

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
BRANCH OFFICE  
SAN FRANCISCO, CALIFORNIA

**GARNER/MORRISON, LLC**

and

Case 28-CA-21311

**INTERNATIONAL UNION OF PAINTERS AND ALLIED  
TRADES, DISTRICT COUNCIL #15, LOCAL UNION  
#86, AFL-CIO-CLC**

**SOUTHWEST REGIONAL COUNCIL OF CARPENTERS**

and

Case 28-CB-6585

**INTERNATIONAL UNION OF PAINTERS AND ALLIED  
TRADES, DISTRICT COUNCIL #15, LOCAL UNION  
#86, AFL-CIO-CLC**

*Mara-Louise Anzalone*, Phoenix, Ariz., for the  
General Counsel.

*James A. Bowles*, of *Hill, Farrer & Burrill, LLP*, Los Angeles,  
Calif., for Respondent Garner/Morrison, LLC.

*Daniel M. Shanley*, of *DeCarlo, Connor & Shanley*, Los  
Angeles, Calif., for Respondent Southwest District Council of  
Carpenters.

*Gerald Barrett* of *Ward, Keenan & Barrett, P.C.*, Phoenix,  
Ariz., for Charging Party District Council of Painters.

**DECISION**

Statement of the Case

**JAMES M. KENNEDY, Administrative Law Judge:** This case was tried before me in Phoenix, Arizona on September 5 and 6, 2007. The consolidated complaint, issued on May 31, 2007<sup>1</sup> by the Regional Director for Region 28 of the National Labor Relations Board is based upon original unfair labor practice charges filed by International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL-CIO-CLC (the Painters) on April 5 and 10, 2007. One of the charges was subsequently amended. The complaint alleges that Respondent

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<sup>1</sup> All dates are 2007 unless otherwise noted.

Garner/Morrison, LLC (Garner) has unlawfully recognized Respondent Carpenters as the exclusive collective bargaining representatives of certain of its employees and thereby violated §8(a)(2) and (1) of the Act. It also alleges that Respondent Carpenters, by accepting that recognition, violated §8(b)(1)(A) of the Act. In addition, the complaint alleges some independent violations of §8(a)(1). Respondents deny the allegations.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. All parties have filed briefs which have been carefully considered. Based upon the entire record of the case,<sup>2</sup> as well as my observation of the witnesses and their demeanor, I make the following:

## I. Findings of Fact

### a. Jurisdiction

Garner admits it is an Arizona corporation with a place of business in Tempe, Arizona where it is engaged in the building and construction industry as a drywall installation and painting contractor performing tenant improvement work in office buildings and other work at commercial construction sites. It further admits that during the 12-month period ending April 5, 2007, in the conduct of its business, it purchased and received goods valued in excess of \$50,000 from enterprises within Arizona which had received those goods directly from points outside Arizona. Accordingly, Garner admits that it is an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act. In addition, Respondents both admit that the Painters and Carpenters are labor organizations within the meaning of §2(5) of the Act.

### b. Background

Garner is an incorporated partnership which commenced business in November 2003. Its principals are Cliff Garner, Gary Travis Garner ('Travis,' who is Cliff's son) and Chris Morrison. In the beginning, all three performed the manual labor required of drywalling and painting. In December they hired their first employee, a friend and co-worker, Brian Boyles, who also worked both phases. At least three of the four had worked previously for another contractor, Bar Five. In the course of their employment with Bar Five, they had worked under two different collective bargaining contracts – one with the Carpenters and one with the Painters. Travis and Boyles worked under the Carpenters' contract while Morrison worked under the Painters' contract. As a result, they were familiar with the applicable hiring halls, wages and working conditions provided under each of those contracts.

Since they intended to do business in the commercial segment of the industry, they thought it important to do business as a union contractor. On December 3, 2003, they signed a contract with the Carpenters. This was a short form which adopted the drywall master agreement between the Carpenters and the Western Wall and Ceiling Contractors Association. Later, on January 16, Garner and the Carpenters signed a successor short form adopting the drywall master agreement.

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<sup>2</sup> The General Counsel's motion to correct the record is granted.

Both master agreements, which the short forms adopted, covered work performed by painters and tapers in addition to what is usually understood to be carpentry, both rough and finish. Moreover, there is no dispute that they covered Garner's drywall installation workers, i.e., those who cut and hang wallboard. In sum, these contracts covered all of Garner's employees, all of whom perform some aspect of wall construction or finishing.

The master agreement adopted in 2003 as well as its 2006 successor, both contain the following language:

The Contractor and the Carpenters Union expressly acknowledges that on the Contractor's current jobsite work, the Carpenters Union has the support of a majority of the employees performing work covered by this Agreement. The Union has demanded and the Contractor has recognized the Carpenters Union as the majority representative of its employees performing work covered by this Agreement. It is also acknowledged that the Union has provided, or has offered to provide, evidence of its status as the majority representative of the Contractor's employees. By this acknowledgment the parties intend to and are establishing a collective bargaining relationship under Section 9 of the National Labor Relations Act of 1947, as amended.

It is clear from that language that the parties were establishing a §9(a) collective bargaining relationship which named the Carpenters as the exclusive collective bargaining agent of all of Garner's employees. That relationship, now 4 years old, is now beyond the reach of §8(a)(2) of the Act because of the Supreme Court's construction of the 6-month limitation period established by §10(b) of the Act. *Machinists Local Lodge 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960).

Moreover, the procedure followed by Garner and the Carpenters at that time is the precise procedure which a unanimous Board approved in its decision in *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 719 (2001). There, the Board, responding to two decisions of the Court of Appeals for the Tenth Circuit, said:

In both cases, the court confirmed that written contract language, standing alone, could independently establish 9(a) bargaining status. 219 F.3d at 1155; 219 F.3d at 1164. The court found that to be sufficient, such language must unequivocally show (1) that the union requested recognition as the majority representative of the unit employees; (2) that the employer granted such recognition; and (3) that the employer's recognition was based on the union's showing, or offer to show, substantiation of its majority support. 219 F.3d at 1155-1156; 219 F.3d at 1164-1165.

