

Nos. 09-73210, 10-70208, 10-70209, 10-70511, 10-71342

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADE DISTRICT COUNCIL OF PAINTERS, AND ALLIED
TRADES DISTRICT COUNCIL NO. 36, et al.**

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

SOUTHWESTERN REGIONAL COUNCIL OF CARPENTERS AND CARPENTERS LOCAL UNION NO. 1506

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

RAYMOND INTERIOR SYSTEMS,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR THE
THE NATIONAL LABOR RELATIONS BOARD**

JILL A. GRIFFIN
Supervisory Attorney

GREGORY P. LAURO
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-2965

RONALD MEISBURG

General Counsel

JOHN E. HIGGINS, JR.

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	2
Statement of the issues presented	4
Statement of the case.....	5
Statement of facts.....	7
I. The Board’s findings of fact.....	7
A. Background; Raymond employs two distinct groups of employees—drywall-finishing employees and drywall-hanging employees—who perform different work and who have been historically represented by different unions in separate units	7
B. In May 2006, Raymond lawfully terminates its Section 8(f) relationship with the Painters, effective September 30, 2006, the day the Painters’ agreement expired by its terms	10
C. On October 2, 2006, Raymond and the Carpenters meet jointly with Raymond’s drywall-finishing employees to inform them that they will now be working under the Carpenters agreement; Raymond tells the employees they must immediately join the Carpenters to continue working for Raymond; the Carpenters gives employees a single document containing membership, dues checkoff, and authorization forms, without concurrently providing the required <i>Beck</i> notices; most of the employees comply by returning signed documents that day	11
1. The employees are called to a meeting on October 2.....	11
2. Company President Winsor and Superintendent Zerrero tell employees that they must sign up with the Carpenters “that day” or else they will have no more work.....	12

Headings-Cont'd

Page(s)

- 3. The Carpenters presents employees with a single document containing membership, dues checkoff, and authorization forms, but does not at that time provide them with a *Beck* notice of their rights regarding union membership and the use and payment of union dues; most employees comply by signing and returning the document that day14

- D. Later on October 2, Raymond recognizes the Carpenters as the employees' Section 9(a) representative based on the authorization cards the employees signed that day16

- II. The Board's conclusions and order.....16

- Summary of argument.....18

- Argument.....22

- I. The Court should not defer processing this case pending the Supreme court's decision in *New Process*22

- II. Substantial evidence supports the Board's findings that, on October 2, Raymond violated Section 8(a)(1), (2) and (3) by unlawfully assisting the Carpenters in obtaining union-authorization cards from its drywall-finishing employees; that Raymond further violated that Section of the Act by granting, and the Carpenters violated Section 8(b)(1)(A) by accepting, recognition as those employees' exclusive bargaining representative based on those tainted cards; and that Raymond violated Section 8(a)(3), and the Carpenters violated 8(b)(2), by applying the Carpenters agreement and its union-security clause to those employees at a time when the Carpenters did not represent an uncoerced majority25

- A. Introduction25

- B. The Act requires that employees' free choice of bargaining representative be untainted by any employer compulsion or influence26

Headings-Cont'd

Page(s)

- C. Substantial evidence supports the Board’s findings that Raymond unlawfully assisted and recognized the Carpenters; that the Carpenters unlawfully accepted that assistance and recognition; and that they both violated the Act by applying the Carpenters agreement to the drywall-finishing employees at a time when the Carpenters lacked uncoerced majority support.....31
- D. The parties fail to meet their heavy burden in seeking to overturn the Board’s reasonable credibility determinations.....35
- III. The Carpenters violated Section 8(b)(1)(A) of the Act by failing to timely inform employees of their *Beck* rights at the time it first sought to obligate them to become union members and pay union dues42
 - A. The Carpenters failed to timely provide a *Beck* notice.....42
 - B. The Carpenters’ contentions are without merit.....45
- IV. The Board acted within its broad discretion when it awarded the the traditional, court-approved, remedy for the unlawful assistance and recognition found here47
 - A. The Board is afford broad discretion in formulating remedies48
 - B. The Board’s remedy is reasonable because it properly restores the employees to the position they would have occupied absent the parties’ violations, and deprives the parties of the advantages gained by their violations.....50
 - C. Raymond’s and the Carpenters’ contentions are without merit51
 - D. The Painters’ challenge to the remedy must fail55
- Conclusion60

TABLE OF AUTHORITIES

<i>Acme Tile and Terrazo Co.</i> , 318 NLRB 425 (1995), <i>enforced</i> 87 F.3d 558 (1st Cir. 1996).....	28,32,34
<i>Amalgamated Local Union 335 v. NLRB</i> , 481 F.2d 996 (2d Cir. 1973)	28
<i>Booth Serv.</i> , 206 NLRB 862 (1973) <i>enforced as modified</i> , 516 F.2d 949 (5th Cir. 1975)	28,32,34
<i>Brooklyn Hospital Ctr.</i> , 309 NLRB 1163 (1992), <i>enforced</i> 9 F.3d 218 (2d Cir. 1993)	55
<i>California Saw & Knife Works</i> , 320 NLRB 224 <i>enforced sub nom. Int’l Ass’n of Machinists & Aerospace Workers</i> <i>v. NLRB</i> , 133 F.3d 1012 (7th Cir. 1998)	43,44,45,46
<i>Campbell Soup Co. v. NLRB</i> , 378 F.2d 259 (9th Cir. 1967)	28,33
<i>Colfor, Inc. v. NLRB</i> , 678 F.2d 655 (6th Cir. 1982)	35
<i>Communications Workers v. Beck</i> , 487 U.S. 735 (1988)	6,43
<i>D.L. Baker, Inc.</i> , 351 NLRB 515 (2007).....	59
<i>Dairyland USA Corp.</i> , 347 NLRB 310 (2006), <i>enforced sub nom. Local 348-S, UFCW</i> , 273 Fed.Appx. 40 (2d Cir. 2008)	27,28,33,46,49,50

Cases-Cont'd	Page(s)
<i>District 65, Distributive Workers of America v. NLRB,</i> 593 F.2d 1155 (D.C. Cir. 1978).....	29
<i>Duane Read, Inc.,</i> 338 NLRB 943 (2003), <i>enforced</i> 99 Fed.Appx. 240 (D.C. Cir. 2004).....	27,29,30,33,47,50,51
<i>Fibreboard Products Corp. v. NLRB,</i> 379 U.S. 203 (1964)	50
<i>Franks v. Bowman Trans. Co.,</i> 424 U.S. 747 (1975)	49
<i>Fun Striders, Inc. v. NLRB,</i> 686 F.2d 659 (9th Cir. 1981).....	27
<i>Garner/Morrison,</i> 353 NLRB No. 78 (2009).....	59
<i>Hartz Mountain Corp.,</i> 228 NLRB 492 (1977).....	56
<i>International Ladies Garment Workers' Union v. NLRB,</i> 366 U.S. 731 (1961).....	24,26,29,30,33,49,50,51,52,53
<i>Industrial, Technical and Professional Employees Division, National Maritime Union of America v. NLRB,</i> 683 F.3d 305 (9th Cir. 1982).....	27,29,33,47, 51
<i>International Association of Machinists & Aerospace Workers v. NLRB,</i> 133 F.3d 1012 (7th Cir. 1998).....	43
<i>International Association of Machinists, Lodge 35 v. NLRB,</i> 311 U.S. 72 (1940)	26,29

Cases-Cont'd	Page(s)
<i>International Union of Petroleum & Industrial Workers v. NLRB</i> , 980 F.2d 774 (D.C. Cir. 1992).....	30
<i>John Deklewa & Sons</i> , 282 NLRB 1375 (1987).....	57
<i>Landis v. North America Co.</i> , 299 U.S. 248 (1936)	22
<i>Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB</i> , 564 F.3d 469 (D.C. Cir. 2009).....	3
<i>Magnum Import Co. v. Coty</i> , 262 U.S. 159 (1923)	22
<i>Markham v. Kallimanis</i> , 151 F.2d 145 (9th Cir. 1945).....	23
<i>Mego Corp.</i> , 254 NLRB 300.....	56
<i>NLRB v. Baja's Place</i> , 733 F.2d 416 (6th Cir 1984).....	36
<i>NLRB v. Bighorn Beverage Co.</i> , 614 F.2d 1238 (9th Cir. 1980).....	30
<i>NLRB v. Forest City/Dillon-Tecon Pacific</i> , 522 F.2d 1107 (9th Cir. 1975).....	49
<i>NLRB v. General Motors Corp.</i> , 373 U.S. 734 (1963)	6,43
<i>NLRB v. Gissel Packaging Co.</i> , 395 U.S. 575 (1969)	29,34,40,50

Cases-Cont'd	Page(s)
<i>NLRB v. Hartman</i> , 774 F.2d 1376 (9th Cir. 1985)	49,50
<i>NLRB v. Midwestern Personnel Serv., Inc.</i> , 322 F.3d 969 (7th Cir. 2003)	29,33
<i>NLRB v. Nueva Engineering, Inc.</i> , 761 F.2d 961 (4th Cir. 1985)	36
<i>NLRB v. Peninsula General Hospital Medical Ctr.</i> , 36 F.3d 1262 (4th Cir. 1994)	27
<i>NLRB v. UFCW Local 4</i> , No. 09-70922	3
<i>NLRB v. Vernitron Electric Components, Inc.</i> , 548 F.2d 24 (1st Cir. 1977)	29
<i>NLRB v. Windsor Castle Healthcare Facilities, Inc.</i> , 13 F.3d 619 (1st Cir. 1994)	28,29,30
<i>Narricot Industries, L.P. v. NLRB</i> , 587 F.3d 654 (4th Cir. 2009) <i>petition for cert. filed</i> , 78 U.S.L.W. 3629 (U.S. Apr. 15, 2010)	3,23
<i>New Process Steel, L.P. v. NLRB</i> , 564 F.3d 840 (7th Cir. 2009), <i>cert. granted</i> , 130 S.Ct. 488 (2009)	3,4,18,22,23
<i>Northeastern Land Services v. NLRB</i> , 560 F.3d 36 (1st Cir. 2009) <i>petition for cert. filed</i> , 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009)	3
<i>Nova Plumbing Inc. v. NLRB</i> , 330 F.3d 531 (D.C. Cir. 2003)	55,56
<i>Raymond Interior Systems.</i> , 354 NLRB No. 85	3

Cases-Cont'd	Page(s)
<i>Restaurant Employees Local 11 v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1995)	30
<i>Retlaw Broad Co. v. NLRB</i> , 53 F.3d 1002 (9th Cir. 1995)	30,35,36
<i>Schwickerts of Rochester, Inc.</i> , 349 NLRB 687 (2007)	59
<i>Sheet Metal Workers' Local 355 v. NLRB</i> , 716 F.2d 1249 (9th Cir. 1983)	49
<i>Snell Island SNF LLC v. NLRB</i> , 568 F.3d 410 (2d Cir. 2009) <i>petition for cert. filed</i> , 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009)	3
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	50
<i>Teamsters Local Union No. 523 v. NLRB</i> , 509 F.3d 849 (10th Cir. 2009) <i>petition for cert. filed</i> , __ U.S.L.W. __ (U.S. May 17, 2010).....	3,23
<i>Topor Contracting, Inc.</i> , 345 NLRB 1278 (2005)	60
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	30
<i>Virginia Electric & Power Co. v. NLRB</i> , 319 U.S. 533, 540 (1943).....	50
<i>Windsor Castle</i> , 310 NLRB 579 (1981), <i>enforced as modified</i> 13 F.3d 619 (2d Cir. 1994).....	50
<i>Zidell</i> , 175 NLRB 887 (1969).....	53,54

Statutes :

Page(s)

National Labor Relations Act, as amended

(29 U.S.C. § 151 et seq.)

