

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

**RAYMOND INTERIOR SYSTEMS**

and

Case 21-CA-38492

**OPERATIVE PLASTERERS' AND  
CEMENT MASONS' INTERNATIONAL  
ASSOCIATION LOCAL UNION 200, AFL-CIO**

and

Case 21-CA-38589

**SOUTHERN CALIFORNIA PLASTERING  
INSTITUTE GROUP BENEFIT TRUST  
C/O AMERICAN BENEFIT PLAN  
ADMINISTRATORS, INC.**

**SOUTHERN CALIFORNIA PLASTERING  
INSTITUTE PENSION TRUST FUND  
C/O AMERICAN BENEFIT PLAN  
ADMINISTRATORS, INC.**

**SOUTHERN CALIFORNIA PLASTERING  
INSTITUTE APPRENTICESHIP AND  
TRAINING TRUST C/O AMERICAN  
BENEFIT PLAN ADMINISTRATORS, INC.**

**SOUTHERN CALIFORNIA PLASTERING  
INSTITUTE ADMINISTRATIVE TRUST  
FUND C/O AMERICAN BENEFIT PLAN  
ADMINISTRATORS, INC.**

**SOUTHERN CALIFORNIA PLASTERING  
INSTITUTE LABOR-MANAGEMENT  
WORK PRESERVATION TRUST  
C/O AMERICAN BENEFIT PLAN  
ADMINISTRATORS, INC.**

**SOUTHERN CALIFORNIA PLASTERING  
INSTITUTE VACATION TRUST AND  
VACATION ADMINISTRATION TRUST  
C/O AMERICAN BENEFIT PLAN  
ADMINISTRATORS, INC.**

**SOUTHWEST REGIONAL COUNCIL  
OF CARPENTERS**

and

Case 21-CB-14576

**OPERATIVE PLASTERERS' AND  
CEMENT MASONS' INTERNATIONAL  
ASSOCIATION LOCAL UNION 200, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT RAYMOND'S EXCEPTIONS**

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Region 21

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## **I. INTRODUCTION AND PROCEDURAL HISTORY**

Raymond Interior Systems (“Respondent Employer”) is a building and construction industry employer. Respondent Employer was signatory to a series of Section 8(f) collective-bargaining agreements with the Operative Plasterers’ and Cement Masons’ International Association Local Union 200, AFL-CIO (“Union”) through its membership in the Western Wall and Ceiling Contractors Association (“WWCCA”), a multi-employer bargaining association. Under the WWCCA labor contracts, Respondent Employer was required to make trust-fund contributions.

On June 26, 2003, the Union demanded from Respondent Employer that it be recognized as the exclusive bargaining representative of employees under Section 9(a) of the Act. Respondent Employer agreed and the parties signed at least two original Section 9(a) voluntary-recognition agreements. At no point from June 2003 to August 2008 did Respondent Employer object to the validity of the Section 9(a) agreement. In May 2008, Respondent Employer withdrew from the relevant bargaining conference under WWCCA. In August 2008, Respondent Employer claimed that there was no valid Section 9(a) relationship; withdrew recognition from the Union; repudiated the contract; refused to bargain; and ceased contributions to the trust funds. On August 6, 2008, Respondent Employer entered into collective-bargaining agreements with the Southwest Regional Council of Carpenters (“Respondent Carpenters”), collectively called “Respondents”. Respondents conducted a joint meeting with plastering employees wherein employees were threatened with termination if they did not join Respondent Carpenters and induced to join by being awarded monetary gifts and trade tools.

After a consolidated complaint issued, on September 22-25 and 30, 2009, the Honorable John J. McCarrick, Administrative Law Judge (“ALJ”) presided over the hearing in these

matters. On March 5, 2010, the ALJ issued his Decision and Order, finding that Respondents violated the Act.

## **II. UNCHALLENGED FINDINGS AND UNDISPUTED FACTS**

Pursuant to Section 102.46(b)(2) of the National Labor Relations Board's Rules and Regulations, herein called the Board's Rules and Regulations, any exceptions to a ruling, finding, conclusion, or recommendation not specifically made is deemed waived. Respondent failed to except to the following findings of fact and conclusion of law of the ALJ, which are summarized for the sake of brevity. Thus, the Board should affirm them:

1. The ALJ's finding that Dave Fritchel and Gary Jaacks ("Jaacks") identified their signatures on the Section 9(a) agreement. (ALJD 6:19-10)
2. The ALJ's finding that Jaacks never made any objection to the validity of the Section 9(a) agreement to the Union or to WWCCA. (ALJD 6:21-23)
3. The ALJ's finding that on May 3, 2007, the Union sent WWCCA copy of Respondent Employer's Section 9(a) agreement showing dates of June 26, 2003 and July 29, 2005. (ALJD 7:11-13)
4. The ALJ's finding that in Travis Winsor's affidavit mentions nothing of his claims that he objected to the validity of the Section 9(a) agreement. (ALJD 7:28-29)
5. The ALJ's finding that Ian Hendry could recall no WWCCA meetings wherein the validity of the Section 9(a) agreements were discussed and when the agreements were raised none of the member-contractors denied signing the agreements. (ALJD 7:41-45)

### III. FACTS

#### A. The Bargaining Relationship Between Respondent Employer and the Union

WWCCA is a multi-employer bargaining association that bargains for labor contracts on behalf of its member-contractors; assists contractors with technical issues relating to building and architecture; and advises employers on issues concerning labor agreements.<sup>1</sup> Under the WWCCA there are certain conferences relating to particular trade industries: carpenters, plasterers, painters, and laborers. Each conference bargains with its respective unions. The Plastering Conference is one such conference, and it bargains with the plastering unions. The WWCCA and the Union have been signatory to a series of Section 8(f) collective-bargaining agreements. There are two relevant collective-bargaining agreements (“CBA”): one with a term of August 4, 1999, to August 5, 2003, which was extended to August 2, 2005 by a written addendum (collectively referred to as “1999-2005 CBA”) (GCX 2(a) and 2(b)) and one with a term of August 3, 2005, to August 5, 2008 (“2005-2008 CBA”). (ALJD 4:15-22) (GCX 2(c))

Respondent Employer was a member of the WWCCA and of the Plastering Conference during the 1999-2005 and the 2005-2008 CBAs. (ALJD 4:15-16) (Tr. 59-60) Gary Jaacks (“Jaacks”), who served as Respondent’s president and chief-executive officer (“CEO”) from 1994 to 2004, sat on the contractors’ committee and negotiated the 1999-2005 CBA. (ALJD 5:4-6) Jaacks also signed the 1999-2005 CBA. (GC Exhibit 2(a), page 50)

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<sup>1</sup>All citations to the ALJ’s decision will be referred to “ALJD” followed by the appropriate page number(s). All citations to Respondent Employer’s exceptions will be referred to “RE” followed by the appropriate number(s); while all citations to the Respondent Employer’s exceptions brief will be referred to “RB” followed by the appropriate page number(s). All citations to the hearing transcript will be referred to as “Tr.” followed by the appropriate page number(s). General Counsel’s exhibits will be referred to as “GCX” followed by the appropriate number(s). Respondent Employer’s exhibits will be referred to as “RX” followed by the appropriate number(s). Charging Party Union’s exhibits will be referred to as “CPX” followed by the appropriate page number(s).

In relevant part, the following Articles are identical in both CBAs:

The preamble reads:

This Agreement entered into [the first date CBA was effective] by and between designated members of the California Plastering Conference of the Western Wall and Ceiling Contractors Associations, Inc., and individual contractors who are signatory hereto, parties to the first part, hereinafter referred to as Contractors, and Operative Plasterers and Cement Masons International Association Local Union No. 200, the signatory Local Union ....

Article II–Union Recognition:

The exclusive bargaining rights are to be vested in the signatory parties to this Agreement up to and including [termination date of the CBA].

Article XV, Section 1–Entire Agreement:

The foregoing Agreement constitutes the entire contract between the parties signatory hereto, and no additions, alterations or modifications shall occur herein without the voluntary, mutual consent of the parties, during the period of this Agreement; provided however, that either may call for a conference on voluntary changes during the life of this Agreement, and both parties shall thereupon meet to confer on such changes.

Finally, Article VII – Fringe Benefits, of the CBAs set forth the required payments into the various trust funds.<sup>2</sup>

**B. Respondent Employer and the Union Enter Into the Section 9(a) Voluntary-Recognition Agreement**

*1. General Background*

On December 27, 2002, the Union submitted to WWCCA a written request for Section 9(a) recognition. (ALJD 5:17-19) In January 2003, the Union filed a representation petition with Region 21, naming WWCCA as the petitioned-for employer of a single bargaining unit. In

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<sup>2</sup> Under the contract, Respondent Employer was required to make contributions to the following trust funds, which are collectively referred to herein as “Trust Funds”: Southern California Plastering Institute Group Benefit Trust; Southern California Plastering Institute Pension Trust Fund; Southern California Plastering Institute Apprenticeship and Training Trust; Southern California Plastering Institute Administrative Trust Fund; Southern California Plastering Institute Labor–Management Work Preservation Trust; and Southern California Plastering Institute Vacation Trust and Vacation Administration Trust.