This approach properly balances Section 9(a)'s emphasis on employee choice with Section 8(f)'s recognition of the practical realities of the construction industry. Such a balance was one of the Board's primary goals in *Deklewa*, 282 NLRB 1375, 1382. The Tenth Circuit's approach also has the advantage of establishing bright-line requirements. Construction unions and employers will be able to establish 9(a) bargaining relationships easily and unmistakably where they seek to do so. These requirements should accordingly reduce the number of cases arising in this area and facilitate the Board's disposition of those disputes that do occur.

We therefore adopt the requirements stated by the Tenth Circuit in *Triple C Maintenance, Inc.* and *Oklahoma Installation Co.* A recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support. As the Tenth Circuit discussed in *Triple C*, although it would not be necessary for a contract provision to refer explicitly to Section 9(a) in order to establish that the union has requested and been given 9(a) recognition, such a reference would indicate that the parties intended to establish a majority rather than an 8(f) relationship. 219 F.3d at 1155-1156. To the extent that any of our post-*Deklewa* decisions can be read to conflict with this holding, those decisions are overruled. [Internal footnotes omitted.]

Accordingly, I start with the fact that the Carpenters are, and have been since 2003, the §9(a) representative of all of Garner's wall construction employees.

Of course, there are additional facts. In early April 2004, Garner began to hire tapers, followed shortly thereafter by painters. Nearly simultaneously, Garner signed two collective bargaining contracts with the Painters. One covered the tapers and the other covered the painters. These contracts had a common expiration date, March 30, 2007. The General Counsel concedes, by language in the complaint, that these contracts were agreements under §8(f) of the Act and were not based on any claim of majority status. The Painters' contracts, like the Carpenters', contain a clause that suggests that the Painters represented a majority of the employees working in those crafts. Any analysis demonstrates that the language does not meet the requirements of *Staunton Fuel & Material*, supra. Because of the General Counsel's concession that the Painters only held §8(f) status, it is not necessary to explore the matter further.<sup>3</sup> Aside from the fact that the Painters' contracts were in seeming conflict with the Carpenters' contracts, the two Painters' agreements seem to have established separate bargaining units for those two (sub)crafts.

However, the Painters' contracts did not actually conflict with the Carpenters', because the Carpenters' contracts provided a reservation for just such a circumstance. Both Carpenters' agreements contained this clause, Article I, §7(g) in the 2006-2010 master agreement:<sup>4</sup>

The [Carpenters] Union understands and recognizes that the WWCCA [the employer association] and its members [5] are signatory to a collective bargaining agreement with the painters and/or plaster tenders covering drywall finishing and wet wall finish work. The parties agree that Article I Section 7 [the recognition clause] shall apply only to those signatory employers who are not already

<sup>3</sup> The General Counsel's concession that the Painters contract and relationship are permitted under §8(f) may not accurately reflect the Painters' status. There is a substantial question concerning whether that status is independent, as in the usual case, or whether it is only a revocable sufferance granted under the Carpenters contract(s) from the outset.

<sup>4</sup> In the 2002-2006 master agreement the clause is in Article I, §6 and follows subsection (f) but without lettering it as (g).

<sup>5</sup> Garner, though not a member of the employer association, is referenced here due its short form adoption contracts.

5 signatory to a collective bargaining agreement with the Painters and/or Plaster  
Tenders covering the drywall finishing or wet wall finish work as described in  
Article I, Section 7 of the agreement and who chose to assign that work to the  
Painters and/or Plaster Tenders. The [Carpenters] Union agrees not to invoke or  
enforce Article I, Section 7 [the recognition clause] or to create any jurisdictional  
dispute concerning the work described in that section against any signatory  
employer that is also signatory to an agreement with the Painters and/or Plaster  
Tenders covering the drywall finishing or wet wall finish work and who chooses to  
assign that work to the painters and/or plasterers and plaster tenders, *as long as  
10 such [Painters'] contract remains in effect.*

[Bracketed material inserted for clarity; Italics supplied.]

15 In addition, it should be noted that the first short form agreement, signed in 2003  
contained language which specifically included the drywall finishing and interior and exterior wall  
finish work. See paragraph 6 of Jt. Exh. 2. Despite that language, the Painters' exception in the  
Master agreement was deemed to control due to a most favored nation clause. Even so, the  
Master Agreement's language states that the Painters' exception is to dissolve upon the  
expiration of any Painters' agreement.

20 With that somewhat troublesome contractual background, the next factual occurrence is  
the expiration of the Painters' two agreements covering the drywall tapers and the drywall  
painters, both of whom performed work described in the Carpenters' master and short form  
agreements.

#### 25 c. The Events Leading to the Expiration of the Painters' Contracts

Both of the Painters' collective bargaining contracts, entered into under §8(f), were  
scheduled to expire on March 31, 2007. Indeed, the parties have stipulated that the contracts  
were properly terminated on that date.

30 As the expiration date approached, Painters' Business Representative Lonnie Tinder  
took several steps toward changing the relationship from a §8(f) to a §9(a). In January, he  
obtained the signatures of 13 painters and tapers on Painters Union authorization cards. He  
obtained six more in March. Curiously, however, he would never present them to any Garner  
35 official.

40 In addition, Tinder made several approaches to Morrison. Although the two recall the  
date somewhat differently, <sup>6</sup> they first met at an Applebee's Restaurant. Garner, through  
Morrison, seems to have been the first contractor Tinder had approached and the two discussed  
the procedure the Painters wanted to follow. Morrison did not want Garner to be the first  
contractor and told Tinder he wanted the Painters to go after the big painting contractors first, so  
he would know what the competition would be about. He reminded Tinder that Garner was  
competing against non-union contractors and its profit margin was not what the larger  
commercial painting contractors enjoyed. Indeed, Tinder had not yet prepared proposed wage  
45 rates and did not present any contract proposal to Morrison during their meeting. He did,  
however, give Morrison a document.

