Garner/Morrison, LLC *and* International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL–CIO–CLC

Southwest Regional Council of Carpenters *and* International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL–CIO–CLC. Cases 28–CA–21311 and 28–CB–6585

January 27, 2009

DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On December 21, 2007, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and Charging Party Painters Union (Painters) each filed exceptions and a supporting brief, the Respondents each filed answering briefs, and the General Counsel and the Painters each filed a reply brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.[2]

I. OVERVIEW

The complaint in this case alleges, among other things, that Respondent Garner/Morrison (Garner/Morrison) violated Section 8(a)(1) of the Act by engaging in surveillance of its employees during a meeting with its painters and tapers on April 2, 2007,[3] and violated Section 8(a)(2) of the Act by assisting and recognizing the Respondent Carpenters Union (Carpenters) at this meeting. The complaint additionally alleges that the Carpenters violated Section 8(b)(1)(A) of the Act by accepting such assistance and recognition and by entering into a collective-bargaining agreement[4] with Garner/Morrison.[5] The judge dismissed the complaint in its entirety, finding that no such unlawful conduct occurred.[6] As discussed below, we find, contrary to the judge, that Garner/Morrison surveilled its employees' protected activity at this meeting, thereby assisting the Carpenters with its organizing effort, and unlawfully recognized the Carpenters as the employees' collective-bargaining representative. We further find that the Carpenters unlawfully accepted such assistance and recognition and unlawfully entered into the memorandum agreement with Garner/Morrison.

The judge further found that Garner/Morrison did not violate Section 8(a)(1) by interrogating employee Gary Servis on April 9. As explained below, we find that further credibility resolutions are required to resolve this issue. Accordingly we shall sever and remand this allegation to the judge for further analysis.

II. APRIL 2 ALLEGATIONS

A. Factual Background

Garner/Morrison is a construction industry employer engaged in drywall installation and tenant improvement work in office buildings and at commercial construction sites. Garner/Morrison incorporated in November 2003.

[1] On June 24, 2008, the Board issued an Order denying Respondent Garner/Morrison's motion to strike the exceptions filed by the General Counsel and the Painters.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] All dates are 2007, unless otherwise indicated.

[4] The complaint refers to the Carpenters entering into a collective-bargaining agreement with Garner/Morrison. As discussed herein, the Carpenters entered into an agreement with Garner/Morrison entitled "Southwest Regional Council of Carpenters Arizona Drywall/Lathing Memorandum Agreement." The agreement states that Garner/Morrison "agrees to comply with all the terms, including wages, hours, and working conditions and rules as set forth in the [Carpenters' master agreement]."

[5] The complaint does not allege that Garner/Morrison violated the Act by entering into a collective-bargaining agreement with the Carpenters.

[6] In adopting the judge's findings that Garner/Morrison did not violate Sec. 8(a)(1) of the Act by expressing to the employees that it would be futile to select the Painters as their collective-bargaining representative, we do not rely on the judge's statement that Garner/Morrison's part-owner, Chris Morrison, did not expressly refer to union representation at the April 2, 2007 meeting. Contrary to the judge's statement, the record establishes that Morrison told the employees that the Carpenters was a "better choice" for them than the Painters; that the Carpenters "is probably the way we want to go"; and that "we think it is a good deal" when introducing the Carpenters' representatives. Under the circumstances, however, these statements do not convey the message that selecting the Painters would be futile. For this reason, we adopt the judge's dismissal of the complaint allegation.

In adopting the judge's finding that Garner/Morrison did not violate Sec. 8(a)(1) of the Act by promising employees improved benefits if they selected the Carpenters as their exclusive collective-bargaining representative, we do not rely on the judge's statement that: "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." Rather, we rely on the judge's additional finding that there was no evidence that Garner/Morrison executives made any promises of benefits to its employees if they selected the Carpenters.

For the reasons set forth in his decision, we adopt the judge's findings that Garner/Morrison did not violate Sec. 8(a)(1) of the Act during its April 2, 2007 meeting by polling its painters and tapers or by interrogating them.

During its first month of operation, Garner/Morrison's three owners performed the manual labor and did not hire any employees. Thereafter, between December 1 and 3, 2003, Garner/Morrison hired its first employee, a carpenter.

On December 3, 2003, prior to hiring any additional employees, Garner/Morrison entered into a 2002–2006 Memorandum Agreement (2002 MOA) with the Carpenters. The 2002 MOA assent provision states, among other things, that: "the Carpenters Union has the support of a majority of the employees performing work covered by this Agreement."

The 2002 MOA bound the parties to a 2002–2006 drywall multiemployer master agreement (2002 Master Agreement) that contained a recognition provision (2002 recognition provision) stating:

> The [Carpenters] Union understands and recognizes that the WWCCA [the employer association] and its members 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 h [sic], Section 6 [the recognition clause] shall apply only to those signatory employers who are not already 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 6 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 6 [the recognition clause] or to create any recognition 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.