2003, the Union began seeking Section 9(a) voluntary-recognition agreements with companies that were signatory to its various labor contracts, including those signatory to the 1999-2005 CBA through membership in WWCCA. (ALJD 5:20-23) (Tr. 63) At the time, the Union had about 70 employers that were signatory to labor contracts, of which about 29 were members of the WWCCA. (Tr. 64) Respondent Employer was one of the 29 member-contractors from which the Union sought Section 9(a) representation status. In soliciting the Section 9(a) status agreements from Respondent Employer on June 20, 2003, Robert Pullen (“Pullen”), the Union’s business manager/secretary treasurer, sent Respondent Employer a certified letter making a demand for recognition under Section 9(a) and stating that the Union had authorization cards from a majority of Respondent Employer’s employees. Pullen also attached a copy of the Section 9(a) agreement. (ALJD 5:25-27)

After sending the June 20, 2003 correspondence, Pullen instructed David Fritchel (“Fritchel”), business agent, to visit Respondent Employer with the authorization cards and copies of the Section 9(a) voluntary-recognition agreement. (ALJD 6:1-12)

## 2. *The June 26, 2003 Meeting*

On June 26, 2003, Fritchel went to Respondent Employer’s facility to meet with Jaacks.<sup>3</sup>

Fritchel met with Jaacks alone in the conference room. Fritchel explained to Jaacks that the Union requested recognition as the Section 9(a) representative of Respondent’s plastering employees. Fritchel explained that the Union wanted voluntary-recognition from the Respondent Employer. Fritchel presented Jaacks with a three-ring binder in which he carried the

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<sup>3</sup> On July 31, 2004, Jaacks retired from his positions as Respondent Employer’s CEO and president. Since his retirement, Jaacks has continued to work for Respondent Employer as its vice president and consultant. (ALJD 4:8-10) (Tr. 352, 383)

authorization cards signed by employees. Fritchel thumbed through the authorization-card binder. Fritchel then showed Jaacks the Section 9(a) voluntary-recognition agreement of which he had at least two copies. (ALJD 6:10-15) (Tr. 218, 225-226, 235) (RE 1 and 3) Jaacks did not claim that he had no authority to sign the Section 9(a) voluntary-recognition agreement. (RE 40) Jaacks did not ask any questions about the agreement nor did he express any objection. (ALJD 6:21-23) (Tr. 227, 234) Jaacks and Fritchel each simultaneously signed a copy of the Section 9(a) voluntary-recognition agreement, and then they exchanged agreements and signed. (Tr. 225-226, 247) Fritchel might have had Jaacks sign a third copy of the Section 9(a) voluntary-recognition agreement. Fritchel consistently testified that he left one fully-signed original of the Section 9(a) voluntary-recognition agreement with Jaacks. (Tr. 226-227, 237-238, 247) The original that Fritchel left with Jaacks bore both their signatures. Respondent Employer never produced this fully-signed original agreement that was left with Jaacks. The record establishes that there were two originals of the Section 9(a) voluntary-recognition agreement; copies of these were entered into the record as GCX 4 and GCX 7. The copy entered as GCX 7 is the same copy entered as RX 8 and 13. All copies of the Section 9(a) agreement entered into the record contain the following *identical content*:

**VOLUNTART RECOGNITION AGREEMENT  
FOR A SINGLE EMPLOYER BARGAINING UNIT**

This agreement is made and entered into by and between Raymond Interior Systems. (herein referred to as the “Employer”), and Local No. 200 of the Operative Plasterers’ & Cement Masons International Association, AFL-CIO (herein referred to as the “Union”).

1. The Union having unequivocally demanded recognition as the majority representative of the employees of the Employer in the collective bargaining unit described below, and the Union have [sic] submitted satisfactory evidence to the Employer that the Union represents, has the support of, and has been authorized to represent said employees by a majority of the Employer’s employees working the classifications within the jurisdiction of the Union, as established and defined in the collective bargaining agreement commonly known as the Labor Agreement between

the Union and the Western Wall & Ceilings Contractors Association, Inc., California Plastering Conference (hereinafter referred to as the "Collective Bargaining Unit"), the Employer hereby unequivocally recognizes the Union as the sole and exclusive majority representative for collective bargaining purposes for the Employer's employees in said Collective Bargaining Unit, under Section 9(a) of the National Labor Relations Act, as amended. This recognition refers to the work described in the said Labor Agreement and applies only to the extent that such work is to be performed within the territorial jurisdiction covered by the said Labor Agreement.

2. This Voluntary-recognition Agreement shall be effective at the time and date that this Agreement is signed by the Employer and by the Union, and if signed on different days, the effective day shall be the day of the latest signature.

GCX 4 and 7 and RX 8 and 13 each bear Fritchel's signature, Jaacks' signature, and the date "June 26, 2003" written next to Jaacks' signature. On GCX 4 there is no date written next to Fritchel's signature, and on GCX 7, July 29, 2005 is written next to Fritchel's signature. Both Fritchel and Jaacks identified their respective signatures on GCX 4 and Jaacks admitted that he was authorized to sign contracts on Respondent Employer's behalf. (ALJD 6:21-22) (RE 6) Jaacks also identified his signature on GCX 7, RX 8 and 13. (Tr. 372-373)

At the hearing, Jaacks denied that any meeting with Fritchel took place on June 26, 2003; but he claimed that he signed the Section 9(a) agreement and mailed it back to the Union. (ALJD 6:30-32) (Tr. 373, 376, 412-413) Jaacks admitted that after signing the Section 9(a) voluntary-recognition agreement he never contacted the Union to state that he should not have signed it because he did not have the authority (ALJD 14:8-9) (RE 40) Despite the fact that Jaacks and Fritchel served as trustees on the Southern California Plastering Institute Trust Funds together, Jaacks never raised the issue of the Section 9(a) voluntary-recognition agreement with Fritchel. (Tr. 235)

a. Jaacks Consulted with WWCCA and Counsel

Jaacks testified that after meeting with Fritchel he then consulted with Mark Treadwell (“Treadwell”), the WWCCA, Plastering Conference’s attorney, and with Ian Hendry (“Hendry”), the then-executive vice president of WWCCA.<sup>4</sup> (ALJD 6:28-29) (Tr. 374-375, 428) Jaacks testified that if he needed to know WWCCA’s position on a particular issue, including labor matters, he consulted with Treadwell. Respondent Employer claimed attorney-client privilege at the hearing to prevent General Counsel and the Charging Parties from asking Jaacks questions about this critical conversation he had with Treadwell about WWCCA’s position on the validity of the Section 9(a) agreement. (Tr. 431-432) Later in the hearing, Respondent Employer waived that privilege to allow its witnesses to testify about Treadwell’s alleged statements.

i. **Hendry’s and Treadwell’s Versions**

Hendry did not corroborate Jaacks' testimony and stated that he recalled no conversation with Jaacks about any individual Section 9(a) recognition agreement. (ALJD 6:29-30) (Tr. 831, 838) (RE 7 and 9)

Since Respondent Employer claimed attorney-client privilege, Treadwell could not testify about any conversations he had with members of the WWCCA’s board of directors or with WWCCA’s members. Notwithstanding, since 1981 Treadwell has represented WWCCA and the Plastering Institute Funds. Treadwell testified that he participated in the negotiation of the two relevant CBAs, and the language of the CBAs did not prohibit the Union from seeking and obtaining voluntary-recognition agreements from individual member-employers. (ALJD 8:6-8) (Tr. 543) When the Union filed its petition in January 2003 for a single unit covered under the

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<sup>4</sup> Hendry has been working in multi-employer bargaining since the late 1970s and currently holds the position of chief executive officer of WWCCA. (Tr. 784, 787) Treadwell is co-counsel for WWCCA along with James Bowles, Respondent Employer’s attorney who represented it at the ULP hearing. For the Plastering Institute Funds, Treadwell represents the management side and Jeffrey Cutler represents the Union side. (Tr. 520-521)

WWCCA's 1999-2005 CBA, the WWCCA conveyed its position through Treadwell. The ALJ credited Treadwell's testimony that he spoke to representatives of the Union and informed them that if it was interested in obtaining Section 9(a) representative status, it should seek the Section 9(a) status from individual member-contractors. (ALJD 8:6-8) (Tr. 522-524, 546-547) Ultimately, the representation petition was withdrawn. (ALJD 8:4-5) (Tr. 523)

The ALJ also credited Treadwell's testimony that WWCCA never took the position that the CBA prevented the Union from seeking individual Section 9(a) recognition agreements. (ALJD 8:8-11) (Tr. 533-534)

Treadwell confirmed that since 2003, WWCCA has taken no legal action, including grievances or unfair labor practice charges, against the Union claiming that the Section 9(a) agreements violated the CBA or the Act. (Tr. 525, 527)

Jaacks admitted that in signing the Section 9(a) agreement he was following the advice of his advisors and understood the significance of converting an 8(f) agreement to a 9(a) agreement.<sup>5</sup> (Tr. 445, 454-455)

b. Jaacks Testified Differently in his Sworn Affidavit Taken During the Investigation

