

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**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)**

**BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT  
CARPENTERS LOCAL UNION 1506  
TO DECISION AND RECOMMENDED ORDER OF  
ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

In his Decision in this case, the Administrative Law Judge (“ALJ”) has recommended what amounts to a revision of Section 8(f) of the National Labor Relations Act. The revision operates as follows: if a construction industry employer and a union, who are free to enter into an agreement under Section 8(f), attempt instead to create a Section 9(a) relationship *but fail to validly do so*, the entire agreement and collective bargaining relationship are invalidated. The agreement will not be deemed a Section 8(f) agreement. Because the agreement indicates an intent to create a Section 9(a) relationship, that intent is controlling and exclusive. This model also amounts to a revision of the presumption of Section 8(f) status as explained in John Deklewa & Sons, 282 NLRB 1375, 1385 (1987).

The following explains how this revision of Section 8(f) operates in the instant matter. Respondent Raymond Interior Systems, Inc. (“Respondent Raymond”), a construction industry employer, had a Section 8(f) contract with the Charging Party Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO (“Painters Union”) covering its drywall finishing employees, which contract expired on September 30, 2006. The Painters Union did not seek to demonstrate majority status, nor did it file an election petition, at this or at any other time relevant herein.

It is undisputed that Respondent Raymond lawfully withdrew recognition from the Painters Union as of September 30, 2006. Thereafter, on October 1, 2006, Respondent Raymond recognized Respondent United Brotherhood of Carpenters and Joiners of America, Local Union 1506 (“Respondent Carpenters” or “Carpenters Union”) as the collective bargaining representative of the drywall finishing employees “to the fullest extent permitted by law.” On

October 2, 2006, Respondent Raymond held a meeting of the drywall finishing employees at its Orange, California, facility where it explained the change in representation, and where the Carpenters Union explained the resulting changes in benefits and terms and conditions of employment. It is at this meeting that the ALJ found unlawful statements to have been made by two representatives of Respondent Raymond, i.e. that the employees had to sign with the Carpenters Union *that day* (as opposed to within eight days) in order to continue their employment with Respondent Raymond.

At the conclusion of this meeting, Carpenters Union representatives obtained authorization cards from the majority of drywall finishing employees, and requested that Respondent Raymond recognize the Carpenters Union as the Section 9(a) representative of these employees. Respondent Raymond did so, and the parties executed a Recognition Agreement.

The ALJ found that the above-noted unlawful statements tainted the Section 9(a) recognition and constituted unlawful assistance. The ALJ also found that as of October 1, 2006, the Respondents had unlawfully accreted the drywall finishing unit into the preexisting Carpenters Union unit comprised of drywall hanging employees. On these grounds, the ALJ has concluded that *any* recognition of the Carpenters Union as the collective bargaining representative of Respondent Raymond's drywall finishing employees is unlawful – *even under Section 8(f)* – and has recommended that Respondent Raymond be prohibited from recognizing the Carpenters Union as the representative of these construction employees absent a Board-certified election. As such, the recommended remedy eliminates Section 8(f) from the Act, at least insofar as Respondent Raymond's drywall finishing employees are concerned.

Lastly, the ALJ found that the Carpenters Union failed to give these employees notice of

their General Motors<sup>1</sup> and Beck<sup>2</sup> rights before obligating them to pay dues and enforcing the union security clause of its collective bargaining agreement. This finding was made despite the fact that the employees were handed magazines containing the required notices *along with* the envelopes for mailing in their dues payment, and *before* any dues or initiation fees were collected. Further, the undisputed evidence in the record demonstrates that the union security clause of the collective bargaining agreement was *never* enforced. As a remedy for this found violation, the ALJ recommends an order that the Carpenters Union be required to reimburse the drywall finishing employees for all dues and initiation fees paid from the time of the original recognition (October 1, 2006) to the present.

As demonstrated below, these factual findings are unsupported by the evidence in the record. Further, the ALJ's recommended remedies exceed the scope of the Board's authority and contravene Board policy.

## **II. STATEMENT OF THE CASE**

Respondent Raymond is a specialty wall and ceiling contractor in the building and construction industry, performing drywall, metal stud framing, drywall finishing, lathe, plastering, and specialty finishing work in several states, including California and Nevada.

ALJD 4:29-31.<sup>3</sup> Since at least the early 1960's, Respondent Raymond has been an employer-

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<sup>1</sup>NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

<sup>2</sup>Communications Workers of America v. Beck, 487 U.S. 735 (1988).

<sup>3</sup>The ALJ's Decision will be referred to herein as "ALJD (page number):(line numbers)." Transcript citations will be referred to as "Tr. (page number)." Exhibits will be referred to herein as follows: General Counsel Exhibits as "GC Exh. \_\_\_"; Respondent Raymond Exhibits as "RE Exh. \_\_\_"; and Respondent Carpenters Union Exhibits as "RU Exh. \_\_\_."

member of the Western Wall and Ceiling Contractors Association, Inc. (“WWCCA”), and its predecessor entities. ALJD 4:38-40. The WWCCA is a multi-employer association composed of companies performing work in the building and construction industry similar to that of Respondent Raymond. ALJD 4:40-41. The WWCCA is divided into several “conferences,” each of which negotiates, executes, and enforces collective bargaining agreements with a particular labor organization on behalf of the WWCCA employer-members who belong to that conference. ALJD 4:44-47. From at least the 1960's, and through September 2006, Respondent Raymond had been an employer-member of the respective WWCCA conferences that negotiated successive collective bargaining agreements with the Painters Union (the “Drywall Finishing Conference”) and the Southwest Regional Council of Carpenters and its affiliated local unions, including Respondent Carpenters Union (the “Drywall/Lathing Conference”)<sup>4</sup>, among others. ALJD 4:47 - 5:4.

The most recent of the successive collective bargaining agreements between the WWCCA Drywall Finishing Conference and the Painters Union that Respondent Raymond was a party to had a term from October 1, 2003 through September 30, 2006. ALJD 5:5-9; GC Exh. 4, tab 1, p. 65. The Painters Union agreement covered the drywall finishing work, which generally includes the work of covering up screws and joints in drywall after the drywall sheets have been hung and smoothing out the walls and preparing the material for painting. ALJD 5:9-12. The scope of work clause of this agreement also states that it covers drywall installation, but the Painters Union never in fact claimed that work. GC Exh. 4, tab 1, p. 2; Tr. 363-364. There is

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<sup>4</sup>In his Decision, the ALJ refers to this conference as the “Drywall/Finishers Conference.” See, i.e., ALJD 5:3-4, 5:16-17. However, this is incorrect; the conference is actually called the “Drywall/Lathing Conference.” See RE Exh. 4, p. 1.

no dispute that, despite the inclusion of language evidencing an intent to create a relationship under Section 9(a) of the Act, this and all prior Painters Union collective bargaining agreements were governed by Section 8(f). ALJD 5:13-14; GC Exh. 4, tab 1, p. 1.

The most recent agreements between the WWCCA Drywall/Lathing Conference and the Southwest Regional Council of Carpenters that Respondent Raymond was a party to had terms from July 1, 2002 through June 30, 2006, and July 1, 2006 through June 30, 2010. ALJD 5:16-20. Both agreements contain the following language:

VOLUNTARY RECOGNITION AGREEMENT

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(a) On behalf of each Contractor signatory hereto, the Association, having received from the Union a demand or request for recognition as the majority representative of the unit employees covered by this collective bargaining agreement; and having been presented or having been offered to be presented with, by the Union, proof that the Union has the support of, or has received authorization to represent, a majority of the unit employees covered by this collective bargaining agreement; hereby expressly and unconditionally acknowledges and grants, on behalf of each of its members in their individual capacities, recognition to the Union as the sole 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.

ALJD 5:21-38; RE Exh. 4, p. 28.

Until 1988, the Carpenters Union agreement basically covered the work of framing and drywall hanging, including metal stud framing, drywall hanging, and lathing work. ALJD 5:40-43; Tr. 573-576. In 1988, the scope of work was expanded to include drywall finishing work. ALJD 5:43 - 6:1; Tr. 573-576. In 1992, language was included in the Carpenters Union agreement to address the concerns of WWCCA employer-members about the overlapping work jurisdictions of the agreements with the Painters Union and the Carpenters Union. Tr. 573-576. This “Painters Union exception” reads as follows in the 2006-2010 Carpenters Agreement:

The Union understands and recognizes that the WWCCA and its members are signatory to a collective bargaining agreement with the Painters and/or Plasterers and Plaster Tenders covering drywall finishing and wet wall finish work. The parties agree that Article I, Section 7 shall apply only to those signatory employers who are not already signatory to a collective bargaining agreement with the Painters 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 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.

ALJD 6:11-23; RE Exh. 4, p. 4.

In May of 2006, the CEO of Respondent Raymond, Travis Winsor, notified the WWCCA and the Painters Union that Raymond was resigning its membership in the Finishers Conference and that Raymond intended to terminate the 2003-2006 Painters Agreement on its expiration date. ALJD 6:24 - 7:2; GC Exh. 4, tab 2. It thus became well known within the industry that Respondent Raymond intended to terminate its agreement with the Painters Union. ALJD 7:3-6. The Painters Union did not file an election petition, nor did it seek to demonstrate majority status among the employees. Effective September 30, 2006, Raymond lawfully withdrew recognition from the Painters Union as the representative of the drywall finishing employees and lawfully terminated the Section 8(f) agreement. GC Exh. 1, Cpt. ¶11.

After Raymond notified the WWCCA of its resignation from the Finishers Conference and of its intent to terminate the Painters Union agreement upon its expiration, Carpenters Union representatives Mike McCarron and Gordon Hubel each informed Mr. Winsor that the Carpenters Union intended to fully enforce all provisions of their contract upon the expiration of the Painters Union contract -- including the scope of work provision covering the drywall

finishing work. ALJD 7:9-15; Tr. 380-381, 576-579. The Carpenters Union had, in fact, done this with at least four other contractors.<sup>5</sup> Tr. 576-577.

