incorporated a checking account was opened under that name and after that rents which came in from the tenants of her and her husband were deposited in this account; that such deposits were shown as income to her and her husband; that Bufco did not have anything to do with the Marbeck, Inc. account; that money which came into Bufco Corp. which belonged to Bufco Corp. was not deposited into the Marbeck, Inc. account; that the \$41,000 writeoff regarding back rent was Forbes' idea; that Respondents' Exhibits 31(a) through (k) are Mark Corbett's W-2s for 1983 to 1993 from Bufco Corp.; that Respondents' Exhibits 32(a)-(j) are her and her husband Bill's W-2s for 1983 to 1993, except 1988, from Bufco Corp.;⁴⁵ that neither Bufco Corp. nor Marbeck, Inc. checks are used to pay to purchase anything for her and her husband's farm;⁴⁶ that Respondents' Exhibit 45 is a copy of Bufco Corp.'s minute book along with a copy of Bufco Corp.'s certificate of incorporation, dated July 7, 1970; and that Respondents' Exhibit 46 is a copy of Bufco Corp.'s record of payments to "Marbeck" for rent from "1/24/84" to "4/5/95," and the document does not have an entry for the above-described \$50,000 payment for back rent and interest since Forbes kept track of that in Bufco's financial records. On cross-examination, Lucinda Corbett testified that there are no minutes of a meeting of Bufco Corp.'s board of directors on February 14, 1983, in Respondents' Exhibit 45 albeit the sheet after the minutes for August 31, 1986, refers to the minutes of a meeting held on February 14, 1983; and that the aforementioned \$30,750 loan was taken out on January 12, 1994, because a general contractor was not paying Bufco Corp.

It is noted that the following appears in Respondents' Exhibit 45:

MINUTES OF MEETING OF BOARD OF DIRECTORS

Held on December 15, 1975

.....

The Directors proceeded adopt the following resolutions unanimously, with motions duly made and seconded:

A. Unanimous resolution to pay to Bill W. Corbett a bonus of \$10,000 for the year 1975 to be paid on or before March 15, 1976.

.....

Also it is noted that Bufco Corp. did not authorize the borrowing of any money in 1975. Further, it is noted that the

⁴⁵ This witness also sponsored (1) R. Exhs. 33, 34, and 35 which are Bufco Corp. payroll records for Mark Corbett, Bill Corbett, and her, respectively, for the years 1983 to 1993, except that her records go to 1994, and (2) R. Exh. 36 which is a summary of Bufco's Corp.'s payroll records showing what she, her husband, and Mark Corbett were paid between 1983 and 1993, including bonuses.

⁴⁶ This witness sponsored copies of checks from their checking account and the farm checking account, R. Exhs. 41(a) and (b), respectively. Copies of Bufco's, Marbeck, Inc.'s, and Marbeck Apartments' checks were received as R. Exhs. 42, 43, and 44, respectively.

minutes of the Bufco Corp. board of directors meeting on April 24, 1975, contains the following:

The Directors proceeded with the transfer of real estate properties into and out of the corporation, to and from Bill W. Corbett personally handled in the corporate records as Officer Drawing as follows:

.....

C. To transfer at cost the warehouse and office building located at 2305-07 North Kentucky Avenue to the corporation from Bill W. Corbett, with the mortgage thereon.

Also, it is noted that while Mark Corbett's \$18,470 bonus is entered on Bufco Corp.'s payroll records (R. Exh. 33(h)) with a date of April 1, 1990, in a location in the payroll record where April entries would be made, the minute authorizing this bonus is dated May 30, 1990 (R. Exh. 45). As noted above, the parties stipulated that the \$18,470 check was dated May 31, 1990. Respondents' Exhibit 45 also indicates that according to Bufco Corp.'s minutes, Newman Corbett Jr. was elected secretary of Bufco Corp. on September 3, 1974, and he held this position until December 15, 1975, when he was replaced by Rebecca Corbett;⁴⁷ that when Bufco Corp. was incorporated it was authorized to issue 1000 shares of the common stock in the corporation on the total amount of \$100,000; that the corporation was designated as a small business corporation, as defined in Section 1244(c)(2) of the Internal Revenue Code of 1954; that by letter dated June 1, 1970, Bill Corbett was offered 100 shares of the common stock of Bufco Corp. at \$100 a share; that after the minutes for February 8, 1972, there is a sheet, "Tax Free Transfer of Stock for Property, Bufco Corporation 12/31/72," included in Respondents' Exhibit 45 which describes seven cars and trucks, machinery and equipment and office equipment and then indicates

As of 12/31/72 the above property was transferred from Bill W. Corbett . . . for 500 shares of capital stock of Bufco Corp. Chattel installment notes amounting to \$7,131.82 were assumed by the Company in the transfer. Bill W. Corbett owned all shares of stock outstanding before (100 shares) the transfer and all shares outstanding after the transfer (600 shares);

that after the minutes for March 17, 1977, there are two letters from the Office of the Secretary of State of Illinois, both dated in July 1977, to Corbett Electric Co. at 2305 North Kentucky Avenue, Evansville, regarding a Certificate of Authority for "BUFECO CONSTRUCTION CORP." to transact business in Illinois; that the minutes of a meeting of the board of directors of "Bufco Construction Corp." held on July 1, 1981, indicates that "the Corporation is inactive and holds no assets"; that the following appears in Respondents' Exhibit 45:

⁴⁷ There is minute which indicates that William Statham was elected secretary on February 8, 1975, but the minute for April 24, 1975, has Newman Corbett Jr. as secretary. As indicated in R. Exh. 45, when Bufco Corp. was incorporated in 1970 Statham, Respondent's attorney herein, was one of the incorporators, a director of the corporation and its original treasurer.

MINUTES OF MEETING OF THE BOARD OF DIRECTORS HELD ON THE 1ST DAY OF AUGUST, 1982, AT THE OFFICE OF THE CORPORATION LOCATED IN EVANSVILLE, INDIANA, PURSUANT TO WAIVER OF NOTICE AND CONSENT TO THE HOLDING OF SAID MEETING

Bill W. Corbett, the sole stockholder and the sole director was present:

Also present were Mark A. Corbett and Lucinda A. Corbett.

Bill W. Corbett then opened a discussion concerning his desire to rid himself of the worries of *Bufco Construction Corp.* and to devote himself solely to the conduct of his electrical business. The said Bill W. Corbett advised Mark A. Corbett and Lucinda A. Corbett that he was suffering a health problem which seemed to stem from his financial problems and Mark A. Corbett and Lucinda A. Corbett concurred in his opinion that if he devoted himself solely to Corbett Electric Company, doing much of the physical labor of Corbett Electric Company himself, that his health condition would probably improve.

