UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RAYMOND INTERIOR SYSTEMS, INC.

and Case 21-CA-37649

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

UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF
AMERICA, LOCAL UNION 1506

and Case 21-CB-14259

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

COUNSEL FOR THE GENERAL COUNSEL'S STATEMENT OF POSITION

Factual Background

Respondent Raymond Interior Systems, Inc., ("Respondent Raymond") is a construction-industry employer that provides drywall hanging and finishing services. For many years Respondent Raymond had an 8(f) collective-bargaining relationship with the Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO (Painters). On September 12, 2006, in anticipation of terminating its

agreement with the Painters, Respondent Raymond executed a Confidential Settlement Agreement with Respondent United Brotherhood of Carpenters and Joiners of America, Local Union 1506 ("Respondent Carpenters") whereby Respondent Raymond agreed to apply Respondent Carpenters' 2006 Drywall/Lathing Master Agreement ("Master Agreement") to its drywall finishing employees.

The Master Agreement went into effect on October 1, 2006. Although Respondent Raymond by signing the Confidential Settlement Agreement with Respondent Carpenters, agreed to sign the 2006-2010 Memorandum Agreement of the Master Agreement, record evidence was never presented establishing that Respondent Raymond did in fact sign Respondent Carpenters' Memorandum Agreement.

On September 30, 2006, Respondent Raymond lawfully terminated its 8(f) agreement with the Painters. Thereafter on October 2, 2006, Respondent Raymond told its drywall-finishing employees that they needed to join Respondent Carpenters "that day" if they wanted to continue working. After receiving the requisite authorization cards that same day, Respondent Carpenters and Respondent Raymond signed an agreement recognizing Respondent Carpenters as the majority representative of Respondent Raymond's drywall finishing employees in accordance with Section 9(a) of the Act.

Procedural History

On September 30, 2009, a two-member Board issued a decision, reported at 354 NLRB 757 (2009), finding that Respondent Raymond violated Section 8(a)(1) (2) and (3) of the Act by: engaging in conduct that conditioned continued employment of the drywall finishing employees on immediate membership with Respondent Carpenters; assisting Respondent Carpenters in obtaining signed authorization cards; recognizing Respondent Carpenters as the employees'

bargaining representative under Section 9(a); and applying Respondent Carpenters' Master Agreement, at a time Respondent Carpenters did not represent an uncoerced employee majority of the employees at Respondent Raymond. In this decision the Board also found that Respondent Carpenters violated Section 8(b)(1)(A) and 8(b)(2) of the Act by: accepting this recognition and assistance from Respondent Raymond; applying its Master Agreement to Respondent Raymond's employees; and failing to timely inform employees of their *Beck* rights. On September 30, 2010, following the Supreme Court's *New Process Steel* decision, the Board affirmed this two-member decision at 355 NLRB 1278 (2010) and incorporated that earlier decision by reference.

On October 27, 2010, Respondent Raymond filed a motion for reconsideration of the Board's decision, and Respondent Carpenters (collectively referred to as "Respondents") filed a notice of Joinder to that motion. On December 30, 2011, the Board, at 357 NLRB 2044 (2011), issued a decision granting in part and denying in part Respondents' Motion for Reconsideration. In its decision the Board addressed in part Respondents' contention that the Board had erred in failing to decide whether the Confidential Settlement Agreement reached between Respondent Raymond and Respondent Carpenters three weeks before the October 2, 2006, unlawful assistance constituted a valid 8(f) agreement that was not invalidated by Respondent Raymond's subsequent acts of unlawful assistance on October 2, 2006.

In making this argument, Respondents' relied on the principles set forth in *Zidell Explorations, Inc.*, 175 NLRB 887 (1969), which held that where a valid Section 8(f) agreement existed, subsequent unlawful conduct would not vitiate the valid 8(f) collective-bargaining relationship. Thus Respondents contended that their September 12, 2006, Confidential Settlement Agreement constituted a valid 8(f) agreement which went into effect on October 1,

2006, when the Master Agreement became effective and that their October 2, 2006, conduct even if unlawful did not vitiate the lawful and valid 8(f) agreement already in existence between Respondents.