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<sup>6</sup> Tinder places the meeting in early February; Morrison recalls it was the first week of  
March, perhaps March 5.

The document, on Painters' letterhead, in its entirety:

Showing of Support Notice  
Section 9A - NLRB

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We are prepared to present our showing of support to a neutral party selected jointly by the Union and the Employer, so that the neutral may verify that a majority of painter unit employees desire the Union to act as their exclusive bargaining representative under section 9(a) of the Act, provided that you agree to this process, please so indicate by signing in the space provided below. Once you have signed, we will select the neutral and present the showing of support to him.

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Sincerely,  
Lonnie Tinder/BR DC#15, LU#86

Accepted and agreed:

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[Signature space]  
Employer Representative

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Morrison didn't know what to make of the document, but took it with him, later showing it to the other principals of the company. The 9A and "9(a) of the Act" meant nothing to them; indeed, the concept of "exclusive bargaining representative" must have been somewhat bewildering as the Carpenters were the exclusive representative of all their employees. The principals decided they didn't understand it and, not understanding it, never signed it.

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Aside from whether or not possible under the then extant contract scheme, the document, hardly a model of good grammar or clarity, must nevertheless be understood as a proposed card check agreement, calling upon a neutral person to validate the cards, and having the aim of eventually converting the Painters' §8(f) status to §9(a). Even so, it does not qualify as a demand for recognition under current Board law.<sup>7</sup> At best, it was a signal that the Painters Union was in the organizing process. Already noted is Tinder's disinclination to present the cards themselves to Garner's principals.

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The two met again on March 20, this time at a Denny's Restaurant. Tinder was accompanied by Patricio Melivilu, the Painters' apprenticeship coordinator. During this meeting Tinder asked Morrison to sign a collective bargaining contract, now proposing a \$1.36 hourly raise. Morrison asked if any other contractors had signed it yet. Tinder responded that none had. Once again Morrison advised he needed to know the pay rates before he could sign since he was competing against the nonunion sector of the industry.

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During the course of the meeting, Tinder says he told Morrison that the Painters were interested in obtaining 'voluntary recognition' asserting that his union did represent 'these employees.' He also says he told Morrison that he "had secured enough authorization cards

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<sup>7</sup> *New Otani Hotel & Garden*, 331 NLRB 1078 (2000). A union's request that an employer sign a card check agreement does not constitute a demand for recognition. Also *Brylane, L.P.*, 338 NLRB 538 (2002).

from these employees to prove that." Melivilu, helpfully, went further, asserting that Tinder told Morrison he had a 'majority' of cards. Still, Melivilu agrees Tinder did not show Morrison any cards or signatures.

5 The General Counsel, examining Morrison, could only elicit the following:

Q [By Ms. ANZALONE] Okay, so you sat down with him [Tinder], and he asked for that meeting, right?

A [Witness MORRISON] Yes, he did.

10 Q And at that point, he says, "I want you to look at authorization cards that I have, that show that I represent a majority of the employees?"

A Lonnie never said that to me.

Q Well, what did he say at this meeting?

15 A He wanted to know if I had discussed with my partners, about the \$1.36 raise -- the monies that we had talked about, the raise, at the previous meeting.

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He continued:

20 ...our [bid] packages are all the same, so we are bidding on an even keel here, and in my TI area that I bid on, I bid against all non-Union, and that is really what I was asking Lonnie, was had -- was he going to re-sign anyone, was he going to sign anyone new, you know, where was I going? If I give the men a raise, where was I going with this? I would price myself out.

Q And what was his response?

25 A That he had signed nobody. Nobody new.

Q What else was discussed?

A I really don't recall. That was the gist of the meeting, as to who I was bidding against, at that point.

30 Q And so, is it your testimony that at no time, Mr. Tinder ever offered to show you authorization cards --

A Absolutely not. He did not offer to show me any cards.

Q Did you ever speak with him about what the Painters would do, if Garner/Morrison did not re-sign? Did you ever have any conversation with Mr. Tinder about what the Painters would do, if Garner/Morrison did not re-sign with the Painters?

35 A No.

The meeting ended inconclusively.

40 Not having heard anything that led him to believe Tinder was going to do something to level the bidding field with other contractors, Morrison returned to his partners and reported that the Painters weren't offering what they needed to hear. He was pretty sure he was not going to be re-signing with the Painters. They decided it would be wise if they talked to the Carpenters'; Morrison called for the meeting about a week before the Painters' contract would expire. He, and both Garners, met with the Carpenters' highest ranking official in the Phoenix area, Mike McCarron, the district council's secretary-treasurer, and its contract administrator Gordon Hubel, who is officed in Los Angeles, as well as a few others, at a Denny's restaurant. Hubel is the person who has drafted most, if not all, of the Southwest Regional Council of Carpenters contracts and is intimately familiar with them.

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Morrison told them that Garner most likely would not re-sign with the Painters and asked what impact that would have on his tapers and painters. Hubel explained that upon the expiration of the Painters' contract, the existing recognition language of the Carpenters'

agreements would kick in and cover those employees, meaning that the Painters' exception would no longer apply. No final decision was made, but Morrison kept Hubel's information in mind. He still wanted to hear from Tinder. McCarron said if the Carpenters were to step in, he would want to meet with the employees to explain what was happening. Morrison agreed to call  
5 him to arrange it as soon as the final decision was made.

In the afternoon of March 30, Tinder called, saying they were running out of time, asking Morrison if he and his partners had made a decision about signing the new contract. Tinder says Morrison told him they hadn't. This resulted in Tinder offering an extension and Morrison  
10 telling him to fax it to the office. Tinder testified that he told Morrison: "We had to have something, you know, right away and before the contract expired. And, you know, if he couldn't do that, then I would have to take other actions."

