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., and SOUTHWEST REGIONAL COUNCIL OF CARPENTERS	Case No. 21-CA-38589
and OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION LOCAL UNION 200, AFL-CIO	Case No. 21-CB-14576

CHARGING PARTIES OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION LOCAL UNION 200, AFL-CIO'S AND CALIFORNIA PLASTERING INSTITUTE GROUP BENEFIT TRUSTS' REPLY TO RESPONDENT RAYMOND INTERIOR SYSTEMS' ANSWERING BRIEF TO CHARGING PARTIES' CROSS-EXCEPTIONS AND BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

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Charging Parties Operative Plasterers' and Cement Masons' International Union Local 200, AFL-CIO and Southern California Plastering Institute Group Benefit Trust hereby reply to the Answering Brief filed by Raymond Interior Systems, Inc. and joined by the Southwest Regional Council of Carpenters as follows.

I. REPLY TO RESPONDENTS' ARGUMENT THAT THE BOARD SHOULD NOT ENSURE THAT THE TRANSCRIPT IS CORRECT

Respondents argue that Charging Parties seek to have it "both ways" by contending that the motion to correct the transcript should have been granted but also that the ALJ did not commit error in concluding that Mr. Pullen misspoke by saying "June 25" instead of "June 26." (*See* Tr. 71, lines 15-20; ALJD, p. 6. n. 5, lines 43-50.) These positions are not inconsistent. Mr. Pullen's testimony either was or was not correctly transcribed. If it was not, it should be corrected. If it was correctly transcribed, there remains the likelihood that Mr. Pullen misspoke by stating "June 25", as found by the ALJ. Because Raymond continues to put the matter at issue by arguing that Mr. Pullen said—and meant—"June 25," Charging Parties are entitled to have the transcript examined.

What *is* inconsistent is for Republic to urge that the ALJ erred by concluding that Mr. Pullen misspoke, while at the same time arguing against any evaluation of the transcript to see if *in fact* he misspoke. Republic truly wants to have its cake and eat it too. Republic should not object to having this case decided on the basis of what was actually said at hearing. If Mr. Pullen truly said "June 25," the Board may evaluate the merits of Republic's arguments that the ALJ committed error in finding that Mr. Pullen misspoke. But if there was an error in transcription, then Republic should not be permitted to exploit it for purposes of argument.

Republic incorrectly argues that the Charging Parties did not present sufficient evidence in support of their motion. Charging Parties provided sworn testimony on behalf of counsel attesting to the veracity of a transcription of a voice mail by a representative of the reporting service that the transcription was in error. They did so not to prove as a substantive matter that the transcript was in error, but to provide sufficient *reasonable cause* for the ALJ to exercise his authority to order that the transcription service perform a formal review. Charging Parties requested this relief so that any review and correction would be performed pursuant to the ALJ's order and in accordance with such safeguards as he might impose. That is still the correct course of action. Ironically, had Charging Parties provided the kinds of evidence suggested by Raymond (*i.e.,* an affidavit by the court reporting agency or a written correction of the transcript), Raymond would have nonetheless objected to these evidentiary sources based on foundation and hearsay. Raymond simply opposes a correct transcript, preferring to take advantage of a transcription error to argue its case.

II. REPLY TO RESPONDENTS' ARGUMENT THAT THE MAKE-WHOLE REMEDY SHOULD NOT BE CLARIFIED WITH RESPECT TO UNILATERAL CHANGES IN HIRING PROCEDURES

Raymond argues that the Board lacks authority to order remedial relief for any unilateral change in hiring procedures as described in the expired master labor agreement because there was no specific complaint allegation seeking that relief. Raymond's argument is wrong for several reasons.

First, the goal of a remedial order is "to create 'a restoration of the situation, as nearly as possible, to that which would have obtained' but for the unfair labor practices." *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 307 (7th Cir.1981) (quoting *Phelps Dodge Corp. v. NLRB*,

313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941)). "Restoration of the status quo ante following an unfair labor practice is prima facie appropriate; it is for the [employer] to demonstrate that it is not appropriate." *North Carolina Coastal Motor Lines, Inc*., 219 N.L.R.B. 1009, 1010 (1975), *enforced*, 542 F.2d 637 (4th Cir.1976).