Respondent Raymond believed that the operation of this provision would result in the parties commencing negotiations from scratch for these employees, and further had concerns about the continuity of these employees' benefits. Tr. 578-9. Respondent Carpenters Union believed that the Master Agreement immediately applied upon expiration of the Painters Union agreement, and was prepared to litigate this issue, if necessary. *Id.*; ALJD 7:15-26. However, the parties resolved the dispute and memorialized the terms of this resolution in a Confidential Settlement Agreement ("Settlement Agreement"). Tr. 382, 579; RE Exh. 5. This Settlement Agreement provided that Respondent Raymond would, upon the expiration of the Painters Union agreement, recognize Respondent Carpenters Union as the representative of the drywall finishing employees "to the fullest extent permitted by law" and would apply the terms and conditions of its Master Agreement with Respondent Carpenters Union to the drywall finishing employees.

RE Exh. 5. Specifically, the Settlement Agreement provides in pertinent part:

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

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

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

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<sup>5</sup>The Carpenters Union agreement also covers drywall finishing work with approximately 30-40 other contractors in the industry, by virtue of the fact that those contractors are not signatory to an agreement with the Painters Union, and the Painters Union exception in the Carpenters agreement therefore does not apply. Tr. 576-577.

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

RE Exh. 5, p. 1.

As noted above, the Painters Union agreement expired on September 30, 2006, and Respondent Carpenters Union was therefore the collective bargaining representative of the drywall finishing employees as of October 1, 2006, which was a Sunday. See GC Exh. 4: tab 1, p. 65; tab 3, part 2, p.3. On Monday, October 2, 2006, beginning at 7:00 a.m., Respondent Raymond held a meeting for all of its drywall finishing employees at its Orange County facility in order to explain these events, and so that Respondent Carpenters Union could explain the employees' new terms and conditions of employment, especially their new benefits, and answer any questions that the employees may have. Tr. 400-402. Approximately 85 to 90 employees attended the meeting. Id.

The meeting was held in a building at the rear of Respondent's Orange County facility that includes three rooms – a gym and storage room, a warehouse, and a training center. ALJD 10:4-6, 18-22, 40-41; RE Exh. 3. Each of these rooms has its own entrance door from the exterior; the warehouse and training room also have an interior door through which one can pass between them. RE Exh. 3. The employees were first served breakfast in the warehouse, where tables and chairs had been set up. Tr. 407. After breakfast, the employees were directed into the training center to hear presentations from Respondent Raymond and from Respondent Carpenters Union explaining the changes in collective bargaining agreements and the resulting changes in terms and conditions of employment for the drywall finishing employees. Tr. 399-401; ALJD

10:18-23.

Travis Winsor spoke on behalf of Respondent Raymond. Tr. 411-412. He utilized a Power Point presentation that he had written, as well as a document that was distributed to the employees, both of which explained the changes that had occurred. Tr. 411-412; ALJD 10:29 - 11:25; RE Exh. 1. Thereafter, Carpenters Union representative Marty Dahlquist spoke and, utilizing another Power Point presentation, explained and the wage and benefit packages set forth in the Carpenters Union agreement. ALJD 11:25-28. Ron Schoen, the administrator of the Carpenters Union trust funds, then spoke and explained the Carpenters benefit package in greater detail, and also explained the administration of these benefits and the documentation that employees needed to complete in order to ensure their coverage. ALJD 11:28-30; Tr. 552, 586. Lastly, Hector Zorrero, General Superintendent for Respondent Raymond, spoke to the employees about his long association with both Respondent Raymond and with Respondent Carpenters Union, and praised both organizations. Tr. 438-439; 477-478. After Mr. Zorrero spoke, the employees were given the opportunity to ask any questions that they may have, and several employees did so. ALJD 11:30-33; Tr. 419.

It is during this meeting that General Counsel contends that unlawful statements were made to the drywall finishing employees. Specifically, the General Counsel alleged, and the ALJ found, that Travis Winsor and Hector Zorrero each made a comment to the employees indicating that the employees needed to join the Carpenters Union *that day* or they would no longer work for Respondent Raymond. ALJD 32:29 - 33:10; GC Exh. 1, Cpt. ¶ 18. The General Counsel had alleged that representatives of the Southwest Regional Council of Carpenters had made similar comments, but no evidence was presented in this regard, and the ALJ recommends dismissal of

the corresponding paragraphs of the Consolidated Complaint. ALJD 31:40-46.

At the conclusion of this meeting, the employees milled about in the training center, warehouse, and in the exterior courtyard, and discussed their options. Tr. 592-593.

Representatives of Respondent Carpenters Union walked around in these areas answering the employees questions and advocating that they sign with the Carpenters Union. Tr. 592-593. In the warehouse, a table had been set up by the trust fund administrators where they were answering questions, distributing materials, and collecting forms regarding benefits and enrollment. Tr. 585-586, 593. Another table had been set up by Respondent Carpenters Union, at which two administrative employees of Respondent Carpenters Union were answering questions and distributing membership forms and authorization cards, along with other materials. Tr. 500-503, 593; GC Exh. 3(a) - (e).

The authorization cards read, in pertinent part:

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

See GC Exh. 3(d). Respondent Raymond had not reviewed the forms being distributed to the employees, and was unaware that they included authorization cards. Tr. 408, 427, 445, 446-447.

Employees began entering the warehouse, asking questions, and completing the materials at these two tables. Tr. 592-593. No dues or initiation fees were collected from the employees that day. Tr. 503. Employees of Respondent Carpenters Union were also distributing a packet of materials to each employee that turned in a membership form. Tr. 503. That packet included the January 2006 issue of the *Carpenter* magazine, which set forth a notice of the employees' rights under General Motors and Beck, and an envelope for mailing in the payment of initiation fees

and dues, among other things. Tr. 503; RU Exh. 2, p. 47. Each year, the January issue of the *Carpenter* magazine sets forth the notice of General Motors and Beck rights, and is mailed to the employees' homes. Tr. 510-511.

During this time, and without Respondent Raymond's knowledge, Respondent Carpenters Union obtained signed authorization cards from a majority of the drywall finishing employees. Tr. 446-7, 597. At the end of the day on October 2, 2006, the Respondent Carpenters Union presented these cards and a Section 9(a) Recognition Agreement to Respondent Raymond, which Agreement Respondent Raymond signed. Tr. 447, 597-8; GC Exh. 4, tab 4.

None of Respondent Raymond's drywall finishing employees were fired or not allowed to work on October 2, 2006, or at any time thereafter, for not joining the Carpenters Union. In fact, at least three drywall finishing employees continued to work beyond the 8-day term of the Carpenters Union agreement's union security clause without joining the Carpenters Union, including one who did not join the Carpenters Union until January of 2007. Tr. 444.

### **III. QUESTIONS INVOLVED**

1. Did the ALJ err in failing to conclude that, if the collective bargaining agreement between Respondent Raymond and Respondent Carpenters Union was not a valid Section 9(a) agreement, it is to be deemed a Section 8(f) agreement? (See Exception Nos. 1-22, 45-47, 54-56.)
2. Did the ALJ err in concluding that the Confidential Settlement Agreement between Respondent Raymond and Respondent Carpenters Union did not constitute a lawful collective bargaining agreement? (See Exception Nos. 1-22, 45, 46, 56.)
3. Did Respondent Raymond and Respondent Carpenters Union have a valid Section

8(f) relationship as of October 1, 2006, that could not be invalidated by the alleged unlawful acts of October 2, 2006? (See Exception Nos. 1-22, 45-49, 54-56.)

4. Did the ALJ err in finding that Respondent Raymond and Respondent Carpenters Union attempted to accrete the drywall finishing employees into the drywall hanging employees' bargaining unit, and that the Respondents thereby violated the Act? (See Exception Nos. 1-22, 45, 46, 56.)

5. Does the clear preponderance of the evidence in the record demonstrate that the ALJ's credibility determinations are incorrect, and that his findings that Travis Winsor and Hector Zorrero made unlawful comments to the employees must be reversed? (See Exception Nos. 23-31, 33, 35-38, 47-49, 56.)

6. Did the ALJ err in recommending that Respondent Raymond be ordered to withdraw recognition from Respondent Carpenters Union as the collective bargaining representative of the drywall finishing employees until the latter has been certified as the exclusive collective bargaining representative of said employees? (See Exception Nos. 1-22, 32-38, 45-49, 53-56.)

7. Did the ALJ err in finding that Respondent Carpenters Union failed to give the drywall finishing employees notice of their rights under General Motors and Beck before obligating them to pay dues and fees, and that it thereby violated the Act? (See Exception Nos. 39-44, 50, 51, 56.)

8. Does the ALJ's recommended remedy exceed the scope of that utilized by the Board to remedy General Motors and Beck violations? (See Exception Nos. 52, 54, 56.)

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#### IV. ARGUMENT

##### A. **THE ALJ FAILED TO FOLLOW LONG-ESTABLISHED BOARD PRECEDENT HOLDING THAT A COLLECTIVE BARGAINING AGREEMENT IN THE CONSTRUCTION INDUSTRY THAT FAILS TO ESTABLISH A SECTION 9(a) RELATIONSHIP WILL BE DEEMED A SECTION 8(f) AGREEMENT**

In the construction industry, the Board applies a rebuttable presumption that a bargaining relationship falls under Section 8(f). John Deklewa & Sons, 282 NLRB 1375, 1385 n.41 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). The burden of proving that the relationship instead falls under Section 9(a) is placed on the party asserting Section 9(a) status. *Id.* However, Deklewa did not foreclose a Section 8(f) representative from achieving 9(a) status, and later, in Staunton Fuel & Material, Inc., 335 NLRB 717 (2001), the Board set forth certain requirements for transforming a Section 8(f) relationship into a Section 9(a) relationship.<sup>6</sup> If the party asserting Section 9(a) status is unable to satisfy these requirements, or if the relevant extrinsic evidence bearing on the parties' intent as to the nature of their relationship does not indicate that a Section 9(a) relationship was intended, the Deklewa presumption has not been rebutted and *the relationship will be deemed a Section 8(f) relationship*. Staunton Fuel & Material, Inc., 335 NLRB at 720; Madison Industries, Inc., 349 NLRB No. 114, \*19-20 (2007).

