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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

RAYMOND INTERIOR SYSTEMS

and

Case 21-CA-37649

**SOUTHERN CALIFORNIA PAINTERS AND
ALLIED TRADES, DISTRICT COUNCIL NO.
36, INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES AFL-CIO**

**UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL
UNION 1506**

and

Case 21-CB-14259

**SOUTHERN CALIFORNIA PAINTERS AND
ALLIED TRADES DISTRICT COUNCIL NO.
36 , INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO**

and

**SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA**

(Party in Interest)

**RESPONDENT RAYMOND INTERIOR SYSTEMS' BRIEF IN SUPPORT OF
EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE BURTON LITVAK**

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 1. The ALJ erred in not finding that the application of Section 7(g) of
 the 2006-2010 Carpenters Agreement created an 8(f) agreement as
 to the drywall finishing employees and erred in finding that
 Raymond violated Sections 8(a)(1), (2) and (3) because Raymond
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 7(g) of the 2006-2010 Carpenters Agreement to such employees
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 2. The ALJ erred in not finding that the parties Confidential
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 D. Even if the ALJ’s findings that, on October 2, 2006, Raymond violated
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 Zorrero’s alleged unlawful statements, and that Raymond violated Sections
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Republic Steel Corp. v. NLRB,
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1 Respondent Raymond Interior Systems (“Raymond”) files this brief in support of the
2 exceptions filed by Raymond to the Decision of Administrative Law Judge Burton Litvak
3 [JD(SF)-47-08] issued on November 10, 2008 in Cases 21-CA-37649 and 21-CB-14259.

4 **I. INTRODUCTION**

5 This case presents important issues about how an employer and a union in the
6 construction industry enter into a Section 8(f) relationship for a new group of employees, where
7 some of the employer’s employees are already covered by a Section 9(a) multi-employer
8 agreement and how such a Section 8(f) agreement is then converted to a Section 9(a) agreement.
9 Here, Raymond had an 8(f) collective bargaining agreement covering a unit of drywall finishing
10 employees. After this Painters agreement was lawfully terminated and expired on September 30,
11 2006, Raymond and the Carpenters on October 1 covered this bargaining unit on an 8(f) basis
12 under a pre-existing multi-employer 9(a) agreement to which Raymond was signatory. After the
13 Carpenters obtained majority support among Raymond’s drywall finishing employees, Raymond
14 then recognized the Carpenters’ 9(a) status on October 2 and the parties covered these employees
15 under a 9(a) agreement.

16 In the Consolidated Complaint, Counsel for the General Counsel sought to invalidate the
17 application of Carpenters agreement to the drywall finishing employees by contending it was a
18 product of violations of Sections 8(a)(1), (2) and (3). The Administrative Law Judge (“ALJ”)
19 agreed with the General Counsel’s contentions and found violation of 8(a)(1), (2) and (3). In
20 finding violations of the Act, the ALJ committed numerous errors, as set forth below. One of the
21 ALJ’s fundamental errors was that he attempted to apply accretion doctrine principles from the
22 industrial setting to the construction industry where non-majority, pre-hire agreements are lawful
23 and proper under Section 8(f). Because the General Counsel did not establish that Raymond
24 violated Sections 8(a)(1), (2) and (3) as alleged in the Complaint as noted below, and the ALJ’s
25 findings pertaining to these violations are not supported by the record, the Complaint must be
26 dismissed in its entirety on the following grounds:

27 First, the ALJ found that Raymond violated 8(a)(1), (2) and (3) on October 1, 2006 by
28 covering the drywall finishing employees under a 9(a) agreement and the ALJ did so even though

1 the Complaint did not allege that Raymond violated the Act at any time other than October 2,
2 2006. Aside from finding violations not alleged in the Complaint, the evidence did not support
3 the ALJ's findings. Rather, the evidence established that Raymond's drywall finishing
4 employees had been previously covered by a Section 8(f) agreement with the Painters, and upon
5 expiration of this agreement became covered on October 1 by an 8(f) agreement between
6 Raymond and the Carpenter. As a result, Raymond did not violate 8(a)(1), (2) and (3) as found
7 by the ALJ.

8 Second, the ALJ found that Raymond violated 8(a)(1) and (2) by granting the Carpenters
9 recognition on October 2, 2006 as the exclusive Section 9(a) bargaining representative of the
10 drywall finishing employees at a time when the Carpenters did not represent an uncoerced
11 majority of these employees. The record evidence, however, establishes that, on October 2, the
12 Carpenters obtained authorization cards from a majority of Raymond's drywall finishing
13 employees and that Raymond granted the Carpenters recognition on the basis of that card-
14 showing. The General Counsel did not contest the sufficiency of the Carpenters' authorization
15 card-showing and did not contend that the Carpenters did not possess authorization cards from a
16 majority of Raymond's drywall finishing employees. Rather, the General Counsel's attack on the
17 Carpenters' majority authorization card showing and the ALJ's findings of violations of the Act
18 are predicated on the ground that the cards were tainted or coerced as a result of allegedly
19 unlawful statements made at the October 2 meeting by Raymond's CEO, Travis Winsor, and its
20 General Superintendent Hector Zorrero to the effect that drywall finishing employees had to sign
21 Carpenters membership cards that day. However, the General Counsel failed to establish that
22 such unlawful statements were made and the preponderance of the evidence does not support the
23 ALJ's credibility findings on which such violations were based.

24 Even assuming arguendo that the evidence supported the ALJ's findings that Mr. Winsor
25 and Mr. Zorrero made the unlawful statements attributed to them, there is insufficient evidence
26 that their purported statements about union membership tainted the authorization cards collected
27 by the Carpenters on October 2 on which their majority claim is based. This is so because, as
28 found by the ALJ, the alleged unlawful statements concerned Carpenters membership cards, and

1 not to the authorization cards the Carpenters were soliciting. In fact Mr. Winsor and Mr. Zorrero
2 were completely unaware that authorization cards were being solicited so their comments were
3 not made in connection with such authorization cards. Moreover, the ALJ's finding that the
4 Carpenters authorization cards were tainted by Mr. Winsor's and Mr. Zorrero's statements is pure
5 speculation and not supported by the testimony of any witness, even though it was the General
6 Counsel's burden to prove that the authorization cards collected by the Carpenters were tainted.

7 Third, even if the ALJ's findings of violations by Raymond and the Carpenters were
8 correct, the ALJ's recommended Remedy, Order and Notice to Employees is unwarranted to the
9 extent they require Raymond to cease and desist from adhering to or recognizing the Carpenters
10 as the collective bargaining representative of the drywall finishing employees under a valid pre-
11 existing 8(f) agreement covering such employees or to jointly and severally reimburse such
12 employees for any dues deducted pursuant to the union security provision of such 8(f) agreement.

13 Fourth, even if the ALJ's findings are adopted in total by the Board, the ALJ's
14 recommended Remedy and Order are unwarranted to the extent that it forever precludes
15 Raymond from recognizing the Carpenters as the limited 9(a) representative of the drywall
16 finishing employees or forever precludes Raymond and the Carpenters from entering into an 8(f)
17 agreement covering such employees. Because Raymond is a construction industry employer, the
18 Act and applicable precedent permit Raymond and the Carpenters to enter into an 8(f) agreement
19 covering the drywall finishing employees even in the absence of a Board election establishing the
20 Carpenters as the 9(a) representative of these employees. For the Board to adopt the ALJ's
21 recommended Remedy and Order to preclude Raymond and the Carpenters from entering into an
22 8(f) agreement after each has otherwise complied with remedial provisions of the ALJ's decision
23 is neither compelled nor warranted.

24 As stated above, this is an important case which affects the ability of unions and
25 employers in the construction industry to cover new groups of employees under pre-existing
26 multi-employer Section 9(a) agreements where this is done on a Section 8(f) basis. Pursuant to
27 the language of the Carpenters Drywall/Lathing Master Agreement and the Confidential
28 Settlement Agreement, Raymond and the Carpenters lawfully agreed to apply the Carpenters

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1 Agreement to the drywall finishing employees upon the expiration of the Painters Agreement.
2 This conduct, which allowed the drywall finishing employees to be covered by a union agreement
3 giving wage increases and improved benefits, should be encouraged, not found violative of the
4 Act. Applying the Carpenters Agreement to the drywall finishing employees on October 1 on a
5 Section 8(f) basis did nothing to take away the employees' free choice to select a bargaining
6 representative. If the Painters or the employees wanted to challenge the Section 8(f) agreement,
7 they could have filed a representation petition.

8 Congress specifically allowed non-majority, pre-hire agreements in the construction
9 industry. "In the body of Section 8(f) Congress expressly authorized the negotiation, adoption,
10 and implementation of collective bargaining agreements in the construction industry without
11 initial reference to the union's actual majority status. . ." John Deklewa & Sons, 282 NLRB
12 1375, 1380 (1987) enfd. sub nom, Iron Workers Local 3. v. NLRB, 843 F.2d 770 (3rd Cir. 1988),
13 cert denied, 488 U.S. 889 (1988). The ALJ's hyper-technical misreading of the law under Section
14 8(f) and 9(a) of the Act misapplies non-construction Section 9(a) accretion cases to the pre-hire
15 construction industry Section 8(f) setting. If not overturned, the ALJ's decision would
16 unreasonably hinder employers and unions in the construction industry from applying pre-
17 existing multi-employer agreements to new groups of employees on a Section 8(f) basis, contrary
18 to Board precedent. Deklewa, supra, n. 30; Comtel Systems Technology, Inc. 305 NLRB 287
19 (1991).

20 Furthermore, the ALJ's decision erroneously invalidates as "tainted" a Section 9(a)
21 collective bargaining agreement entered into after authorization cards were collected from a
22 majority of Raymond's drywall finishing employees on October 2. As discussed herein, the
23 testimony about purportedly coercive statements by Raymond supervisors is garbled,
24 contradictory, incredibly weak, and credibly rebutted by numerous witnesses. But beyond that,
25 finding the authorization cards contaminated by purported comments made about union
26 membership cards (a completely different document) is preposterous and completely speculative.
27 Not one witness testified that he signed a union authorization card because of allegedly coercive
28 statements by Raymond supervisors. If allowed to stand this decision will simply foster more

1 unscrupulous challenges to valid Section 9(a) agreements thwarting the free choice of a majority
2 of employees.

3 Finally, the ALJ's proposed remedy prohibiting Raymond and the Carpenters from ever
4 entering into a Section 8(f) pre-hire agreement imposes a "life sentence" on Respondents, which
5 is directly at odds with Section 8(f) of the Act, which allows construction industry employers and
6 unions to enter into such agreements and is punitive, not remedial.

7 For the foregoing reasons, Raymond requests that the Board sustain its exceptions to the
8 Decision of Administrative Law Judge Burton Litvak and modify his findings, conclusions of
9 law, recommended Remedy, recommended Order, recommended Notice to Employees, and
10 recommended Notice to Members, accordingly.

11 **II. FACTUAL SUMMARY**

12 **A. Raymond's Operations.**

13 Raymond Interior Systems is engaged in the construction industry as a specialty wall and
14 ceiling contractor, and performs drywall, metal stud framing, drywall finishing, lathe and
15 plastering work. In October 2006, Raymond employed 579 construction employees working out
16 of its Orange and San Diego facilities, with 224 framing and drywall hanging employees and 55
17 drywall finishing employees employed at the Orange facility and 127 framing and drywall
18 hanging employees and 55 drywall finishing employees employed at its San Diego facility.
19 Raymond's framing and drywall hanging employees are represented by the Carpenters and its
20 drywall finishing employees had been represented by the Painters prior to the September 30, 2006
21 expiration of the Painters Section 8(f) agreement. (ALJD 4:29-38, Tr. 361:8 to 362:15)¹

22 **B. Collective Bargaining history prior to October 2, 2006 and events**
23 **surrounding termination of the Painters Agreement.**

24 Since the 1960's, Raymond has been an employer-member of the Western Wall and

25
26 ¹ References to the transcript will be designated as (Tr. __). References to the Decision of the
27 Administrative Law Judge will be designated as (ALJD __). References to Counsel for the General
28 Counsel Exhibits will be referenced as "G.C. Ex." followed by the exhibit number, references to
Respondent Raymond's Exhibits will be referenced as "Resp. Er. Ex" followed by exhibit number, and
references, if any, to Respondent Carpenters Exhibits will be referenced as "Resp. Un. Ex" followed by
exhibit number.

1 Ceiling Contractors Association, Inc. (“WWCCA”), a multi-employer association comprised of
2 companies performing work in the building and construction industry similar to that of Raymond.
3 The WWCCA is structurally divided into several “conferences,” each of which negotiates,
4 executes, and enforces collective-bargaining agreements with a particular labor organization on
5 behalf of the WWCCA employer-members, who belong to the conference. Employer-member of
6 the WWCCA “Finisher’s Conference” negotiated successive collective-bargaining agreements
7 with the Painters and employer-members of the “Drywall/Lathing Conference”² negotiated
8 agreements with the Southwest Regional Council of Carpenters on behalf of its affiliated local
9 unions, including Respondent Carpenters. (ALJD 4:38-41)

10 By virtue of its membership in the WWCCA’s California Drywall/Lathing Conference,
11 Raymond has been signatory to multi-employer agreements between the WWCCA and the
12 Carpenters since the 1960’s. (ALJD 4:47 to 5:4) The most recent Carpenters agreement to which
13 Raymond has been party is the Southern California Drywall/Lathing Master Agreement between
14 the WWCCA and the Carpenters effective from July 1, 2006 to June 30, 2010. The 2006-2010
15 Carpenters Agreement covers drywall finishing (or wet wall finish) work and such work has been
16 covered under the Carpenters agreements with the WWCCA since 1988. (ALJD 5:16-40) This
17 agreement contains the following language:

18 “VOLUNTARY RECOGNITION AGREEMENT

19 ***

20 (a) On behalf of each Contractor signatory hereto, the Association, having received
21 from the Union a demand or request for recognition as the majority representative
22 of the unit employees covered by this collective bargaining agreement; and having
23 been presented or having been offered to be presented with, by the Union, proof
24 that the Union has the support of, or has received authorization to represent, a
25 majority of the unit employees covered by this collective bargaining agreement;
26 hereby expressly and unconditionally acknowledges and grants, on behalf of each
27 of its members in their individual capacities, recognition to the Union as the sole
28 and exclusive collective bargaining representative of the unit employees covered
by this collective bargaining agreement, pursuant to Section 9(a) of the National
Labor Relations Act, as amended, and agrees not to make any claim questioning or
challenging the representative status of the Union.”