Section 3(b)(29 U.S.C. § 153(b)).....	3
Section 7 (29 U.S.C. § 157)	17,26,27,28
Section 8(a)(1)(29 U.S.C. § 158(a)(1)).....	4,5,16,19,25,27,29,31,33
Section 8(a)(2)(29 U.S.C. § 158(a)(2)).....	4,5,16,19,25,26,27,29,31,33
Section 8(a)(3)(29 U.S.C. § 158(a)(3)).....	4,5,16,19,25,27,28,30,31,35
Section 8(b)(1)(A)(29 U.S.C. § 158(b)(1)(A))	4,5,16,17,19,25,27,29,31,33,43,44
Section 8(b)(2)(29 U.S.C. § 158(b)(2))	4,17,30,35
Section 8(f)(29 U.S.C. § 158(f))	8,9,10,20,21,26,48,53,54,55,57,58,60
Section 9(a)(29 U.S.C. § 159(a))	9,15,16,19,20,24,26,32,33,47,48,53,54,55,56
Section 10(a)(29 U.S.C. § 160(a))	3
Section 10(c)(29 U.S.C. § 160(c)).....	49
Section 10(e)(29 U.S.C. § 160(e))	4
Section 10(f)(29 U.S.C. § 160(f))	3,4

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 09-73210, 10-70208, 10-70209, 10-70511, 10-71342

**SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADE DISTRICT
COUNCIL OF PAINTERS, AND ALLIED TRADES DISTRICT COUNCIL
NO. 36, et al.**

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

**SOUTHWESTERN REGIONAL COUNCIL OF CARPENTERS AND
CARPENTERS LOCAL UNION NO. 1506**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

RAYMOND INTERIOR SYSTEMS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

These consolidated cases are before the Court on the petitions of the Southern California Painters and Allied Trade District Council of Painters, and Allied Trades District Council No. 36 (“the Painters”); the Southwestern Regional Council of Carpenters and Carpenters Local Union No. 1506 (“the Carpenters”); and Raymond Interior Systems (“Raymond”) to review an Order of the National Labor Relations Board (“the Board”) that issued against Raymond and the Carpenters on September 30, 2009, and is reported at 354 NLRB No. 85. (JER 6-34.)¹ The Board’s Order found that Raymond and the Carpenters committed numerous unfair labor practices, but failed to grant certain relief requested by the Painters. The Board filed cross-applications for enforcement of its Order, which is

¹ Record references are to the Joint Excerpts of Record filed by Raymond and the Carpenters (“JER”) or to the Excerpts of Record filed by the Painters (“PER”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

final under Section 10(f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(f)) (“the Act”).

The Board’s Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). *See Raymond Interior Systems.*, 354 NLRB No. 85, slip op. at 1 n.1 (2009).²

The Board had jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this proceeding pursuant to Section

² The First, Second, Fourth, Seventh, and Tenth Circuits have upheld the issuance of decisions by the same two-member quorum. *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3629 (U.S. Apr. 15, 2010) (No. 09-1248); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 488 (2009) (“*New Process*”); *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009), *petition for cert. filed*, __ U.S.L.W. __ (U.S. May 17, 2010) (No. 09-1404). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). On March 23, 2010, the Supreme Court heard argument on the issue in *New Process*. The issue has been briefed to this Court in *NLRB v. UFCW Local 4*, No. 09-70922, and *NLRB v. Barstow Community Hospital*, No. 09-70771.

10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the events underlying the unfair labor practices occurred in California. The Painters filed its petition for review on October 8, 2009; the Carpenters and Raymond filed their petitions on January 21, 2010. The Board filed its cross-applications on February 4 and April 27, 2010. These filings were timely; the Act places no time limit on the institution of proceedings to review and enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Court should defer processing this case pending the Supreme Court's decision in *New Process* even though the parties offer no compelling reason for such delay.

2. Whether substantial evidence supports the Board's findings that Raymond violated Section 8(a)(1), (2) and (3) of the Act (29 U.S.C. § 158(a)(1), (2) and (3)) by unlawfully assisting the Carpenters in obtaining union-authorization cards from its drywall-finishing employees, and by recognizing the Carpenters, based on those cards, as the exclusive bargaining representative of its employees; that the Carpenters violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)), by accepting Raymond's unlawful assistance and recognition; and that Raymond violated Section 8(a)(3) and (1) of the Act, and the Carpenters violated Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)), by maintaining and applying a collective-bargaining agreement, including a union-security clause, to

Raymond's drywall-finishing employees when the Carpenters did not represent an uncoerced majority of those employees.

3. Whether substantial evidence supports the Board's finding that the Carpenters violated Section 8(b)(1)(A) of the Act by failing to timely inform employees of their rights regarding union membership and the payment and use of union fees and dues.

4. Whether the Board abused its broad discretion in issuing the traditional, court-approved, remedy for the unlawful assistance and recognition found here.

STATEMENT OF THE CASE

Based upon unfair labor practice charges filed by the Painters against Raymond and the Carpenters, the Board's General Counsel issued a complaint alleging that Raymond violated Section 8(a)(1), (2), and (3) of the Act (29 U.S.C. § 158(a)(1),(2), and (3)) "on or about October 2" by assisting, recognizing, and applying a collective-bargaining agreement with the Carpenters, and that the Carpenters violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. § 158(b)(1)(A) and (2)) by accepting that assistance and recognition, and by applying that agreement. The complaint further alleged that the Carpenters violated Section 8(b)(1)(A) of the Act by failing to timely inform employees of

their “*Beck* rights”³ regarding union membership and the payment and use of union fees and dues. After conducting a hearing, the administrative law judge issued a decision finding that Raymond and the Carpenters violated the Act as alleged. Raymond, the Carpenters, and the Painters filed exceptions.

The Board issued a Decision and Order affirming the judge’s findings that Raymond and the Carpenters violated the Act as alleged on October 2, and adopting the judge’s recommended order, as modified. However, the Board found it unnecessary to pass on the judge’s additional finding that Raymond had unlawfully granted, and the Carpenters had unlawfully accepted, recognition on October 1, “because those findings of unlawful conduct would be cumulative of the findings of unlawful conduct occurring on October 2, and would not materially affect the remedy in this proceeding.” (JER 6.)

³ As detailed below, a union must inform employees, when it first seeks to obligate them to pay dues and fees under a union-security clause, of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963) (“*General Motors*”), to be and remain nonmembers of the union; and of the rights of nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988) (“*Beck*”), to object to paying for union activities not germane to the union’s duties as collective-bargaining representative, and to obtain a reduction-in-dues and fees for such activities. These rights are often referred to collectively as “*Beck* rights.”

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. **Background; Raymond Employs Two Distinct Groups of Employees—Drywall-Finishing Employees and Drywall-Hanging Employees—Who Perform Different Work and Who Have Been Historically Represented by Different Unions In Separate Units**

Raymond is a construction-industry contractor that performs drywall framing, hanging, finishing, and related work in California and several other states. In October 2006, it employed 579 construction employees working out of its Orange County and San Diego, California, facilities. This tally included two distinct groups of employees: 351 framing and drywall-hanging employees who perform metal stud framing, drywall hanging, and lathing work; and 110 drywall-finishing employees, who cover up screws and joints in drywall after the drywall sheets have been hung, and smooth out the walls in preparation for painting. 224 of those drywall-hanging employees and 55 of the drywall-finishing employees worked out of the Orange County facility, while the other 127 hangers and 55 finishers worked out of San Diego. (JER 11-12; 224, 279, 498-99.)

In practice, there remained a distinction between the work performed by these two groups. Thus, the drywall-finishing employees testified without contradiction that they never performed drywall-hanging work, and that the drywall-hanging employees never performed drywall-finishing work. (JER 12 n.2;

224-225, 280, 331, 416-17.) Moreover, as fully explained below, these two distinct groups have been, for the last several decades, separately represented in different bargaining units by different unions, with Raymond's drywall-finishing employees represented by the Painters, and its drywall-hanging employees represented by the Carpenters. (JER 12; 736.)

Since at least the 1960s, Raymond has been a member of a multiemployer bargaining association, the Western Wall and Ceiling Contractors Association ("the WWCCA"), comprised of employers performing construction work similar to that of Raymond. Raymond was also a member of two separate WWCCA conferences, each of which negotiates collective-bargaining agreements ("CBAs") with different unions on behalf of the WWCCA's employer-members. Raymond was a signatory to these agreements by virtue of its membership in these conferences. (JER 12.)

First, the California Finishers Conference has, since the 1960s, negotiated CBAs with the Painters covering the drywall-finishing employees of Raymond and the other employer-members. (JER 12; 461-62.) The most recent such CBA ran from October 1, 2003 through September 30, 2006 ("the Painters' Agreement"). (JER 12; PER 66.) It is undisputed that the parties entered this agreement pursuant to Section 8(f) of the Act (29 U.S.C. § 158(f)). (JER 12.) As fully explained below (*see infra* Argument § IV.D), Section 8(f) allows a construction-industry

employer to recognize a union as its employees' bargaining representative before a majority of employees have chosen the union. An employer may refuse to bargain after the expiration of an 8(f) agreement, and may unilaterally change terms and conditions of employment, because the union enjoys no presumption of continuing majority support. Such an agreement is in contrast to a Section 9(a) agreement (29 U.S.C. § 159(a)), which may be lawfully entered into only where the union represents a majority of the employees.

Second, the California Drywall/Lathing Conference has for decades negotiated CBAs with the Carpenters covering the drywall-hanging employees of Raymond and the other employer-members. (JER 12.) Beginning in 1988, the bargaining-unit description in these agreements was extended to include employees who performed drywall-finishing work. (JER 12; 510, 710.) Beginning in 1992, in order to avoid overlapping Painters-Carpenters jurisdiction over such work, successive Carpenters agreements included the so-called "Painters exception," which stated that the Carpenters would not assert jurisdiction over an individual employer's drywall-finishing employees so long as that employer had a CBA with the Painters covering those employees. (JER 12; 713, 1015.)