Such a result was reached in Comtel Systems Technology, Inc., 305 NLRB 287 (1991),

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<sup>6</sup>As stated in Staunton Fuel, "A recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support." 335 NLRB at 719.

where the Board viewed the relationship to be governed by Section 8(f) in light of the union's failure to establish a valid Section 9(a) agreement. See 305 NLRB at 289. In his discussion of the Comtel decision, the ALJ in the instant case correctly notes that, where a construction industry employer attempts to effect a Section 9(a) relationship without obtaining majority support, the Board will deem the relationship to be governed by Section 8(f). See ALJD at 27:33-41. The Board in Comtel did *not* hold that the employer and union were stuck with either Section 9(a) status or nothing. However, that's what the ALJ has done in this case.

In reaching this conclusion, the ALJ has reversed the Deklewa presumption. Noting that the Carpenters Union 2006-2010 Master Agreement contains Staunton Fuel language, the ALJ determines that Respondents have failed to convince him that their relationship is *not* 9(a). (See ALJD at 24:23 - 25:7, and 26:19 (“[T]his presumption is only valid absent evidence to the contrary . . .”).) This is despite language in the September 12, 2006, Confidential Settlement Agreement indicating uncertainty of the Respondents as to which Section of the Act will apply (i.e., that the parties agree to have the drywall finishing employees covered by the Carpenters Union agreement “to the fullest extent permitted by law”). Also, the ALJ made this finding despite the unrefuted testimony of Carpenters representative Gordon Hubel (an attorney himself) that the Carpenters were unsure whether the Board would deem the relationship to be 9(a) or 8(f), but the Union was prepared to accept either. As he put it:

[W]e were prepared to argue that there was one overall 9(a) unit, but we rarely are successful in arguing before the Board that the [agreements are 9(a)]. That's why we went and got cards. 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. The Board's law is constantly chang[ing] on this. I mean we put this language in about 9(a) every year and every two years the Board changes its rules.

(See Tr. at 601:3-15.) The ALJ made no determination that Mr. Hubel was not a credible witness, or that his demeanor evinced a lack of candor. (See ALJD at 31:18 - 32:27.) Mr. Hubel's explanation for the ambiguity in Respondents' contractual language is credible and reasonable, and should be relied upon by the Board in assessing the parties' intent.

As noted by Mr. Hubel, the Respondents entered into a separate Section 9(a) Recognition Agreement with Respondent Raymond after examining authorization cards from only the drywall finishing employees. Such an exercise would be unnecessary if the parties did not contemplate that the relationship may be governed by Section 8(f). See Madison Industries, Inc., 349 NLRB No. 114, at \*16-17 (2007) (concluding that the presumption of 8(f) status was not rebutted where an agreement with a clause granting recognition as the "majority representative" after a demonstration of "majority" status also contained language that would be unnecessary if the agreement was truly 9(a)).

In his Decision, the ALJ concludes that Madison Industries is not applicable here because, as he characterized it, the contractual recognition clause in that case "failed to specify that the employer recognized the union pursuant to Section 9(a) of the Act, and it was this lack of such specificity that caused the Board to examine the entire agreement in order to ascertain the intent of the parties . . . ." (See ALJD at 27:4-7.) However, and with all due respect, this is incorrect. The Board held that the ALJ in Madison Industries had "erred by limiting his analysis solely to the language of that contractual provision. As discussed above, the Staunton Fuel standard requires an examination of the parties' *entire agreement* to determine whether a 9(a)

relationship was intended.” 349 NLRB No. 114, at \*16 (citing Nova Plumbing, Inc., 336 NLRB 633, 635 n.4 (2001)) (emphasis added).

The Board went on to note the opinion of the United States Court of Appeals for the District of Columbia Circuit in reviewing Nova Plumbing, 336 NLRB 633 (2001), where the court “held that contract language and intent to form a 9(a) relationship, standing alone, ‘cannot be dispositive’ at least where, as in that case, ‘the record contains strong indications that the parties had only a 8(f) relationship.’” 349 NLRB No. 114, at \*14 n.9 (quoting NLRB v. Nova Plumbing, Inc., 330 F.3d 531, 537 (D.C. Cir. 2003)). “Thus,” the Board concluded in Madison Industries, “in determining whether the presumption of 8(f) status has been rebutted, the Board first considers whether the agreement, *examined in its entirety*, ‘conclusively notifies the parties that a 9(a) relationship is intended.’ Where it does so, the presumption of 8(f) status has been rebutted. Where the parties’ agreement does not do so, the Board considers any relevant extrinsic evidence bearing on the parties’ intent as to the nature of their relationship.” 349 NLRB No. 114, at \*15 (quoting NLRB v. Oklahoma Installation Co., 219 F.3d 1160, 1165 (10<sup>th</sup> Cir. 2000)) (internal citations omitted; emphasis added).<sup>7</sup>

Yet in this case, the ALJ has refused to examine the agreement in its entirety, as the

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<sup>7</sup>Further, the ALJ overstates the ambiguity in the provision at issue in Madison Industries. While it did not specifically refer to Section 9(a), it did specifically use the term “majority representative” instead. 349 NLRB No. 114, at \*3. As the Board correctly noted in that case, the standards for determining whether contractual language is sufficient to establish 9(a) status are whether the agreement unequivocally indicates that:

- (1) the union requested recognition as the *majority or 9(a) representative* of the unit employees;
- (2) the employer recognized the union as the *majority or 9(a) bargaining representative*; and
- (3) the employer’s recognition was based on the union’s having shown, or having offered to show, evidence of its majority support.

349 NLRB No. 114, at \*12-13 (citing Staunton Fuel, 335 NLRB at 719-720) (emphasis added).

Board directs. Such an examination reveals the Respondents' intent to proceed under Section 8(f) if Section 9(a) status is deemed invalid. Most notable is the above-quoted language from the Confidential Settlement, i.e. "to the fullest extent permitted by law." See RE Exh. 5, p. 1. In addition, the agreement at issue in Madison Industries had contained a provision waiving the employer's right to file an election petition, which provision the Board stated would be unnecessary if the agreement were a Section 9(a) agreement. Id. at \*4. That provision led the Board to conclude that the presumption of Section 8(f) status had not been rebutted. Id. at \*16. The Master Agreement between Respondent Carpenters Union and Respondent Raymond in this case actually contains that same type of waiver provision. (See RE Exh. 4, p. 29.) The language of the parties agreement, considered as a whole, reveals an intent to revert to Section 8(f) status if the Carpenters Union's 9(a) status is deemed invalid. This conclusion is buttressed by the execution of an independent Recognition Agreement, which would be unnecessary if the parties did not contemplate the possibility that the drywall finishers would be deemed a separate 8(f) unit as of October 1, 2006.

**B. THE ALJ INCORRECTLY CONCLUDED THAT THE RESPONDENTS' CONFIDENTIAL SETTLEMENT AGREEMENT DID NOT CONSTITUTE A LAWFUL COLLECTIVE BARGAINING AGREEMENT**

The ALJ finds that the September 12, 2006, Confidential Settlement Agreement did not constitute a collective bargaining agreement because, if it had, such an act would have been unlawful. (See ALJD at 29:27 - 30:3.) Specifically, the ALJ concludes that Respondent Raymond would have violated Sections 8(a)(1) and (5) of the Act by entering into an agreement with Respondent Carpenters Union prior to the expiration of the Painters' Agreement, and that in doing so, Respondent Raymond would be offering unlawful assistance to Respondent Carpenters

union under Sections 8(a)(1) and (2) of the Act. However, examination of the authority cited by the ALJ reveals that this is simply not the case here.

In Oil Field Maintenance Co., Inc., 142 NLRB 1384, 1386 (1963), upon which the ALJ relies in his Decision, the employer signed a collective bargaining agreement with the Oil Workers Union setting terms and conditions of employment for various units of employees who were already covered by five separate contracts with other unions -- *and then began to apply the terms of the Oil Workers contract* before the other contracts had expired. 142 NLRB at 1385-6. Such is not the case presented here. Respondent Raymond honored its agreement with the Painters Union up until expiration, and thereafter began applying the terms and conditions of the Carpenters Union agreement to the drywall finishing employees – which was lawful under Section 8(f) of the Act. The Confidential Settlement Agreement simply memorialized the Respondents’ agreement that this would occur, “[a]t the expiration of Raymond’s agreement with Painters District Council No. 36 on September 30, 2006.” RE Exh. 5, p. 1. Entering into an agreement to engage in a lawful act cannot be deemed unlawful.

The ALJ also appears to base his finding upon his conclusion that the Settlement Agreement did not contain certain indicia that the parties intended it to constitute a collective bargaining agreement. Specifically, the ALJ states:

Initially, I note that, while not dispositive, rather than bearing any title commensurate with collective-bargaining agreement, the document is entitled *Confidential Settlement Agreement*. Further, nothing in the document’s preamble suggests the parties intended to create a collective-bargaining agreement or even meant to establish terms and conditions of employment; rather, the language therein describes their intent to settle disputes and grievances, which had arisen between them. Next . . . there is no record evidence herein that the parties intended their settlement agreement to constitute a collective-bargaining agreement, the term bargaining unit is not mentioned, and the document bears no

expiration date.

ALJD at 29:9-20.