² The ALJD mistakenly referred to this conference as the “Drywall/Finishers Conference.” See, e.g., ALJD 5:2-4. In fact, the actual name of the conference is the “California Drywall/Lathing Conference.” See Resp. Er. Ex. 4, page 1.

1 (ALJD 5:21-38)

2 The 2006-2010 Carpenters Agreement also contains language in Section 7(g) that
3 addresses drywall finishing work performed by WWCCA member employers who have
4 agreements with both the Painters and the Carpenters.³ Section 7(g) of the 2006-2010 Carpenters
5 Agreement states in pertinent part:

6 “The Union understands and recognizes that the WWCCA and its members are signatory
7 to a collective bargaining agreement with the Painters and/or Plasterers and Plasterer
8 Tenders covering drywall finishing and wet wall finish work. The parties agree that
9 Article I, Section 7 shall apply only to those signatory employers who are not already
10 signatory to a collective bargaining agreement with the Painters and/or Plasterers and
11 Plaster Tenders covering the drywall finishing or wet wall finish work as described in
12 Article I Section 7 of the agreement and who choose to assign that work to the Painters
13 and/or Plasterers and Plaster Tenders. The Union agrees not to invoke or enforce Article
I, Section 7 or to create any jurisdictional dispute concerning the work described in that
section against any signatory employer that is also signatory to an agreement with the
Painters and/or Plasterers and Plaster Tenders covering the drywall finishing or wet wall
finish work and who chooses to assign that work to the Painters and/or Plasterers and
Plaster Tenders, as long as such contract remains in effect.”

14 (ALJD 6:1-18; Resp. Er. Ex. 4, page 4 (emphasis added))

15 Section 7(g) was inserted into the Carpenters agreement in 1992. This language was
16 added because WWCCA members were concerned with the overlapping jurisdiction over drywall
17 finishing work between the Painters and Carpenters and, as a result, sought clarification regarding
18 the Carpenters’ intentions in enforcing the scope of work over drywall finishing contained in their
19 agreement with the WWCCA. (ALJD page 6, lines 1-6; Tr. 373-374) The effect of the language
20 in Section 7(g) of the 2006-2010 Carpenters Agreement was that the agreement would not apply
21 to such work so long as a contractor, such as Raymond, was signatory to an agreement with the
22 Painters. (ALJD 6:1-23; Tr. 372:23 to 373:10, 573:17-20, 575:20 to 576:1)

23 Aside from being a party to agreements with the Carpenters, prior to October 1, 2006,
24 Raymond was also party to multi-employer agreements between the WWCCA and the Painters.
25 The most recent agreement to which Raymond was signatory was the Southern California
26 Drywall Finishers Joint Agreement between the Painters and the WWCCA effective from
27

28 ³ Including Raymond, between 20 and 30 contractor members of the Drywall/Lathing Conference
were signatory to agreements with the Painters and Carpenters. (Tr. 385:19-23)

1 October 1, 2003 until September 30, 2006. By letter dated May 24, 2006, Raymond's CEO,
2 Travis Winsor, notified the WWCCA that Raymond was resigning its membership in the
3 WWCCA Finishers Conference.⁴ Mr. Winsor also notified the Painters by letter dated May 24
4 that Raymond was resigning its membership in the WWCCA "Finishers Conference" and that
5 Raymond intended to terminate the 2003-2006 Painters Agreement on its expiration date. (ALJD
6 5:5-14, 6:31 to 7:2) It is undisputed that Raymond lawfully withdrew recognition from the
7 Painters as representative of the drywall finishing employees covered by the 2003-2006 Painters
8 Agreement and lawfully terminated this 8(f) agreement. (G.C. Ex. 1, Complaint, ¶11)

9 Raymond's decision to terminate its membership in the WWCCA Finishers Conference
10 and its agreement with the Painters became well-known in the industry. (ALJD 7:3-6)
11 Additionally, Raymond's CEO, Travis Winsor, knew that the Carpenters contended that their
12 agreement covered drywall finishing employees of a signatory employer who did not have an
13 agreement with the Painters. (ALJD 7:7-9) Mr. Winsor was also well aware that the Carpenters
14 intended to enforce their agreement and cover Raymond's drywall finishing work upon expiration
15 of the Painters 2003-2006 Agreement. (ALJD 7:15-20) While the drywall finishing employees
16 were a separate bargaining unit represented by the Painters, enforcement of Section 7(g) of the
17 2006-2010 Carpenters Agreement to these employees upon expiration of the Painters agreement
18 would mean that the Carpenters agreement would apply to Raymond's existing drywall finishing
19 employees or require Raymond's acceptance of employees dispatched from the Carpenters' hiring
20 hall. (Tr. 383:11-22)⁵ Given these options, Mr. Winsor, wanted to maintain Raymond's ongoing
21 operations with its existing complement of drywall finishing employees. (Tr. 384:13-19) But,
22 Mr. Winsor was also concerned as to the status of Raymond's drywall finishing employees and
23 their treatment under the wage and benefit provisions of the Carpenters agreement and how to
24 "move forward" without any interruption of benefits. (Tr. 380:25 to 382:1)

25 ⁴ The effect of this letter was that the WWCCA no longer represented Raymond for purposes of
26 collective bargaining vis-à-vis the Painters. (Tr. 366:25 to 367:3)

27 ⁵ In his decision, the ALJ quotes Mr. Winsor as testifying that "... we were aware that the
28 Carpenters had expressed their intentions to enforce [the] provisions of [their existing master agreement]
so as to assert bargaining representative status for drywall finishing employees." (ALJD 7:7-9) In fact,
Mr. Winsor's testified that "we were aware that the Carpenters had expressed their intentions to enforce
their provisions of the Contract." (Tr. 380:12-15)

1 Given the Carpenters’ position as to the jurisdiction of their agreement, Raymond could
2 not impose its own terms and conditions on the drywall finishing employees upon expiration of
3 the Painters agreement on September 30, 2006. (Tr. 392:17-23) Mr. Winsor believed that the
4 Carpenters would have brought a grievance or lawsuit if Raymond had decided not to apply the
5 Carpenters 2006-2010 Agreement to its drywall finishing employees and had applied its own
6 terms and conditions. (Tr. 392:17 to 393:23, 395:6-17) Additionally, if Raymond had imposed
7 the 2006-2010 Carpenters Agreement’s terms and conditions, but did not recognize the
8 Carpenters, the trust funds would not have accepted contributions unless Raymond signed a
9 collective bargaining agreement. (Tr. 394:17 to 395:17)

10 After reviewing Raymond’s options, Mr. Winsor spoke with Carpenters representatives
11 Mike McCarron (Executive Secretary) and Gordon Hubel (Contract Administrator). (Tr. 375:23
12 to 376:5) Because the Painters and Carpenters agreements had different benefit plans, Mr.
13 Winsor’s “concerns” in his discussions with Mr. McCarron and Mr. Hubel involved the wage,
14 pension and health and welfare treatment of the drywall finishing employees under the Carpenters
15 agreement. (Tr. 381:19 to 382:1) In his discussions, Mr. Winsor received assurances from Mike
16 McCarron that Raymond’s employees would be immediately vested and eligible in the
17 Carpenters’ benefit plans. (Tr. 384:16 to 385:4, 418:3-10) As a result of Mr. Winsor’s
18 discussions with Mr. McCarron and Mr. Hubel, Raymond and the Carpenters entered into a
19 Confidential Settlement Agreement on September 12, 2006.⁶ (ALJD 8:5-20); Resp. Er. Ex. 5)
20 The Confidential Settlement Agreement states in pertinent part:

21 “WHEREAS, disputes and grievances have arisen between the parties about
22 proper assignment of drywall finishing and other work to the proper trade, craft,
23 and group of employees, and the parties desire to settle said disputes through a
confidential settlement agreement

24 NOW, THEREFORE, for and in consideration of the mutual promises and
agreements set forth, the parties agree as follows:

25
26 ⁶ The ALJD states that “it is obvious that the instant discussions were kept confidential from
Raymond’s drywall employees in order to avert the possibility of a work stoppage.” (ALJD 7:46-48,
27 footnote 7) The attributions made by the ALJ regarding Mr. Winsor’s testimony to support this assertion
in ALJD are not supported by the record. In this regard, the ALJD confuses concerns Mr. Winsor had at
28 the time the Confidential Settlement Agreement was entered into with the concerns he had on October 2.
(Tr. 465:5-10, 465:24 to 466:10, 466:11 to 467:2)

1 1. Raymond agrees to sign the Southern California Drywall/Lathing
2 Memorandum Agreement 2006-2010.

3 2. At the expiration of Raymond's agreement with Painters District Council No. 36
4 on September 30, 2006, Raymond agrees that to the fullest extent permitted by law it will
5 apply the Southern California Drywall/Lathing Agreement to its drywall finishing work
6 and employees"

7 (ALJD 8:5-20, Resp. Er. Ex. 5, page 1) In Paragraph 2 of the Confidential Settlement
8 Agreement, Mr. Winsor's intent was to honor Raymond's existing contractual obligations under
9 the Painters 2003-2006 Agreement until September 30, 2006 and to enter into a collective
10 bargaining agreement with the Carpenters that covered its drywall finishing employees effective
11 October 1. (Tr. 386:13 to 387:7) Mr. Winsor also understood that the Carpenters agreement
12 would go into effect vis-à-vis the drywall finishing employees only upon expiration of the
13 Painters agreement. (Tr. 389:22 to 390:12)⁷

14 Upon expiration of the agreement between Raymond and the Painters, the 2006-2010
15 Carpenters Agreement became applicable to the drywall finishing employees pursuant to the
16 terms of the Confidential Settlement Agreement. (ALJD 9:4-10)⁸

17
18 ⁷ In the ALJ's decision, much is made of his observations that the parties did not discuss the
19 Confidential Settlement Agreement "in terms of creating a Section 8(f) bargaining relationship; that the
20 document "itself" does not contain a bargaining unit description or an expiration date; and that the parties
21 never used the term "bargaining unit." See ALJD 8:49-50, footnote 5, 8:24 to 9:3. While these
22 observations may be true, it is uncontroverted that the Confidential Settlement Agreement was entered into
23 as a result of the parties' discussions over the separate unit of drywall finishing employees represented by
24 the Painters; that the Confidential Settlement Agreement in Paragraph 2 refers to these employees; and that
25 "Southern California Drywall Lathing Agreement" referred to therein did have a term including an
26 "expiration date." (Resp. Er. Ex. 4 and Ex. 5; ALJD 7:28 to 7:20)

27 ⁸ The ALJ cites a December 18, 2006 position statement submitted by Raymond's attorney as
28 suggesting that the 2006-2010 Carpenters Agreement was applied to the drywall finishing employees on a
Section 9(a) basis on October 1, 2006 and by selectively quoting from Gordon Hubel's testimony. (ALJD
9:10-20) However, even the quoted portion of the position statement cited in the ALJ's decision reveals
that Raymond merely "complied with the requirements of that agreement and assigned the drywall
finishing work to Carpenters." (ALJD 9:4-10 (emphasis added)) Additionally, the quoted portion from
the position statement is contained in the section entitled "Legal Analysis." (G.C. Ex. 4, page 5) And, on
this point, Mr. Hubel testified: "I mean, frankly, anticipated that this would be considered a separate unit
and they would look at these individuals separately and we're prepared to go with that, too. A separate
unit where we had representation cards that show we were the exclusive representatives of them. We
could show we were the exclusive representative of the overall unit. And were prepared, alternatively, to
accept the 8(f) contract." (Tr. 608:8-15 (emphasis added))

1 **C. The October 2, 2006 meeting at Raymond’s Orange, California facility.**

2 In his discussions with the Carpenters representatives, Mr. Winsor also discussed a
3 meeting for the drywall finishing employees with Carpenters representatives to explain
4 Raymond’s decision and to let these employees know of the new wage package and benefits. (Tr.
5 399-400) Mr. Winsor made preparations for a meeting to start at 7:00 a.m. on Monday, October
6 2, 2006 and had Raymond’s General Superintendent Hector Zorrero inform the Orange,
7 California based drywall finishing employees on Sunday to show up for the Monday meeting at
8 6:00 a.m. (ALJD 9:20 to 10:13; Tr. 399:14 to 400:9, 401:3-8)

9 On October 2, a meeting was held in Raymond’s Orange, California facility for about 85
10 to 90 drywall finishing employees.⁹ (Tr. 401:12-15) The purpose of this meeting from
11 Raymond’s point of view was to explain Raymond’s decision to terminate its agreement with the
12 Painters and to let employees know of the wage package and benefits under the Carpenters
13 agreement. (ALJD 10:4-8) Prior to the actual meeting, employees were given a buffet-style
14 breakfast in the Warehouse room that had been set up with tables by Raymond in a
15 breakfast/meal configuration. (ALJD 10:18-20; Tr. 407:13-20)¹⁰

16 After breakfast, a meeting was held in the Training Center. Mr. Zorrero, Mr. Winsor and
17 two other Raymond representatives attended this meeting. Also attending this meeting were
18 Mike McCarron, Gordon Hubel, Ron Schoen (from the Health and Welfare Trust), Marty
19 Dahlquist and some other Carpenters’ representatives. This meeting lasted about an hour. While
20 the meeting was conducted in English, the meeting was translated into Spanish for Spanish-
21 speaking employees who heard the translation through headsets. (ALJD 10:18-29; Tr. 401:9-11)

22 During the meeting, drywall finishing employees were given a copy of an October 2, 2006
23 memorandum from Raymond. This memorandum which had been translated into Spanish stated,
24 inter alia, that Raymond had terminated its collective bargaining agreement with the Painters
25 effective September 30, 2006; that Raymond continued to be a “union company;” that drywall

26 ⁹ A meeting was also held for Raymond’s San Diego, California based drywall finishing
27 employees later in the day. (Tr. 401:17-19) None of the allegations in the Complaint relate to this San
28 Diego meeting.