The two most recent such Carpenters agreements were the July 1, 2002 through June 30, 2006, and the July 1, 2006 through June 30, 2010 Southern California Drywall/Lathing master agreements (respectively, "the 2002 Carpenters

master agreement,” and “the 2006 Carpenters master agreement”). (JER 12; 1011.) The 2006 Carpenters master agreement contained a union-security clause, providing that every employee covered by the agreement shall, as a condition of continued employment, become a member of the Carpenters “within eight (8) days” of beginning employment covered by the agreement. (JER 14 n.8; 1017.)

B. In May 2006, Raymond Lawfully Terminates its Section 8(f) Relationship with the Painters, Effective September 30, 2006, the Day the Painters’ Agreement Expired By Its Terms

In May 2006, Raymond notified the Painters by letter of its intent to immediately resign from the California Finishers Conference; to remove the authority of that conference to bargain on Raymond’s behalf; and to terminate the Painters’ Agreement effective September 30, 2006, the day it would expire by its terms. It is undisputed that Raymond lawfully terminated the Painters’ Agreement and that it expired by its terms on September 30. (JER 13; 373, 1044.) In the meantime, the Carpenters told Raymond that, upon expiration of the Painters’ Agreement, the 2006 Carpenters master agreement would “kick[] in immediately” to cover Raymond’s drywall-finishing employees. (JER 13-14; 716.)

On September 12, 2006, in order to avoid potential grievances relating to the application of the 2006 Carpenters master agreement to Raymond’s finishing employees, the Carpenters and Raymond reached a “Confidential Settlement Agreement,” providing that, upon expiration of the Painter’s Agreement, Raymond

would apply the Carpenters 2006 Drywall/Lathing Memorandum Agreement⁴ to its drywall-finishing work and employees “to the fullest extent permitted by law.”

The parties kept this settlement agreement secret from Raymond’s drywall-finishing employees. (JER 13; 1044.) On October 1, Raymond began applying the 2006 Carpenters master agreement to those employees, none of whom were members of the Carpenters at the time. (JER 13-14; 529, 537, 713-16, 736.)

C. On October 2, 2006, Raymond and the Carpenters Meet Jointly with Raymond’s Drywall-Finishing Employees to Inform Them that They Will Now Be Working under the Carpenters Agreement; Raymond Tells The Employees They Must Immediately Join the Carpenters To Continue Working for Raymond; the Carpenters Gives Employees a Single Document Containing Membership, Dues Checkoff, and Authorization Forms, Without Concurrently Providing the Required *Beck* Notices; Most of the Employees Comply By Returning Signed Documents that Day

1. The Employees Are Called to a Meeting on October 2

On the evening of October 1, Raymond’s General Superintendent, Hector Zerrero, and at least one other company official, made telephone calls to all of Raymond’s drywall-finishing employees, directing them to arrive at the Orange County facility’s yard at approximately 6 a.m. the following morning for a meeting. Employees were not told the purpose of the meeting. The employees

⁴ This memorandum agreement is a short-form agreement, which bound Raymond to the terms of the Carpenters 2006 master agreement. (JER 14 & n.4.)

noted that it was unusual for them to be called to Raymond's premises for a meeting. (JER 15; 225-26, 280-81, 331-32.)

On October 2, as planned, Raymond and the Carpenters jointly held a meeting at the Orange County facility, with 85-90 (out of 110) of Raymond's drywall-finishing employees. As each employee arrived in his vehicle at Raymond's outer gate, he was met by company officials who checked the employee's name on a sheet of paper. Once checked, the employee was permitted to enter and park. At an interior gate blocking access to Raymond's main facility, a company office worker again checked each employee's name off a list. At 7 a.m., the gates were opened and the employees were ushered into a warehouse area, in which tables and chairs were arranged and the employees were served breakfast. After an hour, the employees were instructed to enter a large training room, which was arranged with rows of chairs, a stage with tables and a podium, and a dropdown projection screen. (JER 15; 226-27, 332-33, 536-37.)

2. Company President Winsor and Superintendent Zerrero Tell Employees that They Must Sign up with the Carpenters "That Day" or Else They Will Have No More Work

The purpose of the meeting was to explain the transition from the Painters to the Carpenters. The initial presenter was Company President Travis Winsor, who spoke for several minutes, utilizing Power Point slides and a document that was distributed to employees. (JER 15; 589-90, 1004, 1047.) That document states

that, from October 1 forward, Raymond will apply the 2006 Carpenters master agreement to its drywall-finishing work and that, consequently, “[d]rywall-finishing employees who were not previously members of the Carpenters must join the Carpenters Union under the union-security provision of the Carpenters labor agreement.” (JER 1004.) Following Winsor, several Carpenters representatives spoke about the wage and benefits packages in the Painters’ and Carpenters’ agreements, and the employees’ obligation to pay monthly dues. (JER 15, 30; 286, 424, 1060.) During these presentations, English-to-Spanish translation was provided by a Carpenters official through headsets worn by Spanish-speaking employees. (JER 15; 541-42.)

After the formal presentations, employees were permitted to ask questions of Winsor, Superintendent Zerrero, and the Carpenters’ representatives. An employee asked whether the employees could continue working if they did not sign with the Carpenters. Winsor replied that “if they did not sign, there would be no more work, and that, if you don’t sign you will not have a job but no one will be fired.” (JER 18; 423-24.) Employees then asked if they had to reach a decision that day about signing with the Carpenters, and Winsor replied that “if we didn’t sign on that day, we weren’t working anymore.” (JER 17-18, 28; 441; *see also* JER 287-88, 313-14, 326, 430, 453.) Zerrero responded to similar questions, asked by employees who remained in the room after the formal question-and-answer

session, by stating: “There’s no time to think about it. Either sign . . . today or you cannot work tomorrow for us.” (JER 17-18, 28; 339, 346, 361.)

3. The Carpenters Presents Employees With a Single Document Containing Membership, Dues Checkoff, and Authorization Forms, but Does Not at that Time Provide Them With a *Beck* Notice of Their Rights Regarding Union Membership and the Use and Payment of Union Dues; Most Employees Comply By Signing and Returning that Document that Day

Upon conclusion of the question-and-answer session, the drywall-finishing employees—none of whom were members of the Carpenters at the time—were instructed to return to the warehouse area. There, at a table, clerical employees of the Carpenters distributed a single, 3-page document composed of a Carpenters membership application, supplemental dues authorization form, and an authorization for representation form. (JER 15-16, 30; 860.)

The Carpenters did not give employees any notice of their *Beck* rights when it distributed these forms. Rather, it was only after employees completed and returned the entire document, that they were given a Carpenters’ magazine, which contained a printed *Beck* notice. (JER 16 & n.18; 674, 1079.) A Carpenters’ clerical worker confirmed that she would only give out that magazine when an employee returned signed paperwork. (JER 640, 674.) Thus, employees who did not return signed paperwork did not receive the magazine with the *Beck* notice. (JER 674.)

Moreover, around this time, Carpenters representatives circulated amongst employees, spoke to them about whether to sign up with the Carpenters, and solicited them to execute authorization cards. (JER 17; 235-36, 238, 289, 730.) For example, a Carpenters representative approached employee Janet Pineda “to convince her to sign” because she appeared to be “the hardest person to convince.” (JER 289, 730.)

Around this same time, Winsor approached employee Richard Myers and asked him if he was going to sign the Carpenters membership document. When Myers said no, Winsor responded that he would like Myers to do so and continue working for Raymond. Myers replied that “would not happen because it wasn’t about the money, it was about integrity.” (JER 16; 262-64.)

Most of the employees signed and returned the Carpenters’ document that day. Employee Ruben Alvarez, for example, explained that he signed the Carpenters document in order to “keep on working.” (JER 17; 341.) Of the employees who refused to sign, some did not report to work the next day because, as employee Jose Ramos explained, Winsor had told them “that if we didn’t sign that day, we wouldn’t be working [tomorrow].” (JER 19; 453.)

D. Later on October 2, Raymond Recognizes the Carpenters as the Employees' Section 9(a) Representative Based on the Authorization Cards the Employees Signed That Day

On the afternoon of October 2, a second meeting was held at Raymond's San Diego facility for its remaining drywall-finishing employees. At its conclusion, Winsor executed an agreement recognizing the Carpenters as the majority representative of Raymond's drywall-finishing employees pursuant to Section 9(a) of the Act. Winsor did so based on the Carpenters' having presented him with authorization cards signed on October 2 by a majority of the drywall-finishing employees. (JER 22; 582-84, 772, 998.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found, in agreement with the administrative law judge, that Raymond violated Section 8(a)(1), (2) and (3) of the Act (29 U.S.C. § 158(a)(1), (2) and (3)) by conditioning continued employment on immediate membership in the Carpenters, and by unlawfully assisting the Carpenters in obtaining union-authorization cards. (JER 6-7.)

As the Carpenters' only proof of majority employee support was those tainted cards, the Board also found, in agreement with the administrative law judge, that Raymond further violated Section 8(a)(2) and (1) by granting, and the Carpenters violated Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) by

accepting, recognition as the employees' representative under Section 9(a) of the Act at a time when the Carpenters did not represent an uncoerced majority of these employees. Moreover, the Board found, in agreement with the judge, that Raymond violated Section 8(a)(3) of the Act, and the Carpenters violated Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)), by maintaining and applying the Carpenters 2006 master agreement, including its union-security provision, to the employees at a time when the Carpenters did not represent an uncoerced majority. Finally, the Board found, in agreement with the judge, that the Carpenters violated Section 8(b)(1)(A) of the Act by failing to timely inform the drywall-finishing employees of their *Beck* rights (*see* n. 3, above) when it first sought to obligate them to pay dues and fees under the union-security clause. (*Id.*)

The Board's Order requires Raymond and the Carpenters to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157.) The Order further requires Raymond and the Carpenters to cease and desist from maintaining and applying the Carpenters 2006 master agreement, including the union-security clause, to the drywall-finishing employees, unless and until the Carpenters has been certified by the Board as the exclusive collective-bargaining representative of those employees. The Order provides, however, that "nothing in the Order shall

allow or require the withdrawal or elimination of any wage increase or other benefits that may have been established pursuant to said agreement.” (JER 7-8.)