As it related to his signing the Section 9(a) agreement Jaacks' affidavit testimony given during the investigation of the underlying charges, however, was entirely different from his at-hearing testimony. In his affidavit testimony, Jaacks did not recall who presented him with the agreement, when he received it, where he was when he received it, how he received it, or

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<sup>5</sup> Specifically, Jaacks understood that the difference between Section 8(f) status and Section 9(a) status was that with 8(f) an employer could terminate the agreement when it expired; but with a 9(a) agreement, the employer had a continuing bargaining obligation after contract expiration. (Tr. 452)

whether he spoke with counsel about the agreement. Jaacks also testified that he could not recall what he did with the agreement after he signed it. (ALJD 6:33-37) (Tr. 378-379, 438)<sup>6</sup> At the hearing, Jaacks testified that it was Fritchel who asked him to sign the Section 9(a) agreement; that he and Fritchel met a few days before June 26, 2003; that after meeting with Fritchel he consulted with Treadwell and Hendry; that after signing the agreement he mailed it back to the Union. (Tr. 373-376, 412-415) Jaacks also testified that signed the agreement despite believing the agreement to be “invalid” and “null” and “unenforceable.” (Tr. 426, 433, 444)

c. Jaacks’ Authority as of June 26, 2003

During the hearing, Respondent Employer amended its Answer to admit the Section 2(11) and 2(13) status of Jaacks. In his career, Jaacks had several titles with Respondent Employer and with the WWCCA. Jaacks held various officer positions with the board of directors of the WWCCA and eventually served as the president of the WWCCA. (Tr. 409-410) With Respondent Employer, Jaacks served as the controller, vice president, senior vice president of finance, executive vice president, president, and CEO. ) From about 1994 to 2004, Jaacks was the president and CEO. (Tr. 353-354) Beginning in the year 2000 and continuing to about 2004, Jaacks also served as a trustee for the management side of the Southern California Plastering Institute, which is described in Article VII of the CBA. (ALJD 4:11-13) (Tr. 214, 356) As it relates to bargaining, Jaacks was a member of the negotiation committee for the WWCCA management side to negotiate the 1999-2005 CBA, and signed he signed that same CBA. (Tr. 359-360) (GCX 2(a)) From the mid-1990s to July 2004, Jaacks was

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<sup>6</sup> Jaacks’ affidavit testimony regarding his signing the Section 9(a) agreement was read into the record at Tr. 378-379.

also the responsible managing officer for Respondent Employer's contracting license work. (Tr. 405-406)

**C. Events of 2005**

*1. Representation Petitions and Requests for Section 9(a) Recognition*

On March 23 2005, the Union again petitioned to represent a single unit for WWCCA's plastering contractors. (ALJD 6:40-41) (RX 4) Treadwell testified that when the petition was filed he informed Board agents of Region 21 who were assigned to process the petition that in WWCCA's view it should not be party to the matter as it did not employ employees; that WWCCA did not have authority to negotiate on behalf of its member-contractors during the term of the CBA without first obtaining their consent; and that the Union should pursue recognition agreements with the individual member-contractors. As it had in 2003, thereafter the Union withdrew the representation petition. In March 2005, when the Union filed a representation petition for a single-unit of WWCCA contractors' employees, Jeffrey Cutler ("Cutler"), attorney, represented the Union in processing the petition. Through processing the petition, Pullen faxed certain documents to Cutler, which Cutler thereafter kept in the file that his office opened for the representation petition case. (Tr. 505-506, 508) (GCX 10) The top of each of the faxed pages reveal a date of March 25, 2005. Page 30 of the faxed pages shows a signed copy of the Section 9(a) agreement, which Fritchel later dated July 29, 2005. The ALJ determined that this document supported Fritchel's testimony that he did not sign the Section 9(a) agreement for the first time on July 29, 2005 as Respondent Employer claimed at the hearing. (ALJD 8:34-35)

2. *Fritchel Writes July 29, 2005 Next to His Signature*

By July 2005, the Union had signed many of its contractors to Section 9(a) voluntary-recognition agreements. On July 29, 2005, Pullen faxed to Hendry a list of WWCCA contractors and the date upon which each signed a Section 9(a) agreement with the Union. The date next to Respondent Employer's is July 26, 2003.<sup>7</sup> (ALJD 7:1-5) (Tr. 83, 87-88, 136) (RE 12)

On July 29, 2005, Winsor called Pullen and told Pullen that he knew Respondent Employer had signed a Section 9(a) recognition agreement, but he needed a copy of it. (ALJD 7:6-8) (Tr. 617, 678) (RE 13 and 14) Pullen agreed to provide one. Fritchel testified that on this day, he was called into Pullen's office and asked why he had not put a date next to his signature on Respondent Employer's Section 9(a) voluntary-recognition agreement. When Fritchel stated that he did not know, Pullen told him that he had to fax the agreement to Respondent Employer and to write that day's date (July 29, 2005) on the agreement, which Fritchel did. (ALJD 8:27-33) (Tr. 231-232) (RE 23-24) (GCX 7) When Fritchel placed that day's date on the agreement his signature had already been on the document since June 26, 2003. (ALJD 8:29) (Tr. 232) Pullen then faxed Winsor a copy of the Section 9(a) agreement.<sup>8</sup> (Tr. 91-93)

After faxing the Section 9(a) voluntary-recognition agreement to Winsor, Winsor never called Pullen to object that Jaacks did not have the authority to sign the agreement or that the agreement was invalid. Winsor never called the Union to ask about the alleged discrepancy in dates. (ALJD 7:32-33, 16:10-12) (Tr. 103, 688-689, 757-758)

At the hearing, Respondent Employer contended that the copy of the Section 9(a) voluntary-recognition agreement with no date next to Fritchel's name is fraudulent and that the

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<sup>7</sup> A copy of the list was entered into the Record as GCX 5.

<sup>8</sup> This copy is identical to the copy entered into the record as GCX 7 and RX 8 and 13. (ALJD 8:41-42)

“real” agreement is the one with July 29, 2005 written next to Fritchel’s signature. However, there was no evidence presented of any fraud in Respondent Employer’s signing the Section 9(a) agreement. (ALJD 9:1-2)

During the summer of 2005, the Union and WWCCA were bargaining for a successor agreement yet at no time after receiving the faxed list did Hendry contact the Union to complain that the Union’s having obtained Section 9(a) agreements from individual contractors violated the parties’ CBA. (Tr. 136-137)

**D. Events of 2007**

On May 3, 2007, at Hendry’s request, Pullen faxed to WWCCA copies of the Section 9(a) recognition agreements to which WWCCA’s board member contractors were signatory. Since Respondent Employer was a board member contractor its Section 9(a) recognition agreement was faxed to Hendry along with the other agreements. (ALJD 7:11-13) (Tr. 114-115, 160) The Section 9(a) recognition agreement pertaining to Respondent Employer was the copy with July 29, 2005 written next to Fritchel’s signature.<sup>9</sup>

After receiving the Section 9(a) agreement in 2007, during a board of directors meeting, at which Winsor, Treadwell, and Hendry were present, the issue of the Section 9(a) voluntary-recognition agreements was discussed. (ALJD 7:15-17) (Tr. 636, 832) None of the contractors denied signing the Section 9(a) agreements. (ALJD 7:42-44) Although Winsor testified that Hendry and Treadwell stated in the meeting that the Section 9(a) agreements were invalid, neither Hendry nor Treadwell corroborated that testimony. Hendry specifically denied that he ever told the member-contractors that WWCCA considered the Section 9(a) agreements invalid.

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<sup>9</sup> See GCX 9, pages 18 and 19.

(ALJD 7:17-18, 41-42) (Tr. 637, 842) (RE 18) The ALJ credited Treadwell's testimony that WWCCA never took the position that the Section 9(a) agreements were invalid. (ALJD 8:8-11) (RE 20)

Still, after receiving the Section 9(a) recognition agreements in 2007, WWCCA never contacted the Union to object that WWCCA contractors could not sign such agreements or to claim that the agreements were invalid. (ALJD 7:32-33) (Tr. 115-116, 849) (RE 15)

As in 2005, by 2007 WWCCA had filed no grievances claiming that the Union violated the CBA by obtaining Section 9(a) recognition agreements from individual contractors. In fact, it was not until the instant proceedings that Respondent raised any assertion that the Section 9(a) agreement is invalid. (Tr. 187-189)

Winsor asserted that in December 13, 2007, he met with Pat Finley, International Union president, and Earl Heard, general secretary, during which meeting he objected to the validity of the voluntary-recognition agreements. (ALJD 7:27-29) (Tr. 646-647) In 2008, Winsor claimed that he had a similar meeting with Fritchel, Pullen, and Tom Casselman, Pullen's predecessor, wherein he objected to the validity of the voluntary-recognition agreements. (ALJD 7:30-32) (Tr. 649) However, in his NLRB affidavit though he testified about each meeting, he failed to mention any statements that he allegedly made about the invalidity of the Section 9(a) agreement. (ALJD 7:29-30, 32-33) (Tr. 698)

