

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 CARPENTER'S EXCEPTIONS

Submitted by:

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

Table of Contents

I.	INTRODUCTION AND PROCEDURAL HISTORY	1
II.	UNCHALLENGED FINDINGS AND UNDISPUTED FACTS	2
III.	FACTS	
A.	The Bargaining Relationship Between Respondent Employer and the Union	4
B.	Respondent Employer and the Union Enter Into the Section 9(a) Voluntary-Recognition Agreement	
1.	<i>General Background</i>	6
2.	<i>The June 26, 2003 Meeting</i>	7
a.	<u>Jaacks Consulted with WWCCA and Counsel</u>	9
i.	Hendry's and Treadwell's Versions	10
b.	<u>Jaacks Testified Differently in his Sworn Affidavit Taken During the Investigation</u>	11
c.	<u>Jaacks' Authority as of June 26, 2003</u>	11
C.	Events of 2005	
1.	<i>Representation Petitions and Requests for Section 9(a) Recognition</i>	12
2.	<i>Fritchel Writes July 29, 2005 Next to His Signature</i>	13
D.	Events of 2007	14
E.	Respondent Employer Withdraws From the Multi-Employer Association, Refuses to Bargain, and Ceases Trust Fund Contributions	16
F.	Respondent Employer and Respondent Carpenters Enter Into an Agreement and Meet with Employees	
1.	<i>The Agreements</i>	17
2.	<i>The Meeting with Employees</i>	17

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.....19

1. *The ALJ Did Not Err in Failing to Find that the Section 9(a) Agreement was Invalid on its Face.....22*

a. Respondent Employer’s Claim of no Majority Showing is Barred.....23

i. **Respondent Carpenters’ Reliance on Nova Plumbing and Madison Industries is Misplaced.....23**

2. *Respondent Carpenters Exceptions to the ALJ’s Credicbitlity Reoslustions Should be Rejected.....28*

a. The Record Supports the ALJ’s Credibility Finding Regarding the Execution of the Section 9(a) Agreement.....29

b. The Record Supports the ALJ’s Credibility Resolutions Made Regarding the Validity of the Section 9(a) Agreement.....32

3. *The ALJ Did Not Err in Rejecting Respondent Carpenters’ Estoppel Theory and Request33*

4. *The ALJ Did Not Err in his Conclusions Relating to the Multi-Employer Association.....34*

B. The ALJ Correctly Concluded that Respondent Carpenters Violated Section 8(b)(1)(A) and (2)

1. *The Collective-Bargaining Agreement.....35*

2. *The Meeting with Unit Employees.....36*

3. *The ALJ Properly Found that Certain Conduct was Closely-Related.....38*

V. CONCLUSION.....39

Table of Cases

NLRB Cases

<u>Casale Industries</u> , 311 NLRB 951(1993)	23, 25
<u>Comtel Systems Technology</u> , 305 NLRB 287 (1991)	26
<u>District Council of Painters (Northern California Drywall Association)</u> , 326 NLRB 1074 (1998)	34
<u>Duane Reade, Inc.</u> , 338 NLRB 943 (2003)	36
<u>Flatbush Manor Care Center</u> , 287 NLRB 457-458 (1987)	37
<u>Jerr Dan Corp.</u> , 237 NLRB 302 (1978)	22
<u>John Deklewa & Sons</u> , 282 NLRB 1375, (1987)	19, 20, 15
<u>Levitz Furniture Co.</u> , 333 NLRB 717 (2001)	20
<u>Madison Industries</u> , 349 NLRB 1306 (2007)	26, 28
<u>MFP Fire Protection, Inc.</u> , 318 NLRB 840 (1995)	21, 25
<u>Redd-I, Inc.</u> , 290 NLRB 1115 (1988)	38
<u>Saylor's Inc.</u> , 338 NLRB 330 (2002)	21
<u>Standard Dry Wall Products</u> , 91 NLRB 544 (1950).....	29
<u>Staunton Fuel & Material</u> , 335 NLRB 717 (2001)	20, 21, 25
<u>Sweater Bee by Banff, Ltd.</u> , 197 NLRB 805-806 (1972)	36