Morrison says, during that call, he advised Tinder that he had spoken to another contractor that morning about the negotiations and had learned there had been some language  
15 changes made the night before and he needed to know more about it, so he asked Tinder if he could wait until Monday. He remembers Tinder responding that on Monday "things could get nasty" and that the Painters "could start proceedings."

Whatever else might be said of the conversation, Tinder said nothing concerning the  
20 Painters filing representation petitions.

#### d. The April 2 Marriott Hotel Event

When Morrison ended the call with Tinder, he now knew that there was no likelihood that  
25 Garner would re-sign with the painters. He perceived Tinder was using his relatively small company as the spearhead contractor in what was essentially an industry-wide negotiation. Garner was not even a member of the employer association, yet appeared to be Tinder's gateway to changing the industry wage rates. That circumstance did not sit well with Morrison or his partners for they could not see what the industry might settle for. They saw their young  
30 company as a wage follower, not a leader. Furthermore, taper foreman Bob Porch had recently advised Travis Garner that the quality of workmen available through the Painters' hiring hall was not as high as he wished.<sup>8</sup>

As a result, Morrison called the Carpenters' McCarron that Friday and told him that he  
35 was not signing with the Painters. He also was afraid, given the timing, that a health insurance coverage gap might ensue if the Carpenters did not get the employees signed as soon as possible. McCarron told him that the Carpenters would arrange the meeting immediately and let him know about the arrangements. On Monday morning, April 2, McCarron called to advise that a meeting had been scheduled for that afternoon at 2 p.m. at the Phoenix Airport Marriott Hotel.  
40 Both Morrison and Travis Garner sent word to all of the jobsite employees that there was an important meeting scheduled for that afternoon and that all employees should attend since it affected their health coverage.

The meeting was not mandatory; indeed at least two employees did not attend. All the  
45 employees who attended had either completed their workday or were permitted to leave a few minutes early so they could drive to the Marriott. They were not paid for their attendance.

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<sup>8</sup> TRAVIS GARNER: ...[We] contacted [foreman] Robert Porch about it, and he kind of got a little mad and complained about the guys he was receiving from 86, that they were sending them out as journeymen, and they weren't even first stage apprentices, and that he had to watch them like babies, and he couldn't do everything on the job himself.

The meeting was conducted in one of the Marriott's meeting rooms, paid for by the Carpenters. It was arranged with several head tables, an audience section and two tables in the rear of the room, about 65 feet from the front. The two tables in the back were manned by Cigna health insurance representatives and the Carpenters Pension trust, respectively. The three Garner partners were present, but sat in the first row of the audience section.

McCarron opened the meeting by providing background about the Carpenters, speaking of the Southwest Council's size, its history and what it had generally been able to negotiate. Either he or his chief of staff asked Morrison to say a few words about the Painters' situation and Morrison stood from his place in the audience and gave a short explanation regarding the fact that the Painters' contract had expired and would not be renewed. From his point of view the Carpenters had a lot to offer and the Company thought the Carpenters' contract was good deal.

McCarron's presentation included a comparison of the Carpenters' negotiated wage and benefits plan. While much of what he said, according to the PowerPoint presentation,<sup>9</sup> was to extol the virtues of becoming a Carpenter, he never actually demanded that anyone join. He did say that the monthly dues were \$20 payable on the first of every month. He provided a list of trades which the Carpenters represents, applicable to the Garner audience, including "drywall framers, hangers, tapers, plasterers, finishers, stockers and scrappers." He also showed a slide listing all of the Carpenters trades, including drywall, taping/painting and plastering.

From there, the Carpenters health plan administrator, Ron Schoen, gave a fairly lengthy PowerPoint presentation covering both the Carpenters pension and health plans, explaining that the health plan had arranged for 'instant eligibility' since all of the employees had been with the Company long enough to qualify for grandfathering into the program.

A question and answer period followed, during which Morrison reported that when he'd changed from the Painters' health plan to the Carpenters' health plan the year before, it had been seamless and very easy. All of the other questions were answered by the Carpenters; none were answered by the Garner managers. As those wound down, McCarron directed them to the back of the room to sign the forms available at the tables there.

The employees spoke among themselves and milled about in the back of the room for a while as the Garner partners sat up front. Eventually most of the employees signed health insurance and pension binders, or took them with them for spouses to read. At the same time, Hubel and some other Carpenter representatives went to the back of the room and began the process of persuading employees to sign authorization cards. Hubel obtained 17 signed cards. The authorization card signing was unseen by, and unknown to, the Garner owners who had remained in the front of the room. The Garner managers could not have seen what, if anything, the employees were signing, because their view was blocked by the employees at the tables. The only signing that had been discussed publicly was the necessity of signing the health insurance forms. That was set forth on p. 27 of the PowerPoint presentation.

While things were still happening in the back of the room, Hubel came forward to the front of the room and showed Morrison the authorization cards, saying he had obtained a 'majority' of the tapers and painters. He gave Morrison a recognition agreement which Morrison signed, then a Carpenters' Arizona Drywall/Lathing short form agreement. Morrison signed that

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<sup>9</sup> The presentation is in evidence as Jt. Exh. 15. A Spanish translation was presented simultaneously.



restrains, or coerces employees in the exercise of their rights under §7. It has long been observed that the test for unlawfulness is whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act. See, e.g., *El Rancho Market*, 235 NLRB 468, 471 (1978). Intent is not the touchstone. That, however, does not mean that an employer may not express his views about union representation or even prefer one union over another. One needs to consider the totality of the employer's conduct to determine whether the conduct is coercive of §7 rights. As the Board said in *Rossmore House*, 269 NLRB 1176 (1984),<sup>12</sup> in determining whether a supervisor's questions to an employee about his union activities were coercive under the Act, the Board looks to the "totality of the circumstances." The totality certainly includes, as the Board observed in *RCA Del Caribe*, 262 NLRB 963 (1982), the incumbency of an inside union.<sup>13</sup> Also see §8(c) of the Act which says: "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Moreover, given the factual background, where the Painters at best only held §8(f) status, essentially an at-will relationship as described by *Deklewa*,<sup>14</sup> while the Carpenters held §9(a) status as a true incumbent of all of Garner's employees, what constitutes a reasonable tendency to interfere with employee rights is quite different from that which is seen when a stranger union seeks representative status. That remains true even if the Carpenters' §9(a) incumbency is perhaps partially vulnerable under the factors set forth in *General Extrusion*, 121