**E. Respondent Employer Withdraws From the Multi-Employer Association, Refuses to Bargain, and Ceases Trust Fund Contributions**

By letter dated May 9, 2008, Respondent Employer withdrew from the Plastering Conference of the WWCCA. (RX 14) On the same date, Respondent Employer, through

Winsor, notified the Union in writing that it had resigned from the Plastering Conference of the WWCCA and would not be bound by any successor agreement reached between the WWCCA, Plastering Conference and the Union. Respondent Employer offered to meet and bargain with the Union over a successor agreement. (GCX 2(f)) The Union responded by letter dated July 18, 2008, stating that the Union would contact the Respondent about bargaining dates. (GCX 2(g))

On August 5, 2008, Pullen wrote to Respondent Employer, stating that he would be at the facility the following day for bargaining. (GCX 2(i)) By letter dated August 5, 2008, Respondent Employer wrote to the Union, notifying the Union that it was repudiating the 2005-2008 CBA and the collective-bargaining relationship. (ALJD 9:9-11) (GCX 2(h)) Thereafter, by letters dated August 11 and August 12, 2008, the Union requested that Respondent Employer meet and bargain with the Union. (GCX 2(j), 2(k), respectively) Attached to the Union's August 12 letter was a copy of the Section 9(a) agreement. Respondent Employer replied in two separate letters, each dated August 12, 2008. In one letter, in declining the Union's request to bargain, for the first time Respondent Employer states that the Union had no Section 9(a) status and the Section 9(a) agreement was fraudulently created. (GCX 2(l)) In the second August 12 letter, Respondent Employer reiterated that it was repudiating the CBA and informed the Union that it had assigned the plastering work to Respondent Carpenters Union; and had signed a collective-bargaining agreement with Respondent Carpenters. (ALJD 9:13-18) (GCX 2(m))

Upon expiration of the 2005-2008 CBA on August 5, 2008, Respondent Employer ceased making the contractual trust-fund contributions. At the hearing, Respondent Employer stipulated that it ceased making the trust-fund contributions and did not bargain with the Union before doing so. (Tr. 128-129)

**F. Respondent Employer and Respondent Carpenters Enter Into an Agreement and Meet with Employees**

*1. The Agreements*

It is undisputed that on August 6, 2008, Respondent Employer recognized Respondent Carpenters as the collective-bargaining representative of its plastering employees, and Respondent Carpenters accepted the recognition. On August 6, 2008, Respondent Employer and Respondent Carpenters entered into collective-bargaining agreements covering the unit employees and the plastering work. (GCX 2(e) and 2(d))

*2. The Meeting with Employees*

On August 6, 2008, Respondent Employer and Respondent Carpenters conducted a meeting with unit employees at Respondent Employer's facility. (ALJD 9:20-21) (Tr. 659) Employee Francisco Alatorie ("Alatorie") attended the meeting and testified that on August 5 he and other employees were instructed to attend a mandatory meeting at the Respondent Employer's City of Orange facility. (Tr. 321)

Present in the meeting room were representatives of Respondent Employer, including Winsor and Hector Herrera ("Herrera"), superintendent, and about 15 unidentified representatives of Respondent Carpenters. (ALJD 9:21-23) (Tr. 324-325) Winsor told unit employees that Respondent Employer was no longer signatory with the Union and had signed a contract with Respondent Carpenters. Winsor continued that the switch was best for the company and for employees. Winsor then told employees that they had 8 days to join Respondent Carpenters if they wanted to continue working for Respondent Employer. (ALJD 9:23-27) (Tr. 325, 343) Herrera then spoke and stated that unit employees would be getting a wage increase once they signed on with Respondent Carpenters. (ALJD 9:35-36)

Then approximately five unidentified representatives of Respondent Carpenters spoke one-by-one. Each representative had a different theme that he spoke about. (ALJD 9:36) (Tr. 344) Alatorie testified that one of the Carpenters representatives stated that if employees joined on that day the union would waive the initiation fee and employees would immediately have full medical benefits without putting in the required 5,000 work hours. (Tr. 328-329, 348-349) Respondent Carpenters conducted a raffle of checks and tools of the plastering trade.<sup>10</sup> Respondent Carpenters raffled off checks in the following denominations: two checks for \$500; two checks for \$400; two checks for \$300; two checks for \$200; and two checks for \$100. More than 20 tools were raffled, ranging in value from \$5.15 to \$69.97. (ALJD 9:37) (Tr. 332, 398) Winsor testified that he was present during Respondent Carpenters' presentation and during the raffling of tools and money awards. (Tr. 705)

By the end of the raffle every employee won a prize—either money or tools. (ALJD 9:38) (Tr. 349, 398) After the raffle was concluded, employees were ushered into the adjacent room, where individuals were standing behind tables with booklets and materials to assist employees in joining Respondent Carpenters. (Tr. 333-334) At the hearing, the parties stipulated that during the meeting with employees, Respondent Employer distributed a memorandum, which reads:

Plastering employees who were not previously members of the Carpenters must join the Carpenters Union under the union security provision of the Carpenters labor agreement. This provision allows employees to continue working for 8 work days without joining the Carpenters Union. However, at the expiration of this time all Raymond plastering employees must be members of the Carpenters Union. (GCX 2(n))

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<sup>10</sup> At the hearing, the parties entered into a stipulation that Respondent Carpenters conducted the raffle. (Tr. 398)

#### IV. ANALYSIS

##### A. **The ALJ Properly Found that Respondent Employer Recognized the Union as the Section 9(a) Representative by Signing the Voluntary-Recognition Agreement on June 26, 2003**

###### 1. *The Section 9(a) Agreement Comports with Staunton Fuel*

In relevant part, Section 9(a) of the Act provides: “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment....” Section 8(f) is an exception to the general rule established by Section 9(a). Thus, Section 8(f) allows unions and employers involved in the construction industry to negotiate and enter into collective-bargaining agreements without a showing of majority support of the employer’s employees. The distinction between Section 9(a) and Section 8(f) agreements is quite significant. In Section 8(f) agreements, either the union or the employer can terminate the bargaining relationship at the expiration date of the collective-bargaining agreement. John Deklewa & Sons, 282 NLRB 1375, 1385-1386 (1987). However, under Section 9(a) agreements, the bargaining relationship continues after the expiration of the collective-bargaining agreement and the employer must continue recognizing and bargaining with the union unless and until it is shown that the union no longer has majority support. Levitz Furniture Co., 333 NLRB 717 (2001).

The party asserting a Section 9(a) relationship has the burden of proof as there is a rebuttable presumption in the construction industry that a Section 8(f) relationship exists.

Dekelawa, supra.

Parties may effectively convert a Section 8(f) agreement to a Section 9(a) agreement. The Board has held that contract language alone may establish a Section 9(a) relationship. Staunton Fuel & Material, 335 NLRB 717, 721 (2001). Thus, in Staunton Fuel, adopting the 10<sup>th</sup> Circuit's test, the Board held that to determine whether contract language establishes a Section 9(a) relationship, the language must unequivocally indicate: (1) the union requested recognition as the Section 9(a) representative; (2) the employer recognized the union as the Section 9(a) representative; and (3) the employer's recognition was based on the union having shown or offered to show its majority support. *Id.* at 719-720.<sup>11</sup>

The Board adopted the test as it "properly balances Section 9(a)'s emphasis on employee choice with Section 8(f)'s recognition of the practical realities of the construction industry," which balance was the Board's primary goal in deciding Deklewa. Staunton Fuel at 719.

Respondent Employer excepts to the ALJ's conclusion that the Section 9(a) voluntary recognition agreement at issue here comports with Staunton Fuel, particularly with prong three of the Staunton Fuel test. (RE 31-32) (RB 31-32) Despite Respondent Employer's contentions, prong three of Staunton Fuel test is satisfied in paragraph one, page one of the Section 9(a) voluntary-recognition agreement signed by Jaacks and Fritchel.<sup>12</sup> The third factor is met as the agreement reads that the Union "submitted satisfactory evidence to the Employer that the Union represents, has the support of, and has been authorized to represent said employees by a majority

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<sup>11</sup> Citing, NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147, 1155 (10<sup>th</sup> Cir. 2000) and NLRB v. Oklahoma Installation Company, 219 F.3d 1160 (10<sup>th</sup> Cir. 2000).

<sup>12</sup> The first factor of Staunton Fuel is met as the Section 9(a) voluntary-recognition agreement specifically states "[t]he Union having unequivocally demanded recognition as the majority representative of the employees of the Employer." So, Respondent Employer's recognition is express and unconditional. The second factor is met as the Section 9(a) voluntary-recognition agreement specifically states "the Employer hereby unequivocally recognizes the Union as the sole and exclusive majority representative for collective bargaining purposes for the Employer's employees...." To be valid there is no requirement that the Section 9(a) agreement specifically refer to Section 9(a), but such a reference indicates that the parties intended Section 9(a) status. In this matter, the Section 9(a) voluntary-recognition includes a specific reference to Section 9(a).

of the Employer’s employees....” The Board has found similar language sufficient to establish a Section 9(a) relationship. See also Saylor’s Inc., 338 NLRB 330, 330 (2002) (language that the union “submitted to the employer evidence of majority support” sufficient to establish a Section 9(a) relationship); MFP Fire Protection, Inc., 318 NLRB 840, 841(1995) (language that the “employer therefore unequivocally acknowledges and confirms that [the union] is the exclusive bargaining representative pursuant to Section 9(a) of [the Act]” found sufficient).