¹⁰ After the breakfast, the Warehouse room was set up differently with the tables configured
differently in an “L” shape around the perimeter of the room. (Tr. 407:4 to 408:1)

1 finishing work was now “covered by the 2006-2010 Carpenters Agreement,” that the agreement
2 would apply “to employees performing drywall finishing work in Southern California from
3 October 1, 2006 forward;” and that the Carpenters agreement provided for “higher wages and
4 better benefits;” that employees who were not members of the Carpenters “must join the
5 Carpenters Union under the union security provisions of the Carpenters labor agreement;” and
6 that the Carpenters had agreed to “special” provisions regarding pension and health and welfare
7 benefits only available to Raymond’s employees. (ALJD 10:31 to 11:23; Resp. Er. Ex. 1)

8 Mr. Winsor was the first to speak during the meeting in the Training Center and used a
9 Power Point presentation, that he had prepared, that was in English and Spanish and was
10 projected onto screens behind the podium where he was speaking. (ALJD 10:29-31, Tr. 409:10-
11 22)

12 In speaking to the drywall finishing employees Mr. Winsor went through the Power Point
13 presentation and covered the slides and subjects in this presentation. In going over the initial
14 slides of his Power Point presentation, Mr. Winsor introduced himself and welcomed the
15 employees, discussed their value to the company, discussed Raymond’s history along with the
16 “core” values and philosophy of the company, and elaborated on the decisions he had to make
17 relative to Raymond’s signatory status with the Painters and Carpenters. He also introduced the
18 Carpenters representatives that were present at the meeting. (Tr. 410:2 to 411:13, 411:22 to
19 414:2, Resp. Er. Ex. 6) With respect to the fourth slide, Mr. Winsor told employees that the
20 Painters agreement had expired on September 30; that Raymond was committed to being a
21 “union” company; that the Carpenters agreement represented significant improvements in the
22 form of higher wages, a better pension plan, and better health and welfare with no lapse in
23 coverage or potential loss of any vested benefits. (Tr. 414:18 to 415:21, Resp. Er. Ex. 6, page 4)
24 Mr. Winsor also cautioned employees to review their personal situation to see if the change to the
25 Carpenters pension plan was in their best interests. (Tr. 417:2 to 418:2)

26 During his presentation, Mr. Winsor also spoke about the topics and subjects covered by
27 the October 2 memorandum from Raymond that had been passed out at the meeting in the
28 Training Center. (Tr. 418:20 to 419:4; Resp. Er. Ex. 1) After Mr. Winsor had finished his

1 presentation, representatives from the Carpenters spoke to the drywall finishing employees. (Tr.
2 433:16 to 434:5) Carpenters union and trust fund representatives also used a Power Point
3 presentation they had prepared in speaking to the employees. (Tr. 410:5-7, 437:16-19, Resp. Un.
4 Ex. 1) Marty Dahlquist spoke using the Power Point and spoke about wages and compared the
5 Painters and Carpenters wage packages. (ALJD 11:25-28, 433:18 to 434:5) Likewise,
6 Carpenters Trust Fund representative, Ron Schoen, using this Power Point presentation, spoke in
7 “painful” detail about the Carpenters health and welfare benefits. (ALJD 11:28-30, Tr. 414:8-17)
8 The Carpenters Power Point presentation did not cover the subject of union membership and
9 employees having to join the union and Carpenters representatives did not speak about this
10 subject in their presentation. (Tr. 421:19-22, 425:5-8)

11 After Mr. Winsor and the Carpenters concluded their presentations, Raymond’s General
12 Superintendent Hector Zorrero spoke about his 30-year association with Raymond and the
13 Carpenters and made comments supporting both organizations. Mr. Zorrero also stated that he
14 wanted all the employees in the room to continue working for Raymond. Mr. Zorrero further
15 stated that Raymond had an obligation to complete its projects and if employees chose not to
16 show up for work, he would have to staff the projects with Carpenters or individuals dispatched
17 from the Carpenters hall. (Tr. 438:5 to 439:5)

18 After Mr. Winsor, the Carpenters representatives and Mr. Zorrero spoke, the meeting was
19 opened up for questions. (Tr. 419:11-14:) In response to questions about whether employees
20 were being fired and were going to have a job, Mr. Winsor answered that he wanted everybody to
21 continue working with Raymond, no one was being fired and everyone had a job with Raymond,
22 but it was up to them to decide if they wanted to continue working for Raymond. (Tr. 419:24 to
23 421:8) In response to questions as to the union security provisions of the Carpenters agreement
24 or whether employees had to make a decision “today” or “now,” Mr. Winsor responded by saying
25 “no,” they did not have to make a decision today and could take their time. (Tr. 423:4-16, 430:3-
26 10) In response to a question regarding employees carrying cards in the Carpenters and Painters,
27 Carpenters representative Mike McCarron responded by saying the Carpenters had no restrictions
28 against an employee carrying two cards. (Tr. 428:7-12, 429:14 to 430:2) In response to this “two

1 card” question, Mr. Winsor distributed a memorandum dealing with resignation from the Painters
2 and financial core membership (Resp. Er. Ex. 2) prepared by Mr. Winsor in anticipation of a
3 possible Painters strike. In response to a question regarding this memorandum, Mr. Winsor
4 responded by telling employees they did not have to decide “today,” and telling them to take their
5 time and think about it. (Tr. 428:7 to 429:13, 430:12 to 431:11) And, in response to a question
6 regarding Resp. Employer Exhibit 1, Mr. Winsor without referencing “union security” answered
7 that employees had eight (8) days to join the Carpenters union. (Tr. 468:12-18, 472:2 to 473:5)

8 After the meeting in the Training Center concluded, representatives from the Carpenters
9 Health and Welfare and Benefit Trusts spoke to drywall finishing employees in the reconfigured
10 Warehouse room. (Tr. 407:13-22) Mr. Winsor was not aware of the forms or documents
11 distributed by the Carpenters or being signed by the drywall finishing employees. He did not see
12 the Carpenters distributing G.C. Exhibits 3(a), (b), (c) and (d) on October 2 and did not know the
13 Carpenters representatives were having employees sign these documents or that they were
14 gathering authorization cards (G.C. Exhibit 3(d)) at the facility. (Tr. 407:13 to 408:11, 427:4-8,
15 444:25 to 445:10, 446:24 to 447:2)

16 On October 2, 2006, Travis Winsor did not tell drywall finishing employees that they had
17 to join the Carpenters “that day,” or they could no longer work for Raymond, (or any like
18 statements) as alleged in Paragraph 18 of the Complaint. Likewise Raymond’s General
19 Superintendent Hector Zorrero did not tell the drywall finishing employees that they had to join
20 the Carpenters “that day,” if they wanted to work for Raymond (or any like statements) as alleged
21 in Paragraph 18. (Tr. 440:23 to 441:5, 480:9 to 481:18) Carpenters representatives Pedro Loera,
22 David Cordero and Gordon Hubel corroborated Mr. Winsor’s and Mr. Zorrero’s testimony. (Tr.

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24
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1 543:2-24, 558:3-18, 559:8 to 560:12, 589:13 to 591:15)¹¹

2 At about 5:00 p.m. on October 2, Mr. Winsor was approached by Mike McCarron and
3 Carpenters attorney, Dan Shanley, at Raymond's San Diego, California office. At that time, Mr.
4 McCarron told Mr. Winsor that the Carpenters had received authorization for Carpenters
5 representation from a majority of Raymond's drywall finishing employees and was prepared to
6 present evidence of that majority. Mr. McCarron then presented Mr. Winsor with a stack of
7 papers representing authorization cards similar to General Counsel Exhibit 3(d). (ALJD 22:7-3)

8 In pertinent part, these authorization cards stated:

9 "I authorize the Southwest Regional Council of Carpenters of the United Brotherhood of
10 Carpenters and Joinders of America ('The Union') to represent me in collective
11 bargaining with any employer for whom I may work within the jurisdiction of the Union."

12 See G.C. Exhibit 3(d).

13 Mr. Winsor examined the cards and acknowledged their receipt and apparent authenticity
14 and Mr. McCarron's representation of majority status. (Tr. 446: 7 to 447:9) After looking at the
15 authorization cards given to him by Mr. McCarron, Mr. Winsor executed a "Recognition
16 Agreement" (G.C. Ex. 4, tab 4) given to him. This Recognition Agreement acknowledged and
17 referenced the Confidential Settlement Agreement that Raymond had executed on September 12,

18
19 ¹¹ During the hearing, the General Counsel presented Richard Myers, Janet Pineda Ruben Mejia
20 Alvarez and Jose Ramos to testify regarding alleged statements made by Travis Winsor and Hector
21 Zorrero at this October 2 meeting. According to Mr. Myers, Mr. Winsor is alleged to have "told us [that]
22 if we did not sign with the Carpenters . . . we wouldn't have a job," and "repeated" several times that ". . .
23 if you didn't sign, you didn't have a job . . . we were told we weren't fired, we just couldn't have a job."
24 (ALJD 12:17-18, 25-28) Yet, on cross-examination, Mr. Myers testified that in response to a question
25 about having to join the Carpenters in order to keep their jobs, Mr. Winsor said, "you're not fired." (ALJD
26 13:21-25) Ms. Pineda testified that, "[a]n employee asked a question ". . . if we didn't sign up with the
27 Carpenters were we going to be able to work the following day" [and] Winsor responded, saying ". . . no,
28 we could not work the following day if we didn't sign up with the Carpenters." (ALJD 14:5-8) Ms.
Pineda testified that this question was only asked once, that she could not recall whether she or another
person asked the question, and she admitted that her recollection was "hazy," (ALJD 14:32-35) Mr.
Alvarez testified that Zorrero and a Carpenters Union representative each said "that in order to continue
working with Raymond Company we had to sign up with them." Mr. Alvarez also testified that he "if they
would give the employees some time to think about what they had just been told about having to sign with
the Carpenters Union [and] . . . Zorrero responded, in English, 'No. . . that it was either today or that there
wasn't any time to think about it, that it was at that moment.'" (ALJD 15:18-25) While Mr. Alvarez
initially testified that Mr. Zorrero made the latter statement when employees were allowed to ask questions
(ALJD 15:20-21), on cross-examination Mr. Alvarez stated Mr. Zorrero made the statement while ". . .
amongst the people trying to convince them . . . to sign' with the Carpenters Union (ALJD 16: 4-6).

1 2006. (Tr. 447:10 to 448:2, Resp. Er. Ex. 4) Additionally, Raymond recognized the Carpenters
2 as the exclusive collective bargaining representative under Section 9(a). (G.C. Exhibit 4, tab 4)

3 No drywall finishing employee was fired or not allowed to work on or after October 2,
4 2006, for not joining the Carpenters. Additionally, at least 3 drywall finishing employees who
5 did not join the Carpenters were allowed to work after October 2. (Tr. 444:8-24)

6 **III. LEGAL ARGUMENT**

7 **A. The ALJ erred in not finding that Raymond and the Carpenters had an 8(f)**
8 **agreement covering the drywall finishing employees upon expiration of the**
9 **Painters agreement on September 30, 2006 and erred in finding that**
10 **Raymond violated Sections 8(a)(1), (2) and (3) on October 1, 2006. [Exception**
11 **Nos. 1-51, 85-86, 92-97, 99, 101-106, and 112-113.]**

11 Here, the evidence establishes that, as of October 1, 2006, Raymond and the Carpenters
12 had an agreement establishing an 8(f) relationship as to the drywall finishing employees resulting
13 from application of Section 7(g) of the 2006-2010 Carpenters Agreement to these employees or
14 their Confidential Settlement Agreement.

15 **1. The ALJ erred in not finding that the application of Section 7(g) of the**
16 **2006-2010 Carpenters Agreement created an 8(f) agreement as to the**
17 **drywall finishing employees and erred in finding that Raymond**
18 **violated Sections 8(a)(1), (2) and (3) because Raymond and the**
19 **Carpenters covered such employees in applying Section 7(g) of the**
20 **2006-2010 Carpenters Agreement to such employees. [Exception Nos.**
21 **1-5, 9-34, 49-51, 85-86, 92-97, 101-106, and 112-113.]¹²**

22 Article 1, Section 7 of the multi-employer 2006-2010 Carpenters Agreement, an
23 agreement between WWCCA, a multi-employer association, and the Carpenters to which
24 Raymond is signatory, covered drywall finishing work. (ALJD page 5, line 40 to page 6, line 1)
25 With respect to drywall finishing work, Section 7(g) stated:

26 “The parties agree that Article I, Section 7 shall apply only to those signatory employers
27 who are not already signatory to a collective bargaining agreement with the Painters
28 and/or Plasterers and Plaster Tenders covering the drywall finishing or wet wall finish
work as described in Article I Section 7 of the agreement and who choose to assign that
work to the Painters and/or Plasterers and Plaster Tenders. *The Union agrees not to
invoke or enforce Article I, Section 7 or to create any jurisdictional dispute concerning
the work described in that section against any signatory employer that is also signatory to*

¹² For similar reasons, the ALJ erred in finding that the Carpenters violated Sections 8(b)(1) and
(2).

1 an agreement with the Painters and/or Plasterers and Plaster Tenders covering the
2 drywall finishing or wet wall finish work and who chooses to assign that work to the
3 Painters and/or Plasterers and Plaster Tenders, as long as such contract remains in
4 effect.”