In response to this contention the Board failed to specifically address this argument or the *Zidell* progeny of cases and responded that even if it had found that the Respondents' Confidential Settlement agreement had constituted a valid 8(f) agreement, this finding would not affect its determination that Respondent Raymond, on October 2, 2006, unlawfully recognized Respondent Carpenters as the 9(a) representative of its drywall finishing employees. 357 NLRB at 2045.

Respondents appealed the Board's decisions to the United States Court of Appeals for the District of Columbia Circuit, and the Board filed an application to enforce its order. On February 5, 2016, the Court of Appeals issued a decision granting in part the Board's application for enforcement, but also granting in part the Respondents' petition for review and remanding this case for further consideration by the Board. In granting Respondents' petition for review, the Court of Appeals noted that the Board had failed to address Respondents' contention that their Confidential Settlement Agreement created a valid Section 8(f) agreement and that pursuant to the *Zidell* progeny of cases, even if Respondents had engaged in subsequent unlawful conduct it would not vitiate their valid agreement already in place. Thus, the Court of Appeals held that the Board's failure to address these issues could not withstand review and needed to be addressed by the Board on remand.

On June 28, 2016, the Board issued a letter to all parties to this case, stating that it had decided to accept the remand from the Court of Appeals in this proceeding and that the Board would not petition for certiorari. The Board directed that all parties, if they so desire, could file

statements of position with respect to the issues raised by the remand.[1] Based on this request Counsel for the General Counsel for Region 21, hereby files this statement of position addressing the issues remanded to the Board in this matter.

Counsel for the General Counsel's Position on Issues on Remand

Counsel for the General Counsel asserts that a remand to the Board on the issues articulated by the Court of Appeals is appropriate as the Board has not yet specifically addressed Respondents' contention that their Confidential Settlement Agreement created a valid 8(f) agreement which was not vitiated by any subsequent unlawful conduct. Counsel for the General Counsel has addressed this very issue and in his decision in this case, Administrative Law Judge Burton Litvack (ALJ Litvack) made very detailed factual and legal findings on these very issue. In doing so, ALJ Litvack articulately disposed of Respondent's after-the-fact arguments that a valid 8(f) agreement was ever achieved by Respondents by virtue of their September 12, 2006, Confidential Settlement Agreement. See 354 NLRB 757, 775-778. ALJ Litvack discussed this argument at length and concluded:

> I reject Respondent Raymond's and Respondent Carpenters' defenses that either their existing 2006-2010 master agreement or their September 12, 2006 confidential settlement agreement was a valid Section 8(f) of the Act privileged collective-bargaining agreement covering Respondent Raymond's drywall finishing employees. Therefore, I find that, on or about October 1, 2006, in the context of a 9(a) bargaining relationship, Respondent Raymond unlawfully recognized Respondent Carpenters as the majority representative of its drywall finishing employees and Respondent Carpenters unlawfully accepted such recognition, and Respondent Raymond and Respondent Carpenters unlawfully enforced and applied their existing 2006-2010 master agreement as to the former's drywall finishing employees, who constituted a historically separate appropriate unit, by accreting the employees to the existing carpenters bargaining unit. By their actions, each Respondent deprived Respondent Raymond's drywall finishing employees of their statutory right to select their own bargaining representative. Accordingly, Respondent Raymond engaged in acts and conduct violative of Section 8(a)(1), (2), and (3) of the Act and Respondent Carpenters engaged in acts and conduct violative of Section 8(b)(1)(A) and (2) of the Act.
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> Id at 777-778.

[1] The statements of position were originally due on July 12, 2016, but following a request for an extension of time by one of the parties, the Board granted an extension of time to file statements of position to July 26, 2016.

Although the Board later adopted the findings made by ALJ Litvack in his 2009 post-hearing decision, see 355 NLRB 1278, in response to Respondents' Motion for Reconsideration, the Board failed to consider and/or reiterate the thorough findings already made by ALJ Litvack in its 2011 decision on these very issues which are now being remanded. See 357 NLRB 2044.

On brief to ALJ Litvack following the 2007 hearing, Counsel for the General Counsel discussed the unviability of Respondents' argument regarding the Confidential Settlement Agreement. Specifically Counsel for the General Counsel explained that the September 2006 Confidential Settlement Agreement entered into between Respondents is not a collective-bargaining agreement. This document does not bear any of the features traditionally required for collective-bargaining agreements. Most glaringly, the Confidential Settlement Agreement does not include a description of any bargaining unit, or a single term or condition of employment. To the extent this agreement attempts to incorporate the Memorandum Agreement of the 2006 Carpenters Master Agreement, it still fails to create a collective-bargaining agreement.