Federal Case

<u>Nova Plumbing, Inc. v. NLRB</u> , 330 F. 3d 531 (D.C. Cir. 2003)	26-28
---	-------

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, Respondent Employer and the Union entered into a Section 9(a) voluntary recognition 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 in 2003 the Union began obtaining Section 9(a) agreements from member-contractors of WWCCA, which agreements recognized the Union as the Section 9(a) representative. (ALJD 5:20-23)
2. The ALJ's findings that on June 26, 2003, David Fritchel ("Fritchel"), was sent to Respondent Employer's office with the Section 9(a) agreement and with authorization cards; Fritchel presented Gary Jaacks ("Jaacks") with authorization cards; and Jaacks signed one or two copies of the agreement. (ALJD 6:10-16)
3. The ALJ's finding that Fritchel is certain that he signed the Section 9(a) agreement on June 26, 2003. (ALJD 6:17-18)
4. The ALJ's findings that Jaacks admitted that his signature and date on the Section 9(a) agreements were authentic and that he had authority to sign contracts on Respondent Employer's behalf. (ALJD 6: 20-21)
5. The ALJ's findings that Ian Hendry ("Hendry") denied receiving a call for Jaacks in June 2003 regarding the Section 9(a) agreement and that Jaacks' testimony is not corroborated by Hendry. (ALJD 6:29-30, 37)

6. The ALJ's finding that it is clear from Jaacks affidavit that he has very little recollection concerning the event surrounding his signing the Section 9(a) agreement. (ALJD 6:33-37)
7. The ALJ's finding that in July 2005, the Union sent WWCCA a document showing that Respondent Employer signed a Section 9(a) agreement on June 26, 2003. (ALJD 7:3-4)
8. The ALJ's finding that in late July 2005, Travis Winsor ("Winsor") called the Union, stating that he knew that Respondent Employer had signed a Section 9(a) agreement and he wanted a copy of it. (ALJD 7:7-9)
9. The ALJ's finding that on May 3, 2007, the Union sent WWCCA copy of Respondent Employer's Section 9(a) showing dates of June 26, 2003 and July 29, 2005. (ALJD 7:11-13)
10. The ALJ's finding that in Winsor's affidavit he mentioned nothing about objections to the validity of the Section 9(a) agreement. (ALJD 7:28-29)
11. The ALJ's finding that at no time did Winsor or the WWCCA object to the voluntary recognition agreements. (ALJD 7:32-33)
12. The ALJ's findings that Hendry did not claim that the voluntary recognition agreements were invalid; and he could recall no WWCCA meetings wherein their validity was discussed; and when the agreements were raised none of the member-contractors denied signing the agreements. (ALJD 7:35-46)
13. The ALJ's finding that in 2002, 2003, and 2005, Mark Treadwell ("Treadwell") told the Union to seek Section 9(a) voluntary recognition agreements with individual member-contractors and WWCCA never took the position that the CBA prohibited the Union

from seeking Section 9(a) agreements from individual member-contractors. (ALJD 8:1-11)

14. The ALJ's finding that there is no evidence of fraud in the execution of the Respondent Employer's Section 9(a) agreement. (ALJD 9:1-2)
15. The ALJ's finding that Jaacks had the authority to sign the Section 9(a) agreement on Respondent Employer's behalf. (ALJD 14:1-15)

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.¹ 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

¹All citations to the ALJ's decision will be referred to "ALJD" followed by the appropriate page number(s). All citations to Respondent Carpenter's exceptions will be referred to "RE" followed by the appropriate number(s); while all citations to the Respondent Carpenter'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).

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)

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.²

² 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

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 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.³

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 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) Jaacks did not claim that he had no authority to sign the Section 9(a) voluntary-recognition agreement. 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) (RE 3) 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

³ 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)

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 indentified 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) Jaacks also indentified 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) 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.⁴ (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.

⁴ 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)

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)

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 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.⁵ (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 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)⁶ 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

⁵ 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)

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

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 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, 2003.⁷ (ALJD 7:1-5) (Tr. 83, 87-88, 136)

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) 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) (GCX 7) When Fritchel placed that day's date on the agreement his signature had

⁷ A copy of the list was entered into the Record as GCX 5.