Bill W. Corbett advised the said Mark A. Corbett and Lucinda A. Corbett that *Bufco Construction Corp.* had no assets, but if the said Mark A. Corbett and Lucinda A. Corbett desired to enter into any phase of business, that the said *Bufco Construction Corp.*, was already formed. The said Bill W. Corbett then endorsed his stock to Mark A. Corbett and Lucinda A. Corbett with Mark A. Corbett owning 51 shares and Lucinda A. Corbett owning 49 shares.

The said Bill W. Corbett then tendered his resignation as a Director of *Bufco Construction Corp.* and as the President.

The stockholders Mark A. Corbett and Lucinda A. Corbett then proceeded to name themselves as directors of said corporation and as said Directors named Mark A. Corbett as President and Treasurer and Lucinda A. Corbett as Vice President and Secretary of said corporation.

There being no further business, the meeting was duly adjourned [emphasis added].

[T]hat Mark Corbett as president and treasurer and Lucinda Corbett, as vice president and secretary signed "Resolutions of Board of Directors for Corporation Loans," dated August 1, 1982, for "Bufco Corp. a corporation organized under the laws of the State of Indiana"; that while the stock certificate which Bill Corbett held reads "BUFCO CORP.,"⁴⁸ the stock certificates held by Mark and Lucinda Corbett, unlike the certificate held by Bill Corbett, read "INCORPORATED UNDER THE LAWS OF, The State of Indiana, BUFCO CONSTRUCTION CORP., No Par Value";⁴⁹ that the Exhibit contains the following agreement:

⁴⁸ The stock certificate does indicate that Bill Corbett assigned and transferred "unto Mark A. Corbett 51 shares and Lucinda A. Corbett 49 shares."

⁴⁹ While, as noted above, Corbett Electric Co. obtained authority from the State of Illinois to transact business in Illinois as Bufco Construction Corp., nowhere in this record is there any documentation showing that an entity named "Bufco Construction Corp." was incorporated under the laws of the State of Indiana.

This agreement made this 5th day of November, 1982 by and between Corbett Electric Company, Inc. and Bufco Construction Corp. of Vanderburgh County, State of Indiana. Party of the first part and Bufco Construction Corp. an Indiana Corporation of Evansville, Indiana party of the second part witnesseth.

In consideration of 2% of gross sales for fiscal year 1983 of Bufco Construction Corp. it is agreed between the parties hereto as follows:

Said party of the first part agrees to extend to Bufco Construction Corp. the use of all vehicles, tools, and equipment, including office equipment, now owned by Corbett Electric Company, Inc.

Corbett Electric Company, Inc. to have privileged use of all said equipment to complete uncompleted contracts during 1983.

This agreement is for one year with three one year options.

Said party of the second part agrees to accept the terms of said agreement.

It witness thereof the said parties have hereunto set their hands and seals the day and year first above written.

. . . .

This instrument was prepared by Bill W. Corbett[;]

that Bill and Mark Corbett signed the "agreement," that with respect to the "agreement" of the "5th day of November, 1982" the following appears in Judge Sherman's decision herein, *Bufco Corp.*, supra, 291 NLRB at 1022:

The date on the document is November 5, 1982. However, the lease was not in fact executed until several weeks before the hearing, which was held on October 31 and November 1, 1983.⁷

⁷ Mark Corbett explained that the lease had not been signed earlier because 'our books were with our lawyers.' [;]

that at a meeting of the stockholders of Bufco Corp. held on December 15, 1982, the following was resolved:

BE IT RESOLVED that the shareholders of the corporation [the minutes of the meeting of the Board of Directors held on the same date refers to Bufco Corp.] hereby consent, authorize and approve of the entering into by the corporation of a lease with Marbeck Development Corporation of the premises at 2307 Kentucky Avenue, Evansville, Indiana, pursuant to the terms and conditions and for the rental set forth in the written lease prepared by attorney Ruth E. Maier. The officers of the corporation be, and they hereby are, authorized and directed to do or cause to be done all such things as are necessary and proper for the execution and entering into of said written lease[;]

that at the annual meeting on August 31, 1992, Bill Corbett was elected president and treasurer of Bufco Corp.; that beginning in 1983 and continuing up to the time that he resumed being president of Bufco Corp. the minutes of the annual stockholders meetings of "Bufco Corp." indicate "Mark and Cindy Corbett, the owners of all the shares of

stock in the corporation, were present. Bill Corbett was also present.”; that the corporate minutes of Bufco Corp. since April 1985 authorize the borrowing of money from Old National Bank, Bill Corbett, and Marbeck Development; and that with respect to the bonuses which were given to the Corbetts between 1987 and 1990, which total \$80,970, it is noted that between March 7, 1989, and February 2, 1990, the minutes of Bufco Corp. show that it was authorized to borrow a total of \$153,460 “for the business operations of the corporation.”⁵⁰

Analysis

On brief the General Counsel contends that the Corbetts, as principals and Respondents, are “*inevitably biased*” (emphasis in original) in that they seek to avoid any and all financial liability herein; that the May 1990 “bonus” to Mark Corbett damaged the credibility of Respondents’ case in that Respondents failed to address the sham nature of his “bonus” which “*he promptly returned to his step-mother’s and father’s bank account*” (emphasis in original); that Respondent’s credibility was damaged by its failure to credibly explain the timing of the “bonuses” and back rent if it was other than the successive rejections by the Board and the Court of Respondents’ failing legal defense; that for the most part, Respondent’s witnesses were questioned by Respondents’ counsel through the use of leading questions; that the Board has held that answers to leading questions on direct examination are accorded little weight and are viewed by the Board as testimony of Respondents’ attorney of his client’s position, *H. C. Thomson, Inc.*, 230 NLRB 808 (1977); and that if one looks at virtually any given page of Bill Corbett’s testimony, one will see that, through the use of leading questions, Respondents’ counsel is, in effect, testifying for Bill Corbett. The Charging Party, on brief, argues, as here pertinent, that the inconsistencies and contradictions and failure to know things through the testimony of Bill Corbett would make his testimony extremely unreliable; that the record made at the hearing herein clearly sets out “numerous and repeated pages of leading questions”; and that the evidence brought forward by the Employers was of little account and of no probative value.