However, this agreement contains all that is necessary to constitute a collective bargaining agreement. The Board requires that a collective bargaining agreement set forth “substantial terms and conditions of employment” sufficient to stabilize the bargaining relationship between the parties. See *Madelaine Chocolate Novelties, Inc.*, 333 NLRB 1312, 1312 (2001). The Confidential Settlement Agreement refers only, and repeatedly, to the drywall finishing employees, and as such identifies the bargaining unit to which it applies. See RE Exh. 5, pp. 1-2; Tr. 582-584. It states that the Southern California Drywall/Lathing Agreement will apply to these employees, and as such set forth the terms and conditions of employment under which these employees will work. See RE Exh. 5, p. 1; Tr. 582-584. As the referenced Agreement indicates, its term is July 1, 2006 to June 30, 2010. See RE Exh. 4, p. 1. In all material ways, this Confidential Settlement Agreement is the equivalent of a short form, or “me too”, agreement commonly used in the construction industry. The ALJ’s conclusion to the contrary is simply not supported by the record.

**C. THE PRE-EXISTING 8(f) AGREEMENT BETWEEN RESPONDENT RAYMOND AND RESPONDENT CARPENTERS UNION CANNOT BE INVALIDATED BY POST-AGREEMENT MISCONDUCT**

As demonstrated above, there was at least a valid Section 8(f) agreement between Respondent Carpenters Union and Respondent Raymond covering the drywall finishing employees as of October 1, 2006. See supra. The ALJ found that, because Winsor and Zorrero made unlawful statements to the employees during the October 2, 2006, meeting, Respondent Carpenters Union did not have the uncoerced support of a majority of the drywall finishers,

which rendered any Section 9(a) agreement covering those employees unlawful. See ALJD at 33:43-47, 34:7-18. The purported statements are the only aspects of the October 2 meeting that the GC alleges to have constituted unlawful assistance or otherwise unlawful conduct. See GC Exh. 1, Cpt. at ¶¶ 23-25; Tr. 650-652. However, even if the alleged unlawful statements had been made, they would not invalidate the preexisting Section 8(f) relationship between Respondent Carpenters Union and Respondent Raymond.

In Zidell Explorations, Inc., 175 NLRB 887 (1969), the Board found that the respondent employers entered into lawful prehire agreements under 8(f) of the NLRA. Id. at 888. However, the employers were also found to have violated the Act by engaging in unlawful acts of assistance. Id. at 887. The Board held in Zidell that Section 8(f) neither permits nor requires the invalidation of a valid prehire agreement because of “*subsequent* acts of unlawful assistance for which the employer party to the contract has alone been found responsible.” Id. (emphasis in original). According to Zidell, “it has long been established by the Board and court cases that employer acts of unlawful assistance occurring after the execution of a lawful contract, and during the contract term, do not justify a remedial order suspending recognition of the assisted union during the contract term or directing that the contract be set aside.” Id. at 888. The unlawful assistance given by the employers in Zidell occurred within approximately five days or less from the date that the employers executed their collective bargaining agreements with the union. Id. at 887.<sup>8</sup>

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<sup>8</sup>The unlawful assistance rendered by the employers in Zidell was that they had been requiring all new employees at the time of hire to execute Union membership applications and dues checkoff authorizations. Id. at 887. In that case, respondent R.W. Taylor Construction Co. executed its collective bargaining agreement with the Union on February 21, 1966, and began operations that day (presumably hiring employees that day, if not before). Id. Respondent Zidell Explorations

As discussed and demonstrated below, the record in this case simply does not support the ALJ's findings of unlawful assistance. Regardless, the alleged unlawful assistance occurred on October 2, 2006 -- subsequent to the date that the 8(f) agreement became effective. The unlawful statements were found to be made only by Mr. Winsor and Mr. Zorrero, representatives of Respondent Raymond. There is no evidence in the record of any unlawful statements by representatives of Respondent Carpenters Union, and the ALJ so found. ALJD 31:40-46. Under Zidell, even if the ALJ's finding of unlawful assistance is upheld, such a finding does not invalidate Respondent Carpenters Union's Section 8(f) representation of the drywall finishers.

**D. THE ALJ'S FINDING THAT THE RESPONDENTS ATTEMPTED AN ACCRETION OF THE DRYWALL FINISHING EMPLOYEES INTO THE DRYWALL HANGING UNIT, AND THEREBY VIOLATED THE ACT, MUST BE REVERSED**

The Complaint in this case does not allege, nor was it amended to allege, an improper accretion on October 1, 2006, as a violation of the Act. See GC Exh. 1, Cpt. at ¶¶ 12 - 22. Yet the ALJ found that the Respondents unlawfully accreted the drywall finishing employees into the preexisting drywall hanging unit. See, i.e., ALJD 23:26-29, 25:8-17, 25:22-24. However, no accretion took place here. The Respondents treated the drywall finishers and drywall hangers separately, regardless of their hope that the Board would recognize them as a single unit.

The General Counsel conceded that, if the Respondent Carpenters Union and Respondent Raymond had elevated form over substance and done the unreasonable and unnecessary, i.e. entered into a separate collective bargaining agreement covering the drywall finishing employees

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Inc., which had earlier signed a letter of understanding with the Union but had then subcontracted out the work at issue for a couple of months, executed its formal bargaining agreement with the Union on April 10, 1966, and began its own hiring of employees about mid-April. Id.

and containing the same terms and conditions of employment but a different unit description, then the Respondent Carpenters Union's representation of the drywall finishing employees as of October 1, 2006, would have been valid under Section 8(f). Tr. 27, 31-32. There is no legal or rational basis for creating such a hurdle.

Regardless, however, Respondent Carpenters Union cleared that hurdle. It *did* enter into a separate written agreement with Respondent Raymond on September 12, 2006, stating that upon the expiration of the agreement between Respondent Raymond and Charging Party Painters Union, Respondent Raymond would apply the Master Agreement with the Carpenters Union to the drywall finishing employees. See RE Exh. 5 ("Settlement Agreement"). This Settlement Agreement constitutes a Section 8(f) collective bargaining agreement, as demonstrated above. Regardless, it certainly evidences the intent of the parties to it to treat the drywall finishing employees separately.

Further, when Respondent Carpenters Union solicited authorization cards on October 2, it did so solely from the drywall finishers as a unit, and obtained yet another agreement from Respondent Raymond -- the Recognition Agreement -- memorializing the Carpenters Union's Section 9(a) status. Tr. 598-600; GC Exh. 4, tab 4. This represented yet another manner in which the parties treated the drywall finishers separately.

As noted by the ALJ in his Decision, "the Board has traditionally followed a 'restrictive policy' in determining accretions to existing units as '. . . employees accreted to such units are not accorded a self-determination election, and the Board seeks to insure the employees' right to determine their own bargaining representative.' Passavant Retirement & Health Center, 313 NLRB 1216, 1218 (1994)." See ALJD at 23:41 - 24:3. However, the accretion analysis does not

apply in this context because this case arises in the construction industry, and Respondent Raymond was free to recognize Respondent Carpenters Union under Section 8(f) upon the expiration of the Painters Union agreement.

The most closely applicable authority buttresses this conclusion. In Comtel Systems Technology, Inc., 305 NLRB 287 (1991), the Board held that when an employer joins a multi-employer bargaining unit that is already governed by Section 9(a), but the union has not yet independently achieved 9(a) status as to the new employer's employees, that new employer's work force will be represented under Section 8(f) until such time as the union achieves 9(a) status as to those employees. See 305 NLRB at 289.

The Board did not hold that these two groups of employees could not be represented under the same contract, nor that the contract was invalid as to the new employer's work force. Id. There was and is simply no reason to do so. To require the parties to draft a separate collective bargaining agreement, setting forth the same terms and conditions of employment but describing the unit and governing Section of the Act differently, would be to elevate form over substance, and there is no policy to be served by creating and imposing such a requirement.

Any attempt to distinguish Comtel falls flat. The fact that Comtel involved the addition of a new employer to an existing multi-employer unit, and that the instant case arguably<sup>9</sup> involves the addition of a new group of employees to an existing multi-employer unit, is a distinction

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<sup>9</sup>It is important to note here that the drywall finishers have *not* been "added" to the preexisting unit represented by Respondent Carpenters Union. They have been in that unit since 1988. Tr. 573. The condition allowing the application of the "Painters Union exception" in Article I, Section 6(g), has simply been removed. The collective bargaining agreement creating that unit and exception may not be challenged, as it is outside the Section 10(b) period. Machinist Local 1424(Bryan Mfg.), 362 U.S. 411 (1960).

without a difference. The new employer's work force in Comtel had been a historically separate, unrepresented unit, and there had been an attempt to assign them a Section 9(a) bargaining representative without obtaining their majority support. This is the effect that the Board's restrictive policy toward accretions seeks to avoid, and it is precisely the effect that the ALJ found to have resulted from Respondent Raymond's Section 9(a) recognition of the Carpenters Union in this case. The Board dealt with it in Comtel by treating the new, historically separate group as a Section 8(f) unit until such time as the union demonstrated majority support among them. In all material respects, these cases are the same, and should be treated as such if the Board finds the Section 9(a) recognition of the Carpenters Union to have been unlawful in this case.

**E. THE ALJ'S CREDIBILITY DETERMINATIONS REGARDING ALLEGED UNLAWFUL STATEMENTS BY RESPONDENT RAYMOND'S REPRESENTATIVES ARE SO LACKING SUPPORT IN THE RECORD THAT THEY WARRANT REVERSAL**

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that those findings are incorrect. Standard Drywall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Specifically, "as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the [ALJ], but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to [an ALJ's] credibility findings insofar as they are based on demeanor." 91 NLRB at 545.

"However, to the extent that credibility findings are based upon factors other than demeanor, as in the instant case, the Board itself may proceed with an independent evaluation."

