

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)

**RESPONDENT CARPENTERS LOCAL UNION 1506'S REPLY BRIEF  
TO ANSWERING BRIEFS OF COUNSEL FOR THE GENERAL COUNSEL  
AND PAINTERS UNION**

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Respondent Carpenters Local 1506 (“Respondent Carpenters Union”) hereby submits its reply brief to the answering briefs filed by Counsel for the General Counsel (“CGC”) and Charging Party Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO (“Painters Union”).

**I. PURPORTEDLY “UNCHALLENGED” FINDINGS AND CONCLUSIONS**

Counsel for the General Counsel urges that several findings and conclusions of the ALJ have been unchallenged by the Respondents and that any exception thereto has been waived. Several of these assertions are demonstrably incorrect. Specifically, CGC claims that neither of the Respondents excepted to the ALJ’s conclusion, at ALJD 29:7-8, that the September 12 Confidential Settlement Agreement may not be viewed as constituting a collective bargaining agreement. See CGCB<sup>1</sup> at p. 6. However, Respondent Carpenters Union *did* except to this conclusion. See CU Exception No. 4.

CGC also claims that neither of the Respondents excepted to the ALJ’s conclusion, at ALJD 30:25-35, that the Respondents violated the Act by extending coverage of the existing Master Agreement to the drywall finishing employees, given that said Agreement contains a union-security provision. See CGCB at p. 6. However, Respondent Carpenters Union excepted to this conclusion, as well. See CU Exception Nos. 1 and 22. CGC further claims that neither of the Respondents excepted to the ALJ’s finding that Winsor’s and Zorrero’s warnings were heard by numerous employees and are virtually identical to those found unlawful in Acme Tile. See CGCB at p. 6. However, Respondent Carpenters Union excepted to the finding that the alleged

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<sup>1</sup>The submissions of the parties in this matter will be referred to as follows: CGCB (CGC’s Answering Brief); PUB (Painters Union’s Answering Brief); CU Exception (Exceptions of Respondent Carpenters Union Local 1506).

unlawful statements were made at all. See CU Exception Nos. 30 and 31.<sup>2</sup>

**II. IF THE RESPONDENTS' AGREEMENT FAILS UNDER SECTION 9(a), BY OPERATION OF DEKLEWA, IT IS DEEMED A SECTION 8(f) AGREEMENT.**

Respondent Raymond and Respondent Carpenters Union were free to enter into a Section 8(f) agreement effective October 1, 2006. This fact is undisputed. Consolidated Complaint (“Cpt.”) at ¶ 11. Assuming for the sake of argument that Respondents did not enter into a valid and enforceable Section 9(a) agreement covering the drywall finishing employees, their relationship is deemed a Section 8(f) agreement. Neither Counsel for the General Counsel nor the Painters Union articulates a cogent policy argument or identifies persuasive authority indicating that the Board would or should refuse to recognize a Section 8(f) agreement between the Respondents because they attempted but failed to establish a Section 9(a) relationship.

Both the CGC and the Painters Union make much ado of the fact that Respondent Carpenters Union and Respondent Raymond “argued”, during the investigation and litigation of this case, that their agreement was governed by Section 9(a). Argument, of course, is much different than proof. And, in the construction industry, all agreements are “presumed” § 8(f) unless “proven” to be otherwise. Here, there has been no proof that prior to October 2, 2009, did the Carpenters Union “prove” they represented a majority of Raymond’s drywall tapers. Accordingly, the *Deklewa* § 8(f) presumption was not overcome with proof of majority status. And, the Carpenters Union, while prepared to argue to the contrary, was aware that their “argument” may not overcome the presumption. Tr. 601:3-15, 600:23 - 601:15.

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<sup>2</sup>In its recitation of the facts in this case, the CGC also incorrectly asserts, without citation to any testimony in the record, that the Painters Union Exception in the Carpenters Union Master Agreement was added in 2002 instead of 1992. See CGCB at pp. 10-11, and n.8. This is incorrect, as the ALJ found and as was correctly noted, with citation to testimony in the record, by Respondent Carpenters Union in its Brief in Support of its Exceptions. See CUB at p. 5 (citing Tr. 573-576).

There is nothing inconsistent about wanting § 9(a) recognition, but accepting § 8(f) recognition if the *Deklewa* presumption is not overcome. After all, the Painters Union unsuccessfully attempted to obtain § 9(a) recognition by way of its expired agreement with Respondent Raymond. GC Exh. 4, tab 1, p. 1. Failing in that attempt, the Painters Union's agreement is deemed a § 8(f) agreement, which Respondent Raymond was free to repudiate at its expiration. See Cpt. at ¶ 11. This is how a presumption works. The agreement is *presumed* to be 8(f) unless the parties demonstrate that it is a valid 9(a) agreement. The CGC claims that the Respondent's agreement is *not* a valid 9(a) agreement. Therefore, it is a Section 8(f) agreement, because the presumption of Section 8(f) status has not been rebutted.