Judge Sherman, in her 1984 decision in this proceeding, did not credit certain of the testimony of Bill Corbett. She concluded, as here pertinent, that certain of Bufco’s corporate minutes are inaccurate and not credible; that Bill Corbett was “untruthful” in giving certain testimony; that the November 5, 1982 date on the Bufco/Corbett Electric equipment lease, which was not executed until about September 1983, had no relation to the date when it was decided that Bufco would use Corbett Electric’s equipment; that the

⁵⁰ If one considers only those bonuses which were given between March 7, 1989, and February 12, 1990, the total would be \$40,970. The minutes covering the bonuses indicate “at the present time, the corporation has sufficient funds to pay such bonus.” The minute authorizing the payment of \$50,000 by Bufco Corp. to Marbeck Development Company for back rent and interest is dated January 31, 1990, and the minute authorizing the borrowing of \$40,000 “for business operations of the corporation” is dated February 12, 1990. Finally, the minutes which, in effect, forgave the \$41,381 owed to Bufco Corp. by Marbeck Development Company with the understanding that this amount would be deducted from the back rent allegedly owed by the former to the latter is dated June 29, 1990.

above-described “November 5, 1982” lease which was prepared by Bill Corbett recites that the parties “have hereunto set their hands and seals the day and year first written above,” namely November 5, 1982; that Bill Corbett engaged in an effort to conceal the close temporal relationship between the alleged decision to cease doing business as Corbett Electric and the decision to start doing business as Bufco; and that the record showed that the Bufco operation was set up for avoiding the involved collective-bargaining agreements.

The Board in *Bufco Corp.*, supra at 1015 fn. 1, indicated that it carefully examined the record and found no basis for revising Judge Sherman’s credibility findings.

Statham has been involved with Bufco Corporation since day one of its existence. In 1970 he was one of the incorporators, a director of the corporation, and its original treasurer. Later he was elected its secretary. More than once in trying this case before me Statham stated he was testifying or would testify. When questioned about this Statham indicated that it was a misstatement and he did not actually testify herein. Practically speaking, however, this, in effect, is what Statham did with the witnesses he called. Statham engaged in this conduct most extensively with Bill Corbett. And when one considers the extent of the leading and the fact that opposing counsel were constantly objecting, the conclusion is inescapable that it was Statham’s intent to create, from his point of view, as much of the record as possible with testimony elicited with leading questions. More than once Statham stated that this is just an administrative proceeding. Perhaps he believed that all that was required of Respondents was a statement of position. For that, in effect, is what much of the record produced by Respondents is, namely Statham’s statement of Respondents’ position. As indicated above, Statham used leading questions extensively with Bill Corbett. Also, as noted above, before he testified at the supplemental hearing herein Bill Corbett had credibility problems. Under the circumstances existing here, I do not believe that Bill Corbett is a credible or reliable witness. Much of his testimony was nothing more than Statham’s testimony in favor of Respondents’ position. When answering questions asked by opposing counsel, Bill Corbett was evasive, i.e., not knowing his wife’s handwriting.

In this type of proceeding the General Counsel has the burden of establishing as nearly as possible what the employees would have earned but for the unlawful conduct of the Respondents. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), and *NLRB v. Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963). The General Counsel has the burden of establishing a formula for the calculation of gross backpay due to the employee, but in many cases it is difficult to ascertain the precise amount due, and, therefore, a wide range of discretion is accorded the fashioning of such a formula provided it is reasonably designed to produce approximations and it is not arbitrary and unreasonable. Once the General Counsel has established a reasonable formula, the burden then falls upon Respondents’ to establish facts which would negate or diminish the existence of liability. *Brown & Root, Inc.*, supra.

On brief the General Counsel points out that collection of backpay for hiring hall applicants is a standard remedy in cases such as the instant one where repudiation of contractual hiring hall procedures is found to be a violation, *American*

Commercial Lines, 291 NLRB 1066 (1988), and *American Commercial Lines II*, 296 NLRB 622 (1989); that a dual remedy, that is backpay for both actual employees and hiring hall applicants, is entirely proper, *Southwest Steel & Supply*, 276 NLRB 1569 (1985), and *Southwest Security Equipment Corp.*, 262 NLRB 665 (1982); that where, as here, a respondent is required to make whole hiring hall applicants, such backpay must be offset by interim earnings, *Pacific Erectors, Inc.*, 256 NLRB 421 (1981); that where gross backpay is offset by interim earnings, a quarterly analysis is always required; and that the Board's language in footnote 11, as described above, of its decision herein that quarterly computations are "unnecessary and unwarranted" refers to where, unlike with the hiring hall applicants, there are no interim earnings.

Respondents, on brief, reiterate the argument made at the outset of the supplemental hearing, namely, that there is no category of hiring hall applicants who are entitled to backpay in this case. Respondents contend that the complaint that issued in this case did not charge the Respondents with having illegally bypassed the hiring hall and there was no evidence introduced at the hearing that Respondents illegally bypassed the hiring hall; that nowhere in the Board's Decision and Order is it mandated that the Respondent pay any backpay other than the difference between what Respondents' employees were actually paid and what Respondents' employees should have been paid under the collective-bargaining agreement in question; that the Respondent has never had an opportunity to litigate any charges against it of having illegally bypassed the hiring hall; and that it would be a denial of due process if Respondents were now found, on the basis of the specification to be liable for backpay because it allegedly illegally bypassed the hiring hall.

As indicated above, Judge Sherman required "Corbett Electric/Bufco" to furnish signed copies of the involved notice to the involved Regional Director for posting by the Union, if it is willing, at all locations where notices to employees who work out of the hiring hall are customarily posted. Judge Sherman explained in her decision that this was for the benefit of those who work out of the Union's hiring hall and would have been referred to jobs with Corbett Electric/Bufco if the bargaining agreements had been honored. Also, as noted above, the Board in its Order in *Bufco Corp.*, supra, 291 NLRB at 1018, required Respondents Corbett Electric Co. and Bufco Corp. to do the following:

- (d) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by International Brotherhood of Electrical Workers, AFL-CIO, Local 16, if willing, in conspicuous places where notices to employees and members are customarily posted.

The Board, in *Bufco Corp.*, supra, affirmed Judge Sherman's ruling, findings, and conclusions to the extent they were consistent with the Board's Decision and Order. In her decision, Judge Sherman made extensive findings regarding the referral of hiring hall applicants, which findings are found in *Bufco Corp.*, supra at 1028 and 1029. Basically, Judge Sherman found that for at least 10 years before October 1983 the bargaining agreements between the Union and Corbett Electric through its assent with the involved employer association

contained clauses that required employer-members of the association to hire employees through the Union's referral service if the Union could provide employees; that prior to 1982, Corbett Electric, pursuant to such clauses, used the Union as a hiring hall to obtain Corbett Electric's employees; and that about January 1983 Corbett Electric/Bufco. refused to recognize the Union or abide by the involved collective-bargaining agreement.