Thereafter, in April 2004, Garner/Morrison hired painters and tapers and immediately entered into two collective-bargaining agreements with the Painters, one covering Garner/Morrison's painters and the other covering Garner/Morrison's tapers (the Painters' collective-bargaining agreements). Both contracts bore a March 31, 2007 expiration date.

On January 16, 2006, during the term of the Painters' collective-bargaining agreements, Garner/Morrison signed an additional 2005–2007 Memorandum Agreement (2006 MOA) with the Carpenters expressly binding Garner/Morrison to the terms of the 2002 Master Agreement and any subsequent Carpenters master agreements until June 30. Thereafter, effective July 1, 2006, the 2002 Master Agreement was succeeded by a master agreement dated July 1, 2006–June 30, 2010 (2006 Master Agreement). The 2006 Master Agreement contained the same recognition provision (2006 recognition provision) quoted above, wherein the Carpenters agreed not to create any "recognition dispute" with the Painters, with one modification. The last sentence of the recognition provision was modified to include the additional bolded language:

> 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 such contract remains in effect**. [Emphasis added.]

Thereafter, in January, 2 months before the Painters' collective-bargaining agreements expired, Painters Representative Lonnie Tinder obtained signed authorization cards from 13 painters and tapers and obtained six additional cards in March. In February, Tinder met with Garner/Morrison's part-owner, Chris Morrison, told him that the Painters "want to go 9(a) status," and gave Morrison a letter dated February 8 entitled "Showing of Support Notice Section 9A–NLRB" requesting 9(a) recognition.

On March 20, Tinder and Patricia Melivilu, the Painters' apprenticeship coordinator, met with Morrison to request again that Garner/Morrison grant the Painters 9(a) recognition. Morrison responded that he would think about it. One week later, on March 27, Morrison called Carpenters contract administrator Gordon Hubel and asked to meet to discuss extending Carpenters recognition to the painters and tapers.

Thereafter, on March 30, the day before the Painters' collective-bargaining agreements expired, Tinder called Morrison and asked whether he had made a decision. Morrison responded that he had not, and that he was currently talking it over with his partners. Tinder faxed Morrison a contract extension, but Morrison never signed it. On April 1, Morrison called Carpenters executive secretary/treasurer Mike McCarron to set up a meeting between Carpenters representatives and Garner/Morrison's painters and tapers.

B. April 2 Events

On April 2, Garner/Morrison instructed its supervisors to ask the painters and tapers to attend an important

meeting with Carpenters representatives at the Marriott Hotel at 2 p.m. The employees were not compensated for their attendance. Nevertheless, all but one or two employees attended the meeting.

At approximately 11:23 a.m., the Painters' representation petitions were received at the Board's Regional Office. The credited evidence establishes that Garner/Morrison received the Painters' faxed petitions at 3:25 p.m., after the Carpenters meeting began.

The Carpenters meeting began as scheduled. In attendance were: (1) approximately 15–16 Carpenters representatives; (2) three Carpenters health care representatives; (3) Garner/Morrison's owners and its field superintendent, Brian Boyles; and (4) all save one or two of Garner/Morrison's painters and tapers. A Carpenters' representative opened the meeting by introducing Morrison, who stood at the podium and addressed the audience. Morrison urged them to listen to what the Carpenters had to offer, and told them that he thought the Carpenters was a "better choice" for Garner/Morrison and its employees than the Painters, stating: "[t]his is probably the way we want to go." Morrison then introduced the Carpenters' representatives, and stated: "[W]e think it is a good deal."

After Morrison spoke, McCarron addressed the audience and explained the Carpenters' structure and size and its "good relationship" with Garner/Morrison. Carpenters representatives then conducted an hour-long PowerPoint presentation, which imparted information about the Carpenters' dues, membership benefits, apprenticeship program, and benefits program. The representatives repeatedly told the employees that they were "glad to have you on our team." Part-Owner Travis Garner then spoke, telling the employees that he had worked as an employee under Carpenters' benefits, that it was in their best interest to go with the Carpenters, and that the Carpenters' retirement package was better than that of the Painters. Garner concluded by encouraging the employees to ask questions, and these questions were answered principally by Carpenters representatives. However, when an employee asked about switching from the Painters' to the Carpenters' benefits, Morrison stood up and told the employees that he had been covered by the Carpenters' benefits for a year and that his "transfer from the Painters Union went very smoothly."

After the questions ended, Carpenters representatives asked the employees to go to the back of the room to sign documents. The employees went to the back, where they were presented with Carpenters benefits packages and solicited by Carpenters representatives to sign authorization cards. A majority of Garner/Morrison's painters and tapers signed the cards at this time. During the employees' procession to the rear of the room and their signing of cards there at the behest of the Carpenters representatives, Garner/Morrison's owners and field superintendent remained in the front of the conference room.