5 Resp. Er. Ex. 4, page 4 (emphasis added).

6 Until the expiration of the 2003-2006 Painters Agreement on September 30, 2006,
7 Raymond’s drywall finishing employees were covered by a separate bargaining agreement
8 between the Painters and the WWCCA to which Raymond was a party. The 2003-2006 Painters
9 Agreement, like the Carpenters agreement, was a multi-employer agreement. It is undisputed that
10 the 2003-2006 Painters Agreement was a Section 8(f) agreement that was lawfully terminated by
11 Raymond. (Tr. 28, G.C. Ex. 1, Complaint, ¶¶ 9-11) Upon expiration of the 2003-2006 Painters
12 Agreement, on October 1, 2006, Raymond and the Carpenters covered the drywall finishing work
13 performed by Raymond and the drywall finishing employees performing such work by the 2006-
14 2010 Carpenters Agreement. Coverage was extended by the parties either by virtue of Section
15 7(g) of that agreement or by the parties’ separate September 12, 2006 Confidential Settlement
16 Agreement. (ALJD 26:10-14)

17 Here, the ALJ took it upon himself to decide whether Raymond engaged in acts and
18 conduct violative of Sections 8(a)(1) and (2) on October 1, 2006. (ALJD 22:39 to 23:4) The ALJ
19 did so even though the Complaint does not allege that coverage of Raymond’s drywall finishing
20 work by the Carpenters agreement and recognition by Raymond of the Carpenters of the drywall
21 finishing employees on October 1 was unlawful. A straightforward reading of the unlawful
22 recognition allegations of the Complaint establishes they are based on Raymond’s purported
23 violations of Section 8(a)(2) on October 2, 2006. See G.C. Ex. 1, Complaint, ¶¶ 12 (granting
24 recognition on October 2, 2006), 15 and 21 (entering into “Recognition Agreement” on October
25 2, 2006). At no time during the hearing did the General Counsel amend the Complaint to allege
26 violations occurring on October 1. Given the foregoing, the ALJ erred in deciding whether
27 Raymond engaged in violations of Section 8(a)(1) and (2) on October 1, 2006. See, e.g., GPS
28 Terminal Services, 333 NLRB 968, 969 (2001) (“The authority of the Administrative Law Judge

1 to amend the complaint under Section 10(b) of the Act is clearly limited to those instances where
2 the amendment is sought or consented to by the General Counsel[.]”)

3 Even assuming arguendo that alleged violations of Sections 8(a)(1) and (2) based on
4 conduct on October 1 were properly before the ALJ, application of the Carpenters Agreement to
5 Raymond’s drywall finishing employees on October 1 was lawful, and such conduct did not
6 violate the Act as found by the ALJ.

7 Because the 2003-2006 Painters Agreement had been lawfully terminated and was no
8 longer in effect, Raymond was privileged under the Board’s decision in John Deklewa & Sons,
9 282 NLRB 1375 (1987), enfd. sub nom, Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir.
10 1988), cert. den., 488 U.S. 889 (1988), to apply the 2006-2010 Carpenters Agreement to its
11 drywall finishing employees on October 1; Yellowstone Plumbing, 286 NLRB 993 (1987) (Upon
12 expiration of 8(f) agreement, employer free to withdraw recognition and unilaterally change terms
13 and conditions of employment.)

14 Admittedly, the 2006-2010 Carpenters Agreement contained Section 9(a) language in
15 Article X, Section 7, that complied with the requirements of the Board’s decision in Staunton
16 Fuel & Materials, Inc., 335 NLRB 717 (2001). See Resp. Employer Exhibit 4, pages 28-29.
17 While this language established a Section 9(a) relationship vis-à-vis Raymond’s drywall framing
18 and hanging employees represented by the Carpenters, the agreement’s Staunton Fuel language
19 does not *ipso facto* mean that application of that agreement to Raymond’s drywall finishing
20 employees was on a Section 9(a) basis. This is so because the drywall finishing employees were
21 a separate bargaining unit prior to October 1, 2006, and, in the construction industry, the Board
22 presumes that a bargaining relationship is a non-majority Section 8(f) relationship. See, e.g.,
23 Western Pipeline, Inc., 328 NLRB 925, 927 (1999) (“In the construction industry, parties may
24 create a relationship pursuant to Section 9(a) or 8(f) ... [and] ... [i]n the absence of evidence to
25 the contrary, the Board presumes that the parties intend their relationship to be governed by
26 Section 8(f) rather than Section 9(a)”(emphasis added)); H. Y. Floors & Gameline Painting, 331
27 NLRB 304 (2000); Deklwewa, supra at 1385 fn. 41.

1 The ALJ overcame the construction industry 8(f) presumption by mistakenly adopting the
2 General Counsel’s and the Painters’ contentions that Raymond and the Carpenters intended to
3 accrete the drywall finishing employees into the “contractual wall-to-wall Carpenters Section 9(a)
4 bargaining unit.” (ALJD 23:19-31) The ALJ did so without any credible support in the record
5 that the parties’ application of the multi-employer 2006-2010 Carpenters Agreement on October 1
6 to the separate unit of drywall finishing employees was intended by Raymond and the Carpenters
7 as an accretion of these employees into the pre-existing Carpenters unit covered by this multi-
8 employer agreement. Instead, the ALJ erroneously relied on alleged concessions by Raymond’s
9 attorney and Carpenters representative Gordon Hubel that “seemingly describe an accretion.”
10 (ALJD 23:31-32) However, an examination of these alleged “concessions,” does not support the
11 ALJ’s finding since the statements by Mr. Hubel and Raymond’s attorney relied on by the ALJ
12 were simply taken out of context. Thus, as the ALJ noted in his factual summary, Mr. Hubel
13 testified that “if Respondent Raymond had refused to assign the drywall finishing work to
14 Respondent Carpenters, ‘ . . . we would have argued the overall unit was a 9(a) unit.” (ALJD
15 9:16-19) Here, the fact that Mr. Hubel was prepared to “argue” this point does not amount to a
16 “concession” (or even an “admission”) that the drywall finishing employees constituted an
17 attempted accretion, especially where Mr. Hubel testified “And we were prepared, alternatively,
18 to accept the 8(f) contract.” (Tr. 608:8-15) The ALJ’s reliance on statements contained in a
19 position statement by Raymond’s attorney as constituting an admission that an accretion occurred
20 are similarly misplaced and in error. (ALJD 23:11-17). A forthright reading of the position
21 statement plainly shows no such “admission,” and in fact the language in the “Legal Analysis”
22 section quoted by the ALJ addresses not what occurred on October 1, but what occurred on
23 October 2 after the meetings with the drywall finishing employees. (G.C. Ex. 4, page, 5, ALJD
24 23:11-17 (“on October 2 . . . Raymond complied with the requirements of that agreement and
25 assigned the drywall finishing work to Carpenters,’ with the latter acting ‘ . . . as the Section 9(a)
26 representative of its drywall employees (both hangers and finishers.’”))

27 Thus, there was no “admission” or “concession” on the part of Raymond or the Carpenters
28 to support the ALJ’s finding that in applying the 2006-2010 Carpenters Agreement to the drywall

1 finishing employees on October 1, the parties intended an accretion of these employees to the
2 Carpenters existing unit. The ALJ's misplaced reliance on legal arguments by Mr. Hubel or
3 Raymond's attorney as constituting concessions that an accretion was intended was erroneous and
4 does not support the ALJ's accretion finding. Moreover, in finding that an "accretion" occurred
5 on application of the 2006-2010 Carpenters Agreement to the drywall finishing employees, the
6 ALJ completely ignores evidence contradicting this finding. In this regard, it is uncontroverted
7 that, at the October 2 meetings in Orange and San Diego, the Carpenters collected authorization
8 cards from the drywall finishing employees. Obviously, such conduct would not have been
9 undertaken if the Carpenters believed that the drywall finishing employees had been
10 automatically accreted to the existing Carpenters unit on October 1. Moreover, the ALJ's
11 determination that an attempted accretion occurred herein is not supported by the Board's holding
12 in Comtel Systems Technology, Inc., 305 NLRB 287 (1991) (more fully discussed below), that a
13 separate bargaining unit is not merged into a Section 9(a) multi-employer bargaining unit.
14 Accord, Deklewa, supra, n. 30.

15 Aside from the alleged "concessions" noted above, the ALJ relied on the Staunton Fuel
16 language in Article X, Section 7, in finding that Raymond and the Carpenters intended to
17 establish a Section 9(a) relationship when the 2006-2010 Carpenters Agreement was applied to
18 the drywall finishing employees on October 1. (ALJD 24:25-35, 26:19 to 27:10) Such Staunton
19 Fuel language, however, did not mean, as the ALJ found, that Raymond and the Carpenters
20 intended to create a Section 9(a) relationship with respect to the separate unit of drywall finishing
21 employees when they applied the 2006-2010 Carpenters Agreement to these employees. In this
22 regard, the ALJ ignored the Board's refusal in Madison Industries, Inc., 349 NLRB 1306 (2007),
23 to "pass on whether unambiguous language alone is sufficient to establish Sec. 9 status." Id. at
24 1309, footnote 13 (emphasis added). Likewise, the ALJ ignored the Board's admonition in
25 Madison Industries that the "Staunton Fuel standard requires an examination of the parties entire
26 agreement to determine whether a 9(a) relationship was intended." Id. at 1308 (emphasis added).
27 While the Staunton Fuel language related to the 9(a) relationship as to the framing and hanging
28 employees, there is no evidence (aside from the alleged "concessions" discussed above) that the

1 parties intended to create a 9(a) relationship as to the drywall finishing employees when the
2 parties covered such employees by the 2006-2010 Carpenters Agreement on October 1. Before
3 such an intention can be found, the Board requires “positive evidence that the union sought and
4 the employer extended recognition to a union as the 9(a) representative of its employees before
5 concluding that the relationship between the parties is 9(a) and not 8(f).” J & R Tile, 291 NLRB
6 1034, 1036 (1988). Here, there is no such “positive” evidence demonstrating that coverage of the
7 drywall finishing employees by the 2006-2010 Carpenters Agreement upon expiration of the
8 2002-2006 Painters Agreement was based on a Section 9(a) relationship. Significantly, the
9 evidence establishes that, prior to October 2, 2006, the Carpenters did not demand recognition
10 based on majority status and Raymond did not grant Section 9(a) status to the Carpenter as to its
11 drywall finishing employees. In fact, a review of the record herein establishes that the only
12 tangible evidence of such a 9(a) demand by the Carpenters and the granting of such recognition
13 by Raymond as to the drywall finishing employees is the “Recognition Agreement” executed by
14 the parties on October 2, 2006. Accordingly, the ALJ’s finding that on October 1, coverage of the
15 drywall finishing employees was based on Section 9(a) was erroneous.

16 Under Section 8(f), which does not require majority support, Raymond’s recognition of
17 the Carpenters would be legal so long as the drywall finishing employees existed as a separate
18 bargaining unit. Here, there was no contention made by Raymond or the Carpenters at the
19 hearing or in their pleadings that the historically separate drywall finishing employees unit
20 “merged” into the larger Carpenters unit when the 2006-2010 Carpenters Agreement was applied
21 to the drywall finishing employees on October 1.¹³ Moreover, because this agreement was a
22 Section 8(f) agreement as to the drywall finishing employees, no accretion determination was
23 required. See, e.g., IBEC Housing Corporation, 245 NLRB 1282(1979) (A determination that
24 employees constitute an accretion is unnecessary where Section 8(f) agreement is applied to
25

26 ¹³ Here, the only parties that made such a contention were the General Counsel and counsel for
27 the Painters who, obviously, had to make this contention to support the unlawful accretion argument made
28 at the hearing. Yet, the General Counsel did not allege an unlawful accretion theory in the Complaint as a
basis for Raymond’s violations of the Act, and a fair reading of the Complaint establishes that the alleged
unlawful recognition violations attributed to Raymond in the Complaint are not premised on an unlawful
accretion theory. See G.C. Ex. 1, Complaint.

1 them.) Additionally, applicable Board precedent discussed below supports Raymond’s and the
2 Carpenters’ contentions that no “merger” or “accretion” of the drywall finishing employees into
3 the existing Carpenters unit of framing and drywall hanging employees occurred herein on
4 October 1, 2006.

5 The 2006-2010 Carpenters Agreement is a multi-employer Section 9(a) agreement. In
6 Deklewa, the Board overruled Authorized Air Conditioning Co., 236 NLRB 37 (1978), and
7 rejected its merger doctrine under which an employer’s separate bargaining unit was deemed to
8 have merged into the multi-employer’s association Section 9(a) bargaining unit. See Deklewa,
9 supra at 1379 (Describing and rejecting pre-Deklewa law: “[W]hen ... an employer joins a
10 multiemployer association (adopting that association’s agreement with the union), the relevant
11 unit becomes that of the multiemployer association by application of the merger doctrine,” citing
12 Authorized Air Conditioning.)

13 Deklewa’s rejection of this merger doctrine means that coverage of the separate unit of
14 Raymond’s drywall finishing employees did not merge these employees into the larger
15 Carpenters represented bargaining unit of Raymond’s drywall framing and hanging employees
16 covered by the 2006-2010 Carpenters Agreement, and that on October 1 this was on a Section
17 8(f) basis. As noted by the Board in Deklewa, “we can all agree that a construction industry
18 employer and union cannot by merging the single employer unit into a multiemployer one, act to
19 effectively preclude a single employer’s employees from challenging their 8(f) union’s
20 representational authority. Id. at n. 30. What this means is that Raymond and the Carpenters
21 could properly apply the Carpenters Agreement to the drywall finishing employees on a Section
22 8(f) basis on October 1.