Canteen Corp., 202 NLRB 767, 769 (1973) (reversing ALJ’s credibility findings due to disagreement with ALJ’s conclusion that testimony was uncorroborated, vague and contradictory, concluding instead that the testimony was “reasonable and credible”). See also, i.e., Wilson Teaming Co., 140 NLRB 164, 165 (1962) (reversing credibility findings on grounds of consistency and corroboration); Valley Steel Products Co., 111 NLRB 1338, 1340-41 (1955) (reversing trial examiner’s credibility findings on various points, due to, *inter alia*, the “equivocal and inconsistent” nature of one witness’ testimony, and the “contradictory and confused nature” of another’s).

1. The Clear Preponderance Of The General Counsel’s Own Evidence Demonstrates That The ALJ’s Credibility Findings Should Be Reversed

The instant matter presents one of those circumstances where the ALJ’s credibility findings require such a stretch of the imagination that the Board should conclude that the clear preponderance of the evidence warrants reversal. The ALJ found that, at the October 2, 2006, meeting, Travis Winsor and Hector Zorrero, both representatives of Respondent Raymond, committed unfair labor practices by telling the gathered employees that they had to sign up with the Carpenters Union *that day*, or they would no longer have jobs. See ALJD at 32:29 - 33:10.

Specifically, the ALJ found that, at the conclusion of the formal presentations during the meeting: (1) Travis Winsor was asked first whether the employees could continue working for Respondent Raymond if they didn’t sign with the Carpenters Union, and that he replied that “if they did not sign, there would be no more work, and that, if you don’t sign, you will not have a job but that no one would be fired”; (2) Travis Winsor was then asked if the employees had to reach a decision that day about signing with the Carpenters union, and he responded “that if we

didn't sign on that day, we weren't working any more"; and (3) "several" employees shouted to Hector Zorrero and asked if the company would give them more time to decide, and he replied, "There's no time to think about it. Either sign . . . today or you cannot work tomorrow for us." Id. These alleged unlawful statements were the only aspects of the October 2, 2006, meeting that the General Counsel alleged as constituting unlawful assistance or as being otherwise unlawful. See GC Exh. 1, Cpt. at ¶¶ 23-25; Tr. 650-652.

The testimony in the record simply does not support the ALJ's findings. At the hearing, the General Counsel presented four drywall finishing employees as witnesses, all of whom attended the same meeting on October 2, 2006. Two of these witnesses, Richard Myers and Janet Pineda, were even sitting next to each other. Tr. 112. Yet none of these witnesses corroborated each other. Only two of the four (Janet Pineda and Jose Ramos) testified that Travis Winsor made an unlawful statement, and *only one* of the four (Ruben Mejia Alvarez) testified to Hector Zorrero making an unlawful statement.

Incredibly, this witness, Mr. Alvarez, testified that 40 to 50 employees (in a meeting of approximately 85-90 employees) all asked Hector Zorrero the same question at once: whether they could have more time to think about the decision whether to sign. Tr. 223. Mr. Alvarez testified specifically that these employees *all shouted out in unison*. Id. Yet *none* of the other three witnesses presented by the General Counsel heard it, as discussed in detail below. In fact, witness Jose Ramos -- whom the ALJ found to be the "most trustworthy" witness (see ALJD at 31:21-22) -- testified specifically that he did not recall Hector Zorrero saying anything at all during this meeting (Tr. 200), much less being questioned by and responding to 40 to 50 employees who were shouting in unison. That the ALJ would credit this uncorroborated

testimony of Mr. Alvarez, regarding a statement that simply could not have been missed by the other attendees if it had been made, is astounding. It further warrants an even closer examination of the remaining credibility determinations made in the Decision.

Witness Richard Myers, who sat next to witness Janet Pineda during the meeting (Tr. 112), and whom the ALJ concluded was “testifying truthfully” (ALJD at 32:43-48), testified that no unlawful statements were made at the meeting. Specifically, he testified that Travis Winsor told the employees that if they didn’t sign up with the Carpenters Union, they wouldn’t have a job. Tr. 94. He further said that Mr. Winsor stated the employees wouldn’t be fired, they just wouldn’t have a job (Tr. 97), although he later stated on cross-examination that Mr. Winsor never said anything about being fired (Tr. 119). Mr. Myers repeated Mr. Winsor’s comment in this same way -- that “if we didn’t sign with the Carpenters, we didn’t have a job” -- consistently and repeatedly during his testimony. Tr. 94, 97, 117, 124.

Mr. Myers could not recall anything else that Mr. Winsor said during the meeting. Tr. 94. While he testified that Hector Zorrero did speak during the meeting, he did not testify to any similar, much less unlawful, statement by Mr. Zorrero. Tr. 92, 94. In fact, he specifically testified that no one other than Mr. Winsor told the employees that if they didn’t sign with the Carpenters Union they didn’t have a job. Tr. 129. At no time did Mr. Myers ever testify that Travis Winsor or anyone else told the employees that they had to sign up with the Carpenters Union *that day* or they wouldn’t have a job. Tr. 86 - 141.

The ALJ’s stated reason for not relying upon Mr. Myers’ testimony that no unlawful statements were made during the meeting was, quite simply, that Mr. Myers testified that no unlawful statements were made. This truly was the given reason for this credibility

determination. The ALJ stated this tautology as follows:

While Richard Myers also impressed me as testifying truthfully, I note that he recalled Winsor as repeatedly warning the listening employees that, if they did not sign with the Carpenters, they would not have a job. As I stated above, said comment was not inconsistent with the language of the master agreement's union-security clause and did not demand that the employees act prior to the end of the statutory grace period. Accordingly, I shall not rely upon his testimony herein.

See ALJD at 32:43-48.

It is important to note here that, of all of the General Counsel's witnesses, Mr. Myers was the only one who had lengthy experience working under the union-security provision of the Painters Union contract with Respondent Raymond. Specifically, Mr. Myers was a drywall finishing employee who worked at Respondent Raymond under the terms of the Painters Union contract from 1978 to October of 2006, and was a foreman at the time of the meeting. Tr. at 86. The other three General Counsel witnesses had significantly less experience working under this contract than did Mr. Myers. Janet Pineda had two years (Tr. at 142); Ruben Mejia Alvarez had three months (Tr. at 192-3); and Jose Ramos had seven months (Tr. at 278). It is entirely likely that Mr. Myers was the only witness who truly understood how a union security clause in a Section 8(f) contract works. And, in light of the material inconsistencies between the testimony of the remaining three General Counsel witnesses, discussed below, this is the only explanation for this contradictory record that makes sense.

Sitting next to Mr. Myers at the meeting was Janet Pineda, a paid Painters Union apprenticeship instructor. Tr. 112, 174-5, 181. However, Ms. Pineda testified to a substantially different set of comments than Mr. Myers heard. Ms. Pineda stated that during the question and answer period, she asked Mr. Winsor for more time to consider the issue of signing up with the

Carpenters Union, and that he answered that the employees had “plenty of time throughout the day” to decide. Tr. 150. She further testified that Mr. Winsor said that the employees couldn’t work the following day if they didn’t sign up with the Carpenters Union. Tr. 151.

Upon being asked on cross-examination for her best recollection of the actual words that Mr. Winsor used, Ms. Pineda testified that she couldn’t recall Mr. Winsor’s exact words, but that he said “I encourage you guys to think it over and to sign with the Carpenters Union” (Tr. 172) and that he also said that the employees couldn’t work the next day if they didn’t sign over to the Carpenters Union (Tr. 176). After having her recollection refreshed with the affidavit that she gave to the Region shortly after the October 2 meeting, Ms. Pineda confirmed that Mr. Winsor’s comment was actually that the employees “had plenty of time to decide and should think about it.” Tr. 183-184. However, on redirect, Ms. Pineda testified that when Mr. Winsor said this, he had already stated that if the employees didn’t sign that day, they couldn’t work the next day. Tr. 189.

These two statements that Ms. Pineda attributes to Mr. Winsor are obviously inconsistent with each other. Further, Ms. Pineda testified that Mr. Winsor may have stated that no one would be fired, but that she couldn’t recall. Tr. 177. These inconsistencies, combined with the fact that Richard Myers, who was sitting next to her during this meeting, did not hear Mr. Winsor or anyone else say that the decision whether to join the Carpenters Union had to be made *that day*, strongly discredit Ms. Pineda’s version of events.

Contrary to the ALJ’s finding that Mr. Winsor was asked about this issue twice, Ms. Pineda testified that she was “sure” that the question of what would happen if the employees didn’t sign up with the Carpenters Union was only asked once. Tr. 175. Lastly, Ms. Pineda did

not testify to any unlawful statements by Hector Zorrero. Tr. 141-189.

Ruben Mejia Alvarez, who was the sole witness testifying to any unlawful statements by Hector Zorrero, testified through a Spanish interpreter at the hearing but listened to the comments made during the October 2 meeting in English. Tr. 199-202; 208-209. During his testimony, Mr. Alvarez quoted in English the comments that were made during the meeting. Id.

Mr. Alvarez did not testify to any unlawful statements by Travis Winsor. Tr. 191-276. Specifically, Mr. Alvarez testified (in English) that Mr. Winsor told the employees that the Company was changing to the Carpenters Union, and that they wanted to go with them because they were going to get paid more money and more benefits with the Carpenters, and more of a future for the employees. Tr. 199. Mr. Alvarez testified that Mr. Zorrero said almost the same thing that Mr. Winsor had said – and Mr. Alvarez repeated the comments, in English, using nearly the same words. Tr. 200. He also testified that Mr. Zorrero said that “in order to continue working with Raymond company, we had to sign up with” the Carpenters Union. Tr. 202.

