Nos. 12-1011, 12-1012, 12-1013, 12-1047

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAYMOND INTERIOR SYSTEMS, INC.; SOUTHWEST REGIONAL COUNCIL OF CARPENTERS

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO

Intervenor for Respondent

SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAYMOND INTERIOR SYSTEMS, INC.; SOUTHWEST REGIONAL COUNCIL OF CARPENTERS Petitioners v. NATIONAL LABOR RELATIONS BOARD Respondent and SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, Intervenor for Respondent	)	Nos. 12-1011 12-1012 12-1013 12-1047 Board Case Nos. 21-CA-37649 21-CB-14259
SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, Petitioner v. NATIONAL LABOR RELATIONS BOARD Respondent	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. ***Parties and Amici:*** Raymond Interior Systems, Inc. ("Raymond"), the Southwest Regional Council of Carpenters ("the Carpenters"), and the Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO ("the Painters") are the petitioners before the Court. Raymond and the Carpenters were the respondents before the Board; the Painters were the charging party. The Board is the respondent before the Court; its General Counsel was a party before the Board. The Painters have also intervened in favor of the Board's enforcement case against Raymond and the Carpenters; the Painters' petition for review is limited to challenging the scope of the remedy the Board awarded against those parties.

B. ***Ruling Under Review:*** The case involves the parties' petition to review, and the Board's cross-application to enforce, a Decision and Order the Board issued against Raymond and the Carpenters on September 30, 2010 (355 NLRB No. 209); and the Board's Order issued on December 30, 2011 (357 NLRB No. 166), granting in part and denying in part Raymond's and the Carpenters' motion to reconsider the September 2010 Order.

C. ***Related Cases:*** Raymond, the Carpenters, and the Painters filed, in the

United States Court of Appeals for the Ninth Circuit, petitions for review, and the Board filed a cross-application for enforcement, of the Decision and Order issued in the instant case by a two-member Board panel (9th Cir. Case Nos. 09-73210, 10-70208 &10-70209). The parties had completed briefing and were awaiting oral argument. On June 17, 2010, the Supreme Court issued *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, holding that the two-member Board lacked authority to issue decisions when there were no other sitting Board members. Accordingly, on August 25, 2010, the Ninth Circuit remanded its cases to the Board for further proceedings. On September 30, 2010, a three-member Board panel issued the Order now before the Court. The Board is not aware of any related cases pending in or about to be presented to this Court or any other court.

s/Linda Dreeben
Linda Dreeben
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1099 14th Street, NW
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Dated at Washington, DC
this 11th day of December, 2012.

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

GLOSSARY

A.	The parties' joint appendix
Act	The National Labor Relations Act (29 U.S.C §§ 151 *et seq.*)
Board	The National Labor Relations Board
Carpenters	The Southwest Regional Council of Carpenters
Carpenters 2006 master agreement	The July 1, 2006 through June 30, 2010, Southern California Drywall/Lathing master agreement
CBA	Collective-bargaining agreement
CSA	The September 12, 2006, Confidential Settlement Agreement between Raymond and the Carpenters
MFR Order	The Board Order issued on December 30, 2011 (357 NLRB No. 166) granting in part and denying in part Raymond's and the Carpenters' motion to reconsider the Board's September 2010 Order
Order	The Board Decision and Order issued against Raymond and the Carpenters on September 30, 2010 (355 NLRB No. 209)
Painters	The Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO
Painters Agreement	The CBA between the Painters and Raymond that expired on September 30, 2006
Raymond	Raymond Interior Systems, Inc.
WWCCA	The Western Wall and Ceiling Contractors Association

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These consolidated cases are before the Court on the petitions of Raymond Interior Systems, Inc. ("Raymond") and the Southwest Regional Council of Carpenters ("the Carpenters") to review a Decision and Order the National Labor Relations Board ("the Board") issued against them on September 30, 2010, reported at 355 NLRB No. 209 ("the Order") (A. 41), and an Order issued on December 30, 2011, reported at 357 NLRB No. 166, granting in part and denying in part their motion to reconsider the September 2010 Order ("the MFR Order") (A. 9-11.)[1] The Board filed a cross-application for enforcement of both orders, which are final under Section 10(f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(f)) ("the Act"). The Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO ("the Painters"), the charging party before the Board,

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[1] "A." references are to the Joint Appendix filed by the parties. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

filed a petition for review for the limited purpose of challenging the scope of the remedy the Board awarded in both orders. The Painters intervened in support of the Board's cross-application for enforcement of those orders.

The Board had jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The parties' petitions for review and the Board cross-application for enforcement were timely filed, as the Act places no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that Raymond violated the Act by unlawfully assisting the Carpenters in obtaining union-authorization cards from its drywall-finishing employees, and immediately recognizing the Carpenters, based on those tainted cards, as those employees' Section 9(a) bargaining representative; that the Carpenters violated the Act by accepting that unlawful assistance and recognition; and that Raymond and the Carpenters violated the Act by applying a collective-bargaining agreement, including a union-security clause, to the employees when the Carpenters did not represent an uncoerced majority of them.

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

3. Whether the Board acted within its broad remedial discretion in formulating a remedy that requires Raymond and the Carpenters to cease and desist from their unfair labor practices, and Raymond to withdraw its unlawful Section 9(a) recognition of the Carpenters.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

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

their "*Beck* rights"[2] regarding union membership and the payment and use of union fees and dues.

Following a hearing, the administrative law judge issued a decision finding that Raymond and the Carpenters violated the Act as alleged. Raymond, the Carpenters, and the Painters filed exceptions. In a Decision and Order issued on September 30, 2009, and reported at 354 NLRB No. 85 (A. 42-70), a Board consisting of two members affirmed the judge's findings that Raymond and the Carpenters violated the Act as alleged on October 2, and adopting the judge's recommended order, as modified. However, the Board found it unnecessary to pass on the judge's additional finding that Raymond had also unlawfully granted, and the Carpenters had unlawfully accepted, Section 9(a) recognition on October 1, because those findings would be "cumulative" of the findings of unlawful assistance and 9(a) recognition occurring on October 2. (A. 42.) Raymond, the Carpenters, and the Painters filed petitions for review in the United States Court of Appeals for the Ninth Circuit, and the Board filed a cross-application for

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

enforcement. The parties completed briefing and were awaiting argument. On June 17, 2010, the Supreme Court issued *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, holding that the two-member Board lacked authority to issue decisions when there were no other sitting Board members. Accordingly, the Ninth Circuit remanded the case for further proceedings by a properly constituted Board.

On September 30, 2010, a three-member panel of the Board issued the Order now before the Court, adopting the judge's decision and recommended order for the reasons stated in the Board's September 2009 decision, which was incorporated by reference. (A. 41.) Thereafter, Raymond filed with the Board a motion for reconsideration of the Order, which the Carpenters joined. On December 30, 2011, the Board granted that motion in part, and denied it part, and modified its Order accordingly. (A. 9-11.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

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

Raymond is a construction-industry contractor that performs drywall framing, hanging, finishing, and related work in California and several other states. In October 2006, it employed 579 construction employees working out of its Orange County and San Diego, California facilities. This tally included two distinct groups of employees: 351 framing and drywall-hanging employees who perform metal stud framing, drywall hanging, and lathing work; and 110 drywall-finishing employees, who cover up screws and joints in drywall after the drywall sheets have been hung, and smooth out the walls in preparation for painting. Two hundred and twenty-four of those drywall-hanging employees and 55 of the drywall-finishing employees worked out of the Orange County facility, while the other 127 hangers and 55 finishers worked out of San Diego. (A. 47-48; 260, 315, 361-62.)

In practice, there remained a distinction between the work performed by these two groups. Thus, the drywall-finishing employees testified without contradiction that they never performed drywall-hanging work, and that the drywall-hanging employees never performed drywall-finishing work. (A. 48 n.2;

260-61, 316, 367, 452.) Moreover, as fully explained below, these two distinct groups have been, for the last several decades, separately represented in different bargaining units by different unions, with Raymond's drywall-finishing employees represented by the Painters, and its drywall-hanging employees represented by the Carpenters. (A. 48; 772.)

Since at least the 1960s, Raymond has been a member of a multiemployer bargaining association, the Western Wall and Ceiling Contractors Association ("the WWCCA"), comprised of employers performing construction work similar to that of Raymond. Raymond was also a member of two separate WWCCA conferences, each of which negotiates collective-bargaining agreements ("CBAs") with different unions on behalf of the WWCCA's employer-members. Raymond was a signatory to these agreements by virtue of its membership in these conferences. (A. 48.)

First, the California Finishers Conference has, since the 1960s, negotiated CBAs with the Painters covering the drywall-finishing employees of Raymond and the other employer-members. (A. 48; 497-98.) The most recent such CBA ran from October 1, 2003 through September 30, 2006 ("the Painters' Agreement"). (A. 48; 905.) It is undisputed that the parties entered this agreement pursuant to Section 8(f) of the Act (29 U.S.C. § 158(f)). (A. 48.) As fully explained below (*see infra* Argument § III.D), Section 8(f) allows a construction-industry employer

to recognize a union as its employees' bargaining representative before a majority of employees have chosen the union. An employer may refuse to bargain and unilaterally change terms and conditions of employment after the expiration of an 8(f) agreement because the union enjoys no presumption of continuing majority support. Further, employees may file petitions to decertify the union at any time under an 8(f) agreement. Such an agreement is in contrast to a Section 9(a) agreement (29 U.S.C. § 159(a)), which is lawful only where the union represents a majority of the employees, and pursuant to which a union enjoys an irrebuttable presumption of majority support during the agreement's term, for up to three years.