23 The Board’s decision in Comtel, supra, fully supports this proposition. In Comtel, the
24 Board held that an “employer that has designated a multi-employer association as its collective
25 bargaining representative will be bound by any agreement reached by that association, but that the
26 agreement will not be binding as anything other than an 8(f) agreement.” Comtel, supra, 305
27 NLRB at 289. The Board’s Comtel decision is analogous to the circumstances herein. The 2006-
28 2010 Carpenters Agreement, like the multi-employer agreement in Comtel, is a multi-employer

1 agreement. Like the employer's separate bargaining unit in Comtel, the separate bargaining unit
2 of Raymond's drywall finishing employees became covered by this multi-employer Carpenters
3 agreement. While Comtel involved a separate employer's employees, instead of a separate
4 bargaining unit of the same employer as herein, there is no principled basis for distinguishing
5 these situations. It is the separateness of the bargaining unit and Deklewa's rejection of the
6 merger doctrine as to bargaining units in the construction industry, and not the identity of the
7 employer which are crucial.

8 Notwithstanding the ALJ's claims that Comtel was "factually distinguishable" and that
9 Raymond's and the Carpenters' contentions "appear to distort Comtel" (see ALJD 28:6-8, 13-17),
10 the circumstances herein are plainly within the rationale of the Board's Comtel decision that a
11 multi-employer Section 9(a) agreement, like the 2006-2010 Carpenters Agreement, creates a
12 Section 8(f) relationship vis-à-vis newly covered employees like the separate unit of Raymond's
13 drywall finishing employees. In rejecting application of Comtel, the ALJ stated that there "exists
14 no language in Comtel, suggesting that the agreement may also constitute a Section 8(f)
15 agreement covering a completely separate bargaining unit." See ALJD 28:22-25). The ALJ was
16 wrong since this was precisely the issue addressed by the Board in Comtel -- whether an
17 agreement could be a 9(a) vis-à-vis one bargaining unit and 8(f) with respect to another unit.
18 Moreover, while the ALJ faulted Raymond and the Carpenters for not citing any authority
19 directly on point (ALJD 28:22-25), the ALJ cited no authority for the contrary proposition that an
20 agreement could not be 9(a) for one unit of an employer's employees and 8(f) as to a separate unit
21 (ALJD 28:1-46).

22 **2. The ALJ erred in not finding that the parties Confidential Settlement**
23 **Agreement created an 8(f) agreement as to the drywall finishing**
24 **employees and erred that the parties conduct in entering into this**
25 **agreement violated Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and**
8(b)(2) of the Act. [Exception Nos. 1-5, 6-51, 59, 85-86, 92-97, 101-106,
and 112-113.]

26 Even assuming arguendo that the ALJ's determinations that Comtel is inapplicable, that
27 the 2006-2010 Carpenters Agreement did not create an 8(f) relationship as to the drywall
28 finishing employees, and that the effect of Section 7(g) of the agreement was to "accrete" these

1 employees into the existing Carpenters unit, the fact remains that the parties entered into a
2 separate Confidential Settlement Agreement which created an 8(f) agreement as to those
3 employees. The ALJ erred in not finding that the Confidential Settlement Agreement created an
4 8(f) agreement as to the drywall finishing employees. Likewise, the ALJ erred in finding that, in
5 entering into the Confidential Settlement Agreement, Raymond violated 8(a)(1), (2) and (3).¹⁴

6 As the ALJ correctly noted, both Carpenters representative Gordon Hubel and Raymond
7 representative Travis Winsor believed that upon expiration of the Painters Agreement on
8 September 30, 2006, a dispute would arise between the parties if Raymond did not cover the
9 drywall finishing employees under the Carpenters collective bargaining agreement. (ALJD 7:3-
10 26) As the ALJ further noted, in order to obviate a potential contractual grievance Carpenters
11 representatives and Mr. Winsor held discussions regarding this issue, and eventually entered into
12 a Confidential Settlement Agreement on September 12, 2006. (ALJD 7:38 to 8:20) While the
13 ALJ makes “much ado” about the different concerns that Mr. Winsor had in connection with
14 these discussions¹⁵ as opposed to the Carpenters (see ALJD 7:30-39), there is no dispute that the
15 Confidential Settlement Agreement settled a threatened grievance and that this agreement was
16 entered into and signed by the parties. (ALJD 7:39 to 8:20, Resp. Er. Ex. 5)

17 As pertinent herein, the Confidential Settlement Agreement states:

18 “1. Raymond agrees to sign the Southern California Drywall/Lathing
19 Memorandum Agreement 2006-2010.

20 2. At the expiration of Raymond’s agreement with Painters District Council No. 36
21 on September 30, 2006, Raymond agrees that to the fullest extent permitted by law it will
22 apply the Southern California Drywall/Lathing Agreement to its drywall finishing work
23 and employees.”

24 ¹⁴ For similar reasons, the ALJ erred in finding that the Carpenters violated Sections 8(b)(1) and
(2).

25 ¹⁵ Mr. Winsor testified that in these discussions he was concerned about the disruptions or other
26 eligibility, vesting, and coverage issues arising from the differences between the Painters and Carpenters
27 collective bargaining agreements. (ALJD 7:34-39) In his decision, the ALJ noted that neither Raymond
28 nor the Carpenters offered any corroboration for Mr. Winsor’s assertion that the “vesting and eligibility
terms” were worked out and that he believed those provisions were contained in various trust fund
documents. (ALJD 7:44 to 8:4) To the extent the ALJ relies on this alleged lack of “corroboration” for
making an adverse inference regarding the veracity of Mr. Winsor’s testimony, it is in error since the
vesting and eligibility issues were a peripheral issue in this matter.

1 (ALJD 8:5-20; Resp. Er. Ex., page 1).

2 The ALJ erred in his failure to find that the Confidential Settlement Agreement was a
3 Section 8(f) agreement. The ALJ’s reasons for rejecting this agreement as creating a Section 8(f)
4 collective bargaining agreement are not supported by the record evidence, or applicable law, and
5 are based on specious deficiencies and distortions of the record.

6 Initially, the ALJ rejected Raymond’s contention that the Confidential Settlement
7 Agreement created an 8(f) relationship. The ALJ misread that “by the phrase ‘to the fullest extent
8 permitted by law,’ the parties clearly signified their intent to establish a Section 9(a) bargaining
9 relationship covering the drywall finishing employees.” (ALJD page 29, lines 3-7) This finding
10 is clearly erroneous. The phrase “to the fullest extent permitted by law” does not indicate an
11 intent to create a 9(a) relationship, it merely means that the parties intended to create a lawful
12 relationship. For the ALJ to infer that the parties intended to create an unlawful agreement (by
13 language stating an intention to enter into a lawful agreement) is a complete misreading and gross
14 distortion of this phrase.¹⁶ Moreover, to the extent the ALJ rejected the parties 8(f) argument
15 because of the Staunton Fuel language in the 2006-2010 Carpenters Agreement, it was error to do
16 so. As noted above, the Board’s decision in Madison Industries held that it was error to limit a
17 9(a) analysis solely to the language of the recognition provision. Likewise, as noted above, the
18 Board’s decision in J & R Tile requires an analysis of the parties intent by asking whether the
19 Carpenters demanded 9(a) recognition as to the drywall finishing employees and did Raymond
20 grant such recognition. Here, there is no evidence other than the Staunton Fuel language that
21 such was the case. While the ALJ finds that Mr. Hubel conceded “that the parties never discussed
22 the confidential settlement agreement in terms of creating a Section 8(f) bargaining relationship”
23 (ALJD 8:49-50), there is likewise no evidence that the parties discussed the agreement in terms of

24 ¹⁶ To the extent the ALJ based this finding on the possibility of the Painters filing a representation
25 petition vis-à-vis the drywall finishing employees (see, e.g., ALJD 25:4-8), there is no evidence that the
26 Painters contemplated filing such a petition or that the Painters were precluded from filing such a petition
27 by any conduct of Raymond or the Carpenters. Likewise, there is no evidence supporting the ALJ’s
28 rejection of Raymond’s and the Carpenters’ 8(f) defense in this matter on the grounds that such defense
would allow them to escape the consequences of a 9(a) bargaining relationship “after they have been
permitted to enjoy the benefit of such status.” (ALJD 28:31-35) Here, there is no evidence that Raymond
or the Carpenters enjoyed the benefit of a 9(a) bargaining relationship as to the drywall finishing
employees prior to the expiration of the Painters 8(f) agreement on September 30, 2006.

1 creating a 9(a) relationship. Additionally, the undisputed fact that the Carpenters solicited
2 authorization cards from the drywall finishing employees at the October 2 meeting at Raymond's
3 premises, strongly suggests that the Carpenters believed an 8(f) relationship had been created as
4 the result of the Confidential Settlement Agreement. Moreover, the Board's decision in Comtel
5 (discussed above) supports the principle that a 9(a) relationship is neither created nor intended by
6 the mere fact of an employer's signing an agreement binding it to a collective bargaining
7 agreement containing Staunton Fuel language.

8 Aside from the ALJ's erroneous rejection of an 8(f) agreement as it pertains to the
9 Confidential Settlement Agreement, the ALJ committed error by refusing to accept the
10 Confidential Settlement Agreement as "constituting a collective-bargaining agreement." (ALJD
11 29:8-9)

12 First, the ALJ's rejection was based, in part, because the document did not bear the title
13 "commensurate with collective-bargaining agreement." (ALJD 29:8-10) This hyper-technical
14 observation ignores the fact that in Paragraph 2, the Confidential Settlement Agreement does in
15 fact reference the "Southern California Drywall/Lathing Agreement," a collective bargaining
16 agreement.

17 Second, instead of focusing on the language actually contained in the Confidential
18 Settlement Agreement and the agreement(s) incorporated therein, the ALJ inexplicably notes that
19 "nothing in the document's preamble suggests the parties intended to create a collective-
20 bargaining agreement or even meant to establish terms and conditions of employment; rather, the
21 language therein describes their intent to settle disputes and grievances." (ALJD 29:11-15) The
22 ALJ again completely ignores the language of Paragraph 2; that expressly and unequivocally
23 states that Raymond "will apply the Southern California Drywall/Lathing Agreement to its
24 drywall finishing work and employees." Clearly, the import of this language is to establish the
25 "terms and conditions" that will apply to the drywall finishing employees. The terms and
26 conditions are those contained in the Southern California Drywall/Lathing Agreement which is
27 incorporated by reference in the Confidential Settlement Agreement, and it is undisputed that the
28 former contains terms and conditions of employment.

1 Third, the ALJ's rejection is based on his apparent conclusion that "there is no record
2 evidence herein that the parties intended their settlement agreement to constitute a collective-
3 bargaining agreement, [footnote omitted] the term bargaining unit is not mentioned, and the
4 document bears no expiration date." (ALJD 29:18-20) Notwithstanding the ALJ's protestations,
5 the parties considered the Confidential Settlement Agreement to be a collective bargaining
6 agreement. Thus, in response to questions from the ALJ regarding the Confidential Settlement
7 Agreement, Carpenters representative Gordon Hubel testified:

8 "ALJ: [D]id you at the time, on or about September 12, 2006, consider
9 that document . . .to be a Collective Bargaining Agreement?
10 Mr. Hubel: Yes.
11 ALJ: So you considered that document to be a Collective Bargaining
12 Agreement?
13 Mr. Hubel: Yes. As I understand the definition of Collective Bargaining
14 Agreement.
15 ALJ: Well, what's your definition of a Collective Bargaining Agreement?
16 Mr. Hubel: An Agreement between a labor organization and an employer that
17 sets terms and conditions of employment."

18 (Tr. 582:19 to 583:6) Moreover, while the term "bargaining unit" is not mentioned, as noted
19 above, the Confidential Settlement Agreement in Paragraph 2 expressly identifies the drywall
20 finishing employees as the employees to be covered by the Southern California Drywall/Lathing
21 Agreement. And, these employees were not only a separate bargaining unit under the expired
22 Painters agreement, they also are alleged to be an appropriate bargaining unit in the General
23 Counsel's Complaint. (G.C. Ex. 1, Complaint ¶¶ 9 and 10) Likewise, the ALJ ignored the fact
24 that Southern California Drywall/Lathing Agreement referenced in Paragraph 2 contained an
25 expiration of June 30, 2010. See Resp. Er. Ex. 4, page 52.

26 To the extent that a separate agreement between the parties was necessary to create a
27 Section 8(f) collective bargaining agreement, the foregoing establishes that the Confidential
28 Settlement by incorporating the terms and conditions of the Southern California Drywall/Lathing
Agreement to the drywall finishing employees bargaining unit is such a document. See, e.g.,
Carthage Sheet Metal Co., 286 NLRB 1249, 1251 (1987) (Employer bound to Section 8(f)

1 agreement pursuant to the terms of settlement agreement and employer’s repudiation of its
2 contractual obligations under the settlement agreement violated Section 8(a)(5).) The ALJ
3 distinguishes Carthage from the instant case on the grounds that in Carthage, “it does not appear
4 that the settlement agreement and purported Section 8(f) agreement were the same document.”
5 (ALJD 29:46-50) This is not a legitimate basis for distinguishing Carthage because the ALJ
6 simply ignores the language of the Confidential Settlement Agreement. As was the case in
7 Carthage, the Confidential Settlement Agreement herein incorporated a separate collective
8 bargaining agreement. Thus, in the Carthage settlement agreement, the employer agreed to “be
9 bound by all terms and conditions of employment in the next Collective-Bargaining Agreement
10 between Local 36 and the Southwest Missouri Chapter of the Sheet Metal Contractors’
11 Association.” Carthage, supra at 1255. Likewise, as noted above, the Confidential Settlement
12 Agreement states, “[a]t the expiration of Raymond’s agreement with Painters District Council No.
13 36 on September 30, 2006, Raymond agrees . . . it will apply the Southern California
14 Drywall/Lathing Agreement to its drywall finishing work and employees.” Given the foregoing,
15 there is no legitimate basis for distinguishing the effect of the settlement agreement in Carthage
16 from the Confidential Settlement Agreement herein and the ALJ erred in so ignoring the
17 application of Carthage herein. See, also Local Union No. 530 (Cape Construction Company,
18 Inc.), 178 NLRB 162, 164 (1969 (Parties’ oral agreement that terms of mainline pipeline
19 collective bargaining agreement “would be enforced on this particular job” and construction
20 project would be governed by the terms of the agreement was “legally sufficient” to make
21 mainline contract operative as a collective bargaining agreement between parties.)