Respondent Employer asserts that the Section 9(a) language relating to prong three of the Staunton Fuel test is ambiguous as it fails to state that the Union made a contemporaneous showing of majority status. First, Respondent Employer attacks the ALJ’s reasoning that Staunton Fuel does not require a contemporaneous showing of majority support. (RB 32) Nevertheless, a reading of Staunton Fuel supports the ALJ’s reasoning. Nowhere in the Staunton Fuel case did the Board announce a requirement that a Section 9(a) agreement must specifically provide for a contemporaneous showing of majority interest. In Staunton Fuel, the Board observed that an employer’s granting of recognition must be express and unconditional and the union’s claim of majority support must be affirmative, such as language stating that the union “has the support of” or “has the authorization” of a majority of employees. In Staunton Fuel, the Board held that there was no evidence that the union ever made a majority showing at all – contemporaneous or otherwise. Here, the Section 9(a) language is identical to the requirements that the Board detailed in Staunton Fuel. The Union’s claim of majority support was based on the Union having “submitted satisfactory evidence ...[that it] represents, has the support of, and has been authorized to represent [employees of Respondent Employer]....” Thus, as the ALJ concluded, the language is sufficient to establish a Section 9(a) agreement. (ALJD 12:30-32)

Second, Respondent Employer argues that there was no actual contemporaneous showing of majority support on June 26, 2003. (RB 32-33) This argument amounts to an objection to the ALJ's credibility resolutions. The ALJ found that as it related to Jaacks signing the June 26, 2003 Section 9 (a) agreements his at-hearing testimony differed from his affidavit testimony given during the investigation, wherein he had "very little recollection" of his signing the agreement. On the other hand, the ALJ found Fritchel's testimony was "more detailed and specific" and that Fritchel presented authorization cards to Jaacks. (ALJD 12:45-46, 49-50; 6:14-16, 38) (ALJD 6:34-38) The Board will not overturn credibility resolutions based demeanor unless the clear preponderance of the evidence convinces it that the decision is incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). According to the credited testimony, on June 26, 2003, when Fritchel met with Jaacks, he presented Jaacks with a binder of authorization cards. Jaacks was not only the CEO of the company, but he negotiated the CBA and understood the meaning of Section 9(a) representation. The ALJ aptly inferred that if no such majority showing was made at the time of the request for recognition, Jaacks would not have signed the Section 9(a) agreement. (ALJD 12:33-34) (RE 33)

The record supports the ALJ's credibility resolutions that Fritchel presented Jaacks with authorization cards and Respondent Employer has not presented any evidence to warrant a reversal of the credibility findings. Therefore, as of June 26, 2003, Respondent Employer recognized the Union as the Section 9(a) representative of its employees, and the parties entered into a valid Section 9(a) agreement.

2. *Respondent Employer's Claim That No Majority Showing was Made is Barred*

It is well-established Board law that 6 months from entering into a voluntary-recognition agreement, an employer may not argue that the union did not have a majority support to begin with. Casale Industries, 311 NLRB 951, 953 (1993); MFP Fire Protection, 318 NLRB at 842; Staunton Fuel, 335 NLRB at 719, fn. 10. In Casale, the Board refused a challenge to the majority showing that came 6 years after the Section 9(a) recognition was granted. In doing so, the Board held “a challenge to majority status must be made within a reasonable period of time after Section 9(a) recognition is granted.” *Id.* at 953. See also Comtel Systems Technology, 305 NLRB 287, 289 (1991). Like the present cases, Casale involved the construction industry. The Board reasoned the same principles that apply in non-construction cases must apply to construction cases. As the Board stated in Deklewa, construction industry unions should not be treated less favorably than non-construction industry unions.

Here, Respondent Employer's claim is that the Union failed to make a showing of interest in the first place. Like the employer in Casale, the ALJ appropriately found that Respondent Employer should not be permitted to challenge the Union's majority showing more than 5 years after it granted recognition. (ALJD 12:35-37) Nevertheless, Respondent Employer asserts that the ALJ erred in preventing the examination of the authorization cards that the Union presented in June 2003 and any authorization cards presented would have been stale anyway. (RB 33-34)

Neither in June 2003 nor at any time after Jaacks signed the Section 9(a) voluntary-recognition agreement did he ever object or complain that he did not have authority to enter into

the agreement, or complain that the Union did not satisfy the terms of the agreement, including the majority-interest showing. When Winsor received a copy of the Section 9(a) agreement in 2005, he never objected that the Union had not demonstrated a majority-interest showing or that Jaacks did not have authority to enter into the agreement. In 2005, Hendry received a notice of the Section 9(a) agreement and he offered no objections to it. In 2005, the parties negotiated a successor agreement and neither WWCCA nor Respondent Employer objected that no majority interest had been shown; that the Section 9(a) agreement was invalid; that it violated the CBA; or that the Union bypassed WWCCA and Jaacks had no authority to sign. In fact, the Union obtained Section 9(a) agreements from 29 member-contractors, and there is no evidence that WWCCA took the position that any of those agreements were invalid and violated the multi-employer contracts.

Two years later, in 2007, Winsor and Hendry received another copy of the Section 9(a) agreement and still neither objected that the Union failed to demonstrate a majority interest. From 2003 to 2008, neither Respondent Employer nor WWCCA pursued grievances claiming that the Union violated the CBA. The ALJ discredited Winsor's claims that in late December 2007 and early 2008 meetings with local and International Union representatives, he objected to the validity of the Section 9(a) agreement inasmuch as in his September 4, 2008 affidavit given during the investigation, Winsor testified about the meetings but made *no reference* to any objections that he made to the Union about the validity of the Section 9(a) agreement. (ALJD 8:19-22)

Now, as the ALJ found, more than 5 years later, Respondent Employer asserts that the Union failed to make an initial majority-interest showing and that the Section 9(a) agreement is invalid. Given all the record evidence, the ALJ properly found that Employer Respondent's

assertion is barred by Section 10(b) of the Act. (ALJD 12:35-37, 46-47) Also barred would be any argument that the authorization cards were stale in June 2003. Respondent Employer claims that the Union began collecting authorization cards in 2001 and suggests that that must have been the only period of time the Union collected authorization cards. However, the record is clear that the Union filed representation petition in 2002, 2003, and 2005. Thus, presumably the Union collected authorization cards prior to filing of those petitions. Still again, Respondent Employer had an opportunity to review and to object to the authorization cards in June 2003 when Jaacks and Fritchel met. Respondent Employer failed to do so. It may not now claim that the Union never made a majority interest showing because any authorization cards presented were stale.

3. *The Record Supports the ALJ's Finding that the Section 9(a) Agreement was signed on June 26, 2003 by Jaacks and by Fritchel*

In its exceptions brief, Respondent Employer argues that the ALJ erred in finding that both Jaacks and Fritchel signed the Section 9(a) agreement on June 26, 2003. (RE 7-10) (RB 27-31) Again, Respondent Employer's are based on the ALJ's credibility resolutions. Respondent Employer enumerates the testimony of its witnesses that should have been credited and the testimony of the Union agents that should not have been credited. Other than complaining that the ALJ should not have credited Fritchel and should have credited Jaacks, Respondent Employer makes no legitimate arguments that would lead to the ALJ's credibility resolutions being overturned. The ALJ was present, heard the testimony, and observed the demeanor of each of the witnesses and the ALJ credited Fritchel's testimony over the testimony of Jaacks.

Contrary to Respondent Employer's exceptions, Fritchel's testimony was more detailed.

Fritchel testified that he met with Jaacks on a specific date – June 26, 2003; in the conference room; explained presenting Jaacks with the Section 9(a) agreement and binder of authorization cards; and explained how he and Jaacks each signed the agreement and he left a completely signed copy with Jaacks. On the other hand, Jaacks recalled that no meeting took place on June 26, 2003, and speculated that maybe he was presented with the Section 9(a) agreement a few days before. Even had the ALJ credited Jaacks’ at-hearing that revealed his sudden recall of the circumstances surrounding his signing the Section 9(a) agreement, the ALJ found critical the fact that in Jaacks’ affidavit testimony given during the investigation of the underlying ULP charges, Jaacks had very little recollection of signing the agreement. In his affidavit Jaacks testified that he did not recall who presented him with the Section 9(a) agreement, when it was presented to him, whether he signed it in the presence of a Union agent, whether he consulted counsel before signing, or what he did after he signed it.<sup>13</sup> Accordingly, the ALJ’s findings that Fritchel’s testimony was more detailed than Jaacks is supported by the record.