Second, the California Drywall/Lathing Conference has for decades negotiated CBAs with the Carpenters covering the drywall-hanging employees of Raymond and the other employer-members. (A. 48.) Beginning in 1988, the bargaining-unit description in these agreements was extended to include employees who performed drywall-finishing work. (A. 48; 546, 746.) In 1992, however, to avoid overlapping Painters-Carpenters jurisdiction over such work, successive Carpenters agreements began including the so-called "Painters exception," which stated that the Carpenters would not assert jurisdiction over an individual employer's drywall-finishing employees so long as that employer had a CBA with the Painters covering those employees. (A. 48; 749, 1051.)

The two most recent such Carpenters agreements were the July 1, 2002 through June 30, 2006, and the July 1, 2006 through June 30, 2010 Southern California Drywall/Lathing master agreements (respectively, "the 2002 Carpenters master agreement," and "the 2006 Carpenters master agreement"). (A. 48; 1047.) The 2006 Carpenters master agreement contained a union-security clause, providing that every employee covered by the agreement shall, as a condition of continued employment, become a member of the Carpenters "within eight (8) days" of beginning employment covered by the agreement. (A. 50 n.8; 1053.)

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

In May 2006, Raymond notified the Painters by letter of its intent to immediately resign from the California Finishers Conference; to remove the authority of that conference to bargain on Raymond's behalf; and to terminate the Painters' Agreement effective September 30, 2006, the day it would expire by its terms. It is undisputed that Raymond lawfully terminated the Painters' Agreement and that it expired on September 30. (A. 49; 409, 1080.) In the meantime, the Carpenters told Raymond that, upon expiration of the Painters' Agreement, the 2006 Carpenters master agreement would "kick[] in immediately" to cover Raymond's drywall-finishing employees. (A. 49-50; 752.)

On September 12, 2006, in order to avoid potential grievances relating to the application of the 2006 Carpenters master agreement to Raymond's finishing employees, the Carpenters and Raymond reached a "Confidential Settlement Agreement" ("the CSA"), providing that, upon expiration of the Painter's Agreement, Raymond would apply the Carpenters 2006 Drywall/Lathing Memorandum Agreement [3] to its drywall-finishing work and employees "to the fullest extent permitted by law." The parties kept this settlement agreement secret from Raymond's drywall-finishing employees. (A. 49; 1080.) On October 1, Raymond began applying the 2006 Carpenters master agreement to those employees, none of whom were members of the Carpenters at the time. (A. 49-50; 565, 573, 749-52, 772.)

C. Raymond Calls the Employees to a Meeting on October 2, 2006

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

[3] This memorandum agreement is a short-form agreement, which bound Raymond to the terms of the Carpenters 2006 master agreement. (A. 50 & n.4.)

noted that it was unusual for them to be called to Raymond's premises for a meeting. (A. 51; 261-62, 316-17, 367-68.)

On October 2, as planned, Raymond and the Carpenters jointly held a meeting at the Orange County facility, with 85-90 (out of 110) of Raymond's drywall-finishing employees. As each employee arrived in his vehicle at Raymond's outer gate, he was met by company officials who checked the employee's name on a sheet of paper. Once checked, the employee was permitted to enter and park. At an interior gate blocking access to Raymond's main facility, a company office worker again checked each employee's name off a list. At 7 a.m., the gates were opened and the employees were ushered into a warehouse area, in which tables and chairs were arranged and the employees were served breakfast. After an hour, the employees were instructed to enter a large training room, which was arranged with rows of chairs, a stage with tables and a podium, and a dropdown projection screen. (A. 51; 262-63, 368-69, 572-73.)

D. During the October 2 Meeting, Company President Winsor and Superintendent Zorrero Tell Employees that They Must Sign up with the Carpenters "That Day" Or Else They Will Have No More Work

The purpose of the meeting was to explain the transition from the Painters to the Carpenters. The initial presenter was Company President Travis Winsor, who spoke for several minutes, utilizing Power Point slides and a document that was distributed to employees. (A. 50-51; 625-26, 1040, 1083.) That document states

that, from October 1 forward, Raymond will apply the 2006 Carpenters master agreement to its drywall-finishing work and that, consequently, "[d]rywall-finishing employees who were not previously members of the Carpenters must join the Carpenters Union under the union-security provision of the Carpenters labor agreement." (A. 1040.) Following Winsor, several Carpenters representatives spoke about the wage and benefits packages in the Painters' and Carpenters' agreements, and the employees' obligation to pay monthly dues. (A. 51-52, 66; 322, 460, 1096.) During these presentations, English-to-Spanish translation was provided by a Carpenters official through headsets worn by Spanish-speaking employees. (A. 51; 577-78.)

After the formal presentations, employees were permitted to ask questions of Company President Winsor, Superintendent Zorrero, and the Carpenters' representatives. An employee asked whether the employees could continue working if they did not sign with the Carpenters. Winsor replied that if they did not sign, there would be no more work, and that if they did not sign, they will not have a job but no one will be fired. (A. 64; *see* 52, 54, 267, 270, 290, 459-60, 465-66, 475.) Employees then asked if they had to reach a decision that day about signing with the Carpenters, and Winsor replied that "if we didn't sign on that day, we weren't working anymore." (A. 64, *see* 53-55; 466, 477; *see also* 323-24, 349-50, 362, 489.) Zorrero responded to similar questions, asked by employees who

remained in the room after the formal question-and-answer session, by stating: "There's no time to think about it. Either sign . . . today or you cannot work tomorrow for us." (A. 64; 397; *see* 54, 375, 382.)

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

Upon conclusion of the question-and-answer session, the drywall-finishing employees—none of whom were members of the Carpenters at the time—were instructed to return to the warehouse area. There, at a table, clerical employees of the Carpenters distributed a single, three-page document composed of a Carpenters membership application, supplemental dues-authorization form, and an authorization-for-representation form. (A. 51-52, 66; 896.)

The Carpenters did not give employees any notice of their *Beck* rights (*see* p. 5 n.2, above) when it distributed these forms. Rather, it was only after employees completed and returned the entire document that they were given a Carpenters' magazine, which contained a printed *Beck* notice. (A. 52 & n.18; 710, 1115.) A Carpenters' clerical worker confirmed that she only gave out that magazine when an employee returned signed paperwork. (A. 676, 710.) Thus, employees who did not return signed paperwork did not receive the magazine with the *Beck* notice. (A. 710.)

Moreover, around this time, Carpenters representatives circulated amongst employees, spoke to them about whether to sign up with the Carpenters, and solicited them to execute authorization cards. (A. 53; 271-72, 325, 766.) For example, a Carpenters representative approached employee Janet Pineda "to convince her to sign" because she appeared to be "the hardest person to convince." (A. 325, 766.)

Around this same time, Winsor approached employee Richard Myers and asked him if he was going to sign the Carpenters membership document. When Myers said no, Winsor responded that he would like Myers to do so and continue working for Raymond. Myers replied that "would not happen because it wasn't about the money, it was about integrity." (A. 52; 298-99.)

Most of the employees signed and returned the entire Carpenters' document that day. Employee Ruben Alvarez, for example, explained that he signed the Carpenters document in order to "keep on working." (A. 54; 377.) Of the employees who refused to sign, some did not report to work the next day because, as employee Jose Ramos explained, Winsor had told them "that if we didn't sign that day, we wouldn't be working [tomorrow]." (A. 55; 489.)

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

On the afternoon of October 2, a second meeting was held at Raymond's San Diego facility for its remaining drywall-finishing employees. At its conclusion, Winsor executed an agreement recognizing the Carpenters as the majority representative of Raymond's drywall-finishing employees pursuant to Section 9(a) of the Act. Winsor did so based on the Carpenters having presented him with authorization cards signed on October 2 by a majority of the drywall-finishing employees. (A. 58; 618-20, 808, 1034.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Pearce) found, in agreement with the administrative law judge, that Raymond violated Section 8(a)(1), (2) and (3) of the Act (29 U.S.C. § 158(a)(1), (2) and (3)) by conditioning continued employment on immediate membership in the Carpenters, and by unlawfully assisting the Carpenters in obtaining union-authorization cards. (A. 41-43.)

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

accepting, recognition as the employees' representative under Section 9(a) of the Act at a time when the Carpenters did not represent an uncoerced majority of these employees. Moreover, the Board found, in agreement with the judge, that Raymond violated Section 8(a)(3) of the Act, and the Carpenters violated Section 8(b)(2) of the Act (29 U.S.C. § 158(b)(2)), by maintaining and applying the Carpenters 2006 master agreement, including its union-security provision, to the employees at a time when the Carpenters did not represent an uncoerced majority. Finally, the Board found, in agreement with the judge, that the Carpenters violated Section 8(b)(1)(A) of the Act by failing to timely inform the drywall-finishing employees of their *Beck* rights (*see* n.2, above) when it first sought to obligate them to pay dues and fees under the union-security clause. (A. 41-44.)