Affirmatively, the Order directs Raymond to withdraw and withhold all recognition from the Carpenters unless and until the Board has certified it as the exclusive representative of Raymond’s drywall-finishing employees. The Order further directs Raymond to provide alternative benefits coverage equivalent to the coverage that its drywall-finishing employees possessed under the 2006 Carpenters master agreement. The Order also directs Raymond and the Carpenters to jointly and severally reimburse all drywall-finishing employees who joined the Carpenters on or after October 2, for fees, dues and other monies collected under the 2006 Carpenters master agreement. Finally, the Order directs Raymond and the Carpenters to post remedial notices. (*Id.*)

SUMMARY OF ARGUMENT

Raymond and the Carpenters met with employees on October 2 and coerced them into signing authorization and membership cards that day in order to keep their jobs. Following settled law, the Board found that this conduct violated the employees’ right to freely choose their bargaining representative and ordered the only remedy that would dissipate the unlawful coercion—a Board certification to ensure that the employees have freely expressed their preference. The parties’ challenges to these findings and remedy must fail.

I. As an initial matter, the Court should deny Raymond's request to defer the processing of this case until the Supreme Court's decision in *New Process* on the authority of the two-member Board. This Court retains the discretion to continue processing this case while that issue is pending before the Supreme Court. Moreover, by permitting this case to proceed as expeditiously as the normal course of processing allows will ensure that the case is ripe for decision at the earliest possible date.

II. Raymond violated Section 8(a)(1), (2), and (3) of the Act on October 2 when it warned its employees that they must sign with the Carpenters "that day" in order to continue working; immediately recognized the Carpenters as the employees' Section 9(a) bargaining representative based solely on the cards so coercively obtained; and applied its CBA with the Carpenters to the employees at a time when the Carpenters did not represent an uncoerced majority. Likewise, the Carpenters violated Section 8(b)(1)(A) and (2) of the Act by accepting that assistance and recognition, and applying that agreement.

The credited testimony and settled law supports these findings. Neither Raymond nor the Carpenters can show the credited evidence is inherently incredible or "patently unreasonable." Moreover, Raymond cannot show that its sign-today-or-no-work warnings only impacted membership forms, not the authorization cards used to recognize the Carpenters. Indeed, the Carpenters

immediately followed Raymond's ominous warnings by giving employees one document combining both forms, thus leading employees to reasonably believe they must sign both in order to continue working.

III. Settled law holds that a union violates Section 8(b)(1)(A) by failing to inform employees of their *Beck* rights when it first seeks to obligate them to pay union dues and fees. Thus, the Carpenters violated the Act by admittedly failing to give employees any *Beck* notice until *after* they had executed membership applications and dues-checkoff forms. This same law clearly rejects the Carpenters' novel claim that it timely provided *Beck* notices *after* employees completed the forms but *before* actually collecting dues. Nor did the Board err in ordering the established, court-approved remedy that Raymond and the Carpenters jointly and severally reimburse employees for wrongfully collected dues.

IV. On October 2, Raymond and the Carpenters coerced employees in their organizational rights and unlawfully imposed the Carpenters as their Section 9(a) representative. The Board ordered the traditional, court-approved remedy for these violations when it refused to allow any bargaining relationship between the parties unless and until the Board duly certifies that the employees have freely chosen the Carpenters. Anything less would fail to restore employee free choice.

A. Raymond and the Carpenters assert that as they had established a lawful Section 8(f) bargaining relationship on October 1, they should be permitted to

revert to that asserted relationship, even assuming they coerced employees on October 2. To the contrary, any alleged bargaining relationship in existence on October 1 was irretrievably broken when they coerced the employees the next day. Accordingly, the Board reasonably explained that any findings about the nature and legality of their alleged bargaining relationship on October 1 “would be cumulative of the findings of unlawful conduct occurring on October 2, and would not materially affect the remedy.” (JER 6). Further, the parties’ proposal fails because it would require that the employees be represented by the same Carpenters union that had just coerced them in their choice of representative.

B. The Board continued to follow settled law in ordering Raymond to provide substitute benefit-plan coverage equivalent to that provided through the Carpenters CBA. The Painters claim that this remedy must further include benefits equivalent to those established in the Painters’ expired Section 8(f) agreement with Raymond. This claim fails because there is no legal basis whatsoever for ordering Raymond to continue the terms of a lawfully terminated 8(f) agreement.

ARGUMENT**I. THE COURT SHOULD NOT DEFER PROCESSING THIS CASE PENDING THE SUPREME COURT'S DECISION IN *NEW PROCESS***

Raymond suggests (Co Br 24, *see also* Carp Br 55) that the Court “defer deciding this [case] until the Supreme Court’s decision in *New Process*” on the authority of the two-member Board to issue decisions. The Supreme Court heard argument in that case on March 23, 2010, and is expected to issue a decision by the end of June, in all likelihood before this Court, in the normal course of case processing, would hear oral argument in this case. However, to the extent that this Court interprets Raymond’s argument as an attempt to stay processing of this case in the normal course, the Board opposes this effort and respectfully urges the Court to continue processing this case as expeditiously as the normal course of processing allows. Permitting the case to proceed will make the case ripe for decision at the earliest possible date.

Although the Supreme Court granted a writ of certiorari and heard oral argument in *New Process*, this Court retains discretion to review the case before it. *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (courts have discretion to decide whether to stay proceedings pending disposition of a case in another court; this discretion is “incidental to the power inherent in every court to control the disposition of the causes on its docket”); *Magnum Import Co. v. Coty*, 262 U.S. 159, 164 (1923) (refusing to stay mandate while petition for certiorari pending, and

even after certiorari is granted, is “wholly within [court of appeal’s] discretion”); *Markham v. Kallimanis*, 151 F.2d 145, 147 (9th Cir. 1945) (delay of litigation to await the outcome of a writ of certiorari in another case before the Supreme Court is unwarranted). Indeed, since the Supreme Court’s grant of certiorari in *New Process*, the Fourth and Tenth Circuits have issued decisions upholding the authority of a two-member Board to act. *See Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3629 (U.S. Apr. 15, 2010) (No. 09-1248); *Teamsters Local Union No. 523 v. NLRB*, 509 F.3d 849 (10th Cir. 2009), *petition for cert. filed*, __ U.S.L.W. __ (U.S. May 17, 2010) (No. 09-1404).

The Board believes that there is no reason to defer processing this case. Raymond’s sole justification (Br 24) is that the two-member Board issue “is currently pending before . . . the Supreme Court.” However, a pending case before the Supreme Court does not compel such action, and Raymond has demonstrated no undue hardship or inequity from continuing to process the case in the normal course, nor could it. Apart from the two-member Board issue, the issues in this case turn on credibility, and the application of well-settled principles to largely undisputed facts. Moreover, delaying resolution of this case will frustrate an important federal labor policy regarding expeditious resolution of unfair labor practices preventing employees from exercising their right to free choice of

bargaining representative, while permitting the case to proceed will make the case ripe for decision at the earliest possible date. This case involves coercive organizing tactics that culminated in unlawfully establishing the Carpenters as the drywall-finishing employees' Section 9(a) bargaining representative without the uncoerced consent of a majority of those employees. As the Supreme Court has explained, "there is no clearer abridgement" of the employees' organizational rights than an employer's unlawful recognition of a minority union. *ILGWU v. NLRB*, 366 U.S. 731, 737 (1961). A principal purpose of the Act is to guarantee that employees enjoy a free choice of bargaining representative untainted by employer and union coercion. That interest, we submit, militates against any delay of this case.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT, ON OCTOBER 2, RAYMOND VIOLATED SECTION 8(a)(1), (2) AND (3) BY UNLAWFULLY ASSISTING THE CARPENTERS IN OBTAINING UNION AUTHORIZATION CARDS FROM ITS DRYWALL-FINISHING EMPLOYEES; THAT RAYMOND FURTHER VIOLATED THAT SECTION OF THE ACT BY GRANTING, AND THE CARPENTERS VIOLATED SECTION 8(b)(1)(A) BY ACCEPTING, RECOGNITION AS THOSE EMPLOYEES’ EXCLUSIVE BARGAINING REPRESENTATIVE BASED ON THOSE TAINTED CARDS; AND THAT RAYMOND VIOLATED SECTION 8(a)(3), AND THE CARPENTERS VIOLATED 8(b)(2), BY APPLYING THE CARPENTERS AGREEMENT AND ITS UNION-SECURITY CLAUSE TO THOSE EMPLOYEES AT A TIME WHEN THE CARPENTERS DID NOT REPRESENT AN UNCOERCED MAJORITY

A. Introduction

On October 2, Raymond and the Carpenters held a meeting with employees who had historically been represented by the Painters, during which they coerced employees into signing Carpenters’ authorization and membership cards that day in order to keep their jobs. Following settled law, the Board found that this conduct violated the employees’ right to freely choose their union representative, and ordered the only remedy that would fully dissipate the unlawful coercion that tainted the card signing—withdrawal of recognition from the Carpenters as the bargaining representative of these employees unless and until it has been certified by the Board, to ensure that the employees have freely expressed their preference.

Raymond and the Carpenters present numerous arguments addressing a variety of different relationships that might have existed between them on October

1, ranging from accretion to an 8(f) agreement, to a 9(a) agreement that reverted back to an 8(f). The simple answer is that these arguments are irrelevant. The Board found that, irrespective of whatever relationship might have existed on October 1, when Raymond and the Carpenters coerced the employees on October 2, any prior bargaining relationship was irretrievably broken. The Board appropriately refused to allow any bargaining relationship between the parties until a Board certification verified that the employees had freely chosen a representative.

B. The Act Requires that Employees' Free Choice of Bargaining Representative Be Untainted By Any Employer Compulsion or Influence

Section 7 and Section 9(a) of the Act (29 U.S.C. § 157 and § 159(a)) guarantee employees freedom of choice and majority rule in their selection of a bargaining unit representative. *Int'l Ladies Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961) (“*ILGWU*”). Accordingly, the collective-bargaining process must be “free . . . from all taint of an employer’s compulsion, domination or influence.” *Int'l Ass'n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 80 (1940).

Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) therefore makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support

to it.” See *Industrial, Technical and Professional Employees Division, Nat’l Maritime Union of America v. NLRB*, 683 F.2d 305 (9th Cir. 1982) (“*Nat’l Maritime Union*”). It is well settled, for example, that an employer violates Section 8(a)(2) and (1)⁵ by unlawfully aiding a union in its efforts to obtain majority support in a unit of employees, and by recognizing the union on the basis of that unlawfully assisted majority. See *Dairyland USA Corp*, 347 NLRB 310, 311 (2006), *enforced sub nom. NLRB v. Local 348-S, UFCW*, 273 Fed.Appx. 40 (2d Cir. 2008) (“*Local 348-S*”); *Duane Read, Inc.*, 338 NLRB 943, 944 (2003), *enforced* 99 Fed.Appx. 240 (D.C. Cir. 2004); *accord Nat’l Maritime Union*, 683 F.2d at 306, 308. Likewise, an employer violates Section 8(a)(3) when it conditions its employees’ continued employment on immediate membership in the union at a time when the employees enjoy a contractual or statutory grace period,

⁵ Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act (29 U.S.C. § 157)].” A violation of Section 8(a)(2) results in a derivative violation of Section 8(a)(1). See *Fun Striders, Inc. v. NLRB*, 686 F.2d 659, 661 (9th Cir. 1981); *accord NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1264 n.1 (4th Cir. 1994). The union counterpart of Section 8(a)(1) is Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)), which makes it an unfair labor practice for a union to “restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act.]”

during which they cannot be lawfully compelled to join the union.⁶ *See Acme Tile and Terrazo Co.*, 318 NLRB 425 (1995), *enforced* 87 F.3d 558 (1st Cir. 1996); *accord Booth Serv.*, 206 NLRB 862, 865 n.8 (1973) *enforced as modified*, 516 F.2d 949 (5th Cir. 1975); *Campbell Soup Co. v. NLRB*, 378 F.2d 259 (9th Cir. 1967).