22 Aside from the foregoing, the ALJ erred in finding that “as counsel for the Painters Union
23 persuasively argues, if, as argued, the parties did enter into a collective-bargaining agreement via
24 the confidential settlement agreement, such would have been an unlawful act.” See ALJD 29:27-
25 30 (emphasis added). In doing so, the ALJ ignores the fact that the Complaint does not allege
26 that the entering into of the Confidential Settlement Agreement constituted a violation of the Act
27 and the General Counsel never amended the Complaint to so allege. More importantly, the
28 General Counsel never contended that the “entering” into of such an agreement violated the Act.

1 In fact, when specifically questioned by the ALJ about the “effect” of the Confidential Settlement
2 Agreement, the General Counsel responded by simply stating, “The General Counsel’s position is
3 this is not a separate 8(f) agreement. It does not create a separate 8(f) agreement regarding the
4 Finishing employees.” (Tr. 263:16 to 264:1) Under well-established Board precedent, the ALJ
5 cannot base a violation of the Act on the argument or alternative theories of counsel for the
6 Painters. A charging party cannot enlarge upon or change the General Counsel’s theory of the
7 case and the Administrative Law Judge cannot consider theories for violations argued by the
8 Painters that differ from the General Counsel’s. See e.g., ATS Acquisition Corp., 321 NLRB 712
9 (1996).

10 In any event, the ALJ’s citation to Oil Field Maintenance Co., Inc., 142 NLRB 1384, 1386
11 (1963), as supporting a violation herein is misplaced. In Oil Field Maintenance, the Board found
12 that the employer violated Sections 8(a)(1) and (2) because the employer assisted the Oil Workers
13 when during the term of its contracts with the charging party unions, the employer recognized the
14 Oil Workers, substituted the terms of the Oil Workers contract and ceased observing the terms of
15 its contracts with the charging party unions. Id. at 1385. Thus, the vice in Oil Field Maintenance
16 was that the employer entered into overlapping collective bargaining agreements and, as a result,
17 Oil Field Maintenance is factually distinguishable. Here, there were no overlapping collective
18 bargaining agreements. Raymond did not extend recognition to the Carpenters as the collective
19 bargaining representative or apply the terms and conditions of any Carpenters agreement during
20 the term of the Painters agreement. Rather, the Confidential Settlement Agreement, as noted
21 above in Paragraph 2, plainly stated that Raymond would apply the Southern California
22 Drywall/Lathing Agreement to the drywall finishing employees “[a]t the expiration of Raymond’s
23 agreement with Painters District Council No. 36 on September 30, 2006.” See Resp. Er. Ex. 4
24 (emphasis added). Moreover, in finding a violation based on the arguments of Painters counsel,
25 the ALJ ignored the Board’s decision in Acme Tile & Terrazzo Co., 306 NLRB 479 (1992).¹⁷ In
26 Acme Tile, the administrative law judge and the Board found that at an addendum signed by

27 ¹⁷ The ALJ cited Acme Tile & Terrazzo Co., 318 NLRB 425, which supplemented the Board’s
28 original decision in 306 NLRB 479 (1992). See ALJD 31:12-15. The Board’s supplemental decision did
not disturb the Board’s holding regarding the lawfulness of the 8(f) agreement.

1 employer members binding them to an 8(f) multi-employer association agreement with a
2 Bricklayers local union that was signed during the term of the association's 8(f) Carpenters
3 agreement, but which became effective after expiration of the 8(f) Carpenters agreement was a
4 lawful 8(f) agreement. See 306 NLRB at 480 ("we agree with the judge that the Respondent
5 Association lawfully entered into an 8(f) agreement with Bricklayers Local 1")

6 Based on the foregoing, the ALJ erred in not finding that Raymond and the Carpenters
7 had a lawful 8(f) agreement covering the drywall finishing employees on October 1, 2006. A
8 valid 8(f) agreement covering the drywall finishing employees existed as a result of Section 7(g)
9 of that agreement or as a result of the Confidential Settlement Agreement. Consequently, the ALJ
10 erred in finding that Raymond violated Sections 8(a)(1), (2) and (3) and that the Carpenters
11 violated Sections 8(b)(1)(a) and 8(b)(2) on October 1, 2006, violations which were neither alleged
12 in the Complaint nor supported by the record.

13 **B. The ALJ erred in finding that Raymond violated Sections 8(a)(1), (2) and (3)**
14 **based on alleged statements made by Travis Winsor and Hector Zorrero at**
15 **the October 2, 2006 meeting. [Exception Nos. 52-77, 87-106, and 108-113.]**¹⁸

16 In his decision, the ALJ found that Raymond violated Sections 8(a)(1), (2) and (3) by
17 rendering unlawful assistance and support to the Carpenters on October 2, 2006. (ALJD 33:42-
18 47) The ALJ based these findings solely upon statements attributed to Travis Winsor and Hector
19 Zorrero. (ALJD 31:18-20) The ALJ's findings were based on his assessment of the credibility of
20 the General Counsel's witnesses – Jose Ramos, Janet Pineda, Richard Meyers and Ruben Mejia
21 Alvarez - and the witnesses for Raymond and the Carpenters - Travis Winsor, Hector Zorrero,
22 Pedro Loera, David Cordero and Gordon Hubel. (ALJD 31:21 to 32:27) Because the ALJ's
23 credibility findings are not supported by a preponderance of the evidence, the ALJ erred in
24 finding violations of the Act based on the alleged statements of Travis Winsor and Hector
25 Zorrero.

26 As a result of the crediting of Mr. Ramos, Ms. Pineda and Mr. Alvarez, the ALJ found
27 that on October 2, 2006 Raymond violated Sections 8(a)(1), (2) and (3). These violations are

28 ¹⁸ For similar reasons, the ALJ erred in finding that the Carpenters violated Sections 8(b)(1)(A)
and 8(b)(2) on October 2, 2006.

1 based solely on the following findings by the ALJ:

2 “[A]n employee asked, if employees did not sign with the Carpenters, could they continue
3 working, Travis Winsor replied that, if they did not sign, there would be no more work,
4 and that, if you don’t sign, you will not have a job but that no one would be fired. Then,
5 one or more employees asked if they had to reach a decision that day about signing with
6 the Carpenters Union, and Winsor responded, ‘. . . that if we didn’t sign on that day, we
7 weren’t working any more.’ I further find that, at the conclusion of the question and
8 answer session, while Hector Zorrero stayed with the employees in the training room and
9 answered their questions, several employees shouted to Zorrero, asking if the company
10 would give them some time to decide about signing with the Carpenters Union. He
11 replied, ‘There’s no time to think about it. Either sign . . . today or you cannot work
12 tomorrow for us.’”

9 (ALJD 32:29 to 33:10)

11 The ALJ credited the Jose Ramos, Janet Pineda and Ruben Mejia Alvarez on this crucial
12 matter. In this regard, he credited the testimony of Jose Ramos because he was the most “most
13 trustworthy” and he “clearly exhibited his comprehension of the meaning, gravity, and
14 consequences of the oath” (see ALJD 31:21-25), and then credited the testimony of Ms. Pineda
15 and Mr. Alvarez because they corroborated Mr. Ramos and the ALJ believed they were “honest
16 witnesses” (see ALJD 32:1-3).¹⁹

17 The Board’s policy, as enunciated in Standard Dry Wall Products, 91 NLRB 544 (1950),
18 enfd. 188 F.2d 362 (3rd Cir. 1951), is to attach great weight to a judge’s credibility findings
19 insofar as they are based on demeanor. Here, while the ALJ’s credibility resolutions are based in
20 part on demeanor (see ALJD 31:22 to 32:2), he relied on other factors as well. To the extent that
21 credibility findings are based upon factors other than demeanor, as in the instant case, the Board
22 must proceed with an independent evaluation of the ALJ’s findings. See Canteen Corp., 202
23 NLRB 767, 769 (1973) (citing Valley Steel Products Co., 111 NLRB 1338 (1955)). Here, the
24 clear preponderance of the evidence is contrary to the ALJ’s credibility resolutions and
25 accordingly the ALJ’s findings that Raymond violated Sections 8(a)(1), (2) and (3) and that the
26 Carpenters violated Sections 8(b)(1)(A) and 8(b)(2) are in error.

27
28 ¹⁹ Although Richard Myers impressed the ALJ as “testifying truthfully,” the ALJ did not rely on
his testimony in finding a violation herein. See ALJD 32:43-48, footnote 66.

1 As noted above, the ALJ credited Jose Ramos' testimony because he was the most "most
2 trustworthy" and he "clearly exhibited his comprehension of the meaning, gravity, and
3 consequences of the oath." (ALJD 31:21-25) While Mr. Ramos may have appeared trustworthy
4 and may have understood the gravity of the oath, the ALJ's reliance on these factors in crediting
5 Mr. Ramos is misplaced. At the hearing, Mr. Ramos testified through an interpreter (see Tr.
6 277:22 to 278:13) and his testimony can, at best, be characterized as confusing and inconsistent.
7 Mr. Ramos who admittedly understands "very little" English, testified he attended the October 2
8 meeting, listened in English, but used the headsets to hear in Spanish. (Tr. 284:2-15)²⁰ Given his
9 limited English-speaking ability, the issue in evaluating Mr. Ramos' testimony was not, whether
10 he was trustworthy or understood the oath (as relied upon by the ALJ), but whether Mr. Ramos
11 understood what was said at the October 2 meeting, the latter of which the ALJ did not address.
12 And, to the extent the ALJ gave credence to Mr. Ramos' testimony because Mr. Ramos did not
13 report to work the next day (see ALJD 31:25-28), such conduct does not make it more probable
14 that Mr. Winsor made the statements attributed to him. Other drywall finishing employees who
15 did not sign with the Carpenters continued to work for Raymond and were not terminated. ((Tr.
16 444:8-24) Thus, it is equally probable that as a result of Mr. Ramos' preference for the Painters,
17 he decided he did not want to continue working for Raymond if the drywall finishing employees
18 were going to be represented by the Carpenters.

19 During the General Counsel's direct examination, Mr. Ramos testified that in response to
20 a question about what would happen if they did not sign with the Carpenters, Mr. Winsor
21 allegedly stated that "they could continue working but they needed to sign with the Carpenters."
22 (Tr. 286:8-17) Mr. Ramos also testified that a Carpenters representative said the same thing when
23 asked the same question. (Tr. 287:3-10) Significantly, while crediting Mr. Ramos as to what Mr.
24 Winsor said, the ALJ did not credit Mr. Ramos as to what was said by the Carpenters
25 representative.²¹ Additionally, if Mr. Ramos' English-speaking ability is limited and he listened
26 in English, but used the headsets to hear in Spanish during the meeting, how did Mr. Ramos

27 ²⁰ "Did you listen to Mr. Travis in English? Yes." (Tr. 284:6-7)

28 ²¹ In his decision, the ALJ found that "the record evidence attributes no such statements to any Carpenters Union representative." See ALJD 31:40-46, footnote 61.

1 really know who said what and what was actually said by Mr. Winsor? Moreover, even on direct
2 examination, Mr. Ramos' testimony on this point was internally inconsistent. Thus, in contrast to
3 what he testified when questioned by the General Counsel, when Mr. Ramos was examined by
4 the Painters counsel, Mr. Ramos changed his version of what Mr. Winsor had said by testifying
5 that, "First, he said that [we] could continue working and sign later but then someone asked again
6 and he said that if we didn't sign on that day we weren't working any more." (Tr. 293:1-3
7 (emphasis added)) Mr. Ramos' testimony became more confusing and inconsistent on this point
8 when on cross-examination, Mr. Ramos claimed that Mr. Winsor answered the question
9 differently the third time it was asked because Mr. Winsor was "upset." (Tr. 304:3-5) Moreover,
10 on cross-examination, Mr. Ramos yet gave another version of Mr. Winsor's response, testifying
11 that: "The only thing I remember precisely is exactly that, when he was asked what happened if
12 somebody would refuse to sign he said no, if you don't now this day there's no more work." (Tr.
13 304:17-19 (emphasis added))

14 As noted above, the ALJ credited Ms. Pineda's testimony because she corroborated Mr.
15 Ramos and Mr. Ramos corroborated her. (ALJD 31:28 to 32:2) An evaluation of Ms. Pineda's
16 testimony shows more inconsistency than corroboration. First, Ms. Pineda testified that during
17 the question and answer period she asked if employees would have time to think about
18 "switching" from the Painters to the Carpenters and Mr. Winsor responded to her question by
19 allegedly saying, "there is plenty of time to think about it throughout the day." (Tr. 150:5-14)
20 While Mr. Ramos knew Ms. Pineda (see Tr. 299:23-24), he did not testify that either such
21 question was asked or that Ms. Pineda asked this question. And, while Ms. Pineda testified that
22 someone (whom she could not identify) asked if they were going to be able to work the following
23 day if they didn't sign up with the Carpenters, and that Mr. Winsor responded by saying "no, we
24 could not work the following day if we didn't sign with the Carpenters" (see Tr. 151:5-20), her
25 testimony was not credible and should be rejected. Moreover, Ms. Pineda's version of Mr.
26 Winsor's alleged statement(s) is different from Richard Myers' version whom the ALJ also
27 credited as honest. Thus, even though Mr. Myers was sitting next to Ms. Pineda, he did not
28 corroborate Ms. Pineda's version of the statement(s) she testified to on direct examination. Ms.