The Board's Order requires Raymond and the Carpenters to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Specifically, the Orders requires Raymond to cease and desist from assisting the Carpenters in obtaining union-authorization cards, or recognizing the Carpenters as its drywall-finishing employees' Section 9(a) bargaining representative at time when that union does not represent an uncoerced majority of those employees; and requires the Carpenters to cease and desist from accepting such assistance and recognition.

The Order also requires Raymond and the Carpenters to cease and desist from maintaining and applying the Carpenters 2006 master agreement, or any extensions, renewal, or modifications thereof, including the union-security clause, to the drywall-finishing employees, unless and until the Carpenters has been certified by the Board as the exclusive collective-bargaining representative of those employees. (A. 43-44.)

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

III. THE BOARD'S ORDER ON RECONSIDERATION

On October 27, 2010, Raymond filed (and the Carpenters joined) a motion for reconsideration, which the Board granted in part, and denied in part, while

modifying its Order accordingly. (A. 9.) The Board granted Raymond's request to eliminate the Order's requirement that Raymond provide employees with alternative-benefits coverage equivalent to the coverage possessed under the Carpenters 2006 master agreement. The Board explained that while its precedent had not always been consistent in requiring alternate-benefits coverage to remedy unlawful employer assistance and recognition of a union, it had not ordered such benefits in its most recent decision presenting the issue, *Garner/Morrison, LLC*, 356 NLRB No. 163 (2011). Consistent with *Garner/Morrison*, the Board found that alternative-benefits coverage was not required to effectuate the key prescription in unlawful assistance and recognition cases: that an employer not grant Section 9(a) recognition unless and until such recognition is favored by an uncoerced majority of employees. Accordingly, the Board deleted the alternative-benefits provision, and, consistent with *Garner-Morrison*, modified its Order to state that it does not require "any changes in wages or other terms and conditions of employment that may have been established pursuant" to the 2006 Carpenters master agreement. (A. 9 & n.4.)

Next, contrary to Raymond's contention on reconsideration, the Board clarified that its Order "should not be interpreted as requiring a Board certification of representative before Raymond may lawfully recognize the Carpenters (or any other labor organization) as its employees' [Section] 8(f) collective-bargaining

representative." (A. 9 n.5.) Finally, the Board rejected Raymond's argument that the Board erred in not deciding whether the CSA reached between Raymond and the Carpenters three weeks before Raymond's unlawful assistance on October 2 constituted a valid Section 8(f) agreement that was not invalidated by the subsequent unlawful assistance. The Board denied this claim because a finding that the CSA constituted a valid 8(f) agreement "would not affect our determination that Raymond, on October 2, 2006, unlawfully recognized the Carpenters as the 9(a) representative of its drywall finishing employees." (A. 10.)

SUMMARY OF ARGUMENT

Raymond and the Carpenters met with employees on October 2 and coerced them into signing authorization and membership cards that day in order to keep their jobs. Following settled law, the Board found that this conduct violated the employees' right to freely choose their bargaining representative and ordered Raymond to cease and desist from recognizing the Carpenters as the employees' Section 9(a) collective-bargaining representative, and the Carpenters to cease and desist from accepting such recognition, unless and until the Carpenters are duly certified by the Board. The parties' challenges to these findings and remedy fail.

I. Raymond violated Section 8(a)(1), (2), and (3) of the Act on October 2 when it warned its employees that they must sign with the Carpenters "that day" in order to continue working; immediately recognized the Carpenters as the

employees' Section 9(a) bargaining representative based solely on the cards so coercively obtained; and applied its collective-bargaining agreement with the Carpenters to the employees at a time when the Carpenters did not represent an uncoerced majority. Likewise, the Carpenters violated Section 8(b)(1)(A) and (2) of the Act by accepting that assistance and recognition, and applying that agreement.

The credited testimony and settled law amply support these findings. Neither Raymond nor the Carpenters can show the credited evidence is "hopelessly incredible" or "inherently self-contradictory." Moreover, Raymond cannot show that its sign-today-or-no-work warnings only impacted membership forms, not the authorization cards used to recognize the Carpenters. Indeed, the Carpenters immediately followed Raymond's ominous warnings by giving employees one document combining both forms, thus leading employees to reasonably believe they must sign both in order to continue working.

II. Settled law holds that a union violates Section 8(b)(1)(A) by failing to inform employees of their *Beck* rights when it first seeks to obligate them to pay union dues and fees. Thus, the Carpenters violated the Act by admittedly failing to give employees any *Beck* notice until *after* they had executed membership applications and dues-checkoff forms. This same law clearly rejects the Carpenters' novel claim that it timely provided *Beck* notices *after* employees

completed the forms but *before* actually collecting dues. Nor did the Board err in ordering the established, court-approved remedy that Raymond and the Carpenters jointly and severally reimburse employees for wrongfully collected dues.

III. On October 2, Raymond and the Carpenters coerced employees in their organizational rights and unlawfully inserted the Carpenters as their Section 9(a) representative. The Board appropriately exercised its broad discretion in formulating a remedy for these serious unfair labor practices. Raymond and the Carpenters imposed their Section 9(a) relationship on employees based solely on union-authorization cards tainted by unlawful coercion. Accordingly, the Board reasonably ordered Raymond to cease and desist from recognizing the Carpenters as the Section 9(a) representative, and the Carpenters to cease and desist from accepting such recognition, unless and until the Carpenters is duly certified by the Board. Raymond's and the Carpenters' challenge to this remedy fails because it ignores the Board's clarification in its MFR Order that its Order "should not be interpreted as requiring a Board certification" before Raymond may lawfully recognize the Carpenters (or any other union) as its employees' Section 8(f) representative.

The Painters, in turn, fail to show that the Board abused its discretion when it declined to order Raymond to provide alternative-benefits coverage. The Board explained why that remedy was not necessary to effectuate the Act's purposes.

Nor did the Board abuse its discretion by clarifying that its Order did not require a Board certification before Raymond may recognize the Carpenters or another union (including the Painters) as a Section 8(f) representative. This clarification simply acknowledges that, in enacting Section 8(f), Congress explicitly gave construction-industry employers like Raymond the right to use another mechanism for recognizing unions.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT RAYMOND UNLAWFULLY ASSISTED THE CARPENTERS IN OBTAINING UNION-AUTHORIZATION CARDS, THAT RAYMOND UNLAWFULLY GRANTED, AND THE CARPENTERS UNLAWFULLY ACCEPTED, SECTION 9(a) RECOGNITION, AND THAT THEY UNLAWFULLY APPLIED THE CARPENTERS AGREEMENT AND ITS UNION-SECURITY CLAUSE

A. Introduction

On October 2, Raymond and the Carpenters held a meeting with employees who had historically been represented by the Painters, during which they coerced employees into signing Carpenters' authorization and membership cards that day in order to keep their jobs. Following settled law, the Board found that this conduct violated the employees' right to freely choose their Section 9(a) union representative, and ordered Raymond to cease and desist from recognizing the Carpenters as the Section 9(a) representative, and the Carpenters to cease and desist from accepting such recognition, unless and until the Carpenters has been certified by the Board.

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

Section 7 and Section 9(a) of the Act (29 U.S.C. § 157 and § 159(a)) guarantee employees freedom of choice and majority rule in their selection of a bargaining unit representative. *Int'l Ladies' Garment Workers' Union v. NLRB*,

366 U.S. 731, 737 (1961) ("*ILGWU*"). Accordingly, the collective-bargaining process must be "free . . . from all taint of an employer's compulsion, domination or influence." *Int'l Ass'n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 80 (1940).

Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) therefore makes it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. *See District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1159-61 (D.C. Cir. 1978) ("*District 65*"). It is well settled, for example, that an employer violates Section 8(a)(2) and (1)[4] by unlawfully aiding a union in its efforts to obtain majority support in a unit of employees, and by recognizing the union on the basis of that unlawfully assisted majority. *See District 65*, 593 F.2d at 1161; *Dairyland USA Corp*, 347 NLRB 310, 310-14 (2006), *enforced sub nom. NLRB v. Local 348-S, UFCW*, 273 F. App'x 40 (2d Cir. 2008) ("*Local 348-S*");

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[4] Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]." A violation of Section 8(a)(2) results in a derivative violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 250 (D.C. Cir. 1991). The union counterpart of Section 8(a)(1) is Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)), which makes it an unfair labor practice for a union to "restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act.]"

Duane Reade, Inc., 338 NLRB 943, 944 (2003), *enforced*, 99 F. App'x 240, 241-42 (D.C. Cir. 2004).