In demonstrating unlawful assistance, the Board's General Counsel is not required "to show mathematically that less than a majority [of the employer's employees] freely signed [union] authorization cards." *Amalgamated Local Union 335 v. NLRB*, 481 F.2d 996, 1002 n. 8 (2d Cir. 1973); *accord Local 348-S*, 273 Fed.Appx. at 42; *NLRB v. Windsor Castle Healthcare Facilities, Inc.*, 13 F.3d 619, 623 (2d Cir. 1994). Rather, the Board examines the "totality of the circumstances" surrounding the employer's recognition of the union, and need only find a "pattern of employer assistance." *Dairyland USA Corp.*, 347 NLRB at 311-12.

⁶ Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employers from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any [union]." The Act makes an exception to this broad prohibition that permits an employer to enter into certain union-security contracts requiring union membership as a condition of employment, with the proviso that such a requirement cannot be enforced prior to the 30th day of employment. A construction industry union-security clause, pursuant to Section 8(f), bars the employer from requiring union membership as a condition of employment until after the 7th day of employment. Accordingly, it is settled that an employer violates Section 8(a)(3) by conditioning its employees' continued employment on immediate union membership in derogation of a statutory or contractual grace period. *Acme Tile*, 87 F.3d at 561.

Nor is the Board required to look into either the employer's motive for assisting the union, or the employees' subjective reactions to that assistance. Proof of actual coercion is unnecessary; it is sufficient that the employer's assistance has a "tendency to coerce employees in the exercise of their organizational rights." *NLRB v. Vernitron Elec. Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977); accord *NLRB v. Midwestern Personnel Serv., Inc.*, 322 F.3d 969, 977 (7th Cir. 2003). In making that determination, the Board reasonably "take[s] into account the economic dependence of the employees on their employers" *NLRB v. Gissel Packaging Co.*, 395 U.S. 575, 617 (1969) ("*Gissel*"). See *Lodge* 35, 311 U.S. at 78 (even "[s]light suggestions as to the employer's choice . . . may have telling effect" among employees).

Once an employer unlawfully assists a union in gathering support, "any subsequent recognition of the union is tainted." *Windsor Castle*, 13 F.3d at 622-23. Thus, the employer violates Section 8(a)(2) and (1) by extending, and the union violates Section 8(b)(1)(A) by accepting, recognition as the employees' bargaining representative at a time when the union does not represent an uncoerced majority of those employees. *ILGWU*, 366 U.S. at 737; *Nat'l Maritime Union*, 683 F.2d at 306, 308; *Duane Read, Inc.*, 338 NLRB at 944. As the D.C. Circuit has recognized, "[e]mployer recognition of a union is as much an unfair labor practice when the union has majority support procured by employer assistance as when the

union in fact lacks majority support entirely.” *District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1162 (D.C. Cir. 1978). *See also Windsor Castle*, 13 F.3d at 623 (citation omitted) (in such circumstances, “employees cannot be said to have freely selected the union and the union does not represent an uncoerced majority of the employees”).

Further, an employer violates Section 8(a)(3), and a union violates Section 8(b)(2), by applying a collective-bargaining agreement, including its union-security provision, to employees at a time when the union does not represent an uncoerced majority. *Duane Read, Inc.*, 338 NLRB at 944. *See also ILGWU*, 366 U.S. at 737-39; *Windsor Castle*, 13 F.3d at 622-23; *Int’l Union of Petroleum & Indus Workers v. NLRB*, 980 F.2d 774, 778 (D.C. Cir. 1992).

This Court will not disturb the Board’s factual findings if substantial evidence supports the Board’s inferences and conclusions, “even if the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. Bighorn Beverage Co.*, 614 F.2d 1238, 1240 (9th Cir. 1980). Further, this Court has long held that the Board’s credibility determinations “are given great deference, and are upheld unless they are inherently incredible or patently unreasonable.” *Retlaw Broad Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). Finally, this Court will defer to the Board’s interpretation of the Act unless the

Board's view is irrational or inconsistent with the Act. *Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006, 1008 (9th Cir. 1985).

C. Substantial Evidence Supports the Board's Findings that Raymond Unlawfully Assisted and Recognized the Carpenters; that the Carpenters Unlawfully Accepted that Assistance and Recognition; and that They Both Violated the Act By Applying the Carpenters Agreement To the Drywall-Finishing Employees at a Time When the Carpenters Lacked Uncoerced Majority Support

The Board found (JER 6-7) that Raymond violated Section 8(a)(1), (2) and (3) of the Act by unlawfully assisting the Carpenters in obtaining union-authorization cards from Raymond's drywall-finishing employees, by recognizing the Carpenters based solely on those tainted cards, and by applying the 2006 Carpenters agreement to those employees at a time when the Carpenters did not represent an uncoerced majority of those employees; and that the Carpenters violated Section 8(b)(1)(A) and (2) of the Act by accepting that assistance and recognition, and by applying that agreement. These findings are amply supported by undisputed facts, credited testimony, and well-settled law, and must, therefore, be affirmed.

It is undisputed that Raymond directed its drywall-finishing employees, none of whom were members of the Carpenters at the time, to attend an October 2 meeting with the Carpenters at Raymond's premises. The credited testimony shows that, during that meeting, Raymond's top two officials told employees that

they must join the Carpenters “that day” in order to continue working. Then, with that warning fresh in their minds, the Carpenters quickly provided employees with a 3-page document that combined a Carpenters membership form, an authorization form, and a supplemental dues checkoff form. Not surprisingly, most employees heeded their employer’s warning and signed with the Carpenters that day in order to keep working. Just a few hours later, and based solely on the authorization cards so obtained, Raymond granted 9(a) recognition to the Carpenters as the employees’ exclusive bargaining representative, and applied the 2006 Carpenters master agreement and its union-security clause to those employees. The Board reasonably found that these facts establish unlawful assistance, recognition, and application of the Carpenters 2006 master agreement.

Settled law and credited testimony clearly support the Board’s finding that, on October 2, Raymond unlawfully assisted the Carpenters in obtaining authorization cards from Raymond’s drywall-finishing employees. Specifically, the credited testimony shows that Raymond’s President Winsor and Superintendent Zerrero told employees they must join the Carpenters “that day” in order to continue working. These statements explicitly conditioned continued employment on immediate membership in the Carpenters. As such, these statements clearly constitute unlawful assistance under settled law. *See Acme Tile*, 318 NLRB 425, 427-28 (1995), *enforced* 87 F.3d 558 (1st Cir. 1995) (employer violated the Act by

implicitly and explicitly conditioning continued employment on “immediate membership” in the union, thus denying employees their statutory and contractual grace periods); *accord Booth Serv.*, 206 NLRB 862, 865 n. 8 (1973), *enforced as modified*, 516 F.2d 949 (5th Cir. 1975); *Campbell Soup Co. v. NLRB*, 378 F.2d 259 (9th Cir. 1967). *See generally ILGWU*, 366 U.S. at 737; *Midwestern Personnel Serv.*, 322 F.3d at 977-78; *Nat’l Maritime Union*, 683 F.2d at 306, 308; *Dairyland USA Corp*, 347 NLRB at 311; *Duane Read, Inc.*, 338 NLRB at 944 (employer violated the Act by interfering with employees’ decision whether to support union and by assisting union in gaining the support of employees).

Moreover, the Board reasonably found (JER 6) that because Raymond’s unlawful assistance tainted the authorization cards, Raymond acted unlawfully when it immediately granted Section 9(a) recognition to the Carpenters based solely on those cards. As the Board explained, it follows under settled law (*see cases cited above at pp. 29-30*) that Raymond violated Section 8(a)(2) and (1) by granting, and the Carpenters violated Section 8(b)(1)(A) by accepting, recognition as the employees’ bargaining representative at a time when the Carpenters did not represent an uncoerced majority of those employees.

In so finding, the Board reasonably rejected Raymond’s claim, which it re-urges on appeal (Br 46-48), that its sign-today-or-no-work warnings could only impact the employees’ decision to sign membership forms, not authorization cards.

As shown, Raymond explicitly warned employees that they must “sign” up with the Carpenters “that day” in order to continue working. Then, with Raymond’s ominous sign-or-else warning fresh in their minds, the Carpenters immediately provided employees with a single, 3-page document that combined a Carpenters membership form, an authorization form, and a supplemental dues checkoff form. Not surprisingly, most employees complied by completing and returning the document with the signed forms that day.

As Board reasonably found (JER 28), these circumstances leave no doubt that the employees would, in order to continue working, reasonably feel compelled to “complete[] and execute[] every form on the large document without regard to the difference between them.” *See Booth Serv.*, 516 F.2d at 951 (employees simultaneously provided tax and union-authorization forms would reasonably feel compelled to sign both in order to begin working). In so finding, the Board properly took “into account the economic dependence of the employees on their employer.” *Gissel*, 395 U.S. at 617. Moreover, any doubt would be properly resolved against Raymond. As the Board has explained, where, as here, “an employer imposes certain requirements on its employees, it must bear the burden of any ambiguity in its message.” *Acme Tile*, 318 NLRB at 428 n.8.

In response, Raymond (Br 48) simply ignores the applicable test, positing that there is no evidence that Winsor’s and Zerrero’s threats actually “caused

employees to sign authorization cards.” To the contrary, the test is not whether the coercion succeeded or failed (*see* cases cited above at p. 29), but whether, as the Board reasonably found, Raymond’s conduct had a reasonable tendency to coerce employees in the exercise of their free choice of bargaining representative.

Moreover, as noted (*see* cases cited above a pp. 28-30), the Board’s General Counsel is not required to prove “with mathematical precision” that the Carpenters lacked the support of an uncoerced majority of the employees.

Finally, it follows (*see* cases cited above at p. 30) that Raymond also violated Section 8(a)(3) of the Act, and the Carpenters violated Section 8(b)(2), by maintaining and applying the Carpenters 2006 master agreement, including its union-security clause, to the drywall-finishing employees at a time when the Carpenters did not represent a uncoerced majority of those employees. It is undisputed that those parties were applying that agreement to the drywall-finishing employees on October 2, when, as just shown, Raymond unlawfully recognized the Carpenters. (JER 6-7.)