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.⁸ (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 "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 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,

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

160) The Section 9(a) recognition agreement pertaining to Respondent Employer was the copy with July 29, 2005 written next to Fritchel's signature.⁹

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. (ALJD 7:17-18, 41-42) (Tr. 637, 842) 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 2)

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 Employer raised 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,

⁹ See GCX 9, pages 18 and 19.

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.¹⁰ 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,

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

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))

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**

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 10th 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.

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.

Here, even though Respondent Carpenters claims that the Section 9(a) agreement is invalid as there was no intent to enter into a Section 9(a) agreement, all the factors of Staunton Fuel test are satisfied in paragraph one, page one of the Section 9(a) voluntary-recognition agreement signed by Jaacks and Fritchel. (RB 8-9, 15) The first factor 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." 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....” The third factor is met as the agreement states that the Union has “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....” 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).

In Staunton Fuel the Board further 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. Here, Respondent Employer’s recognition is express and unconditional and the language provides that it “unequivocally recognizes the Union as the sole and exclusive majority representative...under Section 9(a)...” While 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, the language is not vague or ambiguous and is sufficient to establish a Section 9(a) agreement. Finally, 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).

1. The ALJ Did Not Err in Failing to Find that the Section 9(a) Agreement was Invalid on its Face

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. According to Respondent Carpenters, on July 29, 2005, the Union presented the Employer with a copy of the Section 9(a) agreement with “July 29, 2005” written next to Fritchel’s signature. By that act, the Union held out that copy of the agreement as the operative one. Despite Respondent Carpenters’ 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.

Finally, 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.

In spite of Respondent Carpenters exceptions, the agreement indicates that the parties intended to enter into a Section 9(a) agreement. 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. (RE 4, 5, and 8)

a. Respondent Employer's Claim of no Majority Showing is Barred

Respondent Carpenters excepts to the ALJ's finding that any challenges to the Section 9(a) agreement are barred by Section 10(b) of the Act. Yet, Respondent Carpenters argues that the ALJ erred in not allowing the Employer to challenge the Union's majority showing by preventing the examination of the authorization cards. (RE 6-7) (RB 20-22) However, like the employer in Casale, infra, Respondent Employer should not be permitted to challenge the Union's majority showing more than 5 years after granting recognition. (ALJD 12:35-37)

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. Over the same period of time, there were no unfair labor practice charges filed against the Union. Winsor claimed 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. However, 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. Winsor's affidavit was given 9 to 10 months after the meetings with the Union agent. Surely had Winsor raised the validity of the Section 9(a) agreement he would have mentioned that fact in his affidavit, inasmuch as Respondent Employer's defense rested on the invalidity of the Section 9(a) agreement. Winsor simply added this testimony in an attempt to bolster Respondent Employer's argument at trial. Second, even if Winsor told the Union in late 2007 and early 2008 that the validity of the Section 9(a) agreement was being questioned, this objection is still untimely.

Finally, if Winsor's new testimony is believed, he still did not object that the Union failed to make a majority-interest showing.

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. 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. Now, 6 years later, Respondent Carpenters asserts that the Union failed to make a majority-interest showing and that the Section 9(a) agreement is invalid. It is far too late for Respondent Employer to claim that the Union never demonstrated majority interest or that the Section 9(a) voluntary-recognition agreement is invalid. Thus, the ALJ properly refused to order the prosecution of authorization cards and correctly found that the Respondent Employer's assertions to the Union's initial majority showing are barred by Section 10(b) of the Act. (ALJD 12:35-37, 46-47)

i. Respondent Carpenters' Reliance on Nova Plumbing and Madison Industries is Misplaced

Respondent Carpenters cites Nova Plumbing, Inc. v. NLRB, 330 F. 3d 531 (D.C. Cir. 2003) and Madison Industries, 349 NLRB 1306 (2007), in arguing that the ALJ should have looked beyond the language of the Section 9(a) agreement to determine if a 9(a) relationship was established.