As pointed out by the Board in *Wayne Electric, Inc.*, 226 NLRB 409 fn. 3 (1976), the "[m]ake whole all of its employees in the appropriate unit" used by the judge therein encompasses employees who would have been referred out but for Respondent's misconduct. Additionally, in footnote 3 of its decision the Board in *Wayne Electric, Inc.*, supra, indicated "that a determination as to whether or not there are such employees is best left to the compliance stage of this proceeding." The Board affirmed the rulings, findings, and conclusions of the judge in *W. L. Miller Co.*, 306 NLRB 936 (1992). There Judge Schmidt concluded that the double payment of actual employees and hiring hall applicants in a *John Deklewa & Sons*, 282 NLRB 1375 (1987), situation is always the case. Also, Judge Schmidt, citing *Wayne Electric, Inc.*, supra, pointed out that a make-whole order, issued in the context of a case involving an employer's refusal to abide by a collective-bargaining agreement, encompasses those employees who would have been referred but for the employers' misconduct and it should come as no surprise to Respondent that this approach was adopted in the compliance proceeding. Contrary to Respondents' assertion on brief, there has been no denial of due process. Also, Respondents' reliance as footnote 11 of the Board's decision in *Bufco Corp.*, supra, is misplaced. The Board was referring only to actual employees in its footnote 11.

Respondents ostensibly also misread footnote 11 in the Board's decision herein when they contend that in view of that footnote backpay should be calculated as a total period basis because the Board indicated that "a quarterly computation is unnecessary and unwarranted." On brief, the General Counsel contends that the fact that computing on a whole period may have ultimately, over an extended time period, resulted in the employee breaking even or even coming out ahead regarding backpay is irrelevant; that the employees were still denied the applicable contractual wage rate in a given week and were, therefore, unable to apply a given week's contractual level wages to the living expenses of that same week as they went along; that the purpose of an 8(a)(5) remedy is not only to make individuals whole but also to prevent a respondent from benefiting from its unfair labor practices; that even if an employee would ultimately, at some future point, receive more total wages under a lump sum or whole period approach, he did not receive the contractual wage level at the time it was due and thus Respondents' own weekly cash-flow problems were alleviated at the expense of the employee's weekly cash flow problems; and that Respondents should not be allowed to benefit by having the flexibility to set its own wage levels when such involves a flaunting of its contractual benefits responsibilities. Respondents, on brief, argues that the specification disregards the Board's Order in that not only are quarterly computations referred to in the specification but the computations were actually done on a weekly basis; that weekly computations are even more restrictive when excess payments are made, as has

occurred in this case, than quarterly computations, thereby making the backpay higher in the specification than what it should be; and that the specification does not take into consideration the fact that on a number of weeks, in regard to several of the employees, Bufco Corp. paid in excess of what was required under the union contracts.

While the Board does, in footnote 11 of its decision, indicate that a quarterly computation is unnecessary and unwarranted, no where in its decision in *Bufco Corp.*, supra, does it indicate that the computation should be made on a total period basis or that excess payments by Bufco Corp. in one period should be taken into consideration in the computations regarding subsequent periods. The language in question, viz., "a quarterly computation is unnecessary and unwarranted" comes verbatim from a case the Board cites in the body of its decision, namely, *Ogle Protection Services*, 183 NLRB 682 (1970). There the Board, at page 683 of that decision, concluded as follows:

Notwithstanding that our original Decision and Order in these cases inadvertently specified that the *Woolworth* [*F. W. Woolworth Co.*, 90 NLRB 289 (1950)] formula should be applied in computing the amounts due employees, it seems obvious and we find that the formula has no application in these cases. The Board's *Woolworth* formula was designed to prevent injustices to discriminatees who exercised their obligation to obtain interim employment, by providing that their interim earnings be offset against backpay on a quarterly basis only; otherwise, as described in the *Woolworth* decision itself, there was often a monetary incentive for an employer to delay reinstating an employee who had been discriminatorily discharged, if he had thereafter obtained higher paying interim employment. Other unwanted consequences also ensued. On the other hand, where, as here, the amounts due employees result from Respondents' repudiation and failure to apply the terms of a collective-bargaining agreements, a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay, a quarterly computation is unnecessary and unwarranted. In fact, application of the *Woolworth* formula in these circumstances would result in a windfall to some employees, who would now benefit from having their employer remit their accrued dues to the union, without ever having had these amounts deducted from their pay, solely because of the fortuitous circumstance that they happened not to have been entitled to unpaid contractual benefits for a particular quarter. We see no justification for such a result, and did not intend it. [Emphasis added.]

While it appears that the Board did not believe it was appropriate that the *Woolworth* formula be used with respect to the actual employees who did not have interim earnings, Respondents' arguments that consequently the computations should have been on a total period basis and excesses paid during a portion of the period should be carried over are a stretch. Respondents cite no precedent (Board or judicial) in support of their position and I am not aware of any. I do not believe that any reasonable reading of *Ogle*, supra, would lead one to conclude that what Respondents contend the

Board meant is what the Board actually meant when it indicated that "a quarterly computation is unnecessary and unwarranted."

