

ELLEN GREENSTONE
Email: egreenstone@rsglabor.com
MARIA KEEGAN MYERS
Email: mmyers@rsglabor.com
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101-3115
Telephone: (626) 796-7555
Facsimile: (626) 577-0124

Attorneys for Charging Party Southern California Painters and
Allied Trades District Council No. 36, International Union of
Painters and Allied Trades, AFL-CIO

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

CHARGING PARTY SOUTHERN CALIFORNIA PAINTERS AND
ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES, AFL-CIO'S STATEMENT OF POSITION

Charging Party SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES
DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED
TRADES, AFL-CIO ("Painters") submits its Statement of Position on issues raised by the

remand from the U.S. Circuit Court for the District of Columbia Circuit in *Raymond Interior Systems, Inc. v. NLRB*, 812 F.3d 168 (D.C. Cir. 2016).¹

In its opinion, the Court sets out the facts and procedural background.

In short, after having been party to an agreement pursuant to Section 8(f) of the Act, 29 U.S.C. § 158(f), with the Painters covering its drywall finishing employees, Respondent Raymond Interior Systems, Inc. (“Raymond”) lawfully terminated its Painters’ agreement as of its expiration on September 30, 2006. Prior to expiration of the Painters agreement, Raymond and Respondents United Brotherhood of Carpenters and Joiners of America, Local Union 1506, and Southwest Regional Council of Carpenters (“Carpenters”) entered into a “Confidential Settlement Agreement” providing that Respondents would apply the Carpenters’ industry drywall/lathing master agreement, which was incorporated in the settlement agreement, to Raymond’s drywall finishing employees. The Court recounts that the Confidential Settlement Agreement took effect and Raymond began applying the Carpenters master agreement to its drywall finishers on Sunday, October 1, 2006. The next day, on October 2, 2006, Raymond held a meeting with its drywall finishers to inform them of the transition to the Carpenters and a new wage and benefit packet. At this meeting, the Carpenters signed the employees to membership cards which the Carpenters later that day presented to Raymond as evidence of majority representation within the meaning of Section 9(a), 29 U.S. C. § 159(a), under the terms of its master agreement. That same day, Raymond recognized the Carpenters as the Section 9(a) representative of its employees.

¹ Painters attaches its Consolidated Intervenor and Reply Brief in the Court of Appeals, filed December 26, 2012. This brief sets out the arguments made by the Painters to the Court which underlie the subject of the remand.

The Board upheld the ALJ's findings of Raymond's and the Carpenters' violations: In the October 2 meeting, Raymond violated Sections 8(a)(1) and (3), 29 U.S.C. § 158(a)(1) and (3), and rendered assistance to the Carpenters in violation of Section 8(a)(2), 29 U.S.C. § 158(a)(2), when Raymond conditioned continued employment on immediate membership in the Carpenters. Raymond and the Carpenters then violated Sections 8(a)(1) and (2) and 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), respectively, by their execution of a Recognition Agreement under Section 9(a) when the Carpenters did not have the support of an uncoerced majority of the employees. Finally, the Carpenters violated Section 8(b)(1)(A) by failing to inform the employees of their rights with respect to union dues and fees. All of these violations occurred on October 2, 2006. The Court upheld all of the violations.

Remaining at issue, however, is the status of Raymond's and the Carpenters' relationship on October 1, 2006.

In its original decision, *Raymond Interior Systems*, 354 NLRB 757 (2009) ("*Raymond I*"), after adopting the ALJ's findings as to Raymond's and the Carpenters' violations on October 2, 2006, the Board stated:

We, therefore, find it unnecessary to pass on the judge's additional findings that Raymond unlawfully granted 9(a) recognition to the Carpenters on October 1, and that the Carpenters unlawfully accepted 9(a) recognition on that day. Those findings would be cumulative of the findings of unlawful conduct occurring on October 2, and would not materially affect the remedy in this proceeding. 354 NLRB at 757.