Next as “evidence” that Fritchel should not have been credited, Respondent Employer points out that it entered into the record a copy of the Section 9(a) agreement, which copy was apparently made before Fritchel had the opportunity to sign it. (RB 30) However, this unsigned copy is not contrary to Fritchel’s testimony. Fritchel testified that he left one original Section 9(a) agreement with Jaacks, which he and Jaacks signed. So, there was an effective 9(a) relationship at that time. Fritchel then signed the remaining original 9(a) agreements on June 26, 2003, when he returned to the Union’s office. The fact that a copy of the 9(a) agreement was made before Fritchel had the opportunity to sign it does not nullify the agreement signed and left with Jaacks on June 26, 2003. As far as the remaining copies of the Section 9(a) agreement, the

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<sup>13</sup> As stated above, Jaacks affidavit testimony was reading into the record at p. 378-379.

ALJ credited Fritchel's testimony that he was certain that he signed the Section 9(a) agreements before the end of the day on June 26, 2003, and before they were placed in the Union's file designated for Respondent Employer. Moreover, the Union sent Respondent Employer a copy of the Section 9(a) agreement in July 2005, which was signed by both parties, and Respondent Employer did not challenge the validity of the agreement.

Respondent's attack on the Section 9(a) agreement in this manner conflicts with Jaacks' testimony and the record as a whole. Jaacks admitted that he signed at least two copies of the Section 9(a) agreement on June 26, 2003, which is consistent with Fritchel's testimony that multiple copies were signed. At the hearing, Jaacks and Fritchel each identified their respective signatures on the copies of the Section 9(a) agreements. Finally, it is not unusual or shocking that parties sign more than one original agreement.

a. Contrary to Respondent Employer's Incredible Claim, Jaacks Had the Authority to Sign the Section 9(a) Agreement

Respondent Employer contends that the ALJ incorrectly found that Jaacks had the authority to enter into the Section 9(a) agreement. (RE 40-41) (RB 19-20) However, as the ALJ held, Respondent admitted that Jaacks was the CEO and president of the company and was Section 2(11) supervisor and Section 2(13) agent. Although Respondent Employer claims that there is not a scintilla of evidence that the business-related contracts Jaacks signed involved any union-related agreements, the record shows that Jaacks negotiated and signed the multi-employer CBA entered into with the Union. While Jaacks did not sign the CBA solely on behalf of Respondent, it certainly shows he signed a Union-related document in the interest of Respondent

Employer. Notwithstanding, Respondent Employer's position on Jaacks' status must be viewed in its entirety. Thus, Respondent Employer's argument is that Jaacks did not have the authority to sign the Section 9(a) agreement because Respondent Employer was a member of WWCCA. The Union sought Section 9(a) recognition from WWCCA, only to be rebuffed. As the ALJ held, the more persuasive version of what happened next is that Treadwell articulated WWCCA's position to the Union that the Union should approach individual member-contractors to individual obtain Section 9(a) recognition agreements. As a result, the Union withdrew its representation petitions (that named WWCCA as the employer) and sought 9(a) agreements with individual contractors. Jaacks acted as Respondent Employer's CEO and president and therefore was a natural and *appropriate* agent of Respondent Employer. Jaacks signed the Section 9(a) agreements believing that he had the authority to do so. The appropriateness of Jaacks as the agent was sealed when Jaacks never said that he had no authority to sign the Section 9(a) agreement or told the Union that its conduct violated the CBA. Even after signing the agreement, Jaacks conceded that he never once told the Union that he should not have signed it. Respondent Employer produced no record evidence at any Respondent or WWCCA informed the Union that Jaacks had no authority to sign the Section 9(a) agreement. Only when the Union filed the underlying ULP charges did Respondent Employer conveniently take the position that Jaacks did not have the authority. Therefore, the ALJ properly rejected Respondent Employer untimely and incredible claim and properly found that Jaacks had authority to sign the Section 9(a) agreement.

4. *The ALJ Correctly Identified the Operative Section 9(a) Agreement as the One Entered Into the Record as GCX 4*

Respondent Employer argues that the ALJ ignored the language of paragraph two of the Section 9(a) agreement as a result the ALJ erred in finding that the operative agreements the one entered into the record as GCX 4. (RB 26-27) Paragraph two of the Section 9(a) voluntary-recognition agreement provides: This Voluntary-recognition Agreement shall be effective at the time and date that this Agreement is signed by the Employer and by the Union, and if signed on different days, the effective day shall be the *day* of the latest signature. Despite Respondent Employer's contention, paragraph two of the voluntary-recognition agreement provides that the agreement becomes effective when *signed* by both parties—not when dated. The paragraph reinforces that theme by stating that if the agreement is signed on different days, then the agreement is effective on the *day of the latest signature*. There is no requirement that the Section 9(a) agreement be dated at all; let alone be dated before its effective. Accordingly, the ALJ did not ignore the plain language of the Section 9(a) agreement as Respondent Employer asserts. Because the effective date of the agreement is when it is signed, the agreement became effective on June 26, 2003 when Jaacks and Fritchel signed it. Therefore, the ALJ properly concluded that the Section 9(a) agreement became effective on June 26, 2003.

Moreover, the Board does not require that recognition agreements be in writing – let alone dated – to be effective. Jerr Dan Corp., 237 NLRB 302, 303 (1978) (commitment to enter into negotiations with the union may constitute an implicit recognition of the union). Thus, a Section 9(a) relationship is established the moment a union demands recognition, shows or offers to show its majority support, and the employer recognizes the Union. Therefore, once Jaacks

agreed to recognize the Union, 9(a) status was established and signing the Section 9(a) agreement was merely a formality.

Respondent Employer excepts to the ALJ's failure to find that the Section 9(a) agreement with "July 29, 2005" written next to Fritchel's signature was the operative agreement. Rather, as Respondent Employer objects, the ALJ erred in concluding that on July 29, 2005, Fritchel dated an undated copy of the Section 9(a) agreement that had been signed on June 26, 2003. (RB 27, 30) According to Respondent's theory, Fritchel did not date the Section 9(a) agreement until July 29, 2005. By this dating, according to Respondent Employer, Pullen "obviously knew" the significance of a date next to Fritchel's signature and Pullen "obviously intended" July 29, 2005 to be the operative date of the agreement. This rationale is a stretch. There is no need to resort to speculation as to what Pullen believed or did not believe when the record evidence establishes that a Section 9(a) voluntary recognition agreement was signed on June 26, 2003. Fritchel testified that he met with Jaacks on June 26, 2003; they flipped through the authorization-card binder; and then they signed at least two copies of the Section 9(a) agreement. Finally, even if the Section 9(a) agreement was not effective until July 29, 2005—which is not the case—any challenge is barred by Section 10(b) of the Act. Therefore, the ALJ correctly found that the operative agreement is GCX 4.

5. *The ALJ Did Not Err in Rejecting Respondent Employer's Estoppel Theory and Request*

Respondent Employer argues that the ALJ was mistaken in his failure to find that the General Counsel and Charging Party Union were estopped from relying on the Section 9(a)

voluntary recognition agreement entered onto the record as GCX 4 (the one with no date written next to Fritchel's signature). (RE 43-44) (RB 36-38) In spite of Respondent Employer's contentions, the ALJ's finding is supported by the record evidence. Thus, it is undisputed that on June 26, 2003 Jaacks signed at least 2 copies of the Section 9(a) agreement, recognizing the Union as the Section 9(a) representative of Respondent's employees. It is undisputed that on July 29, 2005, the Union sent WWCCA a list of contractors that the Union purported had signed Section 9(a) agreements, which list noted that Respondent Employer had signed on June 26, 2003. It is also undisputed that on July 29, 2005, the Union sent Respondent Employer a copy of the Section 9(a) agreement with "July 29, 2005" written next to Fritchel's signature. Even though Respondent Employer received conflicting dates it made no attempt to resolve the discrepancy. (ALJD 16:4-5) The ALJ credited the record testimony that Respondent Employer did not object to the validity of the Section 9(a) agreement and discredited Winsor's claims that in 2007 and 2008 he did object. Instead of raising timely objections, Respondent Employer waited over 5 years before it raised any opposition to the validity of the Section 9(a) agreement. Consequently, any harm, the ALJ held, was self-imposed.<sup>14</sup> (ALJD 16:10-14)

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<sup>14</sup> Furthermore, if any party should be estopped, it is Respondent Employer. Under its own theory, Respondent Employer signed an agreement, in which it recognized the Union as the 9(a) representative. But now Respondent claims that it was a charade and it was not seriously recognizing the Union. The Section 9(a) agreement signed by Respondent Employer states that the Union showed or offered to show majority interest, but now Respondent Employer claims that the majority showing never actually happened. Respondent Employer now contends that it signed the Section 9(a) agreement believing it was invalid, unenforceable, or a violation of the CBA. Respondent Employer failed to utter one word of objection to the Section 9(a) agreement for over 5 years, while believing the agreement to be void, unenforceable, and a violation of the CBA. Since 2003, Respondent Employer filed no grievances, no unfair labor practice charges claiming that the Section 9(a) agreement violated either of the relevant CBAs. Five years after executing the Section 9(a) agreement, Respondent Employer argued *for the first time* that Jaacks did not have the authority to sign the agreement in the first place; that the Union unlawfully bypassed WWCCA; that the Union violated the CBA by obtaining the agreement; and that there was no initial showing of majority interest. For years Respondent Employer allowed the Union to believe that there were no objections to the Section 9(a) agreement's validity. Now Respondent Employer is attempting to use the lawful agreement as a means to harm the Union by withdrawing recognition from it and ceasing trust fund payments. Respondent Employer should not be allowed to benefit from its conduct and should be estopped.