Regarding the method used in the specification, counsel for the General Counsel contends that compliance took the impartial proper method to whatever end the method resulted in, whether or not backpay was ultimately owed; that a step-by-step procedure was used for each direct employee, namely a preview of the work order ledgers with jobs designated as "R" or "C," the weekly time and distribution report, the earnings record, the applicable contract rates, backpay (if any), fringe benefit funds and applicability to the matching hiring hall applicant; that in determining which "pool" of potential hiring hall applicants to use as "match-ups" to Respondent's direct employees, the Region used only those individuals appearing on the Union's commercial out-of-work referral list because on any given day Respondent's will have an employee perform both commercial and residential work and the only hiring hall applicants who are qualified to perform both types of work are the individuals on the Union's commercial out-of-work/referral lists; that only journeyman hiring hall applicants were used because of the journeyman/apprentice ratio called for in the involved contracts; that the backpay for all direct employees (except Strapp who was elevated for computation purposes to journeyman status in January 1984) was computed at the commercial apprentice/trainee rate when they performed commercial work; that the residential apprentice rate was used when the direct employees performed residential work; that this amounted to a significant concession, money wise, to Respondent because this, in effect, "allowed" Respondent to violate the contractual journeyman-apprentice ratio; that the Region counter balanced this "concession" to Respondent by using only commercial journeymen as hiring hall counterparts or applicants; that the Region relied on Respondent's designation of a given job as residential work or commercial work, and therefore it is not necessary to apply a percentage figure as Respondents' attempt to do in determining how much of the involved work was commercial; that it does not appear that Respondents used their own designation in developing their alternative backpay computations; that the Region ignored, and did not convert to commercial hours, residential hours after the expiration of the residential contract on September 30, 1983; that Respondents' backpay computations are incorrect in that Respondents, on an overall basis, converted commercial hours to residential hours in order to charge itself the cheaper residential-wage rate; that since Bill Corbett testified that when a timesheet says he worked 8 hours, he probably worked 12 hours, the extra 4 unrecorded hours can reasonably be considered and conceded by the Region as the administrative/supervisory hours and thus do not enter the Region's computations; that this still arguably leaves the Region with a full day's worth of unit work to be used in the computation; and that the Respondents, who have already been found by a judge, the Board, and the Seventh Circuit Court of Appeals as violators, should not be allowed to claim both unrecorded hours and at the same time subtract further unknown hours from the 8-hour day as administrative/supervisory, thus lessening the Board's computations of unit work they performed; and that the Region's approach, as explained at the hearing herein, is the most reasonable and accurate statement of Respondent's

compliance obligation. Respondents, on brief, argue that Newman Corbett, Timothy Stewart, and Roger Hart did not perform unit work and therefore Respondents have no obligation to pay any backpay to such individuals or their alleged counterparts; that while Respondents stipulated to (1) the residential wage rates and the commercial wage rates as used for Respondents' actual employees who performed unit work and (2) the number of hours worked by Respondent's employees performing unit work, it denied that the aforesaid employees performed unit work and also denied that Respondent's employees worked the number of commercial hours alleged in the specification; that there is no proper basis for using the commercial journeyman rate for the purported hiring hall counterparts; that it is absurd to take the position that backpay be computed on a commercial journeyman basis even on residential work; and that it is not logical to maintain that a commercial journeyman electrician is the "counterpart" of an apprentice electrician.

As noted above, the General Counsel has the burden of establishing as nearly as possible what the employees would have earned but for the unlawful conduct of the Respondents. A wide range is accorded the fashioning of a formulae provided it is reasonably designed to produce approximations and it is not arbitrary and unreasonable. It has not been shown that the approach taken by the Region here is arbitrary or unreasonable. Indeed the Charging Party disagreed with the specification to the extent it considers interim earnings of hiring hall applicants since, as the Charging Party pointed out, there were always members available to be referred out. Under the circumstances extant here, in my opinion the Region's approach is reasonable. Respondent's therefore have the burden to establish facts which would negate or diminish the existence of liability. With respect to Respondent's assertion that certain actual employees, namely Newman Corbett, Hart, and Stewart (and their hiring hall counterparts), should not be included in the specification because they did not do bargaining unit work, it is noted that in advancing this position Respondents rely almost exclusively, on the testimony of Bill Corbett. None of the employees were called by Respondents to testify herein that they did not do bargaining unit work. And with respect to Newman Corbett, other than Bill Corbett no one with personal knowledge testified that he did not do bargaining unit work. There are a number of problems with relying on the testimony of Bill Corbett regarding whether certain actual employees did bargaining unit work. First, Bill Corbett has a lot at stake in this matter. Second, Judge Sherman did not credit certain of Bill Corbett's testimony concluding, regarding one document, that it was executed almost 1 year after Bill and Mark Corbett "set their hands and seals" that it was executed the year before. Third, much of the testimony of Bill Corbett was elicited by Statham with leading questions. Forth, Bill Corbett was supposedly just an employee at Bufco Corp. when these specified employees worked for that company. Fifth, supposedly Bill Corbett worked away from the Evansville area for a time after his son Mark became president of Bufco Corp. and one must therefore wonder how he was in a position to know who was doing what on Respondents' jobs in the Evansville area. Sixth, I did not find Bill Corbett to be a credible witness. I would not rely on his testimony unless it was corroborated by a reliable witness. Also, one must wonder why the president of Bufco Corp. at the in-

volved time, Mark Corbett, did not testify in this hearing about whether these specified employees did bargaining unit work. It is noted that when Bill Corbett worked away from the Evansville area Mark Corbett ran the jobs in this area. It is also noted that according to footnote 9 in Judge Sherman's decision herein Mark Corbett testified that certain employees might perform electrical work. It appears that Stewart was included by Mark Corbett in this group. See transcript pages 380 through 385 in the underlying unfair labor practice hearing. It does not appear that Mark Corbett specifically excluded the two other employees in question from the group who might perform electrical work. With respect to whether work was commercial or residential, the Region was relying on the characterization provided by Respondents. Bill Corbett sponsored and explained Respondents' alternative to the specification which alternative was based on his recalculation of commercial versus residential hours. As concluded above, the Region's approach, in the circumstances existing here, is reasonable in my opinion. Respondent's alternative, in my opinion, is neither reliable nor accurate.

Respondents, on brief, contend that they should not be required to pay interest in this case, most certainly during the number of years that it took the Region to issue the specification. Judge Joan Wieder in *Rainbow Coaches*, 280 NLRB 166, 168 (1986), pointed out as follows:

The National Labor Relations Act requires the wrong-doer "to bear the risks of uncertainty, as to the extent of the consequences ascribable to their own actions." *Electrical Workers UE v. NLRB*, 426 F.2d 1243, 1251-1252 (D.C. Cir. 1970), cert. denied 400 U.S. 950 (1970). As the Court noted, in *Bigelow v. RKO Radio Pictures*, supra, 327 U.S. at 265, "The most elementary conceptions of justice and public policy require the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." See further *NLRB v. Katz*, 369 U.S. 736 at 748 fn. 16 (1962), and citations contained therein.

The region was faced with a complex task. Under the existing circumstances the Region acted in a reasonable manner. Respondents created the situation. They, and not innocent discriminatees, should suffer the consequences of Respondents' unlawful conduct.