None of the above statements contain the key unlawful phrase – that the employees had to join the Carpenters Union *that day* or they would lose their jobs. However, Mr. Alvarez did testify to one alleged unlawful statement. As noted earlier, according to Mr. Alvarez, 40 to 50 employees all asked Hector Zorrero the same question: whether they could have more time to think about the decision. Tr. 222-224. In fact, Mr. Alvarez testified that these employees all shouted out the question in unison. Id. And according to Mr. Alvarez, the response from Mr. Zorrero was: “There’s no time to think about it. Either sign for us today or you cannot work tomorrow for us.” Tr. 223-4.

Mr. Alvarez is the only witness who heard this question that was supposedly shouted out

in unison by 40 to 50 employees -- which would be at least half of the employees present at the meeting.<sup>10</sup> Tr. 401 (Winsor testimony that 85-90 employees attended the Orange County meeting). Mr. Alvarez testified that this was shouted out by “most” of the employees who were present. Tr. 222. It strains credulity that such an exchange could occur and not be remembered by any of the other witnesses who were present. None of the other witnesses even testified to any unlawful statements by Mr. Zorrero. As such, the clear preponderance of the evidence in the record demonstrates that this exchange did not occur, and that Mr. Zorrero did not make the unlawful statement attributed to him by the ALJ.

Lastly, the witness whom the ALJ found to be the “most trustworthy” was Jose Ramos. Mr. Ramos testified that he did not recall Hector Zorrero saying *anything at all* during this meeting (Tr. 299), much less being questioned by and responding to 40 to 50 employees who were shouting to him in unison.

Mr. Ramos and Janet Pineda were the only two of the General Counsel’s four witnesses who testified that Mr. Winsor made any unlawful statements. Yet Mr. Ramos’ account of these statements differs noticeably from that testified to by Janet Pineda -- and was internally inconsistent, as well. Specifically, on direct examination by the General Counsel, Mr. Ramos testified that Mr. Winsor made only lawful statements. Mr. Ramos stated that an employee asked what would happen if they didn’t sign up with the Carpenters Union, and Mr. Winsor answered

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<sup>10</sup>This is not the only purported incident at the meeting that was witnessed by only Mr. Alvarez. Mr. Alvarez also testified that all of Respondent Raymond’s drywall finishing foremen were called into a smaller meeting during this meeting, and that they all came out of this meeting saying they’d been offered raises to sign with the Carpenters Union and had done so. Tr. 209-211. None of the other witnesses testified to such an even -- not even Richard Myers, who *was a foreman himself*. Tr. 86-141.

that “they could continue working but that they needed to sign with the Carpenters.” Tr. 286.

Mr. Ramos then testified that an employee asked again “if they didn’t sign if they could continue working and then Mr. Travis said that if they didn’t sign there wouldn’t be any more work.” Tr. 287. Other than introductory comments, these are the only comments that Mr. Ramos attributed to Mr. Winsor upon direct examination by the General Counsel. Tr. 278-292.

Subsequently, in response to being asked by counsel for Charging Party Painters Union whether Mr. Winsor had stated “*when* the employees needed to sign with the Carpenters” (a leading question, to which Respondent Carpenters Union objected during the hearing and objects again now), Mr. Ramos answered: “first he said that could continue working and sign later but then someone asked again and he said that if we didn’t sign on that day we weren’t working any more.” Tr. 292-3.

Mr. Ramos only described Mr. Winsor’s comments in this manner after the desired response was suggested to him by the Painters Union’s counsel. Further, he testified that during the meeting he listened to Mr. Winsor’s comments through the Spanish interpreter, but that he was also listening to Mr. Winsor in English. Tr. 284. While Mr. Ramos’ demeanor may have “clearly exhibited his comprehension of the meaning, gravity, and consequences of the oath” (ALJD at 31:21-25), Mr. Ramos’ internally inconsistent testimony indicates that he simply did not clearly understand or remember Mr. Winsor’s comments during the October 2 meeting.

The additional fact that, of the General Counsel’s four witnesses, only Mr. Ramos and Ms. Pineda (the Painters Union apprenticeship instructor), heard Mr. Winsor make any unlawful statements, heavily tips the scale against the ALJ’s findings. General Counsel witness Richard Myers, who had almost 30 years of experience working under the union security provision of the

Painters Union agreement, and who testified that no unlawful statements were made, gave much more reliable testimony about Mr. Winsor's explanation of the provision in the Carpenters Union agreement. This is not a matter of demeanor; it is a matter of consistency, corroboration, and common sense. The clear preponderance of the evidence in this case demonstrates that neither Mr. Winsor nor Mr. Zorrero told the employees that they needed to sign with the Carpenters *that day*. The ALJ's findings should be reversed.

2. The Additional Weight Of The Respondents' Witnesses' Testimony Leaves No Room For Doubt That The Overwhelming Weight Of The Evidence In The Record Demonstrates That The Alleged Unlawful Statements Were Not Made

The Respondents' witnesses who were present at the meeting each testified that these alleged unlawful statements were not made by Mr. Winsor, Mr. Zorrero, or anyone else. However, the ALJ chose not to rely on the testimony of any of these witnesses. Given that the clear preponderance of the General Counsel's own evidence weighs heavily against the ALJ's finding, a detailed examination of Respondents' witnesses testimony on this score is not even necessary. In a surfeit of caution, however, it will be addressed herein.

The ALJ dispensed with Mr. Winsor's testimony as "hardly that of a guileless witness," "disingenuous," and "adroitly labored and vague." See ALJD at 32:5-15. The ALJ went on to reject Mr. Zorrero's testimony on the grounds that he "failed to impress me as exhibiting any candor." See ALJD at 32:16-18. The ALJ then disregarded the testimony of Gordon Hubel, David Cordero and Pedro Loera, all of whom testified that neither Mr. Winsor nor Mr. Zorrero made the statements attributed to them by the General Counsel, *simply on the grounds that they corroborated Mr. Winsor and Mr. Zorrero*. See ALJD at 32:23-28. That the ALJ would

discredit these witnesses on the grounds that they materially corroborate each other, but credit the General Counsel's witnesses even though they materially contradict each other (and in some instances, materially contradict themselves) defies reason -- and in fact, no explanation for this is offered by the ALJ.

The testimony given by the Respondents' witnesses was materially consistent, and corroborated by General Counsel witness Richard Myers. Specifically, Travis Winsor testified that during the October 2, 2006 meeting, he followed a Power Point presentation that he had created (Tr. 410-412; RE Exh. 6), as well as two handouts that he instructed be distributed to employees during the meeting (Tr. 402; RE Exh. 1; Tr. 430; RE Exh. 2). General Counsel witness Janet Pineda testified that Hector Zorrero handed out at least one of these two documents during the meeting. Tr. 164-166.

Mr. Winsor used these materials as a guide to explain the situation and address the anxiety that he suspected his employees might feel. Tr. 402-3. He particularly attempted to ensure that the employees understood the changes in their wages and benefits, and in fact noted the risk to the employees that those with less than five years invested in the Painters Union's pension and cautioned such employees to do "the math to ensure that it was in the best interests of their personal situation." Tr. 400, 417-418.

Mr. Winsor denied making the statements alleged by the General Counsel, nor did he hear anyone else make them. Tr. 412-417, 419-423, 438-440, 448. Mr. Winsor did not explain the union security provisions of the contract in any detail because he was afraid that the audience would not quite understand the terms, so he kept his answers to the employees' questions about their employment status short and sweet. Tr. 420-421. Mr. Winsor explained that no one was

being fired (Tr. 420-421), that employees did not need to decide what to do that day (Tr. 423), that the employees should take their time and think about the matter (Tr. 417, 430), but he did encourage them to enroll for benefits (Tr. 430).

Both Mr. Winsor and Mr. Zorrero explained to the employees that they hoped that they would all choose to stay at Raymond, but that if they chose not to go back to work, the Employer would have to staff the jobs with employees from the Carpenters Union hall. Tr. 426, 439. Mr. Winsor never told the employees that they had to join the Carpenters Union *that day*, and in fact, they weren't required to. Tr. 444. Mr. Winsor's explanation of what he told the employees and why was credible and reasonable. Tr. 420-421, 469-472. It was also legal. See Big "D" Mining, 222 NLRB 522, 523 (1976) (holding that an employer's statement that a union security clause requires employees to belong to the union "in order to keep their jobs" was lawful, even where it was combined with inaccurate descriptions of the dues checkoff procedures).

Hector Zorrero testified that he himself did make some comments to the assembled group of employees, which comments he repeated during his testimony – including that he told the employees "that tomorrow Raymond is still obligated to man our jobs and if no one in this room shows up on our jobsites that [Raymond is] no longer signatory with the Painters and I would have to man the people – our Drywall Finishers through the Carpenters." Tr. 478. Mr. Zorrero did answer questions from the employees after the presentation was concluded, but no one asked him any questions during the question and answer period. Tr. 478. Further, no one asked him if they had to decide what to do that day. Tr. 479. Again, Mr. Alvarez is the only witness who testified that Mr. Zorrero made such a statement.

Respondent Carpenters Union representative David Cordero served as the official

interpreter at the October 2 meeting. Tr. 551. He translated the comments made during the meeting from English to Spanish, to the best of his ability. Tr. 560. Like the majority of all witnesses at the hearing, Mr. Cordero testified that none of the speakers told the employees that they needed to join the Carpenters Union *that day* or *at that moment*. Tr. 553-4, 558, 561. Mr. Cordero recalled the employees' main concern during the question-and-answer period being insurance and benefits, and the paperwork necessary for them. Tr. 556.

Not surprisingly for someone who was focused more on translating than on passively listening, Mr. Cordero was not able to give a lengthy recitation of the comments made by the speakers during the presentation. However, his sense of recall was tested by the ALJ after the conclusion of questioning by all counsel, and Mr. Cordero not only demonstrated a solid memory of Mr. Winsor's comments, but that his memory of those comments comported with Mr. Winsor's. Tr. 567-570.

