UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RAYMOND INTERIOR SYSTEMS and OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION LOCAL UNION 200, AFL-CIO	Case No. 21-CA-38492
and SOUTHERN CALIFORNIA PLASTERING INSTITUTE GROUP BENEFIT TRUST C/O AMERICAN BENEFIT PLAN ADMINISTRATORS, INC., et al.,	Case No. 21-CA-38589
and SOUTHWEST REGIONAL COUNCIL OF CARPENTERS and OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION LOCAL UNION 200, AFL-CIO	Case No. 21-CB-14576

CHARGING PARTY OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION LOCAL UNION 200, AFL-CIO'S MOTION TO STRIKE A PORTION OF RAYMOND INTERIOR SYSTEMS, INC.'S REPLY BRIEF

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Charging Party Operative Plasterers' and Cement Masons' International Union Local 200, AFL-CIO ("Local 200") hereby files this motion to strike the following lines from page 1 of Raymond's Interior Systems (Raymond)'s Reply Brief:

> Local 200 claims that its June 2003 9(a) letter was received by Raymond on June 23 or 24. (Local 200's Brief, p. 5). However, the return receipt accompanying Local 200's letter shows it was received by Raymond on June 27, 2003. See GCX, p. 4. [*sic*, should apparently say GCX3, p. 4.]

(See Respondent Raymond Interior Systems' Reply Brief to Charging Party Local 200's and Charging Party Trusts' Answering Briefs to Exceptions to Decision of Administrative Law Judge John J. McCarrick, p. 1.)

Raymond's argument in this passage is a backdoor attempt to file an exception to the ALJ's factual conclusion that Local 200 mailed a copy of the recognition letter on June 20, 2003 and that CEO Gary Jaacks received it a few days prior to signing a similar letter on June 26, 2003. (ALJD, p. 5 lines 25-29 and p. 6, 25-28). Raymond did not file any exception to the ALJ's finding, and as a result, Local 200 did not provide briefing as to the purported "June 27, 2003" date on the return receipt. Raymond's *de facto* exception should be struck.

I. THE ALJ FOUND THAT RAYMOND RECEIVED THE 9(A) LETTER BY MAIL PRIOR TO JUNE 26, 2003

Raymond purportedly takes issue with Local 200's Answering Brief, but in fact it takes issue with the ALJ on a factual finding to which it filed no exception. The ALJ wrote in the Decision that "[o]n or about June 20, 2003, Plasterers' Union Business Manager Robert Pullen (Pullen) sent Respondent Raymond a letter certified mail with an attached voluntary recognition agreement seeking Section 9(a) representative status for the Plasterers' Union among Respondent Raymond's plastering employees." (ALJD, p. 5, lines 25-29 (citing G.C. Exh. #3.)) Of critical importance, the ALJ subsequently wrote: "Jaacks claimed that Fritchel provided him

with copies of the voluntary recognition agreement a few days before he signed it on June 26, 2003. *This would be consistent with Pullen having mailed a copy of the agreement to Respondent Raymond on June 20, 2003*." (ALJD, p. 6, lines 25-28) (emphasis added).

The ALJ did not explicitly state that Raymond received the recognition letter on June 23 or 24 (a fact otherwise established by the June 24 postmark on the return receipt, *see* G.C. Exh. # 3, p. 4). But it is beyond dispute that the ALJ concluded that Jaacks did in fact receive a copy of the letter by mail a few days prior to June 26, 2003. To the contrary, there would be nothing "consistent" between Jaacks' testimony about Fritchel having provided him the document a few days prior to June 26 and the evidence that Local 200 mailed the letter on June 20th. The ALJ's clear and straightforward finding would be rendered non-sense. Thus, to the extent that Raymond might argue that the ALJ did not make such a factual finding, that argument should be rejected as logically incoherent.

Section 102.36(b)(1) of the Rules and Regulations of the National Labor Relations Board states that an exception "(i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception." RULES & REGULATION AND STATEMENTS OF PROCEDURES OF THE NLRB, § 102.46(b)(1). "Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived." *Id*. at § 102.46(b)(2).