Despite the CGC's suggestion, Madison Industries *does* hold that the Board will look to the agreement as a whole, and not simply to the recognition clause, in order to determine whether the parties have effectively created a Section 9(a) relationship. See CGCB at p. 26. To quote the Board's language in that decision: "Thus, 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 tendered.'" Madison Industries, 349 NLRB at 1308 (quoting NLRB v. Oklahoma Installation, 219 F.3d 1160, 1165 (10<sup>th</sup> Cir. 2000) (emphasis added)). In that case, the Board looked to the entire agreement -- not simply the recognition clause that the ALJ found did "clearly establish" that the union requested and the employer granted recognition as the majority representative -- and found that contractual provisions which are also contained in the Master Agreement between the Respondents created an ambiguity that necessitated looking to extrinsic evidence. Id. at 1308-1309. The extrinsic evidence in this case confirms Gordon Hubel's testimony that Respondent Carpenters Union sought and obtained recognition under Section 9(a) of the Act, but was uncertain as to how the

Board would view the agreement and was therefore prepared to accept recognition under 8(f).  
RE Exh. 5; Tr. 601:3-15.

The Respondents did not effect an unlawful accretion of the drywall finishing employees into the drywall installers unit because the drywall finishers were treated separately and there is no proof to the contrary. The Respondents contemplated the coverage of the drywall finishers and memorialized this in the September 12 Confidential Settlement Agreement showed them to be separate. RE Exh. 5. Further, Respondent Carpenters Union – again, suspecting that the Board may not give effect to the Carpenters Union’s coverage of the drywall finishers by way of the Painters Union Exception – obtained authorization cards from the drywall finishers separately, and obtained separate Section 9(a) recognition from Respondent Raymond on October 2, 2006 proves the separateness of the unit. Tr. at 601:3-15; GC Exh. 4, tab 4. This would have all been irrelevant if the drywall finishers had merged into the pre-existing § 9(a) carpenters unit.

**III. THE CLEAR PREPONDERANCE OF ALL RELEVANT EVIDENCE DEMONSTRATES THAT THE ALJ’S CREDIBILITY DETERMINATIONS REGARDING THE ALLEGED UNLAWFUL STATEMENTS ARE INCORRECT.**

Both the CGC and the Painters Union fail to address the numerous *material* inconsistencies in the testimony of CGC’s witnesses, other than the CGC shrugging them off as “minor.” See CGCB at p. 33. Both the CGC and the Painters Union merely recite the cherry-picked bits of testimony in the transcript that support the conclusions they seek, without discussing the fact that those bits of testimony were often contradicted by other testimony from the CGC’s witnesses. In fact, as noted in the Carpenters Union’s opening brief, there is *no consistent version of events* offered by any of the CGC’s witnesses.

The Painters Union fancifully claims that all of the CGC’s witnesses testified that they

were told they could not work the following day if they did not “sign with” the Carpenters Union that day. See PUB at p. 14:23-25. This is flatly untrue, as the cited portions of the transcript reveal. Specifically, Richard Myers did *not* testify that he was told to sign with the Carpenters Union that day. Tr. 94:7-12. Rather, he testified that Mr. Winsor explained that the employees needed to sign with the Carpenters Union in order to continue working for Raymond. This is how a union security clause works, and it is a lawful statement. See Big “D” Mining, 222 NLRB 522, 523 (1976).

As explained in more detail in the Carpenters Union’s opening brief, Mr. Myers was Raymond’s most experienced finisher (a foreman who had 28 years with the company) and he testified that no unlawful statements were made. Tr. at 86, 94, 97, 117, 119, 124. This stands in stark contrast to the testimony of Ruben Mejia Alvarez, who said that 40 to 50 employees called out a question to Hector Zorrero in unison and received an unlawful statement in response. Tr. 223. *None* of the CGC’s three other witnesses heard this -- or any other unlawful statements by Mr. Zorrero -- and yet the ALJ credited this account.

These are not “minor” inconsistencies, as the CGC urges. These inconsistencies go to the very heart of the CGC’s case. None of these witnesses corroborate each other regarding the alleged statements by Mr. Winsor and Mr. Zorrero. The witness with the most experience working under a union security clause at Raymond’s facility corroborated *Respondents’* witnesses accounts of the statements made at the meeting. As such, the clear preponderance of all evidence in the record demonstrates that the ALJ’s credibility findings regarding the statements at the meeting are simply not supported by the evidence in the record -- in fact, they conflict with the clear preponderance of the evidence -- and as such they must be reversed.