<sup>12</sup> Affd. sub nom. *Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

<sup>13</sup> The Board in *RCA Del Caribe* said, at 965-966 said in pertinent part: Unlike initial organizing situations, an employer in an existing collective-bargaining relationship cannot observe strict neutrality. In many situations, as here, the incumbent challenged by an outside union is in the process of—perhaps close to completing—negotiation of a contract when the petition is filed. If an employer continues to bargain, employees may perceive a preference for the incumbent union, whether or not the employer holds that preference. On the other hand, if an employer withdraws from bargaining, particularly when agreement is imminent, this withdrawal may more emphatically signal repudiation of the incumbent and preference for the rival. Again, it may be of little practical consequence to the employees whether the employer actually intended this signal or was compelled by law to withdraw from bargaining. We further recognize that an employer may be faced with changing economic circumstances which could require immediate response and commensurate changes in working conditions. Put another way, the ebb and flow of economic conditions cannot be expected to subside merely because a representation petition has been filed. Thus, to prohibit negotiations until the Board has ruled on the results of a new election might work an undue hardship on employers, unions, and employees. Under the circumstances, we believe preservation of the status quo through an employer's continued bargaining with an incumbent is the better way to approximate employer neutrality.

For the foregoing reasons, we have determined that the mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. *Under this rule, an employer will not violate Section 8(a)(2) by postpetition negotiations or execution of a contract with an incumbent*, but an employer will violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union.

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Unlike before, however, even though a valid petition has been filed, an incumbent will retain its earned right to demonstrate its effectiveness as a representative at the bargaining table. *An outside union and its employee supporters will now be required to take their incumbent opponent as they find it*—as the previously elected majority representative. Consequently, in the ensuing election, employees will no longer be presented with a distorted choice between an incumbent artificially deprived of the attributes of its office and a rival union artificially placed on an equal footing with the incumbent. [Internal footnotes omitted; Italics supplied.]

<sup>14</sup> *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. den. 488 U.S. 889 (1988).

NLRB 1165 (1958), i.e., that Garner employed no tapers or painters when it first recognized the Carpenters in 2003. Even so, it had performed those tasks early on even if they were performed by the owners or its first employees who already were Carpenters, such as employees Dain Jones and James ('Bryan') Boyles. (Boyles later became the superintendent over the drywall finishers, i.e., the tapers.) The Carpenters had been on the scene from the beginning and in that sense were a fact of life for all of Garner's employees. Whether they were the §9(a) representatives of the tapers and painters is of little moment. They were a major part of the totality of the circumstances for all concerned.

Therefore, any discussion of benefits, health or retirement, of Garner's then extant circumstances meant that everyone, both Unions, the Employer and the employees had easy access to exactly what those benefits were and what their cost was. It is not a promise of benefit for an employer or the Carpenters Union to describe the benefits they have negotiated in a current collective bargaining contract. It can't be promise; it is a fact. And, if one works under that contract, those are its terms, beneficial or not. Moreover, if an employer chooses to allow his §8(f) agreement to expire, that, too, is a fact, not a threatened loss of benefits impacting a §7 right. An employer is entitled to let it lapse that under that type of relationship. Indeed, I suspect that most employers who have §8(f) agreements regard it as a source of health insurance and retirement plans; one which competes on a nearly open market. As with open market insurance, there is no obligation to renew under §8(f) at the end of its term. Indeed, such an employer may well find another §8(f) relationship with a different union which could be to the employer's benefit.

And if he did find such an 8(f) union, he might very well ask that union to make certain existing employees did not suffer a health insurance gap. Moreover, he might well ask that union to explain its contract benefits to its employees in much the same manner as Garner contacted the Carpenters. Would the General Counsel then be complaining that such an employer's presence at the meeting was unlawful surveillance? That the discussions which ensued were coercive interrogations? That the employer's announced preference to make the change was coercive? That the raffle had become a poll? That the new union was an agent of the employer for §7 purposes? The answer is obvious. The General Counsel would not.

What, then, is different here? That Garner knew that the Painters wanted a §9(a) relationship? That the Painters had acquired authorization cards, though it had never presented them? That Garner could be perceived as wanting to oust the Painters? A demurrer is the proper answer to those questions.

The simple fact is that on April 2, Garner's Morrison, Travis and Cliff Garner, the Carpenters officials and the employees were all having a discussion about the changes that the expired contract would bring about and how those changes could be addressed. The Painters had not demanded recognition as a §9(a) representative. In essence, they were no longer on the scene. Had they made a demand or filed their election petitions,<sup>15</sup> the facts would have been different. They had not done so by the time of the meeting and therefore, whatever the managers' presence, whatever they said about the Carpenters and whatever questions they asked or conversations they sparked had no tendency whatsoever toward interfering with,

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<sup>15</sup> Assuming that the Painters actually held §8(f) status, it could have filed its representation petitions days or weeks before, as soon as it had acquired the authorization cards. See the second proviso language of §8(f): "*Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection [relating to lack of majority status], shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." Also *Deklewa*, *supra*.

restraining or coercing the painters and tapers in the exercise of their rights under the Act. At worst, it was only the announcement of a change in health insurance carriers. It was privileged to discuss that issue with its employees, particularly with the Carpenters present. Accordingly, it is unnecessary to detail the facts supporting each §8(a)(1) allegation.