Contrary to established Board law, in Nova Plumbing, Inc. v. NLRB, the D.C. Circuit held that contract language alone is not enough to establish a Section 9(a) agreement. However, even if Nova Plumbing were controlling, the court based its holding on the fact that there was *evidence that unit employees resisted union representation from the beginning*. In Nova Plumbing, the employer withdrew recognition based on evidence that employees never supported the union. In reaching its decision the court found it critical that there was uncontroverted record evidence that the employees did not support the union and there was in fact no majority support when the agreement was signed and throughout its term. The initial and continued lack of support itself is what lead the employer to withdraw recognition of the union. In refusing to enforce the Board's order in Nova Plumbing, the court took the position that the Board completely ignored all the record evidence that the union never enjoyed majority support and instead relied solely on the language of the Section 9(a) agreement. By doing this, the court concluded that the Board failed to protect employees' rights guaranteed in the Act. *Id.* at 537-538.

In stark contrast to the facts in Nova Plumbing, evidence of a lack of majority support is not what lead Respondent Employer to withdraw recognition here. In fact, Respondent

Employer has never claimed that it possessed a shred of objective evidence that the Union never enjoyed majority interest or lost majority support. Respondent Employer waited 5 to 6 years to claim for the first time that the Union failed to make an initial majority-interest showing. The argument contradicts the express language of the 9(a) agreement signed by Jaacks. If blanket assertions and no objective evidence are considered viable arguments in defense of a Section 9(a) relationship, employers could make these types of unsubstantiated claims at any time during its bargaining history with a union.

Even if Respondent Carpenters' argument that the Union did not sign the agreement until July 29, 2005 were accepted—which is not true—it would not explain why Jaacks signed the Section 9(a) agreement in 2003 if the meeting did not occur as Fritchel testified. The Section 9(a) agreement states that Respondent Employer recognizes the Union and the Union showed or offered to show its majority support. As the record establishes, Jaacks was the CEO of the company, highly-educated, fully-familiar with and a participant in multi-employer bargaining, and was completely aware of the significance of and difference between Section 8(f) and Section 9(a) agreements. Considering all the evidence, including Jaacks' management experience and labor knowledge, it makes no sense that Jaacks would have signed the agreement if he did not meet with Fritchel in June 2003, as Fritchel testified. (ALJD 12:33-34) Therefore, the concerns articulated in Nova Plumbing simply do not exist in this matter.

Finally, any claim that the court in Nova Plumbing held that Section 10(b) could be ignored is not convincing. In fact, the court did not rely on Section 10(b) at all in making its determination. *Id.* at 538. Rather, the court reasoned that there was no Section 9(a) agreement created so there was no need to examine Section 10(b). Further, the court held that it could not

sustain the Board on Section 10(b) grounds because in the underlying Nova Plumbing case the Board did not rely on Section 10(b) in finding that a Section 9(a) relationship existed. Id. at 539.

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, no 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 or offer of evidence that the Union represented a majority of unit employees.

2. *Respondent Carpenters Exceptions to the ALJ's Credibility Resolutions Should be Rejected*

In its exceptions brief, Respondent Carpenters asserts that the ALJ's credibility findings should be reversed inasmuch as they are not supported by the record evidence. (RE 1) (RB 10-

16) 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).

a. The Record Supports the ALJ's Credibility Finding Regarding the Execution of the Section 9(a) Agreement

Rather than citing legitimate evidence warranting a reversal of the ALJ's credibility findings, in its brief Respondent Carpenters mischaracterizes testimony and extracts nuances in witnesses' testimonies to which it purports the ALJ should have attached particular and greater significance. (RB 10-15) Arguments that the ALJ did not agree with Respondent Carpenters is not tantamount to the ALJ being incorrect or reaching improper conclusions.

Respondent Carpenters mischaracterized Fritchel's testimony regarding the number of Section 9(a) agreements he took when he met with Jaacks. Fritchel testified that in 2003 he would sometimes have employers sign collective-bargaining agreements in triplicate so he testified that he likely carried that same practice when soliciting employers to sign Section 9(a) agreements. Fritchel specifically testified that he could not be certain that he always brought three copies of the Section 9(a) agreements with him when meeting with employers nor could he be sure that he had three copies when he meet with Jaacks. (Tr. 252-253) Fritchel never "changed" his testimony as Respondent Carpenters claims. Even if Fritchel bought two copies or three copies, Fritchel testified that they simultaneously signed a copy of the agreement and he left it with Jaacks. Respondent Carpenters claims that Fritchel initially testified that he was in Respondent Employer's conference room when he signed the agreement and then changed his testimony and stated that he did not know where he was when he signed. (RB 13-14) Again,