1 Pineda's testimony is also contradicted by the testimony of Ruben Mejia Alvarez. Mr. Alvarez
2 did not attribute any responses to Mr. Winsor vis-à-vis questions about joining the Carpenters.
3 Instead, Mr. Alvarez testified that in response to a question for more time to think about signing
4 with the Carpenters, Hector Zorrero, not Mr. Winsor, responded by allegedly saying "no, that it
5 was either at that moment or ..." (Tr. 202:15-23) Ms. Pineda was also inattentive during the
6 meeting at the Training Center and she admitted that her memory of what happened was "not
7 good." (Tr. 175:24-25) Thus, Ms. Pineda could not remember: whether a Power Point
8 presentation was used while Mr. Winsor spoke (Tr. 168:11-13); whether any Raymond memos
9 were passed out (Tr. 164:4-6); the questions she or others asked (Tr. 174:3-4, 175:8-11); and Ms.
10 Pineda also could not remember most of what Mr. Winsor said during his presentation. (Tr.
11 168:7 to 172:10)

12 Additionally, on cross-examination at odds with her testimony on direct examination, Ms.
13 Pineda could not remember whether she or someone else asked what would happen if they didn't
14 sign today. (Tr. 175:11-20) Likewise, on cross-examination Ms. Pineda could not remember the
15 "exact words" used by Mr. Winsor in responding to this question and could not remember
16 whether what was asked was: "sign with the Carpenters" (Tr. 151:11-20 (direct examination)) or
17 "sign over with the Carpenters." (Tr. 176:3-13) Moreover, on cross-examination, Ms. Pineda
18 also testified she was not sure whether Mr. Winsor had said "we have plenty of time to think
19 about it today," and changed the testimony she gave on direct examination by stating, "I mean
20 I'm not quoting him, but he did mention we had plenty of time to think about it." (Tr. 177:7-15
21 (emphasis added)) Ms. Pineda also conceded that Mr. Winsor may have said, "we want
22 everybody to keep working for Raymond, nobody's going to be fired." (Tr. 177:19-23)
23 Significantly, Ms. Pineda conceded on cross-examination in contradiction to her testimony on
24 direct that when she asked Mr. Winsor for more time to think, Mr. Winsor replied that
25 "employees had plenty of time to think about it." (Tr. 183:18 to 184:20) Ms. Pineda was also a
26 biased witness who was motivated to testify favorably on behalf of the Painters charges in this
27 matter. She is not a disinterested witness. She is a paid instructor for the Painters and the
28 Painters got her a job with KHS&S the next day after the October 2 meeting. (Tr. 174:17 to

1 175:4, 180:12 to 181:20) Additionally, she was clearly unhappy with Raymond's decision
2 because she spent considerable time trying to convince employees not to sign with the Carpenters
3 and then met with Painters officials. (Tr. 178:2-17, 180:12 to 181:20)

4 Given the foregoing, the preponderance of the evidence does not support the ALJ's
5 decision to credit Ms. Pineda. She did not corroborate either Mr. Ramos or Mr. Alvarez's
6 testimony as to Travis Winsor's and Hector Zorrero's statements at the October 2 meeting.
7 Moreover, Ms. Pineda's obvious favoritism for the Painters and her employment by the Painters
8 does not support the ALJ's finding that she did not have a "pecuniary, employment or other
9 interest in the outcome of this matter." (ALJD 32:2-4)

10 Like Mr. Ramos, Ruben Mejia Alvarez testified through an interpreter. Mr. Alvarez'
11 testimony is suspect given his limited understanding of English. Mr. Alvarez testified that Mr.
12 Zorrero spoke in English and he listened to Mr. Zorrero in English. (Tr. 200:7-11, 208:20-22)
13 Thus, whether Mr. Alvarez was an "honest" witness is beside the point. The real issue is whether
14 he understood what was said at the October 2 meeting given his limited English-speaking
15 capability. Nowhere in Mr. Alvarez's testimony did he testify that Mr. Winsor made any
16 unlawful statements as alleged in Paragraph 18 of the Complaint and as testified to by Mr. Ramos
17 and Ms. Pineda. Thus, Mr. Alvarez does not corroborate Mr. Ramos or Ms. Pineda and they did
18 not corroborate Mr. Alvarez as the ALJ so found. Unlike Mr. Ramos and Ms. Pineda, Mr.
19 Alvarez testified that Mr. Winsor stated the company was going with the Carpenters because they
20 wanted a "better future for us." (Tr. 199:10-16) Additionally, unlike Mr. Ramos and Ms. Pineda,
21 Mr. Alvarez testified that Hector Zorrero, in response to Mr. Alvarez's question for more time to
22 think about signing with the Carpenters, allegedly responded by saying, "No. That there was no
23 time, that it was either at that moment or ..." See Tr. 202:19-25. Yet, Mr. Alvarez admitted that
24 he only spoke English "somewhat" and did not understand everything said at the meeting. See
25 Tr. 215:11-12, Tr. 215:14-15: understood "most of it". As a result, Mr. Zorrero's alleged
26 statement could have been and was very likely misunderstood by Mr. Alvarez. Additionally, Mr.
27 Alvarez' testimony regarding Mr. Zorrero's alleged statement is not supported by the testimony
28 of Mr. Myers or Ms. Pineda, neither of whom attributed any such statement to Mr. Zorrero.

1 Given the foregoing, the preponderance of the evidence does not support the ALJ's
2 crediting of Jose Ramos, Janet Pineda and Ruben Mejia Alvarez regarding the unlawful
3 statements alleged in the Complaint attributed to Travis Winsor and Hector Zorrero.

4 The ALJ completely rejected Mr. Winsor's testimony denying the unlawful threats
5 attributed to him by the General Counsel's witnesses. (ALJD 32:16-17) The ALJ did so based
6 on his characterization of Mr. Winsor's testimony as "hardly that of a guileless witness,"
7 "disingenuous," and "adroitly labored and vague." (ALJD 32:5-16) The ALJ then completely
8 rejected Mr. Zorrero's denials because he "failed to impress me as exhibiting any candor."
9 (ALJD 32:16-18. Finally, the ALJ rejected the corroborating testimony of Gordon Hubel, David
10 Cordero and Pedro Loera, not because they were not credible, but simply because they
11 corroborated Mr. Winsor and Mr. Zorrero whom the ALJ refused to credit. (ALJD 32:23-28)
12 The above findings by the ALJ are in error because the preponderance of the evidence does not
13 support these findings.

14 Travis Winsor credibly testified that in response to question(s) about whether employees
15 had to make a decision "today" or "now" on joining the Carpenters, he responded by saying "no,"
16 they did not have to make a decision today and could take their time. (Tr. 423:6-16, 430:3-10)
17 Mr. Winsor's testimony in this regard is amply corroborated by Gordon Hubel's testimony. (Tr.
18 590:1-5 ("Travis answered, no, you don't have to make a decision today, but you should sign up
19 for benefits today.") Additionally, Mr. Winsor credibly denied making the statements attributed
20 to him by the General Counsel's witnesses. Thus, he credibly and specifically denied telling
21 employees that if they didn't sign with the Carpenters, they wouldn't have a job (Tr. 439:9-12);
22 denied telling employees that they had plenty of time to think about signing with the Carpenters
23 throughout the day or that they needed to make a decision that day (Tr. 440:19 to 441:1); denied
24 telling employees that if they didn't sign with the Carpenters they couldn't work the following
25 day (Tr. 441:2-5); denied telling employees that if they didn't sign today, there wouldn't be any
26 work; and denied telling employees that if they didn't sign, they wouldn't be working for the
27 company (Tr. 442:1-6). Mr. Winsor's denials are corroborated by Carpenters representative
28 Gordon Hubel who denied that any such statements were made. (Tr. 589:13 to 591:15)

1 Likewise, Carpenters representative, David Cordero, who attended the October 2 meeting as a
2 translator (Tr. 551:8-10), corroborated Mr. Winsor's denials and specifically denied translating or
3 hearing anyone making such statements. (Tr. 558:3-18, 559:8 to 560:12) Similarly, Carpenters
4 representative, Pedro Loera, who translated during the meeting (Tr. 539:15 to 540:5), also
5 corroborated Mr. Winsor's denials and specifically denied making any such statements himself.
6 (Tr. 543:2-24) Finally, Hector Zorrero, who heard all the comments Mr. Winsor made during the
7 meeting, also corroborated Mr. Winsor's denials. (Tr. 480:24 to 481:18, Tr. 482:13 to Tr. 483:3)

8 Travis Winsor is a licensed attorney. (Tr. 360:19 to 361:2) Mr. Winsor prepared for the
9 meeting by creating the Power Point presentation used in the Training Center meeting as well as
10 the documents Raymond distributed at this meeting. (Tr. 402-403, 410-411) Additionally, Mr.
11 Winsor was aware of the union security provision in the Carpenters agreement, distributed a
12 memo addressing it and told employees they had 8 days to join the Carpenters. (Tr. 468:6-23;
13 Resp. Er. Ex. 2) Thus, aside from supporting testimony by Messrs. Hubel, Cordero, Loera and
14 Zorrero, it defies credulity that, as an experienced attorney with labor experience who had
15 prepared for the October 2 meeting, and was knowledgeable about the requirements of the union
16 security provision in the Carpenters agreement, Mr. Winsor would have made the alleged
17 unlawful statements attributed to him by the General Counsel's witnesses. Moreover, the fact
18 that no drywall finishing employee was terminated for not joining the Carpenters after the
19 October 2 meeting (see Tr. 444:8-24) strongly suggests that Mr. Winsor never made these
20 statements.

21 As noted above, Ruben Mejia Alvarez was the only witness who claimed that in response
22 to a question for more time to think about signing with the Carpenters, Hector Zorrero allegedly
23 responded by saying, "No. That there was no time, that it was either at that moment or ..." It
24 turns out, that Mr. Alvarez was the sole individual at the October 2 meeting who heard Mr.
25 Zorrero make this statement because no other witness, including the other witnesses presented by
26 the General Counsel, supported or corroborated Mr. Alvarez's testimony. Mr. Zorrero credibly
27 denied making any such statement. (Tr. 482:4-6, 481:19 to 482:12) And, unlike Mr. Alvarez,
28 Mr. Zorrero's denials are corroborated by Mr. Winsor's testimony (Tr. 441:6-19) as well as the

1 testimony of Carpenters representatives Pedro Loera (Tr. 543:2-14), David Cordero (Tr. 558:3-
2 18), and Gordon Hubel (Tr. 589:13 to 591:15).

3 Based upon the above, the preponderance of the evidence does not support the ALJ's
4 findings rejecting Travis Winsor's and Hector Zorrero's denials as to the unlawful statements
5 alleged in the Complaint attributed to them at the October 2 meeting. While the ALJ was critical
6 of Mr. Winsor's testimony regarding the October 2 meeting and noted an alleged contradiction
7 between Mr. Winsor and Mr. Zorrero as to what was said during the "question and answer
8 session" (see ALJD 32:19-21), more inconsistencies existed among the testimonies of General
9 Counsel's witnesses - Mr. Ramos, Ms. Pineda and Mr. Alvarez. Yet, despite the inconsistencies
10 of the General Counsel's witnesses, and without any attempt to explain them away, the ALJ
11 credited the testimony of the General Counsel's witnesses and justified his doing so with boiler-
12 plate language that he believed them to be "trustworthy" and "honest."

13 Because the preponderance of the evidence did not support the ALJ's findings that Travis
14 Winsor and Hector Zorrero made statements violative of Sections 8(a)(1), (2) and (3) at the
15 October 2, 2006, meeting (as alleged in the Complaint), the ALJ's findings that Raymond
16 violated these provisions of the Act were in error.

17 **C. The ALJ erred in finding that Raymond violated Sections 8(a)(1) and (2) by**
18 **its recognition of the Carpenters via the "Recognition Agreement" on**
19 **October 2, 2006 because the Carpenters' majority support was neither**
20 **tainted nor coerced. [Exception Nos. 69-77, 87-106, and 108-113.]**

21 In Paragraph 21 of the Complaint, the General Counsel alleged that Raymond violated
22 Sections 8(a)(1) and (2) by recognizing the Carpenters on October 2, 2006 because the Carpenters
23 did not purportedly represent an uncoerced majority of the drywall finishing employees at the
24 time Raymond signed the Recognition Agreement recognizing the Carpenters as the Section 9(a)
25 representative of those employees. G.C. Ex. 1, Complaint ¶¶ 21, 24. The ALJ agreed with the
26 General Counsel and found violations of 8(a)(1) and (2) because of Raymond's "unlawful
27 assistance sufficient to taint the latter's asserted showing by authorization cards, of majority
28

1 support.”²² (ALJD 34:12-14) The sole basis supporting this finding is the ALJ’s finding
2 (discussed above) that Travis Winsor and Hector Zorrero made unlawful statements during the
3 October 2, 2006 meeting. See ALJD 34:8-12 (“Herein, I have concluded that the signed
4 authorization cards, which Respondent Carpenters collected subsequent to the October 2 morning
5 meeting at Respondent Raymond’s Orange facility and relied upon in demanding recognition . . .
6 were tainted by the warnings uttered by Respondent Raymond’s Winsor and Zorrero.”)