Likewise, an employer violates Section 8(a)(3) when it conditions its employees' continued employment on immediate membership in the union at a time when the employees enjoy a contractual or statutory grace period, during which they cannot be lawfully compelled to join the union.[5] *See Acme Tile and Terrazo Co*, 318 NLRB 425, 427-28 (1995), *enforced*, 87 F.3d 558 (1st Cir. 1996); *accord Booth Serv., Inc.*, 206 NLRB 862, 865 & n.8 (1973), *enforced as modified*, 516 F.2d 949 (5th Cir. 1975); *NLRB v. Campbell Soup Co.*, 378 F.2d 259 (9th Cir. 1967); *see generally Penn State Educ. Assn. v. NLRB*, 79 F.3d 139, 154 (D.C. Cir. 1996) (employer violates Section 8(a)(3) when employer and union without a legitimate majority enter into collective-bargaining agreement that contains a provision requiring employees to become union members).

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

In demonstrating unlawful assistance, the Board's General Counsel is not required to show "with mathematical certainty" that less than a majority of the employer's employees freely signed union authorization cards. *District 65*, 593 F.2d at 1161. Rather, "proof of a pattern of employer assistance may provide sufficient circumstantial evidence to justify the inference that the union's majority support is tainted." *Id.* (citing with approval *Amalgamated Local Union 335 v. NLRB*, 481 F.2d 996, 1002 n.8 (2d Cir. 1973)); *accord Local 348-S*, 273 F. App'x at 42; *NLRB v. Windsor Castle Healthcare Facilities, Inc.*, 13 F.3d 619, 623 (2d Cir. 1994).

Nor is the Board required to look into either the employer's motive for assisting the union, or the employees' subjective reactions to that assistance. Proof of actual coercion is unnecessary; it is sufficient that the employer's assistance has a reasonable "tendency to coerce employees in the exercise of their organizational rights." *NLRB v. Vernitron Elec. Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977); *accord Duane Reade, Inc. v. NLRB*, 99 F. App'x 240, 241-42 (D.C. Cir. 2004); *NLRB v. Midwestern Personnel Serv., Inc.*, 322 F.3d 969, 977 (7th Cir. 2003). In making that determination, the Board reasonably "take[s] into account the economic dependence of the employees on their employers . . . ." *NLRB v. Gissel Packaging Co.*, 395 U.S. 575, 617 (1969) ("*Gissel*"). *See Lodge 35*, 311

U.S. at 78 (even "[s]light suggestions as to the employer's choice . . . may have telling effect" among employees).

Once an employer unlawfully assists a union in gathering support, its subsequent Section 9(a) recognition is tainted. As this Court has recognized, "[e]mployer recognition of a union is as much an unfair labor practice when the union has majority support procured by employer assistance as when the union in fact lacks majority support entirely." *District 65*, 593 F.2d at 1162. *See also Windsor Castle*, 13 F.3d at 623 (citation omitted) (in such circumstances, "employees cannot be said to have freely selected the union and the union does not represent an uncoerced majority of the employees"). Thus, the employer violates Section 8(a)(2) and (1) by extending, and the union violates Section 8(b)(1)(A) (*see* n.4, above) by accepting, recognition as the employees' Section 9(a) bargaining representative at a time when the union does not represent an uncoerced majority of those employees. *ILGWU*, 366 U.S. at 737-38; *District 65*, 593 F.2d at 1161-62; *Duane Reade, Inc.*, 338 NLRB 943, 944 (2003), *enforced*, 99 F. App'x 240, 241-42 (D.C. Cir. 2004); *see also Penn State Educ. Assn. v. NLRB*, 79 F.3d 139, 144, 153 (D.C. Cir. 1996).

Further, an employer violates Section 8(a)(3), and a union violates Section 8(b)(2), by applying a collective-bargaining agreement, including its union-security provision, to employees at a time when the union does not represent an

uncoerced majority. *Duane Reade*, 338 NLRB at 944. *See also ILGWU*, 366 U.S. at 737-39; *Penn State Educ. Assn.*, 79 F.3d at 153-54; *Windsor Castle*, 13 F.3d at 622-23.

This Court will not disturb the Board's factual findings if substantial evidence supports the Board's inferences and conclusions, "even if the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 42 (D.C. Cir. 2005). Further, this Court holds that the Board's assessment of witness credibility is given great deference and must be upheld unless it is "hopelessly incredible, self contradictory, or patently unsupportable." *Federated Logistics and Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005) (citation omitted); *accord Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988). Finally, this Court will defer to the Board's interpretation of the Act unless the Board's view is irrational or inconsistent with the Act. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

C. Substantial Evidence Supports the Board's Findings that Raymond Unlawfully Assisted and Recognized the Carpenters as Section 9(a) Representative; that the Carpenters Unlawfully Accepted that Assistance and Recognition; and that They Both Violated the Act by Applying the Carpenters 2006 Master Agreement to the Drywall-Finishing Employees at a Time When the Carpenters Lacked Uncoerced Majority Support

The Board's unfair labor practice findings against Raymond and the Carpenters (A. 42-43) are amply supported by undisputed facts, credited testimony, and well-settled law. They must, therefore, be affirmed.

It is undisputed that Raymond directed its drywall-finishing employees, none of whom were members of the Carpenters at the time, to attend an October 2 meeting with the Carpenters at Raymond's premises. The credited testimony shows that, during that meeting, Raymond's top two officials told employees that they must join the Carpenters "that day" in order to continue working. (A. 53-54; pp. 13-14, above.) Then, with that warning fresh in their minds, the Carpenters quickly provided employees with a three-page document that combined a Carpenters membership form, an authorization form, and a supplemental dues checkoff form. Not surprisingly, most employees heeded their employer's warning and signed with the Carpenters that day in order to keep working. (A. 51-54; pp. 14-15, above.) Just a few hours later, based solely on the authorization cards so obtained, Raymond granted 9(a) recognition to the Carpenters as the employees' exclusive bargaining representative, and applied the 2006 Carpenters master

agreement and its union-security clause to those employees. The Board reasonably found (A. 42-43) that these facts establish unlawful assistance, recognition, and application of the Carpenters 2006 master agreement.

Settled law and credited testimony clearly support the Board's finding that, on October 2, Raymond unlawfully assisted the Carpenters in obtaining authorization cards from Raymond's drywall-finishing employees. Specifically, the credited testimony shows that Raymond's President Travis Winsor and Superintendent Hector Zorrero told employees they must join the Carpenters "that day" in order to continue working. (A. 53-54, 64; pp. 13-14, above.) These statements explicitly conditioned continued employment on immediate membership in the Carpenters. As such, these statements clearly constitute unlawful assistance under settled law. *See Acme Tile*, 318 NLRB 425, 425, 427-28 (1995), *enforced*, 87 F.3d 558, 561 (1st Cir. 1995) (employer violated the Act by implicitly and explicitly conditioning continued employment on "immediate membership" in the union, thus denying employees their statutory and contractual grace periods); *accord NLRB v. Campbell Soup Co.*, 378 F.2d 259 (9th Cir. 1967); *Booth Serv., Inc.*, 206 NLRB 862, 865 n.8 (1973), *enforced as modified*, 516 F.2d 949, 951 (5th Cir. 1975). *See generally ILGWU*, 366 U.S. at 737; *Duane Reade, Inc.*, 99 F. App'x at 241-42; *Midwestern Personnel Serv.*, 322 F.3d at 977-78; *District 65*, 593 F.2d at 1159-62; *Dairyland USA Corp*, 347 NLRB at 311

(employer violated the Act by interfering with employees' decision whether to support union and by assisting union in gaining employee support).

Moreover, the Board reasonably found (A. 42) that because Raymond's unlawful assistance tainted the authorization cards, Raymond acted unlawfully when it immediately granted Section 9(a) recognition to the Carpenters based solely on those cards. As the Board explained, it follows under settled law (*see* cases cited above at pp. 25-28) that Raymond violated Section 8(a)(2) and (1) by granting, and the Carpenters violated Section 8(b)(1)(A) by accepting, recognition as the employees' Section 9(a) bargaining representative at a time when the Carpenters did not represent an uncoerced majority of those employees.

In so finding, the Board reasonably rejected Raymond's claim, which it re-urges on appeal (Br. 44-47), that its sign-today-or-no-work warnings could only impact the employees' decision to sign membership forms, not authorization cards. As shown, Raymond explicitly warned employees that they must "sign" up with the Carpenters "that day" in order to continue working. Then, with Raymond's ominous sign-or-else warning fresh in their minds, the Carpenters immediately provided employees with a single, three-page document that combined a Carpenters membership form, an authorization form, and a supplemental dues checkoff form. Not surprisingly, most employees complied by completing and

returning the document with the signed forms that day. (A. 53-54, 65-66; pp. 14-15, above.)

As the Board reasonably found (A. 65), these circumstances leave no doubt that the employees would, in order to continue working, reasonably feel compelled to "complete[] and execute[] every form on the large document without regard to the difference between them." *See, e.g., Booth Serv.*, 516 F.2d at 951 (employees simultaneously provided tax and union-authorization forms would reasonably feel compelled to sign both in order to begin working). In so finding, the Board properly took "into account the economic dependence of the employees on their employer." *Gissel*, 395 U.S. at 617. Moreover, any doubt would be properly resolved against Raymond. As the Board has explained, where, as here, "an employer imposes certain requirements on its employees, it must bear the burden of any ambiguity in its message." *Acme Tile*, 318 NLRB at 428 nn.8 & 10.