6. *The ALJ Did Not Err in his Conclusions Relating to the Multi-Employer Association*

a. Respondent Employer's Argument of Bypass Should be Rejected

Respondent Employer argues that the ALJ erred in finding that Respondent Employer was bound by the Section 9(a) voluntary-recognition agreement even though it was entered into at a time when Respondent Employer was a member of WWCCA, Plastering Conference. According to Respondent Employer, the Union unlawfully bypassed its designated representative when it solicited and executed the Section 9(a) agreement. In support of its position, Respondent Employer relies on Enterprise Association of Steamfitters, Local 638 (HV & AC Contractors' Association), 170 NLRB 385 (1968) and District Council of Painters (Northern California Drywall Association), 326 NLRB 1074 (1998).

In Enterprise Association, the multi-employer association and the union reached a collective-bargaining agreement but the union refused to sign the formal agreement, claiming that its negotiators had no authority to bargain in the first place. The union then sent a separate collective-bargaining agreement to each of the member-employers. After one of the member-employer refused to sign the separate and different agreement, the union engaged in a work stoppage. The Board held that a contract had been reached between the multi-employer association and the union despite the union's claims to the contrary, and that the union violated the Act by seeking a separate collective-bargaining agreement with the member-employers.

Similarly in District Council, the union untimely withdrew from its membership in a multi-union bargaining association and refused to sign and honor the successor agreement that was reached. Then the union negotiated separate interim collective-bargaining agreements directly with the employers, which agreements had different terms and conditions of work.

Some of the different terms were: double-time for working on Saturdays rather than time and a half; a 50-cent/hour greater wage increase for the first year and 25-cent/hour greater increase for the second year; and elimination of two job classifications. The Board held that the union violated the Act by failing to abide by the agreement negotiated by the bargaining association and by maintaining separate agreements with employer-members of the association.

Contrary to Respondent Employer's argument, the situation at issue here is unlike that in Enterprise Association or District Council. Here, the Union did not refuse to bargain by denying the authority of its bargaining agents, by withdrawing from its association, or by engaging in a work stoppage. The Union did not refuse to sign the CBA negotiated by the bargaining association only to seek different terms and conditions of work in separate agreements with individual contractors. Furthermore, as argued below, the Section 9(a) agreement is not a separate collective-bargaining agreement requiring execution by WWCCA. Thus, the ALJ accurately held that the cases relied upon by Respondent Employer are distinguishable from the instant matter. (ALJD 13:45-47)

b. Section 9(a) Status is Not a Term and Condition of Employment

Respondent Employer excepts to the ALJ's finding that the Union's Section 9(a) status is not a term and condition of employment but an expression of employees' free choice under Section 7 of the Act. (RE 38) (RB 13) However, Board law supports the ALJ's conclusion. In fact, the Union's conduct is welcomed by the policy protected in the Act. The Board has held that even in the multi-employer bargaining situation, employees may not be prevented from determining whether or not they wish to be represented by a union. The Board has long-held that "employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multi-employer association. Deklewa, 282

NLRB at fn. 42; District Council, 326 NLRB at 1078; Kephart Plumbing, 285 NLRB 612, 612 (1987) (union permitted to convert 8(f) agreement to a 9(a) agreement for a single employer of a multi-employer association by voluntary recognition or a Board election).

Any argument that Section 9(a) status of a single employer creates instability in the multi-employer bargaining relationship is also not convincing. In Deklewa, the Board stressed that “nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.” *Id.* at fn. 53. Thus, the ALJ simply adhered to Board law that a multi-employer setting will not prevent employees from securing a Section 9(a) representative.

c. The Multi-Employer CBA Language Did Not Preclude the Section 9(a) Agreement

In its brief, Respondent Employer cites to the following language of the 1999-2005 CBA: (1) the preamble, which states that the CBA is between members of WWCCA and the Union; (2) Article II–Union Recognition, which states that the exclusive bargaining rights are vested in the signatory parties; and (3) Article XV, Section 1–Entire Agreement, which states that the CBA is the parties’ entire agreement. (RB 9-10, 21) Respondent assert that the ALJ mistakenly found that the CBA language did not preclude Section 9(a) agreement. (RB 23-26) Notwithstanding, the ALJ did consider the multi-employer CBA, but the ALJ did not attach the significance on it that Respondent Employer wanted. The cited provisions forbid the Union from bypassing WWCCA and negotiating a separate collective-bargaining agreement or for separate terms and conditions of employment with individual member-contractors. The Section 9(a) agreement is *not* a negotiated collective-bargaining agreement with different wages, hours, and other terms

and conditions of work, similar to the one in District Council. The Section 9(a) agreement is Respondent Employer's recognition of the Union as its employees' exclusive bargaining representative. Therefore, the ALJ's decision is supported by Board law. The ALJ properly concluded that the contractual language did not prohibit the Union from obtaining Section 9(a) recognition agreement or employees from expressing their desire to be represented. (ALJD 13:36-49)

Furthermore, the contractual language that Respondent Employer so vehemently uses as an argument did not prevent Jaacks – a member of the WWCCA board of directors and negotiating committee participant – from signing the Section 9(a) agreement. Jaacks was aware of what the CBA permitted and restricted. Respondent Employer cannot contend that Jaacks was without the benefit of counsel because before he signed the Section 9(a) agreement he sought advice from WWCCA's attorney Treadwell, who also negotiated the CBA. Treadwell, who has long-represented WWCCA and who negotiated the CBA terms and whose testimony the ALJ credited, testified that the CBA language does not preclude the Union from obtaining Section 9(a) status from individual contractors. Who better to know what the parties intended by the contract provisions than the individuals who *negotiated* the CBA. Thus, the contractual language relied upon did not prohibit the parties from entering into a Section 9(a) agreement.

Next Respondent Employer argues that the ALJ limited his analysis to the language of the Section 9(a) agreement and did not consider the Section 9(a) agreement in conjunction with the multi-employer CBA. (RB 34-35) In support of Respondent Employer's cites Madison Industries, 349 NLRB 1306 (2007). Respondent's reliance on Madison Industries is misplaced. In Madison Industries, the Board held that extrinsic evidence may be examined when the

recognition language is ambiguous. In Madison Industries the parties' collective-bargaining agreement had Section 9(a) language but also a waiver of any right to file a representation petition. The Board held that such waiver language would not be needed if the agreement was truly a Section 9(a) agreement, since Section 9(a) bars an employer from filing a petition during the contract term. The Board also based its finding on the fact that there was no evidence that the union ever showed or offered to show majority support. The Board held that based on the foregoing there was ambiguity in whether the parties really intended a Section 8(f) or a Section 9(a) agreement and the General Counsel never rebutted the presumption of a Section 8(f) agreement. None of the Madison Industries factors exist in the instant matter. Here, there is no recognition language in the multi-employer contract; there is no provision waiving the employer's right to file a representation petition; and the Section 9(a) language is not ambiguous. As argued above, Respondent Employer unequivocally recognized the Union as the Section 9(a) bargaining agent based on the submission of evidence that the Union represented a majority of unit employees. Therefore, Madison Industries does not present similar circumstances as Respondent Employer claims. (RB 35)

Finally, Respondent Employer asserts that the CBA language superseded the June 2003 Section 9(a) agreement. This argument is a complete misinterpretation of the law. The fundamental characteristic that sets Section 9(a) apart from Section 8(f) agreements is that the employer cannot walk away from the bargaining obligation upon expiration of the Section 9(a)

agreement as the bargaining obligation continues. Therefore, the 2005-2008 CBA language would not supersede the Section 9(a) agreement, as claimed by Respondent Employer.<sup>15</sup>

**B. Respondent Employer Violated Section 8(a)(1) and (5) By Withdrawing Recognition from the Union and Refusing to Bargain**

By letters dated August 5, 11, and 12, 2008, the Union requested that Respondent Employer meet and bargain. Respondent Employer does not dispute that it withdrew recognition from the Union; repudiated the contract; and refused to bargain. Despite the undisputed evidence and the record evidence as a whole, in its exceptions brief Respondent Employer asserts that the ALJ incorrectly concluded that it had a Section 9(a) relationship with the Union as of June 26, 2003. (RE 45, 47-48) (RB 38-39) Respondent Employer's exceptions are based on its claim that the parties' relationship was governed by Section 8(f) and not Section 9(a); thus, it was privileged to terminate the bargaining relationship. However, based on all the foregoing, the ALJ accurately found that the Union was the Section 9(a) representative on August 6, 2008 when Respondent Employer withdrew recognition from the Union; repudiated the contract; and