Here, the ALJ ordered Raymond to "[n]otify the Local 200 in writing of all changes made to its plastering employees' terms and conditions of employment since August 5, 2008 and on request of the Plasterers' Union rescind any changes and restore terms and conditions of employment retroactively to August 6, 2008." (ALJD, p. 20, lines 30-33.) Furthermore, he ordered Raymond to "[m]ake whole all its plastering employees for all wages and benefits, with interest, that would have been paid since August 6, 2008." (*Id.,* lines 35-36.) This remedy is correct, but leaves room for uncertainty as to whether it pertains to employees who were not hired but who would have been hired pursuant to the *status quo* hiring procedures. (G.C. Exh. 2-C., art. VI, section 7, p. 15.) If it does not so pertain, then it should be modified to do so.

It is well-established that status quo remedies may be extended to provide relief to employees who were not hired owing to unilateral changes in hiring procedures. *Positive Electric Enterprises, Inc*., 345 NLRB 915, 923 (2005); *Williams Pipeline Co*., 315 NLRB 630 (1994); *J.E. Brown Electric*, 315 NLRB 620 (1994); *R.L. Resinger Co*., 312 NLRB 915 (1993). If Raymond has unilaterally altered the *status quo* owing with respect to the collectively bargained hiring procedures following its repudiation of the bargaining relationship and its unlawful withdrawal of recognition, then these alterations can only be remedied through a complete restoration of the *status quo*, including remedial relief for persons who might have been hired under the *status quo* hiring procedures but who were not owing to the unilateral change in that term and condition of employment. *See Raymond F. Kravitz Center for the*

Performing Arts., 351 NLRB 143, 149 (2007). Whether there has been such an abandonment and what the specifics of the remedy is a matter that should be addressed during compliance proceedings. But Raymond's own vociferous objection to having to restore the *status quo* in this respect is a certain sign of how the argument will go during compliance absent direction by the Board.

Second, Raymond is wrong when it argues that a full *status quo* remedy reaching unilateral changes in hiring procedures is barred because the complaint did not specifically allege it. The Board has consistently ruled that there is no requirement that a complaint allege a remedy:

> Requiring the Respondents to restore the predecessor's terms and conditions of employment does not violate any principles of due process because this is strictly a remedial matter that does not have to be specifically alleged. The *Love's Barbeque* remedy that we order here does not require a specific complaint allegation that the Respondents made unlawful unilateral changes when they began their operations. Nor must this remedy rest on a separate finding that the Respondents committed a separate unfair labor practice by unilaterally changing employment terms. The illegality of such changes is subsumed in the broader 8(a)(5) and (3) allegations and violations involved in this case.

U.S. Marine Corp., 293 NLRB 669, 672 (1989), *enf'd, U.S. Marine Corp. v. N.L.R.B*. 944 F.2d 1305 (7 th Cir. 1991); *Ebenezer Rail Car Services, Inc*., 333 NLRB 167 n. 4 (2001); *Transport Workers of America*, 327 NLRB 23, 23 (1998); *N.C. Coastal Motor Lines*, 219 NLRB 1009 (1975), *enfd.* 542 F.2d 637 (4th Cir. 1976).[1]

[1] In this regard, Raymond's reliance on *United States Postal Service*, 352 NLRB 923 (2008) is misplaced. That case involved a failure of the complaint to allege the substantive violation of the NLRA at issue (a *Weingarten* violation), not the remedy necessary to remedy that violation. 352 NLRB at 923. Here, the complaint alleges that Raymond withdrew recognition from Local 200 and repudiated the bargaining relationship in all respects. It is not necessary for the complaint to identify every unilateral change that may have occurred. To the contrary, once the violation is proven, all subsequent unilateral changes must be remedied.