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I shall, nonetheless, provide a short recital, together with the reason why those facts were not coercive. With regard to the allegation of surveillance, such a claim generally relates to an employer watching individuals who are engaging in §7 protected conduct. There is no evidence of such conduct occurring at the April 2 meeting. That Garner's management attended a meeting called by its only union is virtually meaningless insofar as coercive surveillance is concerned.

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The next is a supposed expression of futility. This arises from Morrison's remark that "this is the way we want to go," meaning signing (again) with the Carpenters. There was no actual reference to the Painters except that the Painters' contract was no longer in effect. There was no statement that representation by the Painters was a futility for the employees. Indeed, Morrison has not been shown to have made any reference to union representation; only insurance. This evidence falls short. As for promises of benefit as a deterrent to representation by the Painters, again Garner's management did not make that connection. Something needed to be done as the Painters' insurance had been lawfully dropped and something was needed to take its place. The Carpenters provided a handy replacement. But Morrison made no promises, express or implied. Neither did the Carpenters. They simply said the Carpenters' programs were available and were good. Some of the employees, including Servis and Porch did not choose to accept the offer (Porch not at all and Servis waited for more information).

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Certainly remaining employed was not part of the conversation. Indeed, employees could continue to work for Garner, whether signed to Carpenters' benefits or not and whether signed for membership in the Carpenters or not. The statements were something to the effect, 'You've lost your current insurance, here's an easy way to protect yourself from that loss. And if you want to join the Carpenters, you can, but you aren't required to.' The General Counsel's argument: "Where an employer reduced wages following an organizing campaign and then promised to restore them if they supported the union favored by the employer," is not on point nor is the case it relies upon, *Cas Walker's Cash Stores*, 249 NLRB 316 (1980). In that case an unorganized employer responded to initial organizing by the Meat Cutters by cutting wages and committing other unfair labor practices, including a threat to close the business, and then telling employees that if they supported the Independent union, they could get it all back. First, actual promises were made there as part of an unlawful campaign to defeat a union holding majority status. That's not so here. The Painters had never demonstrated majority support before the Carpenters got theirs. More importantly, Garner's treatment of the Painters was entirely lawful. As a §8(f) union, the Painters were subject to the very cancellation it suffered and Tinder knew it, even if the employees did not understand. The loss of benefits here was lawful unlike the loss of benefits in *Cas Walker*. Furthermore, no one 'promised' any benefit in the process.

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The allegation of improper 'polling,' too, is without merit. Here, the complaint asserts, the Carpenters did the polling at the meeting. This was accomplished, according to the General Counsel, at the end of the question period when the Carpenters offered the employees the opportunity to sign up. Here the General Counsel overstates the evidence, claiming the 'sign-up' referred to Carpenters membership. Under the General Counsel's theory, those employees who did not go to the back of the room were seen to have revealed their opposition to the change. This is an imaginative theory, and it might have some substance if the Carpenters had been clearly soliciting membership rather than contract coverage. But polling as an unfair labor

practice is designed to elicit useful information – the level of dissatisfaction or the current strength enjoyed by an incumbent – something leading to loss of recognition. The information seen here was not useful to such a purpose. It only demonstrated that some people were reluctant to switch carriers without more information. That would be something already  
 5 expected. Either way, it had no coercive impact on the employees themselves. Carpenters' membership was not the essence of the presentation. The General Counsel's theory here might be applicable to a different background fact pattern, but has no salience here.

The interrogation allegation fares no better. Bob Porch, a long time Painters' member  
 10 was close to retirement and had been Garner's tapers foreman. He had 38 years invested in the Painters' retirement plan. He wasn't going to change his investment. His loyalty remained with the Painters, as he was free to do. His testimony regarding the purpose of the meeting is a little off-center, as he easily conflated Carpenters' membership and Carpenters' benefits as being one and the same, yet the PowerPoint presentation tells a different story which he does  
 15 not really refute. <sup>16</sup> More important to the allegation is the raffle. Porch was both lucky and unlucky that afternoon. After the group had been called back to their chairs for the raffle, Porch won it twice, both for cash. He first win was \$300. The official running the raffle asked him if he had signed a Carpenters' authorization card; Porch responded that he had not. The official told Porch that if he hadn't signed he wasn't eligible for the cash award. His second win was for  
 20 \$100. Knowing the rule, Porch then declined. The official, however, put Porch's ticket on a tool prize and Porch accepted it. The General Counsel finds this to be a coercive interrogation for it 'outed' Porch as one who didn't want to join the Carpenters. After the raffle ended, Porch said several Carpenters representatives asked him why he wouldn't sign. He responded that he preferred to remain a Painter; that he was nearing retirement and he didn't want to jeopardize  
 25 that.

Counsel for the General Counsel urges that I find the Carpenters to be Garner's agent for purposes of liability here. Frankly, that doubly tortures its position. First, it argues that Porch's situation was coercive of a §7 right in a fact pattern which is subject to several different  
 30 interpretations, the least likely of which is coercion under the Act. Second, it asserts that the Carpenters became Garner's agent for the purpose of coercion. As for the first issue, paying employees to become members is an unfair labor practice within the meaning of §8(b)(1)(A). *Flatbush Manor Care Center*, 287 NLRB 457 (1987); *Teamsters Local 952 (Pepsi Cola Bottling)*, 305 NLRB 268, 275 (1991). <sup>17</sup> It is not a practice which the Carpenters would wish to be  
 35 accused, and it no doubt chose to avoid the issue by not paying the cash. In my opinion, that seems to be the most likely interpretation of the facts. Another would be that such a raffle was only aimed at its own members. Such a limitation would be perfectly lawful so long as employment was not implicated, as here. Interrogation, particularly a coercive interrogation, is the least likely perception which might be made. The allegation is without merit. Similarly,  
 40 Porch's claimed discomfort notwithstanding, Carpenters representatives were free later to try to persuade him to join. Indeed, he could lawfully have joined the Carpenters, signed up for their benefits, remained a member of the Painters and still continued to work for Garner. He never testified that anyone made any type of threat whatsoever. In fact, Porch said of the exchanges, "No, nobody gave me a hard time." He was hardly 'outed.' His Painters' preference had been  
 45 plain for years.