Immediately after the employees finished signing the Carpenters' documents, Hubel approached Garner and Morrison and told them that a majority of the employees had signed authorization cards. Hubel "flashed" the cards in front of Garner and Morrison and requested recognition of the Carpenters. Morrison agreed and signed an April 2 Recognition Agreement and a 2007–2010 Memorandum Agreement with the Carpenters, which incorporated by its terms the Carpenters' master agreement, stating that Garner/Morrison "agrees to comply with all the terms, including wages, hours, and working conditions and rules as set forth in the [Carpenters' master agreement]."

C. Judge's Analysis

The judge found that Garner/Morrison did not engage in unlawful surveillance by remaining in the room while its painters and tapers were solicited and signed authorization cards for the Carpenters, explaining that there was no evidence that the employees engaged in Section 7 activity at the April 2 meeting.[7]

The judge further found that Garner/Morrison did not violate Section 8(a)(2) of the Act by assisting and recognizing the Carpenters at the April 2 meeting and that the Carpenters did not violate Section 8(b)(1)(A) by accepting such assistance and recognition, or by entering into the memorandum agreement with Garner/Morrison. By way of explanation, the judge stated that he could discern "no evidence whatsoever of illegal assistance" during the meeting. Further, the judge opined that Garner/Morrison was entitled to hold the meeting with the Carpenters and remain in the room because the Carpenters was already the 9(a) representative of the painters and the tapers prior to the April 2 meeting. In support, the judge relied on the 2002 MOA, signed in 2003, which stated: "[T]he Carpenters Union has the support of the employees performing work covered by this Agreement." The judge acknowledged that the Carpenters' 9(a) status may be "partially vulnerable" under *General Extrusion*, 121 NLRB 1165, 1167 (1958) ("a contract does not bar an election if executed (1) before any employees had been hired or (2) prior to a substantial increase in personnel"),

[7] Although the judge dismissed this allegation solely on the basis that no protected activity occurred at the meeting, he also stated in his presentation of facts that the Garner/Morrison executives positioned in the front of the room were unable to see what the employees were signing. As discussed, infra, we find it unnecessary to pass on this finding, as it is not a determinative factor in considering whether the executives' presence in the room constitutes unlawful surveillance.

because Garner/Morrison had not hired any painters or tapers when it signed the agreement. Nevertheless, the judge found that Garner/Morrison performed painting and taping tasks in 2003 when it signed the initial agreement with the Carpenters, albeit with Garner/Morrison's owners and not employees. Additionally, the judge found that the 2002 MOA satisfied the 9(a) requirements set forth in *Staunton Fuel*, 335 NLRB 717, 720 (2001).[8]

Further, the judge found that the 2002 and 2006 recognition provisions in the Carpenters' agreements each provided a "reservation" in the event of a Painters representation agreement for only "as long as such contract remains in effect." Because the Painters' collective-bargaining agreements expired on March 31, the judge found that Carpenters representation resumed at that point.

D. Exceptions

The General Counsel excepts to the judge's failure to find that Garner/Morrison unlawfully surveilled its employees at the April 2 meeting, contending that the employees were engaging in protected activity while Garner/Morrison executives remained present in the room.[9]

The General Counsel and the Painters also except to the judge's failure to find that Garner/Morrison violated Section 8(a)(2) by unlawfully assisting and recognizing the Carpenters on April 2 and that the Carpenters violated Section 8(b)(1)(A) by accepting such assistance and recognition and by entering into the memorandum agreement with Garner/Morrison. In support, the General Counsel and the Painters contend that Garner/Morrison engaged in coercive behavior during this meeting by, among other things, remaining in the room while the painters and tapers signed Carpenters authorization cards, and that this rendered Garner/Morrison's recognition unlawful. The General Counsel and the Painters also except to the judge's finding that the Carpenters was the 9(a) representative of the painters and tapers prior to the April 2 meeting. Citing *General Extrusion*, supra at 1167, they contend that Garner/Morrison did not have a stable work force when it signed the 2002 MOA and 2002 Master Agreement. Finally, the General Counsel argues that the judge mistakenly found that the 2002 recognition provision contained the language: "as long as such contract remains in effect." Because the 2002 recognition provision contains no such language, the General Counsel contends that the Carpenters waived jurisdiction with respect to the painters and tapers.

E. Analysis

For the reasons stated below, we find, contrary to the judge, that: (1) Garner/Morrison engaged in surveillance of its employees during the solicitation and signing of the Carpenters' authorization cards, (2) Garner/Morrison violated Section 8(a)(2) by assisting and recognizing the Carpenters, and (3) the Carpenters violated Section 8(b)(1)(A) by accepting such assistance and recognition, and by entering into the memorandum agreement with Garner/Morrison.[10]

1. Surveillance

Turning first to the surveillance allegation, we find, contrary to the judge, that Garner/Morrison unlawfully surveilled its employees during the April 2 meeting. In particular, we disagree with the judge's finding that the employees were not engaged in protected activity during the meeting. The record shows that in the presence of Garner/Morrison executives, Carpenters representatives informed the employees of membership benefits, told them that the Carpenters was "glad to have you on our team," and requested that the employees go to the back of the room. Once the employees went to the back, they were solicited to sign—and did sign—Carpenters authorization cards. Contrary to the judge, we find that the solicitation and signing of authorization cards constituted protected activity.