As the Board observed, the ALJ tied violations of Respondents' maintaining and applying the Carpenters master agreement, including its union security provision, to cover Raymond's

drywall finishers at a time when the Carpenters did not represent an uncoerced majority to Raymond's October 1 recognition of the Carpenters.

As stated, we are not passing on the legality of that recognition. We nevertheless affirm the findings, as it is undisputed that the parties were applying the same agreement to the drywall finishing employees on October 2, when Raymond unlawfully recognized the Carpenters as the 9(a) representative of those employees. See *Duane Reade, Inc.*, 338 NLRB 943, 944 (2003), *enf'd*. mem. 99 Fed.Appx. 240 (D.C. Cir. 2004). *Id.* at 758.

In subsequent decisions, the Board affirmed its determination of Respondents' violations and added to discussion of the remedy and recommended order. See *Raymond Interior Systems*, 355 NLRB 707 (2010) ("*Raymond IP*") (noting that *Garner/Morrison LLC*, 353 NLRB 719 (2009), cited in *Raymond I* at n.6, had been reaffirmed by a three-member panel); *Raymond Interior Systems*, 355 NLRB 1278 (2010) ("*Raymond IIP*"); *Raymond Interior Systems*, 357 NLRB 2044, n.3, 4 (2011) ("*Raymond IV*") (acknowledging inconsistency in requiring remedy of equivalent alternative benefits coverage in unlawful assistance cases and following *Garner/Morrison* to find alternate benefits not required to effectuate withholding 9(a) recognition). The Board added a footnote in *Raymond IV* that, contrary to Raymond's contention, the Board's order should not be interpreted as requiring a Board certification of representative before Raymond may lawfully recognize the Carpenters or any other union as its employees' Section 8(f) representative. 357 NLRB at n.5.²

² A similar footnote in *Garner/Morrison*, 2011 WL 4073481 (Order Denying Motion for Reconsideration), *enf. denied, order vacated, remanded sub nom. NLRB v. Garner/Morrison, LLC*, ___ F.3d ___, 2016 WL 3407723 (2016), cites to *Clock Electric, Inc.*, 338 NLRB 806, 808 (2003). The Board in *Clock Electric* neither held nor indicated that an employer ordered to withdraw and withhold recognition to and to cease maintaining any collective bargaining

The D.C. Circuit upheld the Board's findings of Raymond's and the Carpenters' violations on October 2, 2006, but remanded for the Board to consider Respondents' claim that even if their execution of a 9(a) agreement by their unlawful conduct throughout the day on Monday, October 2, 2006, failed, they had a fleeting 8(f) agreement for a single day on Sunday, October 1. *Raymond Interior Systems, Inc. v. NLRB, supra*, 812 F.3d at 180-81.

The Court stated that the Board had not addressed *Zidell Explorations, Inc.*, 175 NLRB 887 (1969) and the "line of authority" cited in *Zidell* holding that unlawful assistance after execution of a lawful contract which is not a byproduct of unfair labor practices does not justify a remedial order suspending recognition of the assisted union. *Id.* at 180.

Painters submit that the so-called *Zidell* line of authority does not require nor support a finding that Raymond and the Carpenters had a Section 8(f) agreement by default. First, these cases do not establish a rule. Second, this line of cases is factually distinguishable in a critical way – unlike this case, all disapprove a remedy that requires cessation of recognition of an already established union selected by the employees. The order in this case that Raymond

agreement with, an unlawfully assisted union unless and until certified could nevertheless maintain that unlawful agreement as a Section 8(f) agreement. Indeed, the ALJ, whose decision on unlawful assistance was adopted by the Board in *Clock Electric*, concluded:

While *Clock Electric* is a construction industry employer and could voluntarily recognize a union under Section 8(f) of the Act, the Board held in *Bell Energy Management Corp.*, 291 NLRB 168 fn. 8 (1988), that even if the respondent there was a construction industry employer, the Board would still find that its agreement with the union violated Section 8(a)(2) because Section 8(f) of the Act's terms prohibit the execution of an agreement that is the result of unlawful assistance. See *Oilfield Maintenance Co.*, 142 NLRB 1384, 1385-1386 (1963); and *Bear Creek Construction Co.*, 135 NLRB 1285, 1286 (1962). 338 NLRB at 828.