The requirement to remedy any unilateral changes to hiring procedures is subsumed within the broader requirement to restore the *status quo* conditions to the prior to the wholesale repudiation of the 9(a) bargaining relationship. That fact distinguishes this case from cases arising in the 8(f) context, *see supra*, where the unilateral abandonment of hiring hall procedures was alleged in the complaint and specifically litigated. Under those cases, the basis for finding the 8(a)(5) violation was the refusal to adhere to a specific contractual duty imposed by the 8(f) contract to hire from the union's hiring hall. *See John Deklawa & Sons*., 282 NLRB 1375, 1386-1387 (1987.) Here in contrast, the 8(a)(5) violation pertained not merely to a specific unilateral change in hiring hall procedures, but to a wholesale repudiation of the 9(a) bargaining relationship *in toto*. *All* forms of relief for unilateral changes is subsumed within the broader 8(a)(5) allegation, and must be remedied whether alleged with specificity in the complaint or not.

Finally, the fact that the General Counsel has not addressed the issue of unilateral abandonment of hiring procedures as part of the *status quo* remedy is unimportant. The General Counsel has advocated that Raymond must restore the *status quo* with respect to all unilateral changes that Raymond has effectuated since the repudiation of the bargaining relationship and the withdrawal of section 9(a) recognition. Subsumed within that remedy is the particular issue of hiring procedures. But even if the remedy at issue here is different, it is the well established that a charging party may proffer different theories of remedy than the General Counsel. *Air 2, LLC*., 341 NLRB 176, n. 8 (2004); *Kamaugraph Corp*., 313 NLRB 624, 625 (1993); *Sunland Construction Co*., 685, 706 (1993.) As discussed above, pursuit of such relief does not constitute an attempt by the Charging Parties to amend the complaint, as Board law does not require that all forms of relief—as opposed to the violations that justify such relief—be alleged.

III. REPLY TO REPUBLIC'S ARGUMENT THAT UNILATERAL CHANGES IN DUES CHECKOFF SHOULD NOT BE REMEDIED

Charging Parties request that the ALJ's remedy be clarified to require that any valid dues check off authorizations be honored as part of the restoration of the *status quo.*

Respondent notes that it was not under a legal obligation to honor dues checkoff authorizations after the expiration of the 2005-2008 multiemployer labor agreement. That is true, but it is equally true that Respondent was not under an obligation to cancel the same authorizations. *See Lowell Corrugated Container Corp*., 177 NLRB 169 (1969). The issue here is what Respondent would have done in the alternative universe in which it did not violate Section 8(a)(5) by unlawfully repudiating all aspects of its bargaining relationship with the Union. Here, it is incumbent upon Raymond as the wrongdoer to prove that it would have dishonored the valid dues checkoff authorizations of its plastering employees, which it has not done. As the wrongdoing in this matter, speculations concerning what would have occurred absent the unlawful repudiation should be construed against Raymond. *Twin City Concrete, Inc*., 317 NLRB 1313, 1323 (1995); *Fugazy Continental Corp*., 276 NLRB 1334, 1376 (1985.)

CONCLUSION

For the aforesaid reasons, the Board should grant the Charging Parties' exceptions. As to the first exception, the Board should not accept Raymond's version as to what Mr. Pullen supposedly meant to say unless the transcript is reviewed for accuracy. As to the second and third exceptions, the Board should modify the remedy as necessary to ensure that the issue of hiring procedures and dues check off is included within the scope of the make-whole remedy so that these questions may be addressed with greater certainty during compliance proceedings.

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Respectfully submitted,

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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 PARTIES OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION LOCAL UNION 200, AFL-CIO'S AND CALIFORNIA PLASTERING INSTITUTE GROUP BENEFIT TRUSTS' REPLY TO RESPONDENT RAYMOND INTERIOR SYSTEMS' ANSWERING BRIEF TO CHARGING PARTIES' CROSS-EXCEPTIONS AND BRIEF IN SUPPORT OF CROSS-EXCEPTIONS** 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.

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