Garner/Morrison argues that although its executives remained in the same room, they could not see what the employees were doing, because the executives were stationed in the front of the room while the solicitation and signing of authorization cards occurred in the back. This argument misses the point. As discussed above, Garner/Morrison's executives remained present in the room while the employees were engaged in protected activity. Part-Owner Chris Morrison left no doubt about the reason the executives were there. He told the employees that he thought the Carpenters was the "better choice," "the way to go." And when Carpenters representatives

[8] Under *Staunton Fuel*, supra at 720, the party asserting a 9(a) relationship has the burden of establishing 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" (footnote omitted).

[9] Further, the General Counsel contends that the judge erred in finding that Garner/Morrison executives could not see the employees positioned in the back of the room, arguing that there is no evidence that the Garner/Morrison executives could not see the employees while they remained in the same room.

[10] Because we find that Garner/Morrison's grant of recognition to the Carpenters when the Carpenters did not have the support of an uncoerced majority of employees violated Sec. 8(a)(2) of the Act, we find it unnecessary to address the General Counsel's additional allegation that Garner/Morrison violated Sec. 8(a)(2) by granting recognition to the Carpenters while the Painters' representation petitions were pending. Any such finding would not affect the remedy.

directed the employees to go to the back of the room, the employees were effectively being asked to switch their allegiance from the Painters to the Carpenters. Thus, even assuming the Garner/Morrison executives could not see the exact documents that were signed, their presence in the room while the employees were being solicited to sign the Carpenters' documents constituted unlawful surveillance for the purpose of influencing employees to switch their allegiance to the Carpenters. See *Morehead City Garment Co.,* 94 NLRB 245, 255 (1951), enfd. 191 F.2d 1021 (4th Cir. 1951) (finding that the employer engaged in unlawful surveillance, the Board explained that the employer's presence was noticed by employees engaged in protected activity, and that the employer "accomplished its purpose regardless of [the employer's] ability to see. Such obvious and open surveillance of union meetings has universally been found to constitute interference, restraint, and coercion by both the Board and the courts").[11]

Finally, Garner/Morrison contends that it did not engage in unlawful surveillance because its presence during the employees' organizational activity was "open." We find no merit to this contention. Although an employer's observation of employees' organizational activities generally does not violate the Act where "employees elect to conduct their organizational activity openly,"[12] the employees here did not elect to conduct their organizational activities openly. Rather, Garner/Morrison urged the employees to attend an "important" meeting, but did not inform the employees of the meeting's purpose. It turned out that the Carpenters' representatives were at the meeting and encouraged the employees to sign up with that Union, but the employees' attendance at this meeting does not reflect their choice to participate in open organizational activity. Therefore, Garner/Morrison's observation of the painters and tapers as they were solicited and signed authorization cards violated Section 8(a)(1).

2. Unlawful recognition

An employer violates Section 8(a)(2) of the Act when it extends recognition to a union that does not represent an uncoerced majority of employees *Ladies Garment Workers v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961); *Dairyland USA Corp*., 347 NLRB 310, 311 (2006), enfd. 273 Fed. Appx. 40 (2d Cir. 2008). In evaluating whether an employer's assistance to a union precludes the existence of an uncoerced majority, the Board "examines the totality of circumstance to determine whether the respondent's conduct tainted the union's majority status." *Clock Electric, Inc*., 338 NLRB 806, 827 (2003) (internal citations omitted).

The meeting Garner/Morrison set up so that the Carpenters could recruit the painters and tapers occurred about 2 weeks after the Painters secured a majority of authorization cards from the painters and tapers, and days after Painters representatives requested that Garner/Morrison sign a collective-bargaining agreement covering these employees. During the orchestrated meeting, Garner/Morrison's owners went beyond stating their preference for Carpenters representation. They remained in the room while the Carpenters solicited the employees to sign and while they signed Carpenters authorization cards. Given this context, most particularly the unlawful surveillance that tainted acquisition of a majority, we cannot agree with the judge that there was "no evidence whatsoever of illegal assistance and we instead find that the Respondent unlawfully assisted the Carpenters. Thus, Garner/Morrison's extension of recognition based on the authorization cards signed at this meeting was unlawful.

In defense, the Respondents contend that, prior to this meeting, the Carpenters was the 9(a) representative of the painters and tapers. The judge found merit to this contention based on the 2002 MOA and 2002 Master Agreement, the 2006 MOA and 2006 Master Agreement, and the recognition provisions purporting to withhold Carpenters representation for only "as long as" the Painters' collective-bargaining agreements remained in effect. We disagree.