With respect to the amended specification, the General Counsel, on brief, contends that the principals in this case have already been found to have engaged not only in unfair labor practices but also in efforts to avoid the consequences of those unfair labor practices through the use of an alter ego; that as observed by the court in *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990), at fn. 2:

Sometime prior to 1983, the familial and corporate patriarch Bill Corbett transferred ownership of Bufco to his wife and son. . . . Since the Company does not challenge the Board's conclusion that Bufco is the alter ego of Corbett and that the two should be treated as a single employer within the meaning of the Act, we will not waste ink on a boring recitation of Corbett's sophomoric attempt to use a corporate shell to avoid contractual liability. . . .[:]

that such Respondents should not be given the benefit of the doubt in the transactions described below; that the principals of Bufco and Marbeck (Bill, Lucinda, and Mark Corbett) have clearly shown, in the switch from Corbett Electric to Bufco to Bufco/Marbeck, a motivation and desire to evade statutory or contractual liabilities and duties under the Act and to escape the reach of the Board's remedies; that the timing of certain transactions, financial manipulations and dissipations of assets by the Corbett family, and certain other corporate actions are damaging to Respondent's position herein; that on May 31, 1984, Judge Sherman issued her decision finding unfair labor practices and alter ego status and Respondents then exercised their exceptions/appeal rights; that on December 31, 1987, and January 7, 1988, after issuance of the administrative law judge's decision but prior to the Board's decision, Bufco paid bonuses of \$30,000 and \$10,000, respectively, to Bill W. Corbett and Mark Corbett; that Bill Corbett, in his affidavit to the Board (G.C. Exh. 73) vaguely acknowledged that these bonus payments were "unusual" since few bonuses had been paid to corporate officers since 1980; that on November 30, 1988, the Board issued its decision in the unfair labor practice case and at about the same time that the Seventh Circuit issued its notice in November 1989, setting oral argument for a January 16, 1990 date, Lucinda Corbett received a \$20,000 bonus check from Bufco; that on January 16, 1990, oral arguments on Respondent's appeal of the Board's decision were held before the Seventh Circuit and a mere 2 weeks later, on January 31, 1990, Bufco paid \$50,000 in "back rent and interest" to Bill W. Corbett, as sole proprietor d/b/a Marbeck Development; that the involved rental receipt journal does not indicate when, if ever, the alleged back rent accrued, and there is no specific record of the \$50,000 receipt in the journal; that prior to Bill Corbett's request for back rent in late 1989, no documents existed which indicated that Bufco owed Marbeck II more rent than actually had been paid; that on February 20, 1990, Bufco paid Southern Farms Bureau Insurance Co. \$1,250 for life insurance on Bill W. Corbett as a corporate officer, although he was not an officer at the time; that on April 4, 1990, the Seventh Circuit issued its opinion and judgment enforcing the Board's order; that on May 31, 1990, soon after entry of the court's judgment, Bufco paid \$18,470 by check to Mark Corbett which check was promptly endorsed by Mark and by Lucinda Corbett and deposited into Bill and Lucinda Corbett's personal account, to which account Mark Corbett is not a party; that all Corbett family members acknowledged that, although Bill W. Corbett has not been an officer or director of Bufco since 1982, he was participated in all significant financial and management decisions, including the payment of bonuses; that on June 30, 1990, Bufco wrote off a Marbeck II debt of \$41,381.13; that Marbeck's rent receipt journal (G.C. Exh. 49) does not detail this transaction; that the transactions outlined above demonstrate a systematic effort by Bufco, Corbett Electric, Mar Beck, Inc. and the individual Respondents to dissipate corporate assets and to funnel them to Bill W. Corbett and his family as a means of avoiding their backpay liability under the court's April 4, 1990 judgment; that time and time again, as Respondent lost its case at each level and/or as the procedural steps in the case intruded upon the consciousness of the Corbetts, they sought to take unprecedented large chunks of money out of the Bufco corporate entity, in what were cer-

tainly nonarm's length transactions; that there is evidence from Respondent's own witnesses of other indicia of alter ego status, in addition to the above, which support a piercing of the corporate veil and a finding of liability against all the entities and individuals involved; that large amounts of money passed freely back and forth between the entities and individuals; that the Mar Beck, Inc. and Marbeck Development bank accounts and financial statements are combined with respect to assets owed by Bill and Lucinda Corbett; that the Marbeck-Bufco lease is of a most unusual nature in that it is based on gross sales; that Bufco paid the personal medical expenses of Mark Corbett's wife; that Bill Corbett admitted that Bufco charges Marbeck less on certain jobs Bufco performed for Marbeck than it did other customers, because as Corbett stated, "[S]ince I (i.e., Bufco) was paying for it"; that the suspicious and unprecedented nature of the January 31, 1990 \$50,000 Bufco rent payment to Marbeck is heightened by Lucinda Corbett's testimony that she does not know why the \$50,000 was sought at that particular time and Bill Corbett's testimony that he did not know and could not guess when the in-house decision was made to approach the CPA about figuring the amount of "back rent" he (Bill Corbett) could take out of Bufco; that based on the transcript and exhibits as a whole, Respondents are in an alter-ego relationship, have freely intermingled assets, functions, authorities, control, and ownership; that the above financial transfers, "back rents" and "bonuses" are motivated by a desire to evade remedial financial liabilities, and that ample evidence exists to "pierce the corporate veil" herein and hold each and all Respondents liable for the financial remedies in this case; and that based on the above and on the record as a whole all named Respondents should jointly and severally be held liable for the financial remedy herein. Respondents, on brief, argue that Bufco Corp. has been a legally formed and existing corporation under the laws of the State of Indiana; that Bufco has maintained a bank account, which has been properly maintained; that Bufco has maintained appropriate and detailed accounting records of all its business transactions and reputable and experienced certified public accountants have overseen, supervised and participated in the recording and maintenance of such accounting records in accordance with proper standard accounting practices; that Bufco's certified public accountants have regularly prepared and maintained detailed and appropriate financial statements of Bufco's business affairs and financial status and have prepared appropriate income tax returns which have been timely filed; that Bufco Corp. did not pay any of its managerial employees, officers, or directors any excessive compensation or benefits of any kind; that at no time during the time in question has Bufco Corp. paid any dividends to its stockholders; that since Bufco Corp. began engaging in the electrical contracting business, Bill Corbett has not been a shareholder of Bufco Corp., nor was he an officer and director before August 31, 1992; that the average compensation paid by Bufco Corp. to the Corbetts for the aforesaid years, including the bonus payments, was \$39,266.62 to Bill; \$39,292.22 to Mark; and \$15,118.55 to Cindy; that the total compensation to Bill and Mark by Bufco was less than what a commercial journeyman electrician would earn, as aforesaid, even though Bill and Mark are very experienced commercial journeymen electricians and project managers and that in addition to performing "hands-on" commercial journeymen electrical work,