In response, Raymond and the Carpenters (Br. 46) simply ignore the applicable test, positing that there is no evidence that Winsor's and Zorrero's threats actually "caused employees to sign authorization cards." To the contrary, the test is not whether the coercion succeeded or failed (*see* cases cited above at p. 27), but whether, as the Board found, Raymond's conduct had a reasonable tendency to coerce employees in the exercise of their free choice of bargaining representative. Moreover, as noted (*see* cases cited above at p. 27), the Board's

General Counsel is not required to prove "with mathematical certainty" that the Carpenters lacked the support of an uncoerced majority of the employees.

Finally, it follows (*see* cases cited above at p. 28) that Raymond also violated Section 8(a)(3) of the Act, and the Carpenters violated Section 8(b)(2), by maintaining and applying the Carpenters 2006 master agreement, including its union-security clause, to the drywall-finishing employees at a time when the Carpenters did not represent a uncoerced majority of those employees. It is undisputed that those parties were applying that agreement to the drywall-finishing employees on October 2, when, as just shown, Raymond unlawfully recognized the Carpenters as Section 9(a) representative. (A. 42-43.)

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

In an attempt to undermine the Board's findings, based on the credited testimony, that Raymond unlawfully told the employees that they had to sign up with the Carpenters "that day" or they would have no work tomorrow, the parties attack the Board's choice of whom to believe. They face an uphill battle. This Court has held that "credibility issues . . . are quintessentially the province of the [administrative law judge] and the Board." *NLRB v. Creative Food Design Ltd*., 852 F.2d 1295, 1297 (D.C. Cir. 1988); *accord NLRB v. Baja's Place*, 733 F.2d 416, 421 (6th Cir. 1984) (the credibility resolutions of the administrative law judge "who has observed the demeanor of the witness" are not normally disturbed).

Accordingly, the Board's credibility determinations are given great deference, and must be upheld unless they are "hopelessly incredible, self contradictory, or patently unsupportable." *Federated Logistics and Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005). Moreover, deference to the Board's findings is particularly appropriate where the "record is fraught with conflicting testimony and essential credibility determinations have been made." *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985); *accord Federated Logistics*, 400 F.3d at 925 (accepting Board's resolution of conflicting testimony). As now shown, the parties fail to meet their heavy burden.

The parties attack (Br. 35-44) the Board's decision to believe the three witnesses—employees Jose Ramos, Janet Pineda, and Ruben Alvarez—who testified that company officials Winsor and Zorrero made the unlawful statements, over Winsor's and Zorrero's discredited denials. The parties fail to show that the Board's resolution of the conflicting testimony was hopelessly incredible. Rather, the Board, in several pages devoted to witness credibility (A. 52-57, 64), carefully explained why the employee witnesses were more credible, fully taking into consideration their demeanor, consistency, quality of recollection, and other relevant factors. While it is unnecessary to address every one of the parties' meritless claims, discussing only a few of them illustrates why they fail.

Contrary to Raymond and the Carpenters (Br. 35, 42-43), the Board reasonably discredited (A. 64) Winsor's and Zorrero's rote denials of the unlawful statements attributed to them. Winsor, for example, "appeared to be testifying particularly disingenuously" regarding whether he told the employees "they had to reach a decision that day" (A. 64; 592-603); was "contradictory" as to whether this referred to enrolling for benefits or to union membership (A. 595-97, 601-03); and was "adroitly labored and vague" as to what, exactly, he told employees about the master agreement's union-security clause during the October 2 meeting. (A. 64; *compare* A. 625-26 (admitting he spoke from written talking points (A. 1040) that explicitly referred to the employees' obligations under the union-security clause) *and* A. 592-94, 644-45 (equivocating as to whether and how he actually discussed that clause).) The parties provide no basis for overturning these sound, demeanor-based findings. Moreover, as the Board explained (A. 64), Winsor's and Zorrero's denials were properly rejected because they conflicted with the credited employee testimony, which the parties fail to undermine.

As to Jose Ramos, for example, the Board reasonably credited his testimony that Winsor told employees that there would be no more work for them unless they signed up with the Carpenters "that day." (A. 64; 466, 477, 489.) As the judge explained (A. 64), Ramos was particularly trustworthy given his forthright demeanor, and because his conduct right after the meeting was consistent with his

recollection during the hearing of Raymond's unlawful statements. In this regard, Ramos, who did not "sign up" with the Carpenters on October 2, testified that he did not show up to work the next day because Winsor said that if he did not sign "that day" there would be no work tomorrow. (A. 64; 489.)

Raymond and the Carpenters do not directly challenge these demeanor-based findings, but instead resort to mischaracterizing Ramos's testimony to suggest (Br. 38-39) that he contradicted himself on the stand. The parties are simply wrong. Specifically, Ramos testified that Winsor first told the employees that they must sign cards to continue working. Ramos also explained that, when Winsor was subsequently asked essentially the same question again, Winsor specifically said that employees must sign "that day" in order to continue working. As Ramos noted, Winsor appeared "upset" when the question was repeated. Thus, Ramos clearly explained that it was Winsor who varied his response when he answered the same question a second time. Ramos, in contrast, did not equivocate. Rather, he remembered "precisely" that, when Winsor was asked again what would happen if employees refused to sign with the Carpenters, Winsor replied, if employees did not sign "that day," then they "weren't working anymore." (A. 64; 466, 477.)

Raymond and the Carpenters continue to take Ramos's testimony out of context, and ignore undisputed facts, when they wrongly suggest (Br. 37) that, as a

Spanish speaker, Ramos could not have understood what Winsor said during the meeting. For example, they selectively quote (*id.*) Ramos's testimony to the effect that he lacked a strong understanding of English, but listened to Winsor's statements in English. However, they conveniently ignore that Ramos immediately explained (A. 457, 475) that he wore a headset through which he received a simultaneous English-to-Spanish translation of Winsor's statements.[6] Thus, "when [Winsor] spoke in English," Ramos "hear[d] Spanish in the headset." (A. 457, 475.) There is no claim or evidence that Ramos disregarded that translation. To the contrary, when he was asked "precisely what words [he] heard *translated* that Mr. Winsor said," Ramos clearly responded, that "[t]he only thing I remember precisely is exactly that, when he was asked what happened if somebody would refuse to sign he said no, if you don't sign now this day there's no work." (A. 477) (emphasis added.)

Further, the Board reasonably credited Janet Pineda, who, like Ramos, consistently testified that Winsor told employees they "could not work the following day if we didn't sign with the Carpenters." (A. 53, 64; 324, 349-50, 362.) Not only was her testimony corroborated by Ramos, but also it was consistent with her prior, sworn affidavit to the Board. (A. 350, 362.)

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

The parties ignore the relevant particulars of Pineda's testimony in a failed attempt to conjure up inconsistencies. For example, it is of no moment (Br. 40) whether Pineda was unsure if Winsor had told employees that they had "plenty of time to think about [whether to sign up with the Carpenters] today," or simply that they "had plenty of time to think about it." What does matter is that, either way, Pineda was certain that Winsor made this statement only *after* telling employees that they had to sign up *that day*. (A. 362.)

Next, the parties miss the mark when they claim (Br. 39) that Pineda's testimony about these unlawful statements should be rejected because she could not clearly recall details about the meeting that were less relevant to her future employment, such as whether a Power Point presentation was used while Winsor spoke, or whether Raymond passed out memos during his presentation. To the contrary, this simply confirms that Pineda became more focused when Raymond issued unlawful warnings about her future employment. This is understandable. As the Supreme Court has long observed, it is only natural that employees will pay special attention to employer statements that implicate their "economic dependence . . . on their employers." *Gissel*, 395 U.S. at 617.

The parties wildly overstate their case when they assert (Br. 40) that an irreconcilable conflict exists between Pineda's (and Ramos's) testimony that Winsor said the employees must sign "that day," and employee Richard Myer's

testimony that Winsor simply said they must "sign" in order to continue working. These two recollections are not mutually exclusive. The fact that Windsor may have at one point said that employees must sign, does not in itself prove that he did not also say that employees must sign "that day." Indeed, as discussed, Ramos credibly testified that Winsor did just that: at one point, Winsor told employees they must "sign" with the Carpenters in order to continue working, and then, when the same question was repeated, he specifically told them that they must sign "that day."

The parties fair no better in attacking Ruben Alvarez's credited testimony (A. 375, 382, 397) that Zorrero repeated similar unlawful statements. For example, they simply ignore Alvarez's testimony in suggesting (Br. 42) that he could not understand what was said to him in English during the meeting. Alvarez testified, without contradiction, that he was able to understand what was said in English during the meeting. (A. 388.) Accordingly, he was able to clearly testify, in English, that Zorrero told the employees: "There's no time to think about it. Either sign for us today or you cannot work tomorrow for us." (A. 397.)

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

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

A union must inform employees, when it first seeks to obligate them to pay dues and fees under a union-security clause, of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), to be and remain nonmembers of the union. At the same time, it must inform them of their corresponding rights, as nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities that are not germane to the union's duties as collective-bargaining representative, and to obtain a reduction-in-dues for such activities. *See generally California Saw & Knife Works*, 320 NLRB 224, 231, 233-35 (1995), *enforced sub nom. Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998); *see also Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008). By failing to timely provide "*Beck* notices," the union violates its duty of fair representation and Section 8(b)(1)(A) of the Act. *California Saw*, 320 NLRB at 233-35.