**IV. RESPONDENT CARPENTERS UNION GAVE THE DRYWALL FINISHING EMPLOYEES TIMELY AND PROPER NOTICE OF THEIR BECK AND**

### GENERAL MOTORS RIGHTS.

The CGC alleges, and has the burden of proving, that Respondent Carpenters Union failed to give Raymond's employees notice of their rights under Beck and General Motors. The CGC failed to meet this burden, and the ALJ's conclusions to the contrary are not supported by the evidence in the record.

The notices were set forth in the annual Carpenter magazine that was being distributed by Union staff members at tables in the warehouse room at the facility. Tr. 503; RU Exh. 2 (p. 47 of 48 pages). Of the four witnesses presented by the CGC, three testified that they had *already decided not to sign* with the Carpenters Union, and that they therefore paid no attention to the materials being distributed, nor did they approach the tables in the warehouse room. Tr. 134 (Mr. Myers "wasn't paying attention" to what went on at the tables; he "went straight out" of the building); Tr. 185 (Ms. Pineda didn't approach the Union tables or look at what they were handing out at the tables); Tr. 313 (Mr. Ramos also left the presentation room and went straight out into the tool yard). These three employees ceased working for Raymond as of that day, when Painters Union representatives who were waiting outside of the meeting told them the Painters Union would get them jobs with *its* signatory employers. Tr. 129-130; 180-181; 314-315.

The fourth employee, Ruben Mejia Alvarez, did fill out paperwork. Tr. 204. He testified that he was "not certain" if he saw that the Union representatives had magazines available, and while he didn't specifically recall having seen the magazine at the meeting, he did testify that it was sent to his home approximately one week later, and that he still receives it. Tr. 205-206.

The CGC put on no evidence as to whether "Respondent Union sent General Motors or Beck notices to all of the unit employees by the end of this 8-day period [in the union-security clause], or told employees that the contract's union-security clause would not be enforced." See

CGCB at p. 38. It is not Respondent Carpenters Union's burden to establish that it *did* do this without evidence by the CGC that it failed to do so. Nonetheless, the CGC's own evidence demonstrates that Respondent Carpenters Union *did* send the notices to the unit employees prior to the end of the 8-day period. The only employee witness who opted not to leave Raymond for an employer signatory with the Painters Union, Ruben Mejia Alvarez, received the Carpenter magazine at his home approximately one week after the meeting. Tr. 205-206.

As such, the evidence in the record demonstrates that Respondent Carpenters Union distributed the General Motors and Beck notices to employees at the meeting *prior* to collecting any dues or fees from them, and *prior* to the time when the union-security clause could have been enforced (although it never was enforced). As the Board stated in California Saw and Knife Works, 320 NLRB 224 (1995), "We note that 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." 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)). The timing of the Beck notices given by Respondent Carpenters Union was reasonable and appropriate.

As for the form of these notices, the CGC complains that the magazine setting forth the notice was "months-old." However, the Board has held that an annual notice is sufficient. California Saw and Knife Works, 320 NLRB at 234-235. Regardless of the date on the cover of the magazine, it was distributed in October of 2006 for the employees to read. There is no basis in reason for inferring that the employees would elect not to read it because the date on the cover was several months earlier, and there is no basis in law for requiring that the notice be printed in a magazine that is dated contemporaneously with its distribution to new unit members.

The CGC also takes issue with the length of the magazine. Again, while the Carpenter

magazine is longer than the publication at issue in California Saw and Knife Works, the notice itself is placed in the second-most-noticeable place, after the front of the magazine – the back. It was not buried in the middle, or “hidden,” as the Board expressed concern with in that case. 320 NLRB at 234. Part of the text was printed on a differently-colored background than that used in the rest of the magazine. RU Exh. 2. And as for the fact that the notice was not translated into Spanish, the Board requires unions to make “reasonable efforts” to communicate these notices, and judges those efforts by the same standard as a union’s 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). In this case, the magazine containing the notice had been printed long before the meeting at Raymond’s facility was planned. As Mr. Hubel testified, he realized the day before the meeting that the magazine had not been packed up with the materials to be distributed, so he “scrambled around and found a couple of boxes and made sure that they were delivered to Raymond’s facility.” Tr. 586.

There is no evidence of discriminatory motive or bad faith in this, nor any evidence from which it may be inferred. Further, the failure to provide a Spanish translation of the Beck notice cannot be deemed “arbitrary” under these circumstances. 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,’ Ford Motor Co. v. Huffman, . . . as to be irrational.” Air Line Pilots v. O’Neill, 499 U.S. 65, 87 (1991). There is not and was not, in October 2006, a legal requirement to translate Beck notices into other languages, and the fact that Respondent Carpenters Union did not do so in this case did not violate the Act.