"[T]he Board has long held that an employer's voluntary recognition of a union is lawful only if, at the time of recognition, the employer . . . employed a substantial and representative complement of its projected workforce." *Elmhurst Care Center*, 345 NLRB 1176, 1177 (2005).[13] This requirement applies where a union has held an 8(f) relationship with an employer, but seeks to achieve 9(a) status through voluntary recognition, as demonstrated solely on the basis of a contract clause. See *Staunton Fuel*, supra at 718.[14] Here, however, there

[11] We therefore find it unnecessary to pass on the judge's finding that the Garner/Morrison executives could not, in fact, see the documents the employees signed in the back of the room.

[12] *Sunshine Piping, Inc.*, 350 NLRB 1186, 1194 (2007). See also *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986) ("union representatives and employees who choose to engage openly in their union activities at an employer's premises should have no cause to complain that management observes them").

[13] See, e.g., *Hilton Inn Albany*, 270 NLRB 1364, 1365 fn. 10 (1984) (applying standard announced for representation cases in *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958), to find unlawful premature recognition of union by employer).

[14] In *Staunton Fuel*, supra, the Board observed that 9(a) status could be achieved "'from voluntary recognition accorded . . . by the employer *of a stable work force* where that recognition is based on a clear showing of majority support among the union employees, e.g., a valid card majority.'" 335 NLRB at 718 (emphasis added), quoting *John Deklewa*

was no substantial and representative complement of employees at the time that Garner/Morrison and the Carpenters entered into the 2002 MOA and 2002 Master Agreement. At the time of the signing, Garner/Morrison had only one employee, a carpenter; it employed no painters and tapers at all. Thus, Garner/Morrison could not lawfully recognize the Carpenters as the 9(a) representative of painters and tapers who had yet to be hired.[15]

Because the Carpenters was not the 9(a) representative of Garner/Morrison's painters and tapers in 2003, we find that the Painters became the exclusive-bargaining representative of the painters and tapers in 2004, when Garner/Morrison voluntarily entered into a collective-bargaining relationship with the Painters that expressly covered those employees.[16] See *John Deklewa & Sons,* above at 1386 (under Sec. 8(f) "the signatory union possess[es] exclusive representative status"). The Painters enjoyed this exclusive-representative status until at least 2007, when the Painters' collective-bargaining agreements expired. Thus, the Painters' status was undisturbed by Garner/Morrison's signing of the intervening 2006 Carpenters agreements. *Deklewa*, supra at 1387 (8(f) union enjoys exclusive representation "coextensive with the bargaining agreement that is the source of its exclusive representational authority").

In sum, we find that the Carpenters was not the 9(a) representative of the painters and tapers prior to the April 2 meeting. Therefore, we reject the Respondents' defense to the alleged violations.[17] We find that Garner/Morrison unlawfully recognized the Carpenters on April 2 and that the Carpenters unlawfully accepted that recognition and entered into a memorandum agreement with Garner/Morrison, as alleged.

III. APRIL 9 INTERROGATION ALLEGATION

The judge found that Garner/Morrison, through partowner Chris Morrison, did not violate Section 8(a)(1) by interrogating employee Gary Servis on April 9, 1 week after the Carpenters solicited the employees to sign authorization cards. The judge found no unlawful interrogation because Servis testified only that Morrison asked him: "[H]ave you decided what you are going to do yet?" The General Counsel excepts, noting that the judge failed to consider Servis' additional testimony that Morrison "did ask me if I had signed up for the Carpenters." We agree that Servis' additional testimony, if credited, could establish that Morrison interrogated him about Carpenters representation. However, Morrison testified that he did not ask Servis about Carpenters representation, and the judge did not address this portion of Morrison's testimony. Because this conflicting testimony requires a credibility determination the judge failed to make, we shall sever and remand this allegation to the judge. On remand, the judge shall make the appropriate credibility findings and determine whether the credited testimony establishes the alleged interrogation violation.

AMENDED CONCLUSIONS OF LAW

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

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

3. By the following acts and conduct, Respondent Garner/Morrison has violated Section 8(a)(2) of the Act:

(a) Assisting the Carpenters in obtaining union authorization cards from Garner/Morrison's painters and tapers.

(b) Recognizing the Carpenters as the collective-bargaining representative of its painters and tapers at a time when the Carpenters does not represent an uncoerced majority of those employees.

4. By engaging in surveillance of its employees' protected activities on April 2, 2007, Respondent Garner/Morrison violated Section 8(a)(1) of the Act.

5. By the following conduct, Respondent Carpenters has violated Section 8(b)(1)(A) of the Act:

(a) Accepting assistance from Garner/Morrison in obtaining union authorization cards from Garner/Morrison's painters and tapers.

(b) Accepting recognition from Garner/Morrison as the collective-bargaining representative of its painters and tapers at a time when the Carpenters did not represent an uncoerced majority of those employees.

(c) Entering into and giving effect to the memorandum agreement with Garner/Morrison covering Garner/Morrison's painters and tapers at a time when the Carpenters did not represent an uncoerced majority of those employees.