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

hired non-member employee constitutes an attempt to obligate an employee to pay full dues."[7] *California Saw*, 320 NLRB at 235. This is so because, "[b]asic considerations of fairness require that the union at that time inform newly hired employees of their *Beck* rights." *Id*. Otherwise, absent "concurrent notification" of *Beck* rights, the presentation of dues-checkoff and membership forms "may mislead . . . nonmember employees to believe [in contradiction of their *Beck* rights] that payment of full dues and assumption of full membership is required." *Id.*

It is undisputed (*see* Br. 50; A. 710) that the Carpenters presented employees with membership applications and supplemental dues-checkoff forms *before* advising them of their *Beck* rights. Moreover, the Carpenters admittedly (A. 710) failed to give employees any *Beck* notices until *after* employees had executed membership applications and supplemental dues checkoff forms. Accordingly, the Carpenters violated Section 8(b)(1)(A).

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

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[7] While they were not literally "newly hired," Raymond and the Carpenters effectively treated the drywall-finishing employees as such for the purposes of newly subjecting them to the union-security clause of the Carpenters 2006 master agreement. (*See* A. 66 n.72). As discussed, these employees had for decades been represented by the Painters in an historically separate unit.

Carpenters at the time—that they must immediately join the Carpenters in order to continue working. Following Winsor's speech, Carpenters officials spoke about the employees' obligation to pay monthly dues, but admittedly did not inform employees of their *Beck* rights at that time. Shortly thereafter, the Carpenters gave employees a document containing both a membership application and a supplemental dues-checkoff form. The membership application specifically provides for "Monthly dues in the amount of $ ___, per month, *commencing immediately*." (A. 51-52, 66; 896) (emphasis added).

To the extent that the Carpenters subsequently supplied employees with a Carpenters magazine that assertedly contained a printed *Beck* notice, it is undisputed (*see* Br. 50; A. 710) that it did so only after employees returned executed membership and dues-checkoff forms. Thus, the Board correctly found that the Carpenters failed to timely inform employees of their *Beck* rights and that providing *Beck* notices in the Carpenters magazine *after* the employees signed the membership and dues-checkoff forms did not satisfy its obligations under *Beck*.[8] (A. 66; 674.)

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[8] Raymond and the Carpenters claim (Br. 52-53) that the format of the *Beck* notice in the magazine satisfied *California Saw*. However, because that notice was untimely, the Board found it unnecessary to decide whether the notice itself was adequate. (A. 67 n.74.)

B. Raymond's and the Carpenters' Contentions Lack Merit

In response, Raymond and the Carpenters do not dispute (Br. 50-51) that the Carpenters failed to provide the employees with a *Beck* notice until after they had completed the forms. Instead, they offer the novel claim (*id.*) that, contrary to settled law, the distribution of forms did not obligate employees to pay dues, because no dues or fees were requested or collected at the October 2 meeting. They thus claim (Br. 51, emphasis added) that employees were timely "given the *Beck* notice *after* completing membership forms, but before being obligated to pay dues or fees."

The parties confuse the obligation to pay with actual payment, and ignore its settled legal import. As *California Saw* and the other cases cited by the parties (Br. 51 n.11) make clear, the presentation of a union-membership application constitutes an attempt to obligate employees to pay union dues; the union must inform employees of their rights at that time.[9] Moreover, the parties ignore the gravamen of the violation here, which is the presentation of forms without employees having the benefit of notice of their *Beck* rights. As the Board has

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[9] Accordingly, it is not dispositive (*see* Br. 50) whether the dues-checkoff form was "directed" at Raymond. Rather, the obligation to timely provide *Beck* notices was triggered when the Carpenters first sought to apply the union-security clause to employees and presented them with union-membership forms that referred to their obligation to pay union fees and dues. *See California Saw*, 329 NLRB at 231, 233.

noted, "absent concurrent notification" of *Beck* rights, the presentation of these forms "may mislead . . . nonmember employees to believe [in contradiction of their *Beck* rights] that payment of full dues and assumption of full membership is required." *California Saw*, 320 NLRB at 235. Here, of course, the Carpenters not only failed to provide "concurrent notification," but also failed to provide *any* notice until after employees had returned executed forms.

Next, the parties err in claiming (Br. 55-56) that, even assuming the Board properly found the *Beck* violation, the Board's remedy exceeds what has been authorized in similar *Beck* cases. That argument misses the point. As the parties surmise (Br. 55), the dues-reimbursement component of the Board's Order (A. 43-44) remedies, not just the *Beck* violation, but the parties' broader unlawful assistance and recognition unfair labor practices.

The Court has previously approved of the Board's award of the same remedies to compensate for identical violations. *See Duane Reade, Inc.*, 338 NLRB 943, 944-45 (2003) (ordering union and employer that unlawfully enforced union-security clause to "jointly and severally" reimburse employees for dues and other monies unlawfully collected pursuant to that clause), *enforced*, 99 F. App'x 240 (D.C. Cir. 2004); *accord Dairyland USA Corp*, 347 NLRB 310, 314 (2006) (same), *enforced sub nom. Local 348-S*, 273 F. App'x 40 (2d Cir. 2008). As the courts have explained, "reimbursement . . . effectuate[s] the policy of the Act by

returning to employees the money paid to support a union they did not freely chose to join." *Nat'l Maritime Union of Am. v. NLRB*, 683 F.2d 305, 308 (9th Cir. 1982). Thus, the parties wrongly suggest (Br. 55-56) that the order is inappropriate for employees who joined the Carpenters after October 2 and may have received proper *Beck* notices, because reimbursement of dues collected is necessitated by the unlawful application of the union-security clause, not simply the failure to timely provide *Beck* notices.[10]

III. THE BOARD ACTED WITHIN ITS BROAD DISCRETION WHEN IT AWARDED THE TRADITIONAL, COURT-APPROVED REMEDY FOR THE UNLAWFUL ASSISTANCE AND SECTION 9(a) RECOGNITION FOUND HERE

Following settled law, the Board reasonably chose a remedy that would dissipate the unlawful assistance, recognition, and acceptance of the Section 9(a) relationship: that Raymond and the Carpenters cease and desist from establishing a 9(a) relationship unless and until the Board certifies that the employees have freely expressed their preference for a particular union. This, in addition to the

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[10] Moreover, to the extent that the parties' dispute regards the scope of their dues-reimbursement obligation under the Order, that concern is best addressed in compliance. The Board traditionally defers such backpay issues to the compliance stage of the proceeding. *See NLRB v. Katz*, 80 F.3d 755, 771 (2d Cir. 1996). Compliance proceedings are the "appropriate forum" for tailoring the remedy to suit the individual circumstances of each case. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984).

other affirmative relief, was a reasonable exercise of the Board's remedial discretion that this Court should affirm.

A. The Board Is Afforded Broad Discretion in Formulating Remedies

Section 10(c) of the Act (29 U.S.C. § 160(c)) empowers the Board to issue an order requiring the labor law violator "to take such affirmative action . . . as will effectuate the purposes of the Act." The Board's discretion in formulating remedies "is a broad discretionary one, subject to limited judicial review." *Fibreboard Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). Accordingly, the Board's choice of remedy must be enforced unless the parties show that the remedy "is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." *Fibreboard Corp.*, 379 U.S. at 216 (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). The parties fail to meet that heavy burden.

B. The Board's Remedy Appropriately Prevents Raymond and the Carpenters from Benefiting from the Tainted Union-Authorization Cards

To remedy the serious unfair labor practices described above (pp. 30-34), the Board properly ordered Raymond to cease and desist from assisting and recognizing the Carpenters as the Section 9(a) representative of its drywall-finishing employees, and to refrain from applying its agreement with the

Carpenters to those employees, "unless and until [the Carpenters] has been certified by the Board." (A. 43-44.) The Board's remedy follows its judicially approved practice of ordering an employer that has unlawfully granted Section 9(a) recognition to a union, to withhold such recognition from that union, and to cease giving effect to agreements entered into with that union, until the union has been certified by the Board. *See ILGWU*, 366 U.S. at 735-39; *Duane Reade, Inc.*, 338 NLRB at 944-45, *enforced,* 99 F. App'x 240 (D.C. Cir. 2004); *Dairyland USA Corp*, 347 NLRB at 310, 314, *enforced sub nom. Local 348-S*, 273 F. App'x 40 (2d Cir. 2008). This remedy furthers the purposes of the Act by restoring employee free choice and deterring future similar misconduct. *See ILGWU*, 366 U.S. at 737-38; *Nat'l Maritime Union*, 683 F.2d at 308. As the Supreme Court has long described it, "there is no clearer abridgement" of the employees' organizational rights than an employer's unlawful recognition of a minority union as Section 9(a) representative, and the union's unlawful acceptance thereof. *ILGWU*, 366 U.S. at 737.