V. **THE ALJ’S RECOMMENDED ORDER - THAT RESPONDENT RAYMOND CEASE AND DESIST RECOGNIZING RESPONDENT CARPENTERS UNION**

**AT ALL ABSENT AN ELECTION - LACKS SUPPORT IN BOARD LAW OR POLICY, AND IS UNWARRANTED BY THE EVIDENCE IN THIS CASE.**

The CGC and Charging Party Painters Union, in defending the ALJ's order in this case, rely heavily upon the assumption that the Respondents' agreement may not be viewed as a valid Section 8(f) agreement because the Respondents attempted but failed to enter into a valid Section 9(a) agreement. This assumption is incorrect, as demonstrate above.

The fact remains that, since the Deklewa decision,<sup>3</sup> the Board has not ordered withdrawal of recognition and invalidation of a Section 8(f) contract as a remedy for unlawful assistance without evidence that a rival union had presented the employer with evidence of majority support and was actively seeking Section 9(a) recognition. For instance, the CGC cites Clock Electric, Inc., 338 NLRB 806 (2003), as support for its argument that the Respondents' agreement may not be viewed as a valid Section 8(f) agreement if it fails under 9(a). However, Clock Electric is substantially and materially different from the instant matter, in that the employer was found to have rendered assistance to a union after another union had obtained authorization cards and had offered to show the employer evidence of majority support. 338 NLRB at 806. In fact, the employer in Clock Electric went even further and interrogated employees who had signed authorization cards for said union.<sup>4</sup> Id. However, as noted in Respondent Carpenters Union's opening brief, there was no such attempt by Charging Party Painters Union to make a showing of majority support or to obtain Section 9(a) status.

Charging Party Painters Union also fails to cite any authority supporting the ALJ's

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<sup>3</sup>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).

<sup>4</sup>Garner/Morrison, LLC, 353 NLRB No. 78 (2009), which has been appealed by the respondents in that case to the D.C. Circuit Court of Appeals, also involved a rival union that had offered to make a showing of majority status. 353 NLRB at \*2.

recommended order in this case. See Riverbay Corp., 340 NLRB 35, at \*7-8 (2003) (involving a property manager with a restoration department in which ALJ specifically noted that employees worked full-time, 52 weeks per year, and that no evidence that employer engaged in new construction work for “a significant period”; no mention of Section 8(f) contract); Brooklyn Hospital Center, 309 NLRB 1163 (1994) (involving hospital employer, not a Section 8(f) contract); Mego Corp., 254 NLRB 300, 301-302 (1981) (involving toy manufacturing plant, not a Section 8(f) contract).<sup>5</sup> The ALJ’s recommended order in this case is unwarranted by the facts, and not supported by Board law. It must be reversed.

## VII. 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: February 24, 2009

DeCARLO, CONNOR & SHANLEY  
A Professional Corporation



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Kathleen M. Jorgenson  
Attorneys for Respondent Local 1506

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<sup>5</sup>Charging Party Painters Union attempts to distinguish Luke Construction Co., Inc., 211 NLRB 602, 605 (1974), on the grounds that the employer there signed its 8(f) contract with the union before hiring any employees and then, upon hiring employees, rendered unlawful assistance by requiring those employees to sign membership and authorization cards. See PUB at p. 16, n.15. However, the fact remains that the employer here, like the employer in Luke Construction, was lawfully free to enter into a Section 8(f) agreement with Respondent Carpenters Union. It was for this reason that the ALJ in Luke Construction (affirmed by the Board) refused the CGC’s request for an order that the employer cease and desist recognizing the union or giving effect to its agreement. See 211 NLRB at 605. The Board should refuse to issue such an order in this case for the same reason.

**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 February 24, 2009, I telephonically notified Patrick Cullen, Richa Amar, and Richard Zuniga, counsel for the other parties in this matter, that Respondent United Brotherhood of Carpenters and Joiners of America, Local Union 1506 would be E-Filing the RESPONDENT CARPENTERS LOCAL UNION 1506'S REPLY BRIEF TO ANSWERING BRIEFS OF COUNSEL FOR THE GENERAL COUNSEL AND PAINTERS UNION in Cases Nos. 21-CA-37649 and 21-CB-14259.

3. I hereby certify that on February 24, 2009, I filed RESPONDENT CARPENTERS LOCAL UNION 1506'S REPLY BRIEF TO ANSWERING BRIEFS OF COUNSEL FOR THE GENERAL COUNSEL AND PAINTERS UNION 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 February 24, 2009, I caused to be served the foregoing document described RESPONDENT CARPENTERS LOCAL UNION 1506'S REPLY BRIEF TO ANSWERING BRIEFS OF COUNSEL FOR THE GENERAL COUNSEL AND PAINTERS UNION in Cases Nos. 21-CA-37649 and 21-CB-14259 on the interested parties in this action via e-mail:

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Executed on February 24, 2009, at Los Angeles, California.



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Kathleen M. Jorgenson