Specifically, the ALJ picked up Respondent Raymond's Exhibit 1 and began reading from it and asking Mr. Cordero if he recalled Mr. Winsor communicating each of the pieces of information in it. See Tr. 567-570 (the ALJ's questions track the information on RE Exh. 1). (Mr. Winsor had done the same thing on cross-examination during his own testimony. Tr. 469-472.) Mr. Cordero recalled Mr. Winsor covering all of the topics in this memorandum except for the union security provision; he did not recall that term being used. Tr. 569. This corroborates Mr. Winsor's testimony that he covered each of the topics in that memorandum, but that he did not discuss the union security provision. Tr. 469. (Again, Mr. Winsor had explained earlier in his testimony that part of his purpose for holding the meeting was to address the anxiety that he sensed regarding the uncertainty of the situation with the Painters Union contract (Tr. 402), and

that he had not discussed in detail the union security provision of the Carpenters Union contract because he was afraid that such a discussion of contract terms wouldn't be "well understood by all of the recipients" (Tr. 420-421)).

Gordon Hubel is a licensed attorney experienced in labor law, and has been the contract administrator for the Southwest Regional Council of Carpenters ("SWRCC") for 20 years. Tr. 571-2. He attended the October 2, 2006 meeting, but was not one of the speakers during the presentation. Tr. 584, 588. While the ALJ would not allow Mr. Hubel to give a full account of what he recalled being discussed at the meeting, Mr. Hubel was allowed to testify that none of the speakers told the employees that they had to join the Carpenters Union that day or at that moment, that the employees had plenty of time to think about it throughout the day, or any other words to that effect. Tr. 588-591. Rather, in response to a question from an employee about whether they had to make a decision that day, "Travis answered, no, you don't have to make a decision today, but you should sign up for benefits today." Tr. 590.

Mr. Hubel testified about several questions and answers that he remembers from the Q&A period after the presentation, none of which were similar to the unlawful statements alleged in the Consolidated Complaint. Tr. 591-2. Mr. Hubel further testified that, after the meeting when employees were milling about talking to each other and the Carpenters Union representatives, he spoke with General Counsel witness Janet Pineda and tried to encourage her to join. Tr. 593-4. After this conversation, Ms. Pineda was still standing near Mr. Hubel when he was asked by another group of employees whether they had to join the Carpenters Union that day. Tr. 594. He answered that no, "the Carpenters Agreement does have a union security clause, just like the Painters Agreement so within eight days you'd have to join, but you don't

have to decide today.” Tr. 594. Mr. Hubel couldn’t say for sure whether Ms. Pineda heard this exchange, but she was still standing near him when it occurred. Tr. 594-5.

The clear preponderance of the General Counsel’s own evidence demonstrated that the alleged unlawful statements were never made. When the weight of the Respondents’ witnesses’ testimony is considered, the record is overwhelmingly lopsided. The ALJ’s credibility determinations are simply not supported by the weight of the evidence, and must be reversed. The alleged unlawful statements were not made, and there was therefore no unlawful assistance or other unlawful conduct at the October 2, 2006 meeting. See GC Exh. 1, Cpt. at ¶¶ 23-25; Tr. at 650-652. As such, the authorization cards obtained by the Respondent Carpenters Union after the meeting are valid, and the Carpenters Union’s Section 9(a) status is valid.

**F. THE ALJ’S RECOMMENDED REMEDY - THAT RESPONDENT RAYMOND CEASE AND DESIST RECOGNIZING RESPONDENT CARPENTERS UNION *AT ALL* ABSENT AN ELECTION - LACKS SUPPORT IN BOARD LAW OR POLICY**

As discussed above, employers and unions in the construction industry may negotiate and enter into contracts setting terms and conditions of employment without the union attaining majority status first among the bargaining unit employees. 29 U.S.C. § 158(f). However, in his decision in this case, the ALJ has essentially *written Section 8(f) out of the Act*. After declaring that the Respondents must have intended “only” to create a Section 9(a) relationship regarding the drywall finishing employees -- and could not possibly have intended to create either a Section 9(a) or a Section 8(f) agreement, whichever the Board would allow (see ALJD at p. 25, n.53) -- the ALJ invalidated the 9(a) agreement and recommended that the Respondents be prohibited from entering into another collective bargaining agreement absent a Board-certified election.

(ALJD at 37:50 - 38:3.)

This recommended remedy contravenes both law and policy. As the General Counsel alleged in the Complaint, Respondent Raymond lawfully terminated its Section 8(f) contract with the Painters Union on September 30, 2006. See GC Exh. 1, Cpt. at ¶ 11. Respondent Raymond was therefore free to enter into a Section 8(f) contract with any other union regarding the terms and conditions of employment for the drywall finishing employees.

However, the ALJ has now eliminated Section 8(f) insofar as it applies to these employees, due solely to found unfair labor practices occurring *after* the lawful termination of the Painters Union agreement, and *after* Respondent Raymond became free to enter into another Section 8(f) agreement. No authority for such a remedy is given in the Decision, nor can any be found by Respondent Carpenters Union. One would assume that the ALJ had intended to rely upon Julius Resnick, Inc., 86 NLRB 38 (1949), as supporting this sort of remedy. In Julius Resnick, the Board found that an employer had rendered unlawful assistance to a union by agreeing to an unlawful union security clause (which provided that non-members working for the employer could be replaced by members at any time), and held that the appropriate remedy was to order the employer to withdraw recognition of the union until the union had been certified by the Board. 86 NLRB at 39-40. However, Julius Resnick did not involve a construction industry employer or an 8(f) agreement; it involved a Section 9(a) shop agreement. Further, Respondent Carpenters Union cannot find a Board decision utilizing a Julius Resnick remedy in an 8(f) context since the Deklewa decision -- in which the Board established the boundaries of Section 8(f) recognition and held that an employer may repudiate a Section 8(f) contract upon the expiration of that contract. See Deklewa, 282 NLRB 1375, at 1377-78.

There is simply no authority for eliminating the right of Respondent Raymond to enter into a Section 8(f) contract with Respondent Carpenters Union, when it was free to do so upon expiration of the Painters Union contract. There seems no rational basis for such an order, either, since the invalidation of any Section 9(a) status and the posting of appropriate notices would remedy any impact upon the members of the drywall finishing bargaining unit.

The remedy for any such unlawful statements (that the employees had to sign up with the Carpenters Union *that day*) would be to order the Respondents to refund any initiation fees or dues paid by the employees during the 7-day grace period allowed under the union security provision of the Carpenters Union agreement, and to post an appropriate notice. See Luke Construction Co., Inc., 211 NLRB 602, 605 (1974). The employer in Luke, a contractor in the building and construction industry, was found to have violated Sections 8(a)(2) and (1) of the act by soliciting its employees to execute “dual purpose” membership and dues-checkoff authorizations for the union, and by advancing and paying to the union the required initiation fees before collecting it from the employees, among other things. 211 NLRB at 602. The Board affirmed the ALJ’s decision and adopted his recommended Order, in which he refused the General Counsel’s request for an order that the employer cease and desist recognizing the union and giving effect to its collective bargaining agreement. Id. at 604.

Noting that the Respondent was free to recognize the union under Section 8(f), and that such recognition was not a bar to an election petition, the ALJ held that there was “no valid basis or justification” for such a cease and desist order, and instead required a notice-posting and the refund of any dues or initiation fees collected during the 12-day grace period of the union security provision. Id. at 605, 606. The same reasoning applies in this case, and the same

remedy should be applied, as well, in the event that the ALJ's findings regarding the alleged unlawful statements are affirmed by the Board.

**G. THE ALJ'S FINDINGS THAT RESPONDENT CARPENTERS FAILED TO GIVE THE DRYWALL FINISHING EMPLOYEES NOTICE OF THEIR RIGHTS UNDER *GENERAL MOTORS* AND *BECK* ARE UNSUPPORTED BY THE RECORD AND MUST BE REVERSED**

1. The Carpenters Union Provided The Employees With Notices Prior To Obligating The Employees To Pay Dues Or Initiation Fees, And Prior To Enforcing The Union Security Provision Of The Contract

The ALJ found that Respondent Carpenters Union failed to give the appropriate notice of employees' rights under Communications Workers v. Beck, 487 U.S. 735 (1988), and NLRB v. General Motors, 373 U.S. 734 (1963), to, *inter alia*, be or remain nonmembers and to object to paying for nonrepresentational activities. See ALJD at 35:45 - 36:2. This finding is not supported by the record in this case, and should be reversed.

A union's obligations under Beck are to be measured by the same standard as its duty of fair representation -- that is, its actions must not be arbitrary, discriminatory, or in bad faith. California Saw and Knife Works, 320 NLRB 224, 230 (1995). A union meets its obligations under Beck "as long as it has taken reasonable steps to insure that all employees whom the union seeks to obligate to pay dues are given notice of their rights." Id. at 233.<sup>11</sup> However, "a union triggers no disclosure requirement of Beck rights, even in the context of constitutional scrutiny, *until it seeks to obligate nonmembers to pay dues or fees.*" See California Saw and Knife Works, 320 NLRB at 232 n.46 (citing Tierney v. City of Toledo, 824 F.2d 1497, 1503 n.2 (6<sup>th</sup> Cir. 1987))

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<sup>11</sup>In order to fully inform employees of their Beck rights, a union must tell them of their General Motors right to be and remain nonmembers, too. California Saw and Knife, 320 NLRB at 235 n.57. As such, Respondent Carpenters Union will jointly refer to the Beck and General Motors notices herein as the Beck notice.

(emphasis added).