D. The Parties Fail to Meet Their Heavy Burden in Seeking to Overturn the Board’s Reasonable Credibility Determinations

To undermine the Board’s findings, based on the credited testimony, that Raymond unlawfully told the employees that they had to sign up with the Carpenters “that day” or they would have no work tomorrow, the parties attack the Board’s choice of whom to believe. They face an uphill battle. The courts have

consistently held that they are “in no position to substitute” their judgment for the Board’s. *Colfor, Inc. v. NLRB*, 678 F.2d 655, 656 (6th Cir. 1982); accord *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). This is so because the credibility resolutions of an administrative law judge “who has observed the demeanor of the witness” are not normally disturbed. *NLRB v. Baja’s Place*, 733 F.2d 416, 421 (6th Cir. 1984). Accordingly, the Board’s credibility determinations “are given great deference, and are upheld unless they are inherently incredible or patently unreasonable.” *Retlaw Broad. Co.*, 53 F.3d at 1006. Moreover, deference to the Board’s findings is particularly appropriate where the “record is fraught with conflicting testimony and essential credibility determinations have been made.” *NLRB v. Nueva Eng’g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985). As we now show, the parties fail to meet their heavy burden.

The parties attack (Co Br 38-46, Carp Br 33-43) the Board’s decision to believe the three witnesses—employees Ramos, Pineda, and Alvarez—who testified that company officials Winsor and Zerrero made the unlawful statements, over Winsor’s and Zerrero’s discredited denials of having made those statements. The parties fail to show that the Board’s resolution of the conflicting testimony was patently unreasonable. Rather, the Board, in several pages devoted to witness credibility (JER 16-21, 28), carefully explained why the employee witnesses were more credible, fully taking into consideration their demeanor, consistency, quality

of recollection, and other relevant factors. While it is unnecessary to address every one of the parties' meritless claims, we discuss a few of them to illustrate why they fail.

Contrary to Raymond (Br 45-46), the Board reasonably discredited (JER 28) Winsor's and Zerrero's rote denials of the unlawful statements attributed to them. Winsor, for example, "appeared to be testifying disingenuously" regarding whether he told the employees "they had to reach a decision that day" (JER 556-67); was "contradictory" as to whether this referred to enrolling for benefits or to union membership (JER 559-61, 565-67); and was "adroitly labored and vague" as to what, exactly, he told employees about the master agreement's union-security clause during the October 2 meeting. (JER 28; *compare* JER 589-90 (admitting he spoke from written talking points (JER 1004) that explicitly referred to the employees' obligations under the union-security clause) *and* JER 556-58, 608-09 (equivocating as to whether and how he actually discussed that clause).) Raymond provides no basis for overturning these sound, demeanor-based findings. Moreover, as the Board explained (JER 27-28), Winsor's and Zerrero's denials were properly rejected because they conflicted with the credited employee testimony, which the parties have failed to undermine.

As to Ramos, for example, the Board reasonably credited his testimony that Winsor told employees that there would be no more work for them unless they

signed up with the Carpenters “that day.” (JER 27; 430, 441, 453.) As the judge explained (JER 27), Ramos was particularly trustworthy given his forthright demeanor, and because his conduct right after the meeting was consistent with his recollection during the hearing of Raymond’s unlawful statements. In this regard, Ramos, who did not evidence any written support for the Carpenters on October 2, testified that he did not show up to work the next day because Winsor said that if he did not sign “that day” there would be no work tomorrow. (JER 27; 453.)

Raymond and the Carpenters do not directly challenge these demeanor-based findings, but instead resort to mischaracterizing Ramos’s testimony to suggest (Co Br 40-42, Carp Br 41) that he contradicted himself on the stand. The parties are simply wrong. Specifically, Ramos testified that Winsor first told the employees that they must sign cards to continue working. Ramos also explained that, when Winsor was subsequently asked essentially the same question again, Winsor specifically said that employees must sign cards “that day” in order to continue working. As Ramos noted, Winsor appeared “upset” when the question was repeated. Thus, Ramos clearly explained that it was Winsor who varied his response when he answered the same question a second time. Ramos, in contrast, did not equivocate. Rather, he remembered “precisely” that, when Winsor was asked again what would happen if employees refused to sign with the Carpenters,

Winsor replied, “no, if you don’t sign now this day there’s no work.” (JER 27; 430, 441.)

Raymond and the Carpenters continue to take Ramos’s testimony out of context, and ignore undisputed facts, when they wrongly suggest (Co Br 40-41, Carp Br 42) that, as a Spanish speaker, Ramos could not have understood what Winsor said during the meeting. Raymond, for example, selectively quotes Ramos’s testimony to the effect that he lacked a strong understanding of English, but listened to Winsor’s statements in English. However, Raymond conveniently ignores that Ramos immediately explained (JER 421, 439) that he wore a headset through which he received a simultaneous English-to-Spanish translation of Winsor’s statements.⁷ Thus, “when [Winsor] spoke in English,” Ramos “hear[d] Spanish in the headset.” (*Id.*) There is no claim or evidence that Ramos disregarded that translation. To the contrary, when he was asked “precisely what words [he] heard *translated* that Mr. Winsor said,” Ramos clearly responded, that “[t]he only thing I remember precisely is exactly that, when he was asked what happened if somebody would refuse to sign he said no, if you don’t sign now this day there’s no work.” (JER 441) (emphasis added.)

⁷ It is undisputed that the Spanish-speaking employees, including Ramos, were provided such translation.

Further, the Board reasonably credited Pineda, who, like Ramos, consistently testified that Winsor told employees they “could not work the following day if we didn’t sign with the Carpenters.” (JER 17, 28; 287-88, 313-14, 326.) Not only was her testimony corroborated by Ramos, but also it was consistent with her prior, sworn affidavit to the Board. (JER 314, 326.)

The parties must ignore the relevant particulars of Pineda’s testimony in a failed attempt to conjure up fundamental inconsistencies. For example, it is of no moment (Co Br 43-44, Carp Br 37) whether Pineda was unsure if Winsor had told employees that they had “plenty of time to think about [whether to sign up with the Carpenters] today,” or simply that they “had plenty of time to think about it.” What does matter is that, either way, Pineda was certain that Winsor made this statement only *after* telling employees that they had to sign up *that day*. (JER 326.)

Next, Raymond misses the mark when it claims (Br 42) that Pineda’s testimony about these unlawful statements should be rejected because she could not clearly recall details about the meeting that were less relevant to her future employment, such as whether a Power Point presentation was used while Winsor spoke, or whether Raymond passed out memos during his presentation. To the contrary, this simply confirms that Pineda became more focused when Raymond issued unlawful warnings about her future employment. This is understandable.

As the Supreme Court has long observed, it is only natural that employees will pay special attention to employer statements that implicate their “economic dependence . . . on their employers.” *Gissel*, 395 U.S. at 617.

The parties wildly overstate their case when they assert (Co Br 43, Carp Br 34-37) that an irreconcilable conflict exists between Pineda’s and Ramos’s testimony that Winsor said the employees must sign “that day,” and employee Meyer’s testimony that Winsor simply said they must “sign” in order to continue working. These two recollections are far from mutually exclusive. The fact that Winsor may have at one point said that employees must sign, does not in itself prove that he did not also say that employees must sign “that day.” Indeed, as discussed, Ramos credibly testified that Winsor did just that: at one point, Winsor told employees they must “sign” with the Carpenters in order to continue working, and then, when the same question was repeated, he specifically told them that they must sign “that day.”

They fair no better in attacking Alvarez’s credited testimony (JER 339, 346, 361) that Zerrero made these unlawful statements. Raymond, for example, simply ignores Alvarez’s testimony when it suggests (Br 44) that he could not understand what was said to him in English during the meeting. Alvarez testified, without contradiction, that he was able to understand what was said in English during the meeting. (JER 352.) Accordingly, he was able to clearly testify, in English, that

Zerrero told the employees: “There’s no time to think about it. Either sign for us today or you cannot work tomorrow for us.” (JER 361.)

III. THE CARPENTERS VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY FAILING TO TIMELY INFORM EMPLOYEES OF THEIR *BECK* RIGHTS AT THE TIME IT FIRST SOUGHT TO OBLIGATE THEM TO BECOME UNION MEMBERS AND PAY UNION DUES

A. The Carpenters Failed to Timely Provide a *Beck* Notice

A union must inform employees, when it first seeks to obligate them to pay dues and fees under a union-security clause, of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), to be and remain nonmembers of the union. At the same time, it must inform them of their corresponding rights, as nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities that are not germane to the union’s duties as collective-bargaining representative, and to obtain a reduction-in-dues for such activities. *See generally California Saw & Knife Works*, 320 NLRB 224, 233-35 (1995), *enforced sub nom. Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998). By failing to timely provide “*Beck* notices,” the union violates its duty of fair representation and Section 8(b)(1)(A) of the Act. *California Saw*, 320 NLRB at 233-35.

It is settled that, to be timely, the *Beck* notices must be given “when or before a union seeks to obligate an employee to pay fees and dues under a union-security clause.” *California Saw*, 320 NLRB at 233. Specifically, “[t]he

presentation of the membership application and dues checkoff form to a newly hired non-member employee constitutes an attempt to obligate an employee to pay full dues.”⁸ *California Saw*, 320 NLRB at 235. This is so because, “[b]asic considerations of fairness require that the union at that time inform newly hired employees of their *Beck* rights.” *Id.* Otherwise, absent “concurrent notification” of *Beck* rights, the presentation of dues-checkoff and membership forms “may mislead . . . nonmember employees to believe [in contradiction of their *Beck* rights] that payment of full dues and assumption of full membership is required.” *Id.*

It is undisputed that the Carpenters presented employees with membership applications and supplemental dues-checkoff forms *before* advising them of their *Beck* rights. Moreover, the Carpenters admittedly (JER 674) failed to give employees any *Beck* notices until *after* employees had executed membership applications and supplemental dues checkoff forms. Accordingly, the Carpenters violated Section 8(b)(1)(A).

The record evidence demonstrates that, at the October 2 meeting, Winsor told his drywall-finishing employees—none of whom were members of the

⁸ While they were not literally “newly hired,” Raymond and the Carpenters effectively treated the drywall-finishing employees as such for the purposes of newly subjecting them to the union-security clause of the Carpenters 2006 master agreement. (*See* JER 30 n.72).