C. Raymond's and the Carpenters' Contentions Are Without Merit

Raymond and the Carpenters (Br. 23-34) attack the portion of the Board's Order that prohibits them from applying the Carpenters 2006 master agreement—the same agreement they applied when they unlawfully imposed a Section 9(a) relationship on Raymond's drywall-finishing employees—to those employees

unless and until the Carpenters is certified by the Board. This challenge ignores settled law holding that this is a proper remedy for the violations found here. (*See* cases cited at p. 48)

The parties fare no better in asserting (Br. 23-34) that the Board's Order prohibits them from entering into lawful Section 8(f) agreements. This assertion ignores the clarification to the Order that the Board made in its MFR Order. Indeed, the parties fail to mention that the MFR Order states that the Order "should not be interpreted as requiring a Board certification of representative before Raymond may lawfully recognize the Carpenters (or any other labor organization) as its employees' Sec. 8(f) collective-bargaining representative." (A.9 n.5.)

Finally, the parties err in relying (Br. 32-34) on *Zidell Explorations, Inc.*,175 NLRB 887 (1969), a factually distinguishable case they selectively quote in a misleading way. In *Zidell*, unlike here, the "employer alone" was responsible for the unlawful conduct that occurred subsequent to the creation of a Section 8(f) contract. *Id.* at 888. Thus, the Board limited its holding in *Zidell* to where the unlawfully assisted union was *not* "found to have participated in, had any control over, or even been aware of [the unlawful] conduct." *Id*. In those very different circumstances, the Board declined to impose "vicarious liability" on an innocent union. *Id.*; *see also* Br. 33-34 (acknowledging that "the employer alone" was responsible for the unlawful conduct found in *Zidell*). Of course, the opposite is

true here: the Carpenters was aware of, directly participated in, and had control over its own role in the unlawful conduct found. Thus, the parties wrongly ignore the Carpenters' own unfair labor practices—its acceptance of Raymond's unlawful assistance and Section 9(a) recognition, the unlawful application of the CBA, and a *Beck* violation—when they suggest (Br. 33-34) that the unlawful conduct at issue here was solely attributable to Raymond.

D. The Painters' Challenges to the Remedy Must Fail

As shown, the Board properly remedied the unlawful assistance and Section 9(a) recognition found here when it ordered Raymond and the Carpenters to cease and desist from that misconduct, and from applying the Carpenters 2006 master agreement, including its union-security clause, to its drywall-finishing employees unless and until the Carpenters has been certified as the employees' exclusive-bargaining representative. Further, the Board ordered Raymond and the Carpenters to reimburse employees for dues and fees collected under that agreement. The Board's Order is consistent with both settled law and the Act's policies. Consequently, as further demonstrated below, the Painters cannot meet its burden of showing that the Order is a "patent attempt to achieve ends under than those which can be fairly said to effectuate [the Act's] policies." *See* cases cited at pp. 47-48.

1. The Board Reasonably Declined To Order Raymond to Provide Alternate-Benefits Coverage

In its MFR Order, the Board modified its Order to eliminate the requirement that Raymond provide the employees with alternate-benefits coverage equivalent to that provided in the Carpenters 2006 master agreement. The Board's decision (A. 9 & n.3), sought to harmonize two inconsistent lines of Board precedent: one ordering such alternative benefits to remedy an employer's unlawful recognition and assistance of a union, the other not.[11] The Board noted that it had not awarded such benefits in its most recent decision presenting the issue, *Garner/Morrison*, 356 NLRB No. 163 (2011), *petitions for review pending*, D.C. Cir. Nos. 11-1212, 11-1445, 11-446 (oral argument held Sep. 14, 2012). Consistent with *Garner/Morrison*, the Board explained that alternative-benefits coverage is not necessary to ensure that the employer not recognize a union as its employees' Section 9(a) representative unless and until an uncoerced majority of them favors such representation. That goal is met with the traditional cease and desist order and affirmative relief, including repayment of unlawfully collected union dues and

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[11] *Compare Brooklyn Hosp. Ctr.*, 309 NLRB 1163, 1163-64 (1992) (requiring alternative-benefits coverage), *enforced sub nom. Service Employees Local 144 v. NLRB*, 9 F.3d 218 (2d Cir. 1993); *Mego Corp.*, 254 NLRB 300, 301 (1981) (same); *with Dairyland USA Corp.*, 347 NLRB 310, 314 (2006) (not requiring alternative benefits), *enforced sub nom. Local 348-S*, 273 F. App'x 40 (2d Cir. 2008); *Windsor Castle Health Care Facilities*, 310 NLRB 579, 594 (1993), *enforced as modified*, 13 F.3d 619 (2d Cir. 1994) (same).

fees, as the Board ordered here. Accordingly, the Board deleted the alternative-benefits provision, and clarified that nothing in the Order requires Raymond to make "any changes in wages or other terms and conditions of employment that may have been established pursuant to said agreement." (A. 9 n.4.)

The Board's modified remedy is reasonable because it provides for consistent remedies in similar future cases,[12] requires cessation of the violations found, and provides employees with make-whole relief. It also benefits employees and helps disengage the unlawfully recognized Carpenters by allowing Raymond (but not the Carpenters) to choose which benefits to continue. As such, the Painters face an uphill burden in proving that the Board's remedy is an abuse of discretion. It fails to meet this heavy burden.

a. The Painters' Claims Lack Merit

The Painters acknowledge (Br. 18) that the Board has broad discretion to interpret—and harmonize conflicts within—its own precedent. Indeed, the Painters agree that the Board should do exactly what it did here, namely, choose between two conflicting strands of precedent so as to avoid treating "similar

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[12] *Cf. SFO Good-Nite Inn, LLC v. NLRB*, No. 11-1295, 2012 WL 5846444, at *6 (D.C. Cir. Nov. 20, 2012) (enforcing Board order where its articulated distinction between two lines of precedent and its reasons for rule were rational and consistent with the Act).

situations dissimilarly," (*id.*). The Painters nonetheless argue (Br. 25-26) that the Board failed to adequately explain its choice. This claim fails because it is founded on repeatedly mischaracterizing the Board's Order.

For example, the Painters erroneously claims (Br. 26) that the Board elected its remedy "without explanation" and "casually ignored" (Br. 19) its precedent. In fact, the Board explicitly acknowledged its conflicting precedent and explained why it chose one strand over the other. As the Painters concede (Br. 25; *see* pp. 19, 51-52, above), the Board explained why alternative-benefits coverage is not necessary to remedy the unlawful assistance and Section 9(a) recognition found here. It is the Board's prerogative to make this decision given its "primary responsibility for developing and applying national labor policy," and its decision should be affirmed because it is rational and consistent with the Act. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87 (1990) (further observing that a Board rule is entitled to deference, even if it is a departure from its prior policy, so long as it is rational and consistent with the Act). Contrary to the Painters' suggestion (Br. 28), the issue is the adequacy of the Board's rationale in the decision before the Court, not whether prior Board precedent already provides an adequate justification for the result reached here.

The Board's rational explanation should not be rejected merely because it is terse or the Painters want "further analysis," (Br. 25.)[13] Nor is it dispositive that, in the Painters view (Br. 26-28), the other line of precedent, which awards alternative benefits, is "more reasoned." The issue is not, as it might be under *de novo* review, whether this Court prefers a different remedy—or a different view of the relative merits of conflicting Board precedent—rather, this Court should defer to the Board's permissible application of the Act's policies.[14]

The Painters cannot support its claim (Br. 25-26, 28, 30, 31, 33) that the Board's MFR Order binds employees to the unlawfully recognized Carpenters, and/or mandates that they receive benefits through the Carpenters. To the contrary, the Board's remedy disengages the Carpenters by allowing—but not requiring—Raymond to continue terms and conditions of employment, including existing benefits, and requiring Raymond to withdraw its unlawful Section 9(a)

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[13] *See generally W&M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1347 (D.C. Cir. 2008) (court may accept Board explanation for change in policy that is "tolerably terse" but not "intolerably mute") (citation omitted); *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1281 (D.C. Cir. 1990) (court will uphold Board decision "of less than ideal clarity if the agency's path may reasonably be discerned"); *NLRB v. Schill Steel Prod., Inc*., 340 F.2d 568, 574 (5th Cir. 1965) (Board not required to issue "elaborate opinion").

[14] Put differently, the fact that the Board may have explained in other cases (*see* Br. 26-28) why awarding alternative-equivalent benefits is *consistent* with the Act's purposes, does not itself preclude the Board's reasonable explanation here why such benefits are not *necessary* to effectuate the Act's purposes.

recognition of the Carpenters, and to cease applying the Carpenters 2006 master agreement, unless and until that union is certified. Thus, the Order plainly does not afford "Raymond *and* the Carpenters the ability to continue" such benefits, as the Painters wrongly suggest (Br. 16, emphasis added). Nor does it require Raymond to "maintain" (Br. 31) the terms of the Carpenters agreement.