The union in California Saw and Knife Works mailed out its Beck notices to members and nonmembers in the December issue of the union publication, *The Machinist*. 320 NLRB at 234-235. This was held to be sufficient as to these two groups of employees. Id. The problem, however, was that the union did not take any additional measures at all to provide this notice to newly hired employees. Id. at 235. It was within this context that the Board stated, “The presentation of the membership application and dues-checkoff form to a newly hired nonmember employee constitutes an attempt to obligate an employee to pay full dues. Basic considerations of fairness require that the union at that time inform newly hired employees of their Beck rights and that therefore the Union acts arbitrarily and in bad faith by not giving such notice, in violation of its duty of fair representation.” Id. at 235.

The instant case is materially different, and presents a unique set of circumstances not contemplated by the Board in California Saw and Knife Works. Specifically, Raymond’s drywall finishers were given the Beck notice *in the same meeting* at which they received the membership forms, after they had completed the forms, but *before any dues or fees were requested or collected*. Tr. 503. The employees were handed the Beck notice along with envelopes to send in their dues payments, and sent home with both. Tr. 503. As such, the employees received the notice after being handed the forms, but before being obligated to pay dues or fees. Because the new employees at issue in California Saw and Knife Works were not given any additional Beck notice at all, beyond the annual copy sent in the mail, these cases are materially different.

Review of the relevant portions of California Saw and Knife Works reveals that it is the

*obligation to pay dues and fees* that the Board was concerned with. See 320 NLRB 233-235).

For instance:

[W]e stress that the union meets that obligation as long as it has taken reasonable steps to insure that all employees whom the union seeks to obligate to pay dues are given notice of their rights. Thus, we find that when or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee [of the employee's rights under General Motors and Beck].

320 NLRB at 233. An employee may resign from membership at any time. 320 NLRB at 236.

The fact that the drywall finishers were given the Beck notice after completing membership forms, but before being obligated to pay dues or fees, is material -- and constitutes compliance with the Union's obligations under California Saw and Knife Works.<sup>12</sup>

It is thus relevant that Respondent Carpenters Union never enforced the union security provision of the collective bargaining agreement (Tr. 444), contrary to the ALJ's finding (ALJD 36:46-47). In fact, one of Respondent Raymond's drywall finishing employees worked until January 23, 2007 without joining the Carpenters Union. Tr. 444. At this point, the employee would have received the Beck notice distributed at the October 2, 2006 meeting, as well as the new Beck notice mailed out in the January 2007 issue of the *Carpenter* magazine. Tr. 510. The employees had "plenty of time" to decide, just as Travis Winsor told them they would, and Respondent Carpenters Union took sufficient, repeated measures to ensure that they were fully informed of their rights under General Motors and Beck.

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<sup>12</sup>The ALJ also cites Weyerhaeuser Paper Co., 320 NLRB 349 (1995), as authority for his finding. However, the union in Weyerhaeuser never gave the employees notice of their Beck rights *at any time* (320 NLRB 352), and the case is therefore inapplicable in this matter.

2. The Notices Set Forth In The Carpenters Union Magazine Meet The Board's Standards Under California Saw And Knife

As for the form of the Beck notice, it was sufficient under the standards set forth in California Saw and Knife. Specifically, the notice was set out in detail in the January 2006 issue of the Carpenter Magazine, which the staff members of Respondent Carpenters Union distributed to each employee when they returned their membership applications to the Union's table in the warehouse area. Tr. 503. The yearly January issue of the magazine is the one that contains the Beck notice, and that is given to all new members. Tr. 505. In that issue, the Beck notice is set forth in detail, taking up an entire page at the very end of the magazine (page 47 of 48 pages). RU Exh. 2. The employees' Beck and General Motors rights are highlighted in a beige box at the top of that page, which is opposite a blue page of the magazine setting forth "Union Member Rights and Officer Responsibilities Under the LMRDA." RU Exh. 2.

This is almost precisely the same format of notice that was at issue in California Saw and Knife, and which format the Board held was sufficient. Specifically, the union in that case printed its Beck notice in the December issue of the union's newsletter. 320 NLRB at 234. The GC objected to the form of the notice on the grounds that the union did not draw attention to the Beck notice by referring to it on the cover of the publication, and claimed that this meant the notice was "'buried' in the newsletter for purposes of obfuscation." Id. The Board disagreed, noting that the notice was highlighted in color, and set apart from other text by being placed in a different format. Id.

While the newsletter at issue in California Saw and Knife was only 12 pages long, and the magazine at issue in this case was 48 pages long, this distinction is of no moment. Respondent

Carpenters Union did not “bury” the notice in the middle of the magazine. Rather, it placed it in the second easiest spot to find -- the last page, as opposed to the first -- in a two-page section of highlighted text about member and non-member rights. There is absolutely no obligation to place this notice on the first page of the magazine, and it is easier to find it at the end of the magazine than it would be to find it anywhere in between.

Again, the Union’s obligations under General Motors and Beck are deemed part of its duty of fair representation -- its actions must not be arbitrary, discriminatory, or in bad faith. California Saw and Knife Works, 320 NLRB at 230. The Supreme Court has held that “a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ . . . as to be irrational.” Air Line Pilots v. O’Neill, 499 U.S. 65, 87 (1991) (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)). The measures taken by Respondent Carpenters Union to inform the drywall finishing employees of their General Motors and Beck rights were certainly reasonable and in good faith, and there is no allegation, nor any finding, that they were discriminatory. The ALJ’s finding that Respondent Carpenters Union violated Section 8(b)(1)(A) of the Act should be reversed.

**H. THE ALJ’S RECOMMENDED REMEDY FOR THE FAILURE TO GIVE *GENERAL MOTORS* AND *BECK* NOTICES EXCEEDS THE SCOPE OF THAT UTILIZED BY THE BOARD IN SUCH CASES**

If the Board should determine that Respondent Carpenters Union did not in fact provide sufficient Beck and General Motors notices, the remedy for such a violation is to order the Union to: (1) provide the proper notice to all member and non-member employees; (2) honor any resignations that it receives pursuant to this notice; (3) process any objections it receives; and (4)

reimburse the objecting non-members for the reduction, if any, in their dues and fees for nonrepresentational activities that occurred during the accounting period at issue. See United Parcel Service, Inc., 346 NLRB 360, 365 (2006); California Saw and Knife Works, 320 NLRB at 254.

The ALJ's recommended remedy for this violation goes far beyond the scope of remedies authorized by the Board in these cases, however. The ALJ recommends that the Respondents be jointly and severally required "to reimburse all of [Respondent Raymond's] past and present drywall finishing employees, who joined [Respondent Carpenters Union] on or after October 2, 2006, for any initiation fees, periodic dues, assessments, or other moneys, which they may have paid or which may have been withheld from their pay pursuant to the Carpenters Union 2006-2010 master agreement." ALJD at 38:15-22. The scope of this remedy may simply be a result of the ALJ's conclusion that *no* collective bargaining relationship between the Respondents should be allowed to stand, although the Decision does not make this clear.<sup>13</sup> However, if the Board reverses the ALJ's credibility determinations and concludes that the alleged unlawful statements were not made, and that therefore the Respondents' Section 9(a) agreement is valid, the remedy for any remaining General Motors or Beck violations should be limited to that outlined above.

The same would be true in the event that the Section 9(a) majority showing is found to have been

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<sup>13</sup>In this regard, Respondent notes that the ALJ explains his reason for ordering reimbursement of dues and fees to employees joining *after* October 2 by noting that "there is no evidence that any received the necessary General Motors and Beck notices before doing so." ALJD at 38, n. 76. However, the ALJ has again reversed the burden of proof in this Decision. The General Counsel did not present evidence that those signing with the Carpenters Union after October 2 did not receive the appropriate notices, nor was any such violation alleged in the Complaint. The General Counsel's evidence related only to those who signed with the Carpenters Union at the October 2 meeting itself. It is not Respondent's burden to show that violations *did not* occur. The remedy should be tailored to conform to the evidence in the record.

tainted, but the Respondents' Section 8(f) relationship is allowed to stand.

**V. CONCLUSION**

For the foregoing reasons, Respondent Carpenters Union respectfully requests that the Board sustain its exceptions to the Decision of the Administrative Law Judge and modify his findings, conclusions of law, recommended Remedy, recommended Order, and recommended Notice to Members accordingly.

Respectfully submitted,

DATED: January 12, 2009

DeCARLO, CONNOR & SHANLEY  
A Professional Corporation

/s/ Kathleen M. Jorgenson

Attorneys for Respondent UNITED  
BROTHERHOOD OF CARPENTERS AND  
JOINERS OF AMERICA, LOCAL UNION 1506

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I, Kathleen M. Jorgenson, declare as follows:

1. I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is DeCARLO, CONNOR & SHANLEY, a Professional Corporation, 533 South Fremont Avenue, Ninth Floor, Los Angeles, California 90071-1706.

2. On January 8, 2009, I telephonically notified Patrick Cullen, Ellen Greenstone, and Richard Zuniga, counsel for the other parties in this matter, and again notified the above individuals by e-mail on January 12, 2009 that Respondent United Brotherhood of Carpenters and Joiners of America, Local Union 1506 would be E-Filing the BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT CARPENTERS LOCAL UNION 1506 TO DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE in Cases Nos. 21-CA-37649 and 21-CB-14259.

3. I hereby certify that on January 12, 2009, I filed BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT CARPENTERS LOCAL UNION 1506 TO DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE in Cases Nos. 21-CA-37649 and 21-CB-14259, via E-Filing and 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, DC 20570-0001  
Phone: 202.273.1067

4. I hereby certify that on January 12, 2009, I caused to be served the foregoing document described BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT CARPENTERS LOCAL UNION 1506 TO DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE in Cases Nos. 21-CA-37649 and 21-CB-14259 on the interested parties in this action by placing a true copy thereof in sealed Fedex envelopes and affixing prepaid air bills, and causing the envelopes to be delivered to a Fedex agent for overnight delivery as follows:

James Small, Regional Director  
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DIVISION OF JUDGES  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779  
Phone: 415.356.5255

Executed on January 12, 2009, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

/s/ Kathleen M. Jorgenson