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<sup>15</sup> Even if it is determined that a union may not solicit Section 9(a) agreements from individual contractors without the multi-employer bargaining association's consent, here the record establishes that WWCCA's consent was obtained. The record evidence shows that the Union first demanded Section 9(a) status from WWCCA, which demand was rejected. The Union was told to seek 9(a) agreements from the individual contractors. Respondent Employer consulted and obtained WWCCA's consent. Respondent Employer's own witness, Jaacks, testified that before he signed the Section 9(a) agreement he consulted with the individuals he described as his advisors: Hendry, WWCCA's CEO and president; and Treadwell, WWCCA's attorney. Hendry was responsible for carrying out WWCCA's policies and acknowledged that member-employers consulted him for WWCCA's position on many issues that arose, such as questions regarding contract provisions and labor relations matters. If Hendry could not answer, he directed the member-employer to call Treadwell. That is precisely what occurred in this case. Jaacks consulted with Hendry and then consulted with Treadwell, each advised him on WWCCA's position, and he decided to sign only after consulting with them. In assessing the credibility between Winsor and Treadwell the ALJ was "persuaded that Treadwell was telling the truth" and testified in a "forthright manner." In contrast, Winsor's testimony was "too convenient...lacked substance, detail, was self serving, and was not corroborated." Since the ALJ credited Treadwell's testimony that WWCCA took the position that the Union had to seek Section 9(a) status from individual contractors that is likely the advice that Jaacks received.

refused to bargain. Accordingly, the record evidence supports the ALJ's conclusions that Respondent Employer violated Section 8(a)(1) and (5) of the Act. (ALJD 16:19-20)

**C. Respondent Employer Violated Section 8(a)(1) and (5) By Ceasing Trust Fund Payments**

The 1999-2005 CBA and the 2005-2008 CBA each require that Respondent Employer make payments to the identified Trust Funds. Respondent Employer admits that it ceased the required payments to the Trust Funds without notice to or bargaining with the Union. Respondent Employer argues that since it had no Section 9(a) relationship with the Union it was permitted to terminate the Section 8(f) agreement and cease making trust fund contributions. (RE 49) (RB 39) As argued above the ALJ's conclusions are support by the record and by Board law. Since the Union was the Section 9(a) representative Respondent Employer was obligated to meet and bargain with the Union before making changes to terms and conditions of work that survive the expiration of the contract. It is well-settled that an employer's unilateral discontinuance of contributions to employees' contractual fringe benefits funds violates Section 8(a)(1) and (5). Michigan Drywall Corporation, 232 NLRB 120 (1977). Contractual Trust Fund payments survive expiration of the CBA. Made 4 Film, 337 NLRB 1152 (2002). Accordingly, the record evidence shows that Respondent Employer violated Section 8(a)(1) and (5) of the Act by ceasing trust fund contributions. (ALJD 16:32-40)

**D. The ALJ Correctly Concluded that Respondent Employer Violated Section 8(a)(1), (2), and (3)**

*1. The Collective-Bargaining Agreement*

Again, Respondent Employer contends that since it did not have a Section 9(a) relationship with the Union its conduct at the August 6, 2008 meeting did not violate Section

8(a)(1), (2), or (3). (RE 50-51) (RB 39-40) It is undisputed that on August 6, 2008, Respondent Employer recognized Respondent Carpenters and the Carpenters accepted the recognition. Respondents embodied the recognition in a collective-bargaining agreement. The collective-bargaining agreement contains a union security clause that requires employees to become members of Respondent Carpenters within 8 days as a condition of continued employment with Respondent Employer. At the time Respondent Employer recognized and entered into the agreement mentioned above, the Union was the lawfully recognized Section 9(a) representative. Accordingly, the ALJ's finding was correct that the Respondent Employer violated Section 8(a)(1) and (2) by dominating and interfering with the formation and administration of, and rendering assistance and support to Respondent Carpenters. Gem Management Co., 339 NLRB 489, 501 (2003). Because the collective-bargaining agreement that contains a union security clause, Respondent Employer also violated Section 8(a)(3).

## 2. *The Meeting with Unit Employees*

On August 6, 2008, Respondents conducted a joint mandatory meeting on paid company time, on Respondent Employer's premises. Employees were served food and subjected to a meeting where they were threatened with loss of work and induced with money and trade tools to join Respondent Carpenters. Winsor began the meeting by telling employees that Respondent Employer was no longer signatory to any contact with the Union. Winsor told employees that they had 8 days to join Respondent Carpenters if they wanted to continue working for the company. Respondent Employer distributed a memorandum to employees reiterating that employees had 8 days to join Respondent Carpenters or lose their jobs and that joining would result in higher wages and better benefits. In its exceptions brief, Respondent Employer stated that it is not unlawful for an employer to inform employees of a union security clause, citing

Rochester Manufacturing Co., 323 NLRB 260 (1997). (RB 40) While it is true that in Rochester Manufacturing the Board held that an employer does not have an obligation to explain to employees their union membership status requirements, the Board specifically noted that an employer would violate the Act by combining its explanation with a threat of loss of employment. Id. at 262, fn. 8. Here, Winsor statement as well as the memo was that if employees wanted to continue working with the Respondent Employer they had 8 days to join the Carpenters Union. (ALJD 9:24-25, 29-33)

After Winsor spoke a series of Respondent Carpenters agents took the floor, each making a power point presentation designed to induce employees to join the Carpenters. The representatives told employees that if employees joined on that day Respondent Carpenters would waive the initiation fees and required 5000 work hours; as a result, employees would immediately be eligible to receive medical benefits. Respondent Carpenters then raffled off \$3,000.00 in cash awards and 20 different types of trade tools, ranging in value from \$5 to \$70 each. Respondent Employer's representatives were present during the entire presentation and raffle process. By the end of the raffle, all unit employees had won either money or tools.

Looking at this meeting in its totality reveals the coercive impact. Employees were obligated to attend a meeting on paid company time; on company premises; forced to listen to a series of presentations aimed at encouraging them to join the Carpenters; told that they had 8 days to join or lose their jobs; told that if they join they would get increased wages and immediate get medical benefits; and Respondent Employer's representatives were present throughout Respondent Carpenters' presentation and raffle. Under these circumstances, the record supports the ALJ's finding that Respondent Employer rendered unlawful assistance to Respondent Carpenters in violation of Section 8(a)(1) and (2) by threatening employees with job

loss unless they joined Respondent Carpenters within 8 days at a time when the Union still enjoyed exclusive bargaining status. Dobbs International Services, Inc., 335 NLRB 972, 987 (2001).

3. *The ALJ Properly Found that Certain Conduct was Closely-Related*

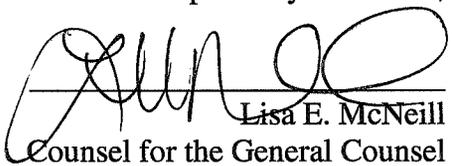
Respondent Carpenters contends that the ALJ erred by finding that although the consolidated complaint did not allege as unlawful the fact that the Respondent Employer held the mandatory meeting, on company time and made promises of increased benefits, the conduct violated the Act. (ALJD 18:48-51) (RE 17) (RB 24-25) Despite Respondent Carpenters objections an ALJ may find violations based on conduct that is closely-related to complaint allegations. In determining whether otherwise untimely allegations in a complaint are closely related to the violations alleged, the Board will examine whether the charge and complaint allegations involve the same legal theory; whether they arise from the same factual situation or sequence of events; and whether a respondent would raise similar defenses to both allegations. Redd-I, Inc., 290 NLRB 1115 (1988). Here, there is no doubt that the August 6, 2008 meeting is apart of the same factual sequence of events alleged in the complaint. In fact, the consolidated complaint alleges as unlawful certain statements made at the meeting as well as a memorandum handed out during the meeting. The conduct at the August meeting involves the same legal theory; thus, Respondent Employer violated the Act by threatening employees and rendering assistance to Respondent Carpenters; while Respondent Carpenters violated the Act by accepting that assistance and conducting a raffle. Respondent Carpenters defense would be the same as it was to the consolidated complaint allegations since the unalleged conduct is not new and there is no dispute that Carpenters were present and fully participate in the meeting. According, the ALJ

properly found that holding the mandatory meeting, on company time and where promises of increased benefits, are closely-related to the complaint allegations and violate the Act.

**V. CONCLUSION**

In conclusion, Respondent Employer's exceptions should be rejected in their entirety and the ALJ's recommended Order should be adopted.

Respectfully submitted,



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Lisa E. McNeill  
Counsel for the General Counsel  
National Labor Relations Board  
Region 21

Dated at Los Angeles, California, this 14<sup>th</sup> day of June, 2010

## STATEMENT OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT RAYMOND'S EXCEPTIONS has been submitted by E-filing to the Washington, D.C. on June 14, 2010, and that each party was served with a copy of the same document by email.

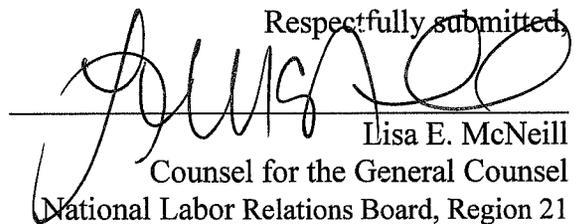
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Respectfully submitted,



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