they also performed work as project managers and superintendents on the Bufco Corp. projects, there being no other project managers, superintendents, or foremen employed by Bufco Corp. during the time in question; that there were appropriate meetings of the stockholders and directors of Bufco at which such bonus payments were considered and approved, with appropriate minutes of such meetings being maintained in the corporate minute book; that there was no evidence, and no reasonable "inference" can be made that such bonus payments were made for any devious purpose, such as to "dissipate" or "siphon off" Bufco's assets; that on December 15, 1992, a written lease was entered into between Bufco Corp. and Bill, d/b/a Marbeck Development Company, of the premises which Bufco Corp. began using for its operations as an electrical contractor and which it has continued to use for such purposes to the present time; that the lease provided for a rental of 2.5 percent of annual gross sales, which, while unusual in the circumstances existing here, is not an unheard of method for the calculation of rental payments; that the stockholders and directors of Bufco Corp. had corporate meetings at which it was determined that the sum of \$50,000 should be paid by Bufco Corp. to Bill, in partial payment of the rental obligation to him, and proper minutes were prepared of the meeting and placed in the minute book of the corporation; that thereafter, upon the advice of Forbes, the stockholders and directors of Bufco Corp. determined that a \$41,381 receivable of Bufco Corp. from Marbeck Development should be applied as a payment on the unpaid back rent, and such was done; that as established by the aforesaid commercial real estate appraiser, the amount of the total rent paid by Bufco Corp. to Bill during the period of time in question was reasonable on the basis of rent that is paid for comparable properties in Evansville during the time in question; that under Indiana law, another remedy that a landlord has against a tenant who fails to pay the full amount of rent owed by the tenant under a written lease, is to make a claim against the tenant for the unpaid rent plus interest thereon; that within a period of months, Bufco Corp. completely paid off the \$40,000 which it took out within weeks of paying \$50,000 in back rent and interest; that since 1990, Bufco Corp. has continued to fail to pay the full amount of rent required under the written lease and at the time of the hearing there was a large obligation of Bufco Corp. to Bill for the unpaid rent; that it can hardly be maintained that Bill is "siphoning off" or "dissipating" the assets of Bufco Corp., because if Bill Corbett had any intent to do so he would certainly have legal means of doing so; that Bill Corbett has even continued to loan his personal funds to Bufco Corp. to keep it in operation; and that the evidence establishes that none of the additional Respondents have any obligation for the backpay owed by Bufco Corp. in this case.

The Board in *White Oak Coal Co.*, 318 NLRB 732, 732-735 (1995), reexamined the principle of "piercing the corporate veil" and imposing personal liability on individual shareholders. The Board concluded as follows:

We conclude that the corporate veil may be pierced when: (1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

Under Federal common law, the corporate veil may be pierced when: (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.²¹

When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled.²² Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of same or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes;²³ and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice, or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found.

²¹*NLRB v. Greater Kansas City Roofing*, supra [2 F.3d 1049 (10th Cir. 1993), denying enf. in pertinent part of 305 NLRB 720 (1991)] at 1052.

²²*Id.*

²³*Id.*

As noted by the court in *NLRB v. Bufco Corp.*, supra, Respondent therein did not challenge the Board's determination that Bufco is the alter ego of Corbett and that the two should be treated as a single employer. The court also referred to Bill Corbett as the familial and corporate patriarch. In my opinion, throughout the period involved herein Bill Corbett was fully in charge of all of the Corbett family closely held corporations. Bill Corbett, in my opinion, had final say with respect to any meaningful decision made by Bufco Corp. even during that period when he was allegedly not an officer of the corporation.

In my opinion Bill Corbett, Lucinda Corbett, and Mark Corbett and all of the Respondent companies owned and controlled by the Corbetts, as described above, should be jointly and severally liable for the involved remedial and backpay obligations. While it appears that Bill Corbett throughout the

period involved was the final decision maker, the other involved individuals, namely Lucinda Corbett and Mark Corbett, were willing participants.

The Corbetts were responsible for the involved unfair labor practices. They owned and controlled the corporate alter egos. They misused the corporations in their attempt to avoid the legal obligations of the involved collective-bargaining agreements. They also misused Bufco Corporation in that they dissipated corporate assets for their personal gain in an attempt to avoid the consequences of their refusal to fulfill their legal obligations.

Most of the dissipation occurred with the use of the "lease" between Marbeck Development Company and Bufco Corp. The Respondents introduced the minutes of Bufco Corp. Included therein is a minute dated April 24, 1975, which speaks to the transfer of 2305-07 North Kentucky from Bill Corbett to the corporation (Bufco Corp.) at cost with a mortgage thereon. No explanation is given in this proceeding as to how Bill Corbett doing business as Marbeck Development Company could legally collect back rent in 1990 from Bufco Corp. on property which, according to the April 24, 1975 minute, was already transferred to Bufco Corp. It is noted that documents introduced herein list the involved real property as an asset of Bill Corbett after 1975. Assuming *arguendo* that Bill Corbett d/b/a Marbeck Development Company did have title to the land in 1982 and thereafter, consideration must be given to Mark Corbett's testimony, which was elicited on November 1983, in the underlying unfair labor practice proceeding herein, that although it is indicated in the "lease," General Counsel's Exhibit 46, "IN WITNESS THEREOF: The parties hereto set their hands and seals on the 15th day of December, 1982," (emphasis in original), the lease was not signed until "several weeks" before he testified in November 1983. Respondent's attorney at that hearing withdrew his motion to introduce the lease into evidence. From 1983 until 1990 no attempt was made to enforce the provisions of this "lease" with respect to how much was owed under its terms. From 1983 to late 1989 the accountant of Bill Corbett and Marbeck Development Company and Bufco Corp. did not even know of the existence of the "lease." Consequently he made no provision in the involved financial statements for the fact that allegedly Bufco Corp. was paying less each year than what it owed under the terms of the "lease." In other words, pre-1989 balance sheets for Bufco Corp. do not show any accrued rent under current liabilities. The \$50,000 back rent and interest allegedly owed pursuant to the lease was not paid until January 31, 1990, 15 days after this case was argued before the United States Court of Appeals for the Seventh Circuit. As noted above accountant Forbes testified that, with respect to the \$50,000 back rent and interest, Bill Corbett said at that time that there would be money available to be taken out. However, 12 days after the \$50,000 check was issued, Bufco Corp.'s board of directors and stockholders met and authorized the borrowing of \$40,000 "for the business operations of the corporation." Accountant Forbes was not aware of this loan at the time it was taken out. And contrary to Respondents' assertion on brief, this loan was not completely paid off within a period of months. Forbes testified credibly that it took years; that, with renewals, it was paid off in June 1992. See Respondents' Exhibit 37. Five months after the first back rent plus interest payment was