The Painters fare no better by then completely switching course and suggesting (Br. 30) that the Board is "rescinding benefits." Of course, the Board's MFR Order does not require Raymond to withdraw benefits. Thus, contrary to the Painters (Br. 28), the remedy here does not contravene the Board's desire in *Mego Corp.*, 254 NLRB at 301, to avoid issuing an order that "on its face" would "require Respondent employer to withdraw certain benefits."[15]

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[15] Finally, this Court should not consider the Painters' additional claim (Br. 26 n.5) that the Board must order Raymond to provide benefits equivalent to those in the Painters' expired Section 8(f) agreement. In its brief, the Painters make only a passing reference to this claim, discussing it in two sentences in a footnote without citing any legal authority. This is plainly insufficient to preserve the issue for judicial review. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1180-81 (D.C. Cir. 2000) (declining to consider argument that party referred to, but had not "actually argue[d]," in its opening brief to the court); *accord Dunkin' Donuts Mid-Atlantic Dist. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (party's opening brief must contain its contentions and the reasons for them, with citations to supporting authorities). In any event, it is undisputed that Raymond lawfully terminated its 8(f) agreement with the Painters effective September 30, 2006, when the agreement expired. *See Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534-35 (D.C. Cir. 2003) (an employer may unilaterally change terms and conditions of employment from an expired 8(f) agreement). As a remedial matter, then, there is no basis to impose terms equivalent to that agreement.

2. The Board properly acknowledged Raymond's statutory right to recognize a union as its employees' Section 8(f) representative

Contrary to the Painters' claim (Br. 21-25), the Board properly clarified, in a footnote (A. 9 n.5), that its Order "should not be interpreted as requiring a Board certification of representative before Raymond may lawfully recognize the Carpenters (or any other labor organization) as its employees' Sec. 8(f) collective-bargaining representative." This language was responsive to the parties' concerns (raised on reconsideration) that the Order could be interpreted to forbid Raymond from entering into lawful Section 8(f) agreements. The Board clarified that it did not intend for its Order to have that effect. As explained below, this clarification is consistent with the language of Section 8(f), which expressly allows construction-industry employers like Raymond to recognize a union even before the union demonstrates that it has majority employee support. As such, the Painters cannot show that the Board's clarification is a "patent attempt to achieve ends under than those which can be fairly said to effectuate [the Act's] policies."

Congress enacted Section 8(f) as a limited exception to the general "majority support" rule in Section 9(a), which requires a union to have majority employee support, demonstrated by either a Board certification or voluntary employer recognition, in order to achieve representative status. *See Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003). Once a union achieves Section 9(a)

status, it enjoys an irrebuttable presumption of majority support during the applicable collective-bargaining agreement, for up to three years. *Id.; see Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996). During this time, the parties and employees are barred from filing petitions to challenge the union's majority status. *Nova Plumbing*, 330 F.3d at 534.

Construction employers like Raymond, however, tend to employ workers for short durations, making the employees' selection of a 9(a) representative more difficult. Accordingly, Congress enacted Section 8(f) to allow such employers to enter into "pre-hire" agreements that recognize a union as the employees' bargaining agent before the union is chosen by a majority of employees. *Nova Plumbing*, 330 F.3d at 534. To protect employees, however, Section 8(f) provides—in contrast to Section 9(a)—that employees and other parties, including rival unions, may file petitions to decertify the union at any time under a pre-hire agreement. *Nova Plumbing*, 330 F.3d at 534, 537. Congress decided that Section 8(f) furthers the Act's goals of promoting stable labor relations and protecting employee free choice of representative, in a manner tailored to the unique circumstances of the construction industry. *See id*.

Consistent with this basic law, the Board clarified that its Order should not be read as requiring a Board certification before Raymond may lawfully recognize the Carpenters—or another union, including the Painters—as its employees'

Section 8(f) representative. There is no merit to the Painters' claim (Br. 24) that this clarification effectively denies employees' their right to freely choose a representative. Rather, if and when an 8(f) relationship is established, the employees would remain free to decertify the Carpenters (or other union) at any time under an 8(f) agreement.

The Painters err to the extent it claims (Br. 22-23) that the Board either recognized an 8(f) relationship between Raymond and the Carpenters, or acted contrary to precedent by noting the statutory availability of such agreements. Neither claim is correct. The Board's MFR Order does not determine that any particular 8(f) relationship is lawful, prejudge under what specific circumstances such a relationship would or would not be valid, or even presume that the Carpenters would be a party to it. Rather, it merely acknowledges Raymond's statutory right to enter into such agreements.

To the extent the Painters raise the specter of Raymond and the Carpenters coercively imposing an 8(f) agreement under the Order, that claim is premature. Section 8(f) provides that an agreement is invalid if it is "established, maintained or assisted" by unfair-labor practices. *See* 29 U.S.C. § 158(f). If such coercion were to taint any subsequently established 8(f) agreement here, then the employees, the Painters, or another appropriate party could bring an unfair labor practice charge challenging the agreement at that time. *See generally Bear Creek*

Constr. Co., 135 NLRB 1285, 1286 (1962) (addressing charges involving validity of 8(f) agreement). Any such claim is premature now, however, as the facts surrounding the establishment of a potential 8(f) relationship have yet to be shown.

It follows that this case is unlike those cited by the Painters (Br. 22) where the Board found that an existing 8(f) agreement had been established or maintained by contemporaneous unfair-labor-practices, and was therefore invalid pursuant to the express terms of Section 8(f). *See Bear Creek Constr. Co.*, 135 NLRB at 1286, 1294 (Section 8(f) provided no defense to charges of unlawful assistance and recognition where purported 8(f) agreement was invalidated by violations committed "at the time the agreement was executed"); *accord Clock Elec., Inc.*, 338 NLRB 806, 828 (2003); *Oilfield Maint. Co., Inc.*, 142 NLRB 1384, 1385-86 (1963).

Nor is the Board's remedy barred (*see* Br. 22) by these cases, which were silent about the future availability of an 8(f) agreement. To be sure, the Board in these cases ordered construction-industry employers to withdraw recognition from an unlawfully assisted union until the union was Board certified. These cases do not, however, discuss whether this remedy eliminates the employer's statutory right to enter into Section 8(f) relationships. *See Bear Creek,*135 NLRB at 1285-87 (ordering construction-industry employer to withdraw recognition from unlawfully assisted union until the union has demonstrated majority status, but

without addressing whether this remedy bars an 8(f) relationship absent certification).[16]

Finally, the Painters err in suggesting (Br. 24) that the Board's acknowledging the statutory availability of an 8(f) agreement somehow "eliminate[s] any meaningful consequence" of the parties' unlawful assistance and Section 9(a) recognition. To the contrary, the Board redressed these violations by prohibiting Raymond and the Carpenters from recreating their 9(a) relationship, or applying the Carpenters agreement, unless a Board certification establishes that a majority of employees have freely chosen the Carpenters. This is the traditional, court-approved remedy for unlawful assistance and 9(a) recognition, and is not, therefore, a departure from settled law (*see* Br. 22).

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[16] *See also Clock Electric*, 338 NLRB at 808, 829-30 (ordering electrical contractor that had unlawfully assisted and granted 9(a) recognition to union, to cease recognizing the union until it has been Board certified; no discussion of barring employer from subsequently recognizing union under Section 8(f)); *Oilfield Maint. Co.*, 142 NLRB at 1385-86, 1395-96 (employer forfeited protection of Section 8(f) by contracting with union when bound to recognize five other unions during their contracts' terms, and employer was ordered to withdraw recognition from the unlawfully assisted union until it becomes "lawfully entitled to recognition").

CONCLUSION

The Board respectfully requests that the Court deny the petitions for review of Raymond, the Carpenters, and the Painters, and enforce the Board's orders in full.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAYMOND INTERIOR SYSTEMS, INC.; SOUTHWEST REGIONAL COUNCIL OF CARPENTERS	)	
Petitioners	)	
v.	)	Nos. 12-1011
	)	12-1012
	)	12-1013
	)	12-1047
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case Nos.
Respondent	)	21-CA-37649
	)	21-CB-14259
and	)	
SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO,	)	
Intervenor for Respondent	)	
SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO,	)	
Petitioner	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,519 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben

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Dated at Washington, DC
this 11th day of December, 2012

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Sec. 7 [§ 157.] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a) [§ 158(a).] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees

eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement . . . .

Sec. 8(b) [§ 158(b).] [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

Sec. 8(f) [§ 158(f).] [Agreements covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or

(4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

Sec. 9(a) [§ 159(a.)] [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Sec. 10(a) [§ 160(a).] [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Sec. 10(c) [§ 160(c).] [Reduction of testimony to writing; findings and orders of Board] . . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter] . . . .

Sec. 10(e) [§ 160(e).] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

10(f) [§ 160(f).] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to

have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAYMOND INTERIOR SYSTEMS, INC.; SOUTHWEST REGIONAL COUNCIL OF CARPENTERS Petitioners v. NATIONAL LABOR RELATIONS BOARD Respondent and SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, Intervenor for Respondent	)	Nos. 12-1011 12-1012 12-1013 12-1047 Board Case Nos. 21-CA-37649 21-CB-14259
SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, Petitioner v. NATIONAL LABOR RELATIONS BOARD Respondent	)	

CERTIFICATE OF SERVICE

I certify that on December 11, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are

registered users or, if they are not, by serving a true and correct copy at the address listed below:

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Dated at Washington, D.C.
this 11th day December, 2012