Raymond filed 66 separate exceptions to the ALJ's Decision. But nowhere did it except to the ALJ's conclusion that Raymond received a copy of the recognition letter that Pullen mailed on June 20, 2003 prior to Jaacks' signing such a letter on June 26, 2003. It neither cited

to the passage of the ALJ decision that it disagrees with nor did it cite to any portion of the record supporting its claim that Raymond did not receive the letter until June 27. Raymond's failure to except to the ALJ's finding conclusively establishes that Raymond received the recognition letter by mail a few days prior to Jaacks' signing such a letter on June 26, 2003.

II. LOCAL 200 RELIED ON RAYMOND'S DECISION NOT TO FILE AN EXCEPTION ON THIS MATTER

Based upon Raymond's failure to file an exception, Local 200 elected not to provide briefing in support of the ALJ's observation that Jaacks' testimony about receiving a recognition a few days before June 26, 2003 was consistent with evidence that Local 200 mailed such a letter on June 20, 2003. If Local 200 had been on notice that Raymond debated this finding, it would have explained why Raymond is wrong when it asserts that the return receipt shows that the letter was not received by Raymond until June 27, 2003. Local 200 addressed this issue to the ALJ as follows:

> The Form 3811 contains at first glance what appears to read "June 27, 2003" written in the box entitled "Date of Delivery." But the letter could not have been delivered on June 27th because the Form 3811 was posted to Local 200 on June 24th. The Form 3811 constitutes proof that the item was delivered; it would have been impossible for the U.S. Postal Service to return the Form 3811 prior to the date that delivery was actually made. See U.S. POSTAL SERVICE DOMESTIC MAIL MANUAL, Section 6.2.1, available at http://pe.usps.com/text/dmm300/503.htm#6_0 ("Return receipt service provides a mailer with evidence of delivery (to whom the mail was delivered and date of delivery), along with information about the recipient's actual delivery address"); see also 6.2.3 (the Form 3811 constitutes the return receipt).
>
> The likely explanation is that the scrawled annotation that appears to say "June 27" actually says "June 23" (the "7" being a poorly formed "3"). In any event, the date of "June 27" is clearly erroneous because the postmark date is June 24th. That date—and not the date scrawled by the postal worker who delivered the item—must control. *See e.g.*, *Colbert v. Potter*, 471 F.3d 158, 165-66 (D.C. Cir. 2006) (postmark date stamp on domestic return receipt, Form 3811, is conclusive of date received); *Luizzi v. Pro Transport Inc*., 548 F.Supp.2d 1, 18 (E.D.N.Y. 2008) (postmark date stamp on domestic return receipt, Form 3811, is the delivery date processed by the post office); *Mabry v. U.S.*, 952 F.2d 403 (Table), No. 90-5270, 1992 WL 1320 at *3, n.1 (6th. Cir. Jan. 6,

1992) (relying on postmark date on domestic return receipt, Form 3811, as date delivered); *Vannoni v. TSO*, 120 F.R.D. 501, 501-02 (E.D. Pa. 1988) (same).

Local 200 did not pursue this matter in its Answering Brief because Raymond did not except to the ALJ's finding. Raymond's effort to resuscitate the debate in its Reply Brief when it filed no exception should not be countenanced. This portion of its Reply Brief should be struck.

CONCLUSION

For the foregoing reason, the cited portion of Raymond's Reply Brief should be struck because it amounts to an improper exception to the ALJ's finding on an issue to which Raymond did not file an except in accordance with the Board's Rules and Regulations.

Dated: July 20, 2010

Respectfully submitted,

/s/Eric B. Myers

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PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 595 Market Street, Suite 1400, San Francisco, CA 94105.

On July 20, 2010 I served the document described as **CHARGING PARTY OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION LOCAL UNION 200, AFL-CIO'S MOTION TO STRIKE A PORTION OF RAYMOND INTERIOR SYSTEMS, INC.'S REPLY BRIEF** via e-mail, as indicated below:

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Executed on July 20, 2010 at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/Yien Saelee
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