Respondent Carpenters mischaracterizes Fritchel's testimony. Fritchel consistently testified that he and Jaacks signed a copy of the Section 9(a) agreement and then exchanged the copy for the other to sign. (Tr. 225-226, 247) Fritchel then left one completely signed copy with Jaacks on June 26, 2003. (Tr. 226-227, 237-238, 247) When Fritchel testified about not recalling where he was when he signed the Section 9(a) agreement he had been specifically asked about the copies of the agreement that he took with him when he left Jaacks' office—not the agreement he left with Jaacks. (Tr. 237-238) Thus, Fritchel offered consistent testimony.

Contrary to Respondent Carpenters' exceptions, Fritchel's testimony was more detailed as the ALJ found. Fritchel testified that he met with Jaacks on a specific date – June 26, 2003; in the conference room; explained that he presented 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 testimony of 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.¹¹ It was not until Jaacks testified at the ULP hearing that he recalled any of the professed specific circumstances surrounding his signing. Accordingly, the ALJ's findings are supported by the record.

¹¹ As stated above, Jaacks affidavit testimony was reading into the record at p. 378-379.

Respondent Carpenters alleges that Fritchel should not have been credited because the Union produced and Respondent Employer 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 13-14) 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 on June 26, 2003.* 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, which was left with Jaacks on June 26, 2003. The 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 Carpenters 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. Moreover, it is not unusual or shocking that parties sign more than one original agreement.

Other than complaining that the ALJ should not have credited Fritchel and should have credited Jaacks, Respondent Carpenters 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. In conclusion, the ALJ's are supported by the record and Respondent Carpenters presented no legitimate evidence that would warrant overturning the ALJ's credibility resolutions.

b. The Record Supports the ALJ's Credibility Resolutions Made Regarding the Validity of the Section 9(a) Agreement

Respondent Carpenters excepts to the ALJ's credibility resolution regarding the validity of the Section 9(a) agreement. (RE 10) (RB 15-16) The basis for its exception rests on the ALJ crediting Treadwell's testimony over the testimonies of Jaacks and Hendry. Again Respondent Carpenters Respondent Carpenters just disagrees with the findings but does not cite evidence that would warrant overturning the ALJ's credibility findings. 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." The ALJ's finding that Hendry did not tell member-contractors or the Union that the Section 9(a) agreements were invalid is supported by record. (Tr. 637, 842) Thus, the ALJ credited Treadwell's testimony that WWCCA took the position that the Union had to seek Section 9(a) status from individual contractors. Respondent Carpenters references to the WWCCA board member minutes does not assist its claim. The board minutes generally acknowledge that the Union made requests of WWCCA for 9(a) status, which is neither relevant nor in dispute. There was *no board minutes* showing that the board of directors ever took the position that the individual Section 9(a) agreements were invalid, unenforceable, or violated the CBA. Surely if the board of directors took that position,

the minutes would reflect the same. At a minimum the minutes would reference a discussion over the alleged *invalidity* of the Section 9(a) agreements.

3. *The ALJ Did Not Err in Rejecting Respondent Carpenters' Estoppel Theory and Request*

Respondent Carpenters 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). (RB 18-19) Notwithstanding Respondent Carpenters' arguments, 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 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. It is also 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*. Winsor admitted that WWCCA provided him with this list. Moreover, the ALJ found that in July 2005, Winsor called Pullen, stating the he knew that Respondent Employer had signed a Section 9(a) agreement and he wanted a copy of it. (ALJD 7:6-9) Winsor's conversation with Pullen is consistent with the fact the he knew that Respondent Employer was already signatory to the Section 9(a) agreement. In light of all these findings, for Respondent Carpenters to now claim that Winsor "detrimentally relied" is not genuine.