Regarding the Memorandum Agreement, ALJ Litvack found it was never signed. 354 NLRB at 773, fn 49. Moreover, had it been properly executed, it would have only compounded Respondents' unlawful conduct. The Memorandum Agreement purports to create a Section 9(a) relationship immediately upon its execution, not an 8(f) agreement. If this documents was "signed" on September 12, 2006, as the parties appear to claim, that would only add to the length of time that they unlawfully applied a Section 9(a) agreement to the finishing employees.

As for the 2006 Carpenters Master Agreement creating a Section 8(f) bargaining unit, Respondents' admissions that the agreement created a single 9(a) unit preclude any serious discussion that it alternatively created a separate Section 8(f) unit. In fact, Respondents' disingenuous claim that they created a separate 8(f) unit is belied by their answers to paragraph

10 of the Complaint. Both Respondents aver that the 2006 Carpenters Master Agreement and its recognition clause bar any bargaining unit, other than the Carpenters' single wall-to-wall unit, from being appropriate.

While it is true that agreements in the construction industry are presumed to be Section 8(f) agreements, Respondents are not entitled to this presumption. Instead, Respondents appear to seek to turn this presumption on its head. As one of their myriad alternate theories, they claim that their failed 9(a) accretion/collective-bargaining agreements have an "8(f) core," and that if they didn't have a 9(a) relationship, they at least had an 8(f) agreement.

Further, the Board's decisions cast doubt on the ability to revert to an 8(f) after a failed 9(a) agreement. In *Clock Electric, Inc.*, 338 NLRB 806 (2003), the Board found that an electrical contractor had unlawfully recognized a union as the majority representative of its employees (a Section 9(a) recognition). In that case, the Board ordered the employer to withhold recognition from the union until it was certified following a Board-conducted election – there was no finding that the employer and union could revert back to some "core 8(f)" bargaining relationship. *Clock Electric, Inc.*, 338 NLRB at 808.

The purpose of the 8(f) presumption is not to allow parties to avoid liability when they later realize that their conduct is inconsistent with Section 9(a). Rather, the proper purpose of the presumption is to protect employees' representational rights when there is a dispute between the parties about whether an agreement is 8(f) or 9(a). But here, Respondent Raymond and Respondent Carpenters have both claimed that they have a 9(a) relationship, and thus, there is no dispute between them about their relationship.

Where both the parties' statements and conduct indicate that they intended to create a 9(a) relationship, and the language of their agreement creates a 9(a) relationship under Board

law, there is no need for this 8(f) presumption. To allow Respondents the benefit of this presumption is not only contrary to their own statements and conduct, but allows them to escape the consequences of a 9(a) relationship after they have been permitted to enjoy the benefits of that status.

The evidence here, consisting of Respondents' own admissions, shows that upon the expiration of the Painters contract, they unlawfully accreted the drywall-finishing employees into the Carpenters' Section 9(a) contract in a single bargaining unit with drywall-hangers and -framers. This accretion unlawfully deprived the drywall-finishing employees of their Section 7 rights to choose their bargaining representative. By their conduct, Respondent Raymond violated Section 8(a)(1) (2) and (3), and Respondent Carpenters violated Section 8(b)(1)(A) and (2) of the Act.

Thus in light of the above, Counsel for the General Counsel urges the Board on remand to carefully review the thoughtful analysis made by ALJ Litvack at 354 NLRB 757, 775-778, and dispose of Respondents' unviable argument that they created a valid 8(f) agreement by virtue of their September 12, 2006, Confidential Settlement Agreement, despite their unlawful conduct on October 2, 2016.

DATED at Los Angeles, California, this 26th day of July, 2016.

Lindsay R. Parker
Counsel for the General Counsel
National Labor Relations Board
Region 21

STATEMENT OF SERVICE

I hereby certify I have this date served copies of Counsel for the General Counsel's Statement of Position on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Executive Secretary of the National Labor Relations Board with service by electronic mail on the parties identified below.

Dated: July 26, 2016

Aide Carretero
Secretary to the Regional Attorney

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