& Sons, 282 NLRB 1375, 1387 fn. 53 (1987), enfd. sub. nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[15] We need not decide, then, whether the 2002 Carpenters agreements, by their terms, otherwise satisfied the requirements imposed by *Staunton Fuel* for establishing a 9(a) relationship by contract language alone.

[16] We find it unnecessary to address the Painters' contention that its collective-bargaining agreements were 9(a) agreements rather than 8(f) agreements. Regardless of whether the agreements were under Sec. 8(f) or Sec. 9(a) of the Act, the Painters enjoyed exclusive representative status during the agreements' terms.

[17] We reject the General Counsel's contention that Garner/Morrison's conduct warrants a bargaining order under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). The violations found here, standing alone, do not demonstrate that a fair election cannot be held after the entry of the Board's traditional remedies.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

Specifically, having found that Garner/Morrison violated Section 8(a)(2) of the Act by assisting the Carpenters in obtaining union authorization cards from Garner/Morrison's painters and tapers and by recognizing the Carpenters as the collective-bargaining representative of those employees, we shall order Garner/Morrison to cease and desist from assisting and recognizing the Carpenters unless and until the Carpenters has been duly certified by the Board as the collective-bargaining representative of such employees. We shall also order Garner/Morrison to cease and desist from giving any effect to that unlawful recognition.

Further, having found that the Carpenters violated Section 8(b)(1)(A) of the Act by accepting Garner/Morrison's unlawful assistance and recognition, and by entering into and giving effect to the April 2, 2007 memorandum agreement with Garner/Morrison, we shall order the Carpenters to cease and desist from accepting such assistance and recognition, and from entering into and giving effect to the April 2, 2007 memorandum agreement with Garner/Morrison. We shall further require the Carpenters to reimburse all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues-checkoff and union-security clauses incorporated in the April 2, 2007 memorandum agreement, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). However, reimbursement does not extend to those employees who voluntarily became members of the Carpenters before April 2, 2007. See, e.g., *Dairyland USA Corp*., 347 NLRB 310, 314 (2006), enfd. 273 Fed. Appx. 40 (2d Cir. 2008).

ORDER

A. The Respondent, Garner/Morrison, LLC, Tempe, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assisting Southwest Regional Council of Carpenters in obtaining union authorization cards from Garner/Morrison, LLC's painters and tapers.

(b) Recognizing Southwest Regional Council of Carpenters as the collective-bargaining representative of its painters and tapers at a time when Southwest Regional Council of Carpenters does not represent an uncoerced majority of those employees.

(c) Giving effect to the unlawful recognition of Southwest Regional Council of Carpenters.

(d) Engaging in surveillance of employees' protected activities.

(e) 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Southwest Regional Council of Carpenters as the collective-bargaining representative of Garner/Morrison, LLC's painters and tapers unless and until it has been duly certified by the Board as the collective-bargaining representative of those employees.

(b) Within 14 days after service by the Region, post at its facility in Tempe, Arizona, copies of the attached notice marked "Appendix A."[18] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Southwest Regional Council of Carpenters, Los Angeles, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting assistance from Garner/Morrison, LLC in obtaining union authorization cards from Garner/Morrison, LLC's painters and tapers.

(b) Accepting recognition from Garner/Morrison, LLC as the collective-bargaining representative of its painters and tapers at a time when Southwest Regional Council of

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Carpenters does not represent an uncoerced majority of those employees.

(c) Entering into and giving effect to a memorandum agreement with Garner/Morrison, LLC covering Garner/Morrison LLC's painters and tapers at a time when Southwest Regional Council of Carpenters does not represent an uncoerced majority of those employees.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Reimburse all present and former employees for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues checkoff and union-security clauses incorporated in the April 2, 2007 memorandum agreement plus interest as provided in the remedy section of this decision. However, reimbursement does not extend to those employees who voluntarily joined and became members of Southwest Regional Council of Carpenters prior to April 2, 2007.

(b) Within 14 days after service by the Region, post at its union facility in Tempe, Arizona copies of the attached notice marked "Appendix B."[19] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation regarding Garner/Morrison, LLC's interrogation of Gary Servis is severed from this case and remanded to the administrative law judge for appropriate action as discussed above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision on the remanded interrogation allegation setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

[19] See fn. 18, supra.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT assist Southwest Regional Council of Carpenters in obtaining union authorization cards from you.

WE WILL NOT recognize Southwest Regional Council of Carpenters as your collective-bargaining representative at a time when Southwest Regional Council of Carpenters does not represent an uncoerced majority of you.

WE WILL NOT give effect to our unlawful recognition of Southwest Regional Council of Carpenters.

WE WILL NOT engage in surveillance of your protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Southwest Regional Council of Carpenters as your exclusive collective-bargaining representative unless and until it has been duly certified by the Board as your collective-bargaining representative.

GARNER/MORRISON, LLC

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT accept assistance from Garner/Morrison, LLC in obtaining union authorization cards from Garner/Morrison's painters and tapers.