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 a timely objection, Respondent Employer waited over 5 years before it raised its first objection to the validity of the Section 9(a) agreement or to the Union's supposed failure to present a majority interest showing. Accordingly, any harm, the ALJ held, was self-imposed. (ALJD 16:10-14)

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

Respondent Carpenters claims that the ALJ did not consider the parties entire agreement, which included the Section 9(a) agreement as well as the CBA. In its exceptions brief, Respondent Carpenters cites to the following contractual language of the 1999-2005 CBA: (1) Article II—Union Recognition, which states that the exclusive bargaining rights are vested in the signatory parties and (2) 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. Notwithstanding, the ALJ did consider the multi-employer CBA, but the ALJ did not attach the significance on it that Respondent Carpenters 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 of Painters (Northern California Drywall Association), 326 NLRB 1074 (1998). 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)

Finally, Respondent Carpenters 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 Carpenters.¹²

B. The ALJ Correctly Concluded that Respondent Carpenters Violated Section 8(b)(1)(A) and (2)

1. The Collective-Bargaining Agreement

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

¹² 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.

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 Respondent Carpenters violated Section 8(b)(1)(A) and (2) by accepting the recognition, entering in the collective-bargaining agreement that contains a union security clause. Duane Reade, Inc., 338 NLRB 943, 944 (2003); Sweater Bee by Banff, Ltd., 197 NLRB 805, 805-806 (1972).

2. *The Meeting with Unit Employees*

Respondent Carpenters asserts that the ALJ erred in finding that its raffle violated the Act. (RB 22-23) 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.

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.

The record further demonstrates that in an effort to induce the unit employees to join, Respondent Carpenters raffled off monetary awards and trade tools, with each employee receiving an award. Respondent Carpenters raffled \$3000.00 to employees and over 20 trade tools. The raffle was conducted in the context of employees being told they had 8 days to join Respondent Carpenters or lose their jobs and that joining would result in higher wages and better pay. If that were not enough employees Respondent Carpenters waived the usual initiation fee and the required work hours, allowing employees to immediately receive medical benefits if they joined Respondent Carpenters. Finally, after the waves of incentives, employees were ushered into another room to complete membership packets. Contrary to Respondent Carpenters argument this type of coercion is not restricted to representation cases. (RB 23) This atmosphere would reasonable tend to restrain and coerce employees in violation of Section 8(b)(1)(A) of the Act. Flatbush Manor Care Center, 287 NLRB 457, 457-458 (1987).

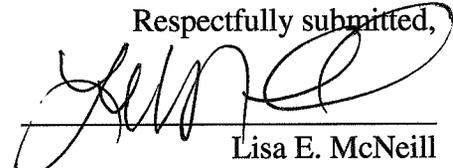
3. *The ALJ Properly Found that Certain Conduct was Closely-Related*

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, certain statements made and a memorandum handed out are alleged in the consolidated complaint. 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. Accordingly, 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 Carpenters' exceptions should be rejected in their entirety and the ALJ's recommended Order should be adopted.

Respectfully submitted,



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

Dated at Los Angeles, California, this 14th day of June, 2010.

STATEMENT OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT CARPENTER'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.

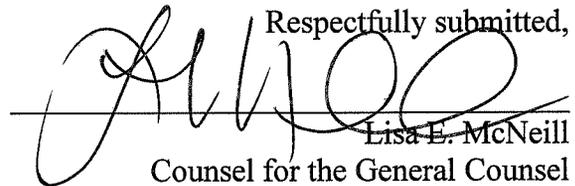
James Bowles, Attorney at Law
Hill, Farrer & Burrill LLP
One California, 37th Floor
300 South Grand Avenue
Los Angeles, CA 90017
e-mail: JBowles@hillfarrer.com

Daniel Shanley, Attorney at Law
DeCarlo, Connor & Shanley
533 South Fremont Avenue, 9th Floor
Los Angeles, CA 90071
e-mail: dshanley@decounsel.com

Eric B. Myers, Attorney at Law
Davis, Cowell & Bowe, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
email: ebm@dcbsf.com

Jeffrey Cutler, Attorney at Law
Wohlner Kaplon Phillips Young & Cutler
15456 Ventura Boulevard, Suite 500
Sherman Oaks, CA 91403
Email: jcutler@wkpyc.com

Respectfully submitted,



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