Carpenters at the time—that they must immediately join the Carpenters in order to continue working. Following Winsor’s speech, Carpenters officials spoke about the employees’ obligation to pay monthly dues, but admittedly did not inform employees of their *Beck* rights at that time. Shortly thereafter, the Carpenters gave employees a document containing both a membership application and a supplemental dues-checkoff form. The membership application specifically provides for “Monthly dues in the amount of \$ __, per month, *commencing immediately.*” (JER 15, 30; 860) (emphasis added.)

To the extent that the Carpenters subsequently supplied employees with a Carpenters magazine that assertedly contained a printed *Beck* notice, it is undisputed that it did so only after employees returned executed membership and dues-checkoff forms. Thus, the Board correctly found that the Carpenters failed to timely inform employees of their *Beck* rights and that providing *Beck* notices in the Carpenters magazine *after* the employees signed the membership and dues-checkoff forms did not satisfy its obligations under *Beck*.⁹ (JER 25; 674.)

⁹ The Carpenters claim (Br 50-52) that the format of the *Beck* notice in the magazine satisfied *California Saw*. However, because that notice was untimely, the Board found it unnecessary to decide whether the notice itself was adequate.

B. The Carpenters' Contentions Are Without Merit

In response, the Carpenters do not dispute (Br 48-50) that it failed to provide the employees with a *Beck* notice until after they had completed the forms. Instead, it offers the novel claim (*id.*) that, contrary to settled law, its distribution of forms did not obligate employees to pay dues, because no dues or fees were requested or collected at the October 2 meeting. It thus claims (Br 49, emphasis added) that employees were timely “given the *Beck* notice *after* completing membership forms, but before being obligated to pay dues or fees.”

The Carpenters confuse the obligation to pay with actual payment, and ignore the settled legal import of the former. As *California Saw* and the other cases cited by the Carpenters (Br 49 n.10) make clear, the presentation of a union membership application constitutes an attempt to obligate employees to pay union dues; the union must inform employees of their rights at that time. Moreover, the Carpenters ignore the gravamen of the violation here, which is the presentation of forms without employees having the benefit of notice of their *Beck* rights. As the Board has noted, “absent concurrent notification” of *Beck* rights, the presentation of these forms “may mislead . . . nonmember employees to believe [in contradiction of their *Beck* rights] that payment of full dues and assumption of full membership is required.” *California Saw*, 320 NLRB at 235. Here, of course, the

Carpenters not only failed to provide “concurrent notification,” but also it failed to provide *any* notice until after employees had returned executed forms.

Next, the Carpenters err in claiming (Br 53-54) that, even assuming the Board properly found the *Beck* violation, the Board’s remedy exceeds what has been authorized in similar *Beck* cases. The Board’s Order requires the Carpenters and Raymond to jointly and severally reimburse all of Raymond’s drywall-finishing employees who joined the Carpenters on or after October 2, for any initiation fees, periodic dues, assessments, or other moneys which they may have paid. The Board has, with court approval, awarded this exact remedy where, as here, the employer who unlawfully assisted and recognized the union, and the union who unlawfully accepted that recognition, violated the Act by applying a union-security clause and obligating employees to become union members and pay dues. *See Duane Read, Inc.*, 338 NLRB 943, 944-45 (2003), *enforced* 99 Fed.Appx. 240 (D.C. Cir. 2004) (ordering union and employer that unlawfully enforced union-security clause to “jointly and severally” reimburse employees for dues and other monies unlawfully collected pursuant to that clause); *Dairyland USA Corp*, 347 NLRB 310, 314 (2006), *enforced* 273 Fed.Appx. 40 (2d Cir. 2008) (same remedy for same violation). As this Court has explained, “reimbursement . . . effectuate[s] the policy of the Act by returning to employees the money paid to

support a union they did not freely chose to join.” *Nat’l Maritime Union*, 683 F.2d at 308.

IV. THE BOARD ACTED WITHIN ITS BROAD DISCRETION WHEN IT AWARDED THE TRADITIONAL, COURT-APPROVED, REMEDY FOR THE UNLAWFUL ASSISTANCE AND RECOGNITION FOUND HERE

Raymond and the Carpenters held a meeting on October 2 during which they coerced employees into signing authorization and membership cards and then imposed the Carpenters as the employees’ Section 9(a) representative. Following settled law, the Board ordered the only remedy that would dissipate the unlawful coercion and tainted card signing: that these parties be separated unless and until the Board certifies that the employees have freely expressed their preference for a particular union.

Raymond (Br 24-38, 49-54) and the Carpenters (Br 19-29, 43-46) respond with a series of arguments suggesting numerous ways in which they had established a Section 8(f) bargaining relationship on, if not before, October 1, and then fault the Board for not issuing a remedy that allows them to revert to this alleged status. This claim is to no avail. Any bargaining relationship that existed on October 1 was irretrievably broken when Raymond and the Carpenters coerced the employees the next day, and allowing them to nevertheless maintain a collective-bargaining relationship would reward their wrongdoing and, obviously, fail to truly restore employee free choice. Accordingly, it is irrelevant whether the

parties had lawfully established a bargaining relationship on October 1, or whether the relationship, if any, was pursuant to Section 8(f) or Section 9(a).

A. The Board Is Afforded Broad Discretion in Formulating Remedies

Section 10(c) of the Act (29 U.S.C. § 160(c)) empowers the Board to issue an order requiring the labor law violator “to take such affirmative action . . . as will effectuate the purposes of the Act.” The Board’s task in issuing orders to effectuate the purposes of the Act is to restore the status quo ante—in other words, to “take measures designed to recreate the conditions and relationships that would have been there had there been no unfair labor practice.” *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 769 (1975). In crafting such a remedy, the Board properly secures the rights of the injured parties and deters the commission of future wrongdoing by preventing the wrongdoer from gaining an advantage from its unlawful conduct. *NLRB v. Hartman*, 774 F.2d 1376, 1388 (9th Cir. 1985); *accord Sheet Metal Workers’ Local 355 v. NLRB*, 716 F.2d 1249, 1256 (9th Cir. 1983) (noting that the Act “requires that a transgressor should bear the burden of the consequences stemming from its illegal acts”).

Where, as here, the Board is “remedying coercive union organizing,” it promotes the policies of the Act by “severing [the illegally recognized union’s] connection with the employer, restoring freedom of choice to the employee, and encouraging the employee to exercise his rights under the Act.” *Nat’l Maritime*

Union, 683 F.2d at 308 (quoting *NLRB v. Forest City/Dillon-Tecon Pacific*, 522 F.2d 1107, 1109 (9th Cir. 1975)). Accordingly, to accomplish these valid remedial goals, the Board has, with court approval, routinely ordered that the employer cease recognizing and bargaining with the unlawfully recognized union until the union has been duly certified by the Board as the employees' bargaining representative. See *ILGWU*, 366 U.S. 731, 735-37 (1961); *Duane Read, Inc.*, 338 NLRB 943, 944-45 (2003), *enforced* 99 Fed.Appx. 240 (D.C. Cir. 2004); *Dairyland USA Corp*, 347 NLRB 310, 310, 314 (2006), *enforced* 273 Fed.Appx. 40 (2d Cir. 2008); *Windsor Castle*, 310 NLRB 579 (1981), *enforced as modified* 13 F.3d 619 (2d Cir 1994).

The Board's discretion in formulating remedies "is a broad one, subject to limited judicial review." *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). Because of its special expertise, the Board is afforded broad discretion in formulating remedies that will further the purposes of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Hartman*, 774 F.2d at 1387. Accordingly, the Board's choice of remedy must be enforced unless the parties show that the remedy "is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the [A]ct." *Fibreboard Corp.*, 379 U.S. at 216 (quoting

Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943)). The parties fail to meet that heavy burden.

B. The Board’s Remedy is Reasonable Because It Properly Restores the Employees to the Position They Would Have Occupied Absent the Parties’ Violations, and Deprives The Parties of the Advantages Gained By Their Violations

The Board properly remedied Raymond’s unlawful assistance and recognition by ordering it to “withdraw and withhold all recognition” from the Carpenters as the representative of its drywall-finishing employees, and to refrain from applying its agreement with the Carpenters to those employees, “unless and until [the Carpenters] has been certified by the Board” as the bargaining representative of those employees. (JER 7-8.) The Board’s remedy is fully consistent with settled law. *See ILGWU*, 366 U.S. at 735-37 (“Board ordered employer to withhold all recognition from the union and to cease giving effect to agreements entered into with union . . . until such time as a Board-conducted election demonstrated its majority support”); *Duane Read, Inc.*, 338 NLRB at 944-45, *enforced* 99 Fed.Appx. 240 (D.C. Cir. 2004) (ordering employer to “withhold all recognition” from unlawfully assisted and recognized union “unless and until the [union] has been duly certified as the exclusive representative of such employees by the Board”); *Dairyland USA Corp*, 347 NLRB at 310, 314, *enforced* 273 Fed.Appx. 40 (2d Cir. 2008) (same remedy).

This remedy furthers the purposes of the Act by restoring employee free choice and deterring future similar misconduct. *See ILGWU*, 366 U.S. at 737; *Nat'l Maritime Union*, 683 F.2d at 308. As the Supreme Court has described it, “there is no clearer abridgement” of the employees’ organizational rights than an employer’s unlawful recognition of a minority union, and the union’s unlawful acceptance thereof. *ILGWU*, 366 U.S. at 737. Accordingly, the Board properly restores employee free choice by requiring the employer and the unlawfully recognized union to separate until lawfully joined through a Board certification. *Id.* Moreover, because the unlawfully recognized union is “given a marked advantage” over any other “in securing the adherence of employees,” *id.*, this remedy is necessary to fully disengage that union, and to remove from the wrongdoer employer and union the fruits of their unlawfully established relationship. Finally, far from being punitive, as the parties suggest (Co Br 49), such a remedy “places no particular hardship on the employer or the union” because “it merely requires that recognition be withheld” until the Board certifies “a majority selection of representative.” *ILGWU*, 366 U.S. at 739.

C. Raymond’s and The Carpenters’ Contentions Are Without Merit

Raymond (Br 49-53) and the Carpenters (Br 43-46) challenge the portion of the Board’s Order that prohibits Raymond from recognizing the Carpenters as the exclusive bargaining representative of the drywall-finishing employees until it has

been certified as such by the Board. This challenge boldly ignores the settled precedent that supports this remedy. Sweeping aside their unlawfully coercive conduct and interference with the employees' statutory rights on October 2, they suggest (Co Br 36-37, Carp Br 29-31) that they should be allowed to revert to an allegedly valid, previously established bargaining relationship effective October 1. Such a theory plainly contravenes the fundamental remedial principles of restoring employee free choice and removing from the parties the fruits of their coercive organizing tactics. *See ILGWU*, 366 U.S. at 737-39; *Nat'l Maritime Union*, 683 F.2d at 308.