WE WILL NOT accept recognition from Garner/Morrison, LLC as the collective-bargaining representative of its painters and tapers at a time when we do not represent an uncoerced majority of those employees.

WE WILL NOT enter into and give effect to a memorandum agreement with Garner/Morrison, LLC covering Garner/Morrison's painters and tapers at a time when we do not represent an uncoerced majority of those employees.

WE WILL NOT in any like or related manner restrain or coerce Garner/Morrison's painters and tapers in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reimburse all present and former Garner/Morrison, LCC painters and tapers for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues-checkoff and union-security clauses incorporated in the April 2, 2007 memorandum agreement plus interest. However, reimbursement does not extend to those employees who voluntarily joined and became members of Southwest Regional Council of Carpenters prior to April 2, 2007.

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS

Mara-Louise Anzalone, for the General Counsel.

James A. Bowles (Hill, Farrer & Burrill, LLP), of Los Angeles, California, for the Respondent Garner/Morrison, LLC.

Daniel M. Shanley (DeCarlo, Connor & Shanley), of Los Angeles, California, for the Respondent Southwest District Council of Carpenters.

Gerald Barrett (Ward, Keenan & Barrett, P.C.), of Phoenix, Arizona, for the 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,[1] by the Regional Director for Region 28 of the National Labor Relations Board (the Board), is based upon the 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 Garner/Morrison, LLC (Garner) has unlawfully recognized Respondent Carpenters as the exclusive collective-bargaining representatives of certain of its employees and thereby violated Section 8(a)(2) and (1) of the Act. It also alleges that Respondent Carpenters, by accepting that recognition, violated Section 8(b)(1)(A) of the Act. In addition, the complaint alleges some independent violations of Section 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,[2] 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 Section 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 Section 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 coworker, 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

[1] All dates are 2007, unless otherwise noted.

[2] The General Counsel's motion to correct the record is granted.

Western Wall and Ceiling Contractors Association. Later, on January 16, Garner and the Carpenters signed a successor short form adopting the drywall master agreement.

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 Section 8(a)(2) of the Act because of the Supreme Court's construction of the 6-month limitation period established by Section 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, 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, 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 (1987). 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 Section 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.[3] 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 Carpen-

[3] The General Counsel's concession that the Painters contract and relationship are permitted under Sec. 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.

ters' agreements contained this clause, article I, section 7(g) in the 2006–2010 master agreement:[4]

> 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 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 such [Painters'] contract remains in effect.* [Bracketed material inserted for clarity; emphasis added.]

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 par. 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.

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.

C. The Events Leading to the Expiration of the Painters' Contracts

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

As the expiration date approached, Painters' Business Representative Lonnie Tinder took several steps toward changing the relationship from Section 8(f) to Section 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 official.

In addition, Tinder made several approaches to Morrison. Although the two recall the date somewhat differently,[6] 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 nonunion contractors and its profit margin was not what the larger commercial painting contractors enjoyed. Indeed, Tinder had not yet prepared proposed wage rates and did not present any contract proposal to Morrison during their meeting. He did, however, give Morrison a document.

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

> Showing of Support Notice
> Section 9A–NLRB
>
> 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 [S]ection 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.
>
> Sincerely,
> Lonnie Tinder/BR DC#15, LU#86
>
> Accepted and agreed:
> [Signature space]
> Employer Representative

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.

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.[7] 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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[4] In the 2002–2006 master agreement the clause is in art. I, sec. 6 and follows subsec. (f) but without lettering it as (g).

[5] Garner, though not a member of the employer association, is referenced here due its short-form adoption contracts.

[6] Tinder places the meeting in early February; Morrison recalls it was the first week of March, perhaps March 5.

[7] *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).

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.

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 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.

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.
>
> 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?
>
> 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.
>
> . . . .

He continued:

> . . . 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?
>
> 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.
>
> 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?
>
> A. No.

The meeting ended inconclusively.

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 resigning 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.

Morrison told them that Garner most likely would not resign 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 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 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 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 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 Garner would resign with the painters. He perceived Tinder was using his relatively small company as the spearhead contractor in what was essentially an industrywide 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 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.[8]

As a result, Morrison called the Carpenters' McCarron that Friday and told him that he 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. 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 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.

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,[9] 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 page 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 as well. (Jt. Exhs. 3 and 4.) The agreement was a newer version of the short form Garner had signed in 2003. It contained no significant changes, except for its term, now expiring in 2010 instead of 2007. It also adopted the successor master agreement.

Although the meeting seemed to be ending, McCarron called everyone back in order to conduct a raffle from tickets given earlier at the door. Both wall-finishing tools (knives, pans, and the like) and cash were awarded in a drawing. The tools had been displayed on one of the front tables throughout the entire presentation. However, the cash awards were withheld from those employees who had not signed authorization cards. That would appear to have been a precaution against an accusation that the Carpenters were bribing employees to sign such cards. (A cash door prize to someone who had already signed would not carry that risk.) Tools, on the other hand, were awarded without regard to whether the lucky ticketholder had signed an authorization card. They were valued at about $40.