made Bufco Corp. paid an additional \$41,381 in back rent and interest to Marbeck Development Company. This amount was originally owed by Marbeck Development Company to Bufco Corp. Assuming *arguendo* that the latter owed the former back rent and interest, the latter did not receive the full benefits of this write off for as Bill Corbett testified Bufco Corp. charged Marbeck Development Company less than it charged other customers of Bufco Corp. for work done for them. In other words there was a failure to maintain an arm's-length relationship. In addition to the \$40,000 above-described loan which was not fully paid off yet, as indicated by the minutes of Bufco Corp. it was authorized to borrow a total of \$24,600 (\$14,600 from Bill Corbett) in the 12-month period following the \$41,381 back rent payment and it repaid Bill Corbett \$6600.

The real property "lease" is a sham. It was an afterthought which was signed just before the unfair labor practice hearing herein and backdated. No attempt was made for 6 years to comply with its terms regarding rent. It is not an instrument memorializing an arm's-length transaction. Rather the document, for what ever it is worth legally, has been used to dissipate the assets when Respondents realized that they were about to be faced with backpay. The declaration that Bufco Corp. was in a financial position to pay \$91,381 in back rent and interest in a 5-month period rings hollow in view of what Bufco Corp.'s directors and shareholders were authorizing it to borrow during this period and the 1 year following the \$41,381 backrent payment.

If this dissipation during this period was not enough, Bufco Corp. by minutes dated May 30, 1990, authorized the payment of \$18,470 to Mark Corbett. The minutes indicate that "at the present time, the corporation has sufficient funds to pay such bonus." As indicated above, Bufco Corp. did pay Bill Corbett a bonus in 1975. So there is a past practice of paying a bonus before the involved unfair labor practices occurred. But for two reasons the 1975 bonus demonstrates that this \$18,470 1990 bonus and other of the involved recent bonuses were not true bonuses. First the 1975 bonus was authorized by a minute dated December 15, 1975, and it was to be paid on or before March 15, 1976. Bufco Corp.'s financial statements are done on a calendar year basis with the business year ending on December 31 of each year. In other words, this would be an end of the year bonus. Toward the end of the business year, a company would know how well it had done and whether it could afford to pay a bonus. Second, as noted above, in 1975 the directors and stockholders of Bufco Corp. did not have to authorize the corporation to borrow money. Bufco Corp.'s minutes show that during 1989 it was authorized to borrow money. And as noted, it did not totally repay the February 1990 loan until June 1992. Bufco Corp. was not in a financial position to give this mid-year \$20,000 before taxes (\$18,470 after taxes) bonus to Mark Corbett. The way this bonus was handled also raises two other questions. Why was it entered in the payroll records under the date April 1, 1990? This was not a simple mistake, i.e. taking a May 30, 1990 entry and mistakenly entering it as an April 1, 1990 entry. Here the entry was made in the April 1990 portion of the payroll records. Was it because these was not an open line available for a May 30, 1990 entry? Also, no explanation was offered for why, if this was a bonus to Mark Corbett, he endorsed it over to be deposited in Bill and Lucinda's joint bank account.

By taking the above-described approach the Corbetts have been bleeding Bufco Corp., infusing, at the same time, just enough borrowed blood to keep the corporation alive or solvent. Also, corporate funds were used to pay the life insurance on Bill Corbett as an officer of Bufco Corp. when he was not, according to his own testimony, an officer of Bufco Corp. And corporate funds were used to pay for the medical expenses of Mark Corbett's wife when she delivered, assertedly because it was a mistake that such coverage was not included in Mark Corbett's Bufco Corp. medical insurance.

The Corbetts misused Bufco Corp. both with respect to Corbett Electric Company Inc.'s legal obligations regarding the involved collective-bargaining agreements and with respect to the Corbett's attempt to avoid the consequences of their unlawful conduct. The Corbetts failed to maintain an arm's-length relationship between themselves and the related corporate entities under their control. In these circumstances it must be concluded that such unity of interest, and the lack of respect given by the Corbetts to the separate corporate identities, that the personalities and assets of these corporations and the Corbetts effectively have been blurred.

The Corbetts blurring of separate corporate identity, and their misuse of the corporations they control and their misuse of corporate assets is unfair, unjust, and has resulted in an evasion of the remedial and backpay obligations for unfair labor practices that the Corbetts have committed. The natural, foreseeable, and inevitable consequences of the Corbett's misuse of corporate assets, is the diminished ability of the corporate alter egos to satisfy the involved statutory remedial obligations. Accordingly, in my opinion the corporate veil should be pierced and Bill Corbett, Lucinda Corbett, and Mark Corbett, along with the entities they own and control, as described above, should be jointly and severally liable for the involved remedial obligation under the Act.

ORDER⁵¹

Respondents Bufco Corp., Corbett Electric Company, Inc. and its alter egos Marbeck, Inc., Bill W. Corbett, Lucinda Corbett, and Mark Corbett, and Bill W. Corbett, Lucinda Corbett, and Mark Corbett, individually, are hereby ordered to pay the persons listed in the appendix hereto the amounts

⁵¹If 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.

set forth opposite their names, together with interest, computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), with interest on or after January 1, 1987, computed at the short-term Federal rate "for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. §6621, and with interest an amounts which accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. §6621), computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

APPENDIX

Bufco Employees

Timothy Bunte	\$10,004
Newman Corbett	438
Daniel Edwards	1,847
Roger Hart	179
Gary Johnson	1,517
Patrick Reisinger	227
Harold Roeder	4,509
Clifford Russell	1,083
Timothy Stewart	124
Tom Strupp	16,595
Jeffrey Walts	1,331
Kevin Wimpelberg	5,077
Total	<u>\$42,931</u>

Hiring Hall Applicants

John Brady	\$334
Donald Canfield	6,307
Danny Dorris	2,277
Grover Hammonds	5,231
Alan Helm	4,669
Michael Kemp	2,268
Bill Kern	4,119
Clyde Leonard	12,156
James McGehee	15,663
Everett Pace	10,508
Harley Ring	13,532
Jesse Sampson	1,646
Alan Scott	6,381
Lawrence Whitted	8,534
Total	<u>\$93,625</u>
	\$136,556