7 However, as discussed above, the preponderance of the evidence does not support the
8 ALJ’s crediting of the testimony of Jose Ramos, Janet Pineda and Ruben Mejia pertaining to the
9 alleged unlawful statements of Mr. Winsor and Mr. Zorrero, and the latter credibly denied such
10 statements. As a result, the General Counsel failed to establish that the Carpenters’ authorization
11 cards were tainted by any coercive conduct that occurred at the October 2 meeting. Even
12 assuming arguendo that such statements were made they do not vitiate the authorization cards
13 collected by the Carpenters from the drywall finishing employees. Both Mr. Winsor and Mr.
14 Zorrero understood that the purpose of the October 2 meeting was to let employees know of the
15 new wage package and benefits. (Tr. 400:4-9) Moreover, it is undisputed that neither Mr.
16 Winsor nor Mr. Zorrero solicited or directed employees to sign authorization cards on behalf of
17 the Carpenters. In fact, the undisputed evidence establishes that both were unaware that the
18 Carpenters were soliciting authorization cards on October 2 from the employees and neither Mr.
19 Winsor nor Mr. Zorrero were told by the Carpenters that Carpenters representatives would be
20 soliciting authorization cards. (Tr. 446:24 to 447:2, 486:4-8) Thus, Mr. Winsor’s and Mr.
21 Zorrero’s alleged 8(a)(2) statements, even if made, could not have been remotely directed to the
22 signing of authorization cards. Even the General Counsel’s Complaint concedes this point by
23 attributing the Mr. Winsor’s and Mr. Zorrero’s statements to the signing of union membership
24 cards since the Complaint alleges these purported statements were made “even though the drywall
25 finishing employees were not granted the 7-day grace period provided by the 2006-2010
26 Carpenters Agreement and provided by the Act.” (G.C. Ex. 1, Complaint, ¶ 18(d)) Additionally,
27

28 ²² The ALJ did not find that Raymond violated Section 8(a)(3) based on its entering into the
Recognition Agreement. (ALJD 34:41-46, footnote 68)

1 the union membership cards and the authorization cards distributed by the Carpenters on October
2 2 were separate cards. See G.C. Ex. 3(a)-(e).

3 Because the alleged statements of Mr. Winsor and Mr. Zorrero, even if made, were
4 directed to the employees' signing of union membership cards, not authorization cards, at best,
5 the General Counsel established violations vis-à-vis the union membership cards. But this
6 violation and the evidence therein failed to establish an 8(a)(2) violation as to the authorization
7 cards and, accordingly, failed to establish that the authorization cards collected by the Carpenters
8 from the drywall finishing employees were invalid or coerced. In his decision, the ALJ rejected
9 this argument on the basis that he understood "the Board as equating membership in a labor
10 organization with supporting representation by the said labor organization, and therefore, I
11 believe that becoming a member of a labor organization signifies one's desire to be represented
12 by it for the purposes of collective bargaining." (ALJD 33:29-32, and 12-45) The ALJ, however,
13 cited no Board decision for this belief. While the ALJ cited Acme Tile & Terrazo Co., 318
14 NLRB 425 (1995), this decision does not support the ALJ's belief or understanding inasmuch as
15 there is no reference by the Board equating union membership with supporting representation.
16 Moreover, the ALJ's finding is based on his unwarranted and unsupported belief "that employees,
17 who were instructed to complete the membership application, undoubtedly completed and
18 executed every form on the large document without regard to the difference between them."
19 (ALJD 33:38-42) Here, none of the witnesses presented by the General Counsel testified in
20 support of the belief on the part of the ALJ despite extensive questioning by counsel of all parties
21 and the ALJ. In fact, no witness testified that he signed a union authorization card because of the
22 statements of Mr. Winsor or Mr. Zorrero. The General Counsel had the burden of proof to
23 establish that the Carpenters' majority support was tainted or coerced and, except for the ALJ's
24 rank speculation on this crucial issue, did not carry his burden.

25 Based on the foregoing, the 8(a)(1) and (2) allegations of the Complaint attacking the
26 October 2, 2006 "Recognition Agreement" should have been dismissed in their entirety by the
27 ALJ.
28

1 **D. Even if the ALJ's findings that, on October 2, 2006, Raymond violated**
2 **Sections 8(a)(1), (2) and (3) as a result of Travis Winsor's and Hector**
3 **Zorrero's alleged unlawful statements, and that Raymond violated Sections**
4 **8(a)(1) and (2) by its recognition of the Carpenters via the "Recognition**
5 **Agreement" are correct, these findings do not vitiate Raymond's pre-existing**
6 **8(f) agreement covering the drywall finishing employees and, accordingly, do**
7 **not support Sections 1(a) and (b) and 2(a), (b), and (c) of the recommended**
8 **Order. [Exception Nos. 85-86, 92-97, 101-106, and 108-113.]**²³

9 Even if the Carpenters majority status vis-à-vis the drywall finishing employees was
10 invalid because of unlawful conduct engaged in by Raymond on October 2, 2006, as noted above,
11 Raymond had an enforceable Section 8(f) agreement covering the drywall finishing employees.
12 The Carpenters and Raymond had a Section 8(f) agreement covering these employees based on
13 Section 7(g) of the 2006-2010 Carpenters Agreement, which required coverage of these
14 employees upon expiration of the 2003-2010 Painters Agreement, and/or the Confidential
15 Settlement Agreement between Raymond and the Carpenters. This Section 8(f) agreement pre-
16 dated and was in existence on October 2, when the conduct alleged as violative of Section 8(a)(2)
17 occurred. This pre-existing Section 8(f) agreement was a legally enforceable collective
18 bargaining agreement during its term under the Board's decision in Deklewa and its progeny.
19 See, e.g., Gem Management Co., 339 NLRB 489, 501 (2003) (Employer violates Section 8(a)(5)
20 by failing to adhere to or by repudiating an 8(f) agreement during its term.) Thus, even assuming
21 arguendo that the alleged statements by Travis Winsor and Hector Zorrero violated Sections
22 8(a)(1, (2) and (3), and vitiated the authorization cards that the Carpenters had from the drywall
23 finishing employees, this conduct cannot invalidate the pre-existing Section 8(f) agreement
24 between Raymond and the Carpenters.

25 ²³ For similar reasons, any like provisions of the ALJ's recommended Order directed against the
26 Carpenters are not warranted. With respect to Exception Nos. 78-83, 90, and 107, the ALJ found that the
27 Carpenters violated Section 8(b)(1)(A) by failing to inform the drywall finishing employees of their rights
28 under the Supreme Court's decisions in NLRB v. General Motors, 373 U.S. 734 (1963) and
29 Communication Workers v. Beck, 373 U.S. 734 (1963). (ALJD 34:24 to 36:22, 36:18-22) The record
30 evidence and applicable Board precedent do not support these violations. Even assuming arguendo, it is
31 determined that such 8(b)(1)(A) violations were committed by the Carpenters, Raymond would not be
32 jointly and severally liable for any dues and fees collected from the drywall finishing employees based on
33 such violations and, accordingly, . Raymond would not be obligated "jointly and severally" with the
34 Carpenters to refund such dues and fees to the extent based on any purported 8(b)(1)(A) violations. See,
35 e.g., California Saw & Knife Works, 320 NLRB 224 (1995), enfd sub nom Machinists v. NLRB, 133 F.3d
36 1012 (7th Cir. 1998), cert. denied sub nom. Strang v. NLRB, 525 U.S. 813 (1998); Yellow Freight
37 Systems of Indiana, 327 NLRB 996, 997 (1999) ("employers have no affirmative responsibility to inform
38 employees of their Beck ... rights").

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1 Settled Board law establishes that an 8(f) agreement continues to remain valid where the
2 8(a)(2) assistance or support occurred wholly after the parties had already executed their 8(f)
3 agreement. Zidell Explorations, Inc., 175 NLRB 887 (1969). Thus, in Zidell, the Board stated
4 that,

5 “[We] do not read Section 8(f) as permitting, much less as
6 requiring, the invalidation of a prehire contract, allowable under
7 that Section and valid when entered into, simply because of
8 subsequent acts of unlawful assistance for which the employer party
9 to the contract has alone been found responsible . . . Section 8(f), if
10 it is true, imposes as one of the conditions that an employer may
“make” such an agreement only with a labor organization “not
established, maintained, or assisted by any action defined in Section
8(a) of the Act as an unfair labor practice.” That condition,
however, speaks only as of the time of the making of the contract
and obviously refers to antecedent unfair labor practices.”

11 Id. at 888 (emphasis in original). Under the Board’s holding in Zidell, conduct violative of
12 Section 8(a)(2) that post-dates the execution of a Section 8(f) agreement does not invalidate that
13 agreement. See also Luke Construction Company, 211 NLRB 602, 605 (1974) (Post 8(f) contract
14 assistance not a proper basis for ordering withdrawal of recognition or rescission of an otherwise
15 valid Section 8(f) agreement.)

16 Based upon the above, Raymond and the Carpenters had a lawful and enforceable Section
17 8(f) agreement which incorporated the provisions of the 2006-2010 Carpenters Agreement and
18 covered the drywall finishing employees, and pre-dated the October 2 meeting. Accordingly,
19 Raymond was legally privileged in “maintaining and enforcing” this agreement, including its
20 union-security provision, vis-à-vis its drywall finishing employees. As a result, Sections 1(b),
21 2(a), (b), and (c) of the ALJ’s recommended Order are unwarranted.

22 Even assuming arguendo that no such pre-existing 8(f) agreement existed, Sections 1(a)
23 and (b), and 2(a), (b) and (c) of the ALJ’s recommended Order are still unwarranted.
24 Construction industry employers like Raymond and the Carpenters are permitted under Deklewa
25 to enter into a non-majority Section 8(f) agreement and Board certification is not required as a
26 condition precedent for entering into such an agreement. Here, the ALJ’s recommended Remedy
27 and the other provisions of the ALJ’s recommended Order adequately remedy the violations of
28 the Act found by the ALJ, but would forever preclude Raymond and the Carpenters from entering

1 into an agreement covering the drywall finishing employees absent a Board certification that the
2 Carpenters are the exclusive collective bargaining representative. The ALJ's recommended
3 Remedy and recommended Order, however, do not distinguish between limited 9(a)
4 representation permitted under Deklewa and full-blown 9(a) representation.

5 While the ALJ cited no Board decision supporting the foregoing provisions of his
6 recommended Remedy and Order, we assume the ALJ relied on the Board's decision in Julius
7 Resnick, Inc., 86 NLRB 38 (1949), and its progeny. Julius Resnick, however, did not involve a
8 construction industry employer or an 8(f) agreement and therefore is not applicable herein. While
9 a Julius Resnick remedy was ordered in Oilfield Maintenance Co., 142 NLRB 1384, 1388 (1963),
10 in connection with an employer's 8(a)(2) violations, the Board did so without any analysis or
11 extended discussion as to why such a remedy was appropriate or warranted in the construction
12 industry in which the Act permits 8(f) agreements.

13 Oilfield Maintenance was decided before the Board's decision in Deklewa and we are not
14 aware of any post-Deklewa construction industry 8(a)(2) decision by the Board citing Julius
15 Resnick. Given that Deklewa and its progeny distinguish between limited 9(a) representation
16 under an 8(f) agreement and full-blown 9(a) representation, the ALJ's recommended Remedy and
17 Order is not warranted to the extent it imposes a "death penalty" or "life sentence" for an 8(a)(2)
18 violation by forever barring Raymond and the Carpenters from entering into a separate 8(f)
19 agreement covering the drywall finishing employees even after Raymond and the Carpenters have
20 otherwise affirmatively complied with the remaining provisions of the ALJ's recommended
21 Remedy and Order. In Zidell, the Board stated:

22 "Section 8(f), it is true, imposes as one of its conditions that an employer may 'make'
23 such an agreement only with a labor organization 'not established, maintained or assisted
24 by any action defined in Section 8(a) of the Act as an unfair labor practice.' That
condition, however, speaks only as of the time of the making of the contract."

25 Zidell, supra at 888 (emphasis added). Thus, if Raymond indeed violated Section 8(a)(1), (2) and
26 (3) by entering into a 9(a) collective bargaining agreement covering the drywall finishing
27 employees on October 2, 2006, after otherwise remedying these violations, Raymond (and the
28 Carpenters) should not be barred thereafter from entering into an 8(f) agreement covering these

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employees. The Act does not impose “death penalties” or “life sentences” for its violations. See Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940) (“The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes.”)

IV. CONCLUSION

Based upon the above, Raymond Interior Systems respectfully requests that the Board sustain its exceptions to the Decision of Administrative Law Judge Burton Litvak and modify his findings, conclusions of law, recommended Remedy, recommended Order, recommended Notice to Employees, and recommended Notice to Members, accordingly.

Respectfully submitted,

DATED: January 12, 2009

HILL, FARRER & BURRILL LLP
James A. Bowles, Esq.
Richard S. Zuniga, Esq.

By: Richard S. Zuniga
Richard S. Zuniga
Attorneys for Respondent,
RAYMOND INTERIOR SYSTEMS

PROOF OF SERVICE

I, Richard S. Zuniga, declare as follows:

1. I am a resident of the state of California and over the age of eighteen years, and not a party to the within action; my business address is Hill, Farrer & Burrill LLP, One California Plaza, 37th Floor, Los Angeles, California 90071-3147.

2. On January 7, 2009, I telephonically notified Patrick Cullen, Ellen Greenstone, and Kathleen Jorgenson, counsel for the other parties in this matter, and again notified the above individuals by e-mail on January 12, 2009, that Respondent Raymond Interior Systems would be E-Filing its brief in support of exceptions to the Decision of Administrative Law Judge Burton Litvak in Cases 21-CA-37649 and 21-CB-14259.

3. I hereby certify that on January 12, 2009, I filed **Respondent Raymond Interior Systems' Brief In Support Of Exceptions to Decision of Administrative Law Judge Burton Litvak** in Cases 21-CA-37649 and 21-CB-14259, via E-Filing, and I caused the original and eight (8) copies of the foregoing document to be placed in a sealed envelope and sent overnight delivery via Federal Express as follows:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 – 14th Street N.W.
Washington, D.C. 20570
Tel: (202) 273-1067

4. I hereby that on January 12, 2009, I caused to be served a true copy of **Respondent Raymond Interior Systems' Brief In Support Of Exceptions to Decision of Administrative Law Judge Burton Litvak** in Cases 21-CA-37649 and 21-CB-14259, by placing a true copy thereof in sealed Federal Express envelopes and affixing pre-paid air bills, and causing the envelopes to be delivered to a Federal Express agent for overnight delivery as follows:

James Small, Regional Director
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449
Tel: (213) 894-5213
[One copy]

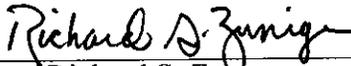
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I declare under the laws of the State of California that the foregoing is true and correct.
Executed this 12th day of January 2009.



Richard S. Zuniga

HFB 850862.1 R1766006