When the raffle ended, the meeting was over. It lasted about 1-1/2 hours, ending about 3:30 p.m.

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[8] 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.

[9] The presentation is in evidence as Jt. Exh. 15. A Spanish translation was presented simultaneously.

E. The Painters' Representation Petitions

While the meeting had been underway, the Painters' Tinder was busy. He prepared two, one for the tapers and another for the painters. He gave instructions to fax signed copies to both the NLRB's Regional Office and to Respondent. According to the stipulation, the faxes to the Region occurred about 11:20 a.m.[10] The Painters sent copies to Garner a few hours later, together with a cover letter. Although the Painters' and Garner's fax machines show different times for the transmissions, I credit Garner's fax machine as being the most likely to be accurate.[11] Its record shows the petitions were received at Garner's office about 3:25 p.m. Of course, no manager was in the office at that time because they were attending the meeting at the Marriott. Given that timing, Morrison had already signed the two Carpenters' agreements by the time those faxes were received in the office.

II. ANALYSIS AND CONCLUSIONS

The complaint asserts that Garner's Morrison and Travis Garner committed several independent acts interfering with the Section 7 rights of the painters and tapers. Specifically, it alleges that during the April 2 meeting those company officials committed improper actual surveillance, made a statement of futility aimed at the Painters, promised benefits, polled the employees, and interrogated them regarding their preference for a representative. Indeed, the complaint urges that the Carpenters' representatives were Garner's agents and Garner is responsible for their behavior, too. There is a later contention that Morrison unlawfully interrogated employee Gary Servis when a payroll deduction needed to be addressed.

All except for the Servis allegation took place at the meeting. Without detailing the facts, however, it should be remembered that Section 8(a)(1) only prohibits activity which interferes with, restrains, or coerces employees in the exercise of their rights under Section 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 Section 7 rights. As the Board said in *Rossmore House,* 269 NLRB 1176 (1984),[12] 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.[13] Also see Section 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

[10] These do not appear in the Painters' fax records; perhaps they were faxed by counsel.

[11] The Painters had never programmed their machine to comply with FCC regulations concerning the sender's identity and fax number, though it did show the date and time of transmission. Curiously, the time of day does not seem to have been set correctly. Its log shows a transmission time of 2:30 p.m. (Arizona does not observe daylight savings time, so a neglected changeover does not explain the discrepancy of about an hour.) This may be contrasted with Garner's fax machine which on its face complies with the FCC rule. See Jt. Exhs. 23 and 24.

[12] Affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[13] The Board in *RCA Del Caribe*, supra 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 post-petition 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.
>
> . . . .
>
> 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; emphasis added.]

as described by *Deklewa*,[14] 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 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 Section 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 Section 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 Section 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,[15] 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, 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.

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 Section 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.

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 determent 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).

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

[14] *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. denied 488 U.S. 889 (1988).

[15] 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 Sec. 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 [S]ection 9(c) or 9(e)." Also *Deklewa*, supra.

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 an 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.

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 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 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 not really refute.[16] 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 $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 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 Section 7 right in a fact pattern which is subject to several different 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 Section 8(b)(1)(A). *Flatbush Manor Care Center,* 287 NLRB 457 (1987); *Teamsters Local 952 (Pepsi Cola Bottling)*, 305 NLRB 268, 275 (1991).[17] It is not a practice which the Carpenters would wish to be 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, Porch's claimed discomfort not withstanding, 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 plain for years.

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

[16] See Porch's testimony at Tr. 161–165.

[17] In addition, in an election context, unions engage in objectionable conduct under Sec. 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).

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 long 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 Section 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 Section 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*, 262 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 Section 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.

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.

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.

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.

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 an 8(f) contract does not establish a controlling bargaining history, although Section 9(b)(2) of the Act might well permit a craft severance.[18] Yet, the application of the *General Extru-*

[18] Sec. 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. . . .

sion, 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.

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, Inc.,* 157 NLRB 583 (1966). The change was effected by *Dana Corp.*, 351 NLRB 434 (2007). 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 timeframe.

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, supra at 435:

> 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. [Emphasis added.]

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*, 262 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." [Emphasis added.] 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 1980s. 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 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 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." Supra at 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 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 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 preexisting unit of wall construction workers.

Aside from the representation issues which could be raised in the event the petitions are processed, one thing is clear. Garner did not commit a violation of Section 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 Corp.*, supra (2007), should be applied here, assuming no contract bar. Neither do I 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.

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

CONCLUSIONS OF LAW

1. Respondent Garner is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent Carpenters is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to prove that Respondent Garner committed any violation of Section 8(a)(1) or (2) of the Act.
4. The General Counsel has failed to prove that Respondent Carpenters committed any violation of Section 8(b)(1)(A) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The complaint is dismissed.

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[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.