Indeed, adopting this position would permit the parties to unlawfully assist or coerce the creation of a Section 9(a) relationship risk-free, as they could simply revert to their alleged, prior Section 8(f) relationship following their unlawful conduct. Rather than restore employee free choice, it would leave the employees represented by the same union, the Carpenters, that had just coerced them in the exercise of their organizational rights. For these same reasons, the parties' proposal would fail to deter similar future wrongdoing, or to disgorge from the wrongdoers the fruits their violations. After all, nothing would deter parties from coercing a Section 9(a) relationship if they could simply revert to some alleged, prior Section 8(f) relationship. The Carpenters, for example, would be allowed to

retain the “marked advantage” they unlawfully gained “in securing the adherence of [Raymond’s drywall-finishing] employees.” *ILGWU*, 366 U.S. at 737-39.

The parties provide no explanation of how their proposal would vindicate employee free choice. Remarkably, the Carpenters actually claim (Carp 45) that so long as the unlawful 9(a) recognition on October 2 is invalidated, reverting to the asserted October 1 8(f) relationship with the same unlawfully recognized union would have no “impact” on the employees’ organizational rights. This claim utterly ignores the Supreme Court admonition that “there is no clearer abridgement” of the employees’ organizational rights than an employer’s unlawful recognition of a minority union. *ILGWU*, 366 U.S. at 737.

The parties’ remaining claims are plainly without merit. For example, they blatantly mischaracterize (Co Br 36-37, 53, Carp Br 30-31) the Board’s decision in *Zidell*, 175 NLRB 887 (1969), as if it holds that an existing Section 8(f) relationship can *never* be invalidated by subsequent unfair labor practices. Their reliance on *Zidell* is woefully misplaced. To be sure, the Board in *Zidell* held that the specific employer act of unlawful assistance at issue there—after executing a lawful 8(f) contract, the employer, without the union’s knowledge or involvement, unlawfully required employees to sign dues-checkoff authorizations—did not, without more, justify a remedy suspending recognition of the assisted union. However, the Board explicitly limited that holding to circumstances where the

assisted union was *not* “found to have participated in, had any control over, or even been aware of, [the unlawful] conduct.” *Zidell*, 175 NLRB at 888. In other words, the Board simply declined to impose “vicarious liability” on an innocent union. *Id.*¹⁰ Of course, the opposite is true here: the Carpenters was aware of, directly participated in, and had control over its own role in the unlawful conduct found.¹¹

Finally, this Court need not be detained by the parties’ last-ditch attempt to mischaracterize the Board’s remedy as “punitive” (Co Br 49) because it assertedly “eliminat[ed] the right of [the parties] to enter into a Section 8(f) contract, . . . upon the expiration of the Painters agreement.” (Carp Br 43). Simply put, had Raymond and the Carpenters not made a mockery of the drywall-finishing employees’ statutory rights on October 2, they might have been able to exercise whatever rights the Act provided them under Section 8(f) or Section 9(a). But, while Raymond and the Carpenters might want to ignore their unlawful October 2 conduct, the Board need not.

¹⁰ *Zidell* is otherwise distinguishable. The “subsequent” act at issue here—unlawful recognition—implicates the nature of the relationship created, rather than constituting a discrete act of assistance in an otherwise lawful relationship as in *Zidell*.

¹¹ The Carpenters ignores its own unfair labor practices—to wit, the acceptance of Raymond’s unlawful recognition, unlawful application of the CBA, and the *Beck* violation—when it assumes (Br 31) that the unlawful conduct at issue here was solely attributable to Raymond.

D. The Painters' Challenge to the Remedy Must Fail

The Board properly ordered Raymond to provide substitute benefit-plan coverage equivalent to that provided through the Carpenters 2006 master agreement. This remedy is well supported by Board precedent ordering the same remedy to redress unlawful assistance, recognition, and application of a CBA. *See, e.g., Brooklyn Hosp. Ctr.*, 309 NLRB 1163 (1992), *enforced* 9 F.3d 218 (2d Cir. 1993); *Mego Corp.*, 254 NLRB 300 (1981); *Hartz Mountain Corp.*, 228 NLRB 492 (1977). Moreover, this remedy furthers the Act's purposes by ensuring that employees will suffer no loss of benefits. It also helps disengage the Carpenters by ordering that the benefits instead be provided by Raymond. As such, the remedy involves no abuse of discretion and should be affirmed.

However, the Painters argue (Br 16-30) that a complete make-whole remedy must require Raymond to provide substitute benefits equivalent to those established by either the Carpenters' or Painters' agreement, whichever was more generous. The Painters are simply wrong. As we explain below, there is no basis for requiring Raymond to continue the terms of its lawfully terminated Section 8(f) agreement with the Painters.

Section 8(f) allows a construction-industry employer, like Raymond, to recognize a union as its employees' bargaining representative before a majority of them have chosen the union. *See generally Nova Plumbing Inc. v. NLRB*, 330 F.3d

531, 533-35 (D.C. Cir. 2003). The parties to an 8(f) agreement must adhere to it during its term unless the union is decertified or replaced by another bargaining representative in a Board election. *John Deklewa & Sons*, 282 NLRB 1375, 1385 (1987). However, an employer may refuse to bargain after the expiration of an 8(f) agreement, and may unilaterally change terms and conditions of employment from the expired agreement, because the union enjoys no presumption of continuing majority support. *Nova Plumbing*, 330 F.3d at 535. Put differently, the employees lack any entitlement to the terms of that agreement after it has been lawfully terminated. *Id.*

It is undisputed that Raymond lawfully terminated its Section 8(f) agreement with the Painters effective September 30, 2006 when the agreement expired. Thus, by the time the violations occurred on October 2, the employees were clearly not receiving benefits under the Painters' expired Section 8(f) agreement. As a remedial matter then, there is no basis to impose terms equivalent to that agreement.

The Painters fail to provide any basis for the Board to impose terms of an expired 8(f) contract. Rather, it makes a series of claims that must fail because they ignore the basic facts and law just discussed, engage in sheer speculation, mischaracterize the Board's Order, and rely on plainly inapposite cases.

For example, the Painters repeatedly claim (Br 26; *see also* Br 17, 30) that the Board must restore the benefits the employees had “at the expiration of the Painters agreement.” This claim is puzzling because the employees would not continue to receive any benefits from the Painters “at the expiration” of its Section 8(f) agreement on September 30. For similar reasons, the Painters gain no ground in claiming (Br 18-19) that the Board’s remedy wrongly deprives employees of the benefits they enjoyed through the Painters expired agreement “at the time” of Raymond’s unlawful recognition of the Carpenters on October 2.

The Painters repeat the same basic mistake in claiming (Br 18) that the Board’s remedy is based on inapposite cases. In this regard, the Painters claim that Board precedent establishing the substitute-benefit remedy (*see* cases cited above at p. 55) does not apply to employees who “were already getting benefits through another union [the Painters] *at the time of the unlawful recognition.*” (Br 18-19) (emphasis added). As just shown, the employees were simply not receiving benefits through the Painters at the time of the unlawful recognition.¹²

Curiously, the Painters observe (Br 24) that, in issuing a remedy, the Board should refrain from assuming that the Painters’ representation of the employees

¹² The Painters misconstrue (Br 20) the relevance of *Garner/Morrison*, 353 NLRB No. 78 (2009), which the Board cited here (JER 7 n.6). That case is relevant because, like the Board’s Order here, it required the employer to withhold recognition from the unlawfully recognized union until it had been duly certified by the Board.

would not have continued absent the unlawful recognition of the Carpenters. As a matter of undisputed fact, the Painters' representation of those employees was lawfully terminated on September 30. Thus, it is the Painters who speculate (Br 24) that their representative status would have been continued absent coercion. Other than such speculation, it has offered no legal basis for a remedy that would effectively continue the terms of its expired 8(f) agreement.

Next, the Painters offer no support for the claim (Br 25-27) that the Board's remedy fails "fully to disestablish" the unlawfully assisted Carpenters. It wrongly asserts (Br 25-26 & n.7) that the Board's Order mandates that the employees receive "benefits through the Carpenters." To the contrary, the Board's Order requires Raymond to provide equivalent benefits. In so doing, the Board properly ensures that the employees suffer no loss of benefits, and disengages the Carpenters by requiring that Raymond provide the benefits instead.

Finally, in a failed attempt to extend the life of its expired 8(f) agreement, the Painters cite (Br 22, 27-30) a series of cases that are plainly inapposite because they involve, for example, an employer's unlawful repudiation of an 8(f) agreement during its term. The distinction is significant because, as shown, the parties to an 8(f) are obligated to adhere to it during its term, but not thereafter.

Thus, *D.L. Baker, Inc.*, 351 NLRB 515 (2007), on which the Painters mistakenly relies (Br 29), involved a series of unfair labor practices committed

during the term of an unexpired Section 8(f) agreement. Specifically, the employer unlawfully discharged an employee during the term of an 8(f) agreement and also refused to comply with that unexpired agreement. There are, of course, no similar allegations in this case, where all of the unlawful conduct admittedly occurred after the Painters' agreement was lawfully terminated. And, while it is true that, during a subsequent compliance hearing, the Board awarded backpay based on the 8(f) wage rate, that award arose from the 8(f) terms in effect at the time of the wrongdoing. *D.L. Baker, Inc.*, 351 NLRB at 533. For similar reasons, the Painters fare no better in relying (Br 28) on two other contract-repudiation cases, *Schwickerts of Rochester, Inc.*, 349 NLRB 687 (2007), and *Topor Contracting, Inc.*, 345 NLRB 1278 (2005).

CONCLUSION

Based on the foregoing, the Board respectfully requests that the Court dismiss the petitions for review of the Painters, the Carpenters, and Raymond, and enforce the Board's Order in full.

/s/ Jill A. Griffin

JILL A. GRIFFIN

Supervisory Attorney

/s/ Gregory P. Lauro

GREGORY P. LAURO

Attorney

National Labor Relations Board

1099 14th Street NW

Washington DC 20570

(202) 273-2949

(202) 273-2965

RONALD MEISBURG

General Counsel

JOHN E. HIGGINS, JR.

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

May 2010

H:\Raymond Interiors final brief jggl.doc

CERTIFICATE OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the Board represents that there are no related cases pending in this Court.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 27th day of May, 2010

**Form 6. Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 13,389 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using (*state name and version of word processing program*) Microsoft Word 2000
(*state font size and name of type style*) Times New Roman 14-point type, *or*

this brief has been prepared in a monospaced spaced typeface using (*state name and version of word processing program*) _____
with (*state number of characters per inch and name of type style*) _____

Signature /s/ Linda Dreeben

Attorney for National Labor Relations Board

Date May 27, 2010

9th Circuit Case Number(s) 09-73210, 10-7028, 10-70209, 10-70511, 10-71342

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 27, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Linda Dreeben

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

[Empty box for listing non-CM/ECF participants]

Signature (use "s/" format)

[Empty box for signature]