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<sup>16</sup> See Porch's testimony at Tr. 161-165.

<sup>17</sup> In addition, in an election context, unions engage in objectionable conduct under §9 if they pay individuals to become members. *General Cable Corp.*, 170 NLRB 1682 (1968); *Wagner Electric Corp.*, 167 NLRB 532 (1967); *Teletype Corp.*, 122 NLRB 1594 (1959).

As for the interrogation of Servis, his own testimony puts the matter in the proper context. He had been a 30-year member of the Painters. He is also Morrison's brother-in-law. First, he testified that he'd been asked to attend the April 2 meeting because "[T]he Carpenters were going to give a presentation about their plan, about their benefits, and he [Morrison] thought it would benefit me to attend it." Servis did so. After the benefits presentation was over, he testified the Carpenters representative said, "That if you liked the presentation, if you liked what you heard, and wanted the benefits and you wanted to join up with them, to sign up." Because of his long-term membership in the Painters, he was reluctant to sign up for Carpenters' benefits that evening and did not do so at that time.

About a week later, he received a telephone call from Morrison, apparently relating to payroll deductions. Servis recalls Morrison asked: "Have you decided what you are going to do yet?" Servis thinks he asked Morrison, "Well, if I stayed with Local 86, are you going to pay benefits?" and Morrison replied "No," he is "not paying benefits to Local 86 any longer." Shortly thereafter, Servis switched and signed up for the Carpenters. His testimony is not clear regarding whether he signed up for Carpenters' membership, simply signed up for the contract's insurance benefits or did both. Clearly he could sign for benefits without joining the Carpenters. Beyond that, Arizona is a right-to-work state and union membership is not required as a condition of employment. Signing up for benefits, on the other hand, was an administrative requirement of the plans.

The General Counsel's evidence here is unimpressive. Servis was asked to attend a meeting to discuss the new benefit program with the Carpenters as it came to be effective. He had reservations about it and initially chose not to. When Servis learned more clearly that Garner was no longer going to be paying the health plan premiums to the Painters' plan, but only to the Carpenters' plan, he chose to switch. This evidence simply does not support the allegation that a coercive interrogation had occurred. Its import is the same as what occurred during the April 2 meeting. It was only a discussion about whether he wished to take advantage of the Carpenters' benefit plans, given the fact that the Painters' plan was no longer available through the company. Morrison's inquiry does not qualify as coercion; it qualifies as financial good sense.

All the facts offered in support of the §8(a)(1) allegations, as a matter of law, had no tendency to interfere with the affected employees §7 rights due to the context in which they took place. They simply didn't have a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of their §7 rights.

Turning to the §8(a)(2) allegation (and the connected §8(b)(1)(A) charge against the Carpenters), in reviewing the General Counsel's arguments, I am struck by its failure to cite the definitive Board holdings in §8(a)(2) cases. His representative does not rely on *Bruckner Nursing Home*, 261 NLRB 955 (1982) or *RCA Del Caribe*, 262 NLRB 963 (1982) in any way. These two cases made significant changes to the manner in which facts are to be analyzed under §8(a)(2), including the changes to the 'strict neutrality' rule as it relates to an incumbent union, discussed above. Indeed, reliance on cases pre-1982 is risky because of the impact these two cases have had on the current state of the law. Yet, the General Counsel has done exactly that, relying on *Price Crusher Food Warehouse*, 249 NLRB 433 (1980). Moreover, *Price Crusher* is distinguishable for it concerned the affirmative barring of the outside union and did not entail a union having any claim of incumbency. It is not helpful here.

More importantly, there is really no evidence whatsoever of illegal assistance. The hotel meeting room was paid for by the Carpenters. The meeting was run by the Carpenters and the authorization cards were solicited by the Carpenters. Indeed, it was not until Hubel presented the cards to Morrison, that anything approaching assistance occurred. But even that falls short.

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First, the Carpenters already held a colorable claim to §9(a) representation of the tapers and painters. That claim was based upon the Board's decision in *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 719 (2001), discussed in passing in the background section. That recognition was 4 years old and had already been renewed once. It is a clear right to all of Garner's employees. The Painters had been granted, under the terms of that agreement, a concession to represent some of those employees on a temporary basis, nothing more. When the Painters' contract expired, the concession expired, because the Carpenters' contract continued to be in force, covering all of Garner's employees, specifically the job classifications in question.

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To the extent there may have been doubt about that §9(a) status vis-à-vis the tapers and painters, the Carpenters chose to obtain authorization cards from the employees who had previously worked under the Painters' contracts to clear up whatever uncertainty there might have been. In point of fact, however, that was probably not necessary, assuming that under *Staunton* those employees had been represented by the Carpenters the entire time they were employed, even if they or the Painters did not understand it. Respondent Garner did not really need to see the authorization cards to justify signing the short form extension agreement. Morrison could have signed without the cards for Garner had a §8(d) obligation to bargain with the Carpenters over all its wall construction employees.

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I regard the authorization cards presented by Hubel to Morrison as nothing more than a 'belt and suspenders' approach to the changeover. Hubel had invoked the clause with other employers on several occasions. The clause, however, until now, has never been litigated. Hubel, who is a lawyer, wanted to be cautious and put the majority status issue to rest. His caution is understandable. The Painters had, up to the time of the April 2 meeting, never raised a question concerning representation, so neither Garner nor the Carpenters had any obligation to consider the impact it might have. There was little to worry about for their §9(a) relationship had long since become perfected. Their collective bargaining contract, under *Staunton Fuel*, was thought to serve as a bar to any representation petition.

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At the time they signed on April 2, the only way a petition could have been processed was to contend that the tapers and the painters constituted appropriate bargaining units separate from the all-employee unit established by the Carpenters' contracts. That contention would have been problematical, since a §8(f) contract does not establish a controlling bargaining history, although §9(b)(2) of the Act might well permit a craft severance.<sup>18</sup> Yet, the application of the *General Extrusion*, supra, principles may have overcome the contention that the Carpenters do not represent the tapers and painters under *Staunton*. I need not decide that here.

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<sup>18</sup> §9(b): The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not...(2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation....

A second wrinkle in the applicable law appeared on September 29, 2007, about 3 weeks after the hearing in this case closed. On that date the Board changed the rules concerning the recognition bar doctrine. That doctrine is similar to, but different from the contract bar rules established in cases such as *Hexton Furniture*, 111 NLRB 342 (1955) and *Deluxe Metal Furniture*, 121 NLRB 995 (1958). A recognition bar had been held to occur when an employer had lawfully recognized a labor organization as the §9(a) representative of employees in an appropriate unit. That bar prevented another union from raising a question concerning representation for a 'reasonable period.' *Keller Plastics Eastern*, 157 NLRB 583 (1966). The change was effected by *Dana Corporation*, 351 NLRB No. 28. There, a full board (Members Liebman and Walsh dissenting) modified the *Keller* rule to allow for the processing of a rival union's petition filed within 45 days of the recognition, so long as the employer notifies the employees of their right to seek representation by the rival union within that time frame.

That change presumes that there has been no illegal support for the recognized union. And, based on the facts found above, that is the situation here. Furthermore, *Dana* has application to a circumstance where a contract is signed immediately upon recognition, also present here. The Board said, slip op. at 2:

Modifications of the recognition bar cannot be fully effective without also addressing the election-bar status of contracts executed within the 45-day notice period, or contracts executed without employees having been given the newly-required notice of voluntary recognition. *Consequently, we make parallel modifications to current contract-bar rules as well such that a collective-bargaining agreement executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless notice of recognition has been given and 45 days have passed without a valid petition being filed. (Italics supplied.)*

Therefore, if *Dana* were applied, assuming the bargaining unit issue can be resolved, the two Painters' petitions could be processed to an election.

We get a similar result when we address the effect the two April 2 representation petitions have on the facts. It is true that both petitions had been filed in the Board's Regional Office in the morning of April 2 at 11:20 a.m. Yet they were not served on Garner by the time it had signed the short form agreement 3 hours later at roughly 2:20 p.m. Furthermore, the Painters had really done nothing to warrant the conclusion that Garner should have stopped dealing with the Carpenters. This minutes-apart fact pattern creates a significant problem under the contract bar rules.

First, under the usual interpretation of *Deluxe Metal Furniture*, supra, if a petition is filed before the execution date of a contract effective either immediately or retroactively and is otherwise timely, the contract will not bar the processing of the petition and the holding of an election. Yet, a reading of *Bruckner Nursing Home*, 261 NLRB 955, 957 (1982), yields a slightly different rule. The Board said: "Accordingly, we will no longer find 8(a)(2) violations in rival union, initial organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board. [fn. omitted] However, *once notified of a valid petition*, an employer must refrain from recognizing any of the rival unions." [Italics supplied.] This suggests that it is not the filing, per se, of a petition that controls, but its notification to, i.e., actual notice to the employer, which controls. This statement was made before the ubiquity of telefax machines, which Board offices did not even acquire until sometime in the late 1980's. Perhaps the statement should not be taken literally, but I cannot ignore it. Adding some more complexity is what it said in *RCA Del Caribe*, 262 NLRB 963 (1982), decided the same day. ". . . [We] have

determined that the mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. [fn. omitted] Under this rule, an employer will not violate Section 8(a)(2) by post-petition negotiations or execution of a contract with an incumbent, but an  
 5 employer will violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union.

This thinking was fleshed out a little more clearly in *City Markets, Inc.*, 273 NLRB 469-470 (1984), when the Board, citing *RCA Del Caribe*, said: "If the incumbent union prevails in the  
 10 election held, any contract executed with the employer will be valid and binding; but if the [incumbent] union loses, the contract will be null and void." 273 NLRB 469-470.

Since I have found that no §8(a)(1) independent unfair labor practices have occurred here, this case is in either a *Bruckner* or an *RCA Del Caribe* posture. If it is *Bruckner*, and the  
 15 Painters are regarded as an outside union, then the question is whether the timing of its petitions must be judged under *Deluxe Metal Furniture* time of filing rule or under the *Bruckner* time of notification expansive comment.

However, if the case is regarded as an *RCA Del Caribe* incumbency, then the timing of  
 20 the Painters' petitions would have no bearing on the matter whatsoever, since the addition of the tapers and painters to the Carpenters' all employee unit would simply be a simple expansion question and resolved on that basis. A contract bar would immediately be raised since this is only the addition of wall construction workers to a pre-existing unit of wall construction workers.

Aside from the representation issues which could be raised in the event the petitions are  
 25 processed, one thing is clear. Garner did not commit a violation of §8(a)(2) as alleged. It may have hastily signed a new contract with the Carpenters, but it did not violate the Act by doing so, for it could not have known that petitions were in the offing that day. At worst, the contract is not a bar to the Painters' petitions. That is an issue I need not decide. I leave it to the Regional Director and the Board. It may well be that the new rule the Board announced in *Dana Corporation*, 351 NLRB No. 28, should be applied here, assuming no contract bar. Neither do I  
 30 dismiss the possibility that the petitions could be treated as a craft severance matter. Whatever may happen in the representation proceedings, it is clear that no §8(a)(2) violation has occurred here.

35 Based upon the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

#### Conclusions of Law

40 1. Respondent Garner is an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act.

2. Respondent Carpenters is a labor organization within the meaning of §2(5) of the Act.

45 3. The General Counsel has failed to prove that Respondent Garner committed any violation of §8(a)(1) or §8(a)(2) of the Act.

4. The General Counsel has failed to prove that Respondent Carpenters committed any violation of §8(b)(1)(A) of the Act.