A discussion of the remedy issue is set forth in the attached Reply Brief. Painters continue to submit that the availability of an 8(f) agreement, along with the Board's determination not to require equivalent alternative benefits coverage, fails to provide employees with a complete remedy from unlawful assistance which would make them whole and would place them in a position freely to choose a bargaining agent.

withhold recognition of, and cease giving effect to an agreement with, the Carpenters disestablishes a union that was never established in the first place. Third, the claimed 8(f) agreement in this case was part and parcel of Raymond's unlawful assistance to the Carpenters and the Carpenters' unlawful acceptance of this assistance.

In *Zidell*, the Board held:

[W]e do not read Section 8(f) as permitting, much less as requiring, the invalidation of a prehire contract, allowable under that Section and valid when entered into, simply because of *subsequent* acts of unlawful assistance for which the employer party to the contract has alone been found responsible. 175 NLRB at 888; emphasis in text.

Not only was the assisted union in *Zidell* not also at fault, but, unlike this case, there was no other union involved. In this case, the Carpenters fully participated in the unlawful assistance, and, as is discussed below, the ALJ's findings, upheld by the Board, establish that the Raymond/Carpenters' agreement was a byproduct, if not the means, of the unlawful assistance.

The cases cited in *Zidell*, 175 NLRB at 888, n.2, include *NLRB v. Reliance Steel Products Co.*, 322 F.2d 49 (5th Cir. 1963); *NLRB v. Scullin Steel Co.*, 161 F.2d 143 (8th Cir. 1947); *Arden Furniture Indus.*, 164 NLRB 1164 (1967); *M. Eskin & Son*, 135 NLRB 666 (1962), *enf'd. sub nom. Confectionary & Tobacco Drivers & Warehousemen's Union, Local 805 v. NLRB*, 312 F.2d 108 (2d Cir. 1963); and *Lykes Bros. Inc.*, 128 NLRB 606 (1960). These cases, likewise, do not support a determination that Raymond and the Carpenters had a lawful 8(f) agreement on October 1, 2006.

A review of the facts and holdings of these cases reveals that the Board's reluctance to disestablish agreements lawfully entered into before the occurrence of unlawful assistance in

each of these cases rests on the established nature of the particular agreements and the fact that the employees were already members of or had freely chosen the later-assisted union. Here, the already established union was the Painters, and finding the Raymond/Carpenters' agreement-for-a-day a valid 8(f) agreement by default would force a result opposite that of the *Zidell* line of cases.

In *Reliance Steel*, the employer entered into a six-year collective bargaining agreement with a union approximately a year before a second union began an organizing campaign. The employer rendered unlawful assistance to the incumbent union, which won a Board election. The Court held that the Board did not have authority in the unfair labor practice case to deny the incumbent union certification (the challenging union having filed election objections late). With respect to the incumbent union's contract, the Court held that "it [was] undisputed that the contract was entered into prior to any alleged unlawful assistance and at a time when no question was or could have been raised concerning [the incumbent union's] authority to represent the respondent's employees." The Court distinguished cases in which the Board set aside contracts which were "entered into after the unlawful assistance and were the fruits of the employer conduct complained of." 322 F.2d at 56.

In *Scullin Steel*, the Court refused to enforce a Board order that the employer cease and desist giving effect to its contract with a union it had assisted. However, the unlawful assistance had all occurred after a majority of the employees had selected the union in a Board election, after the union had been duly certified, and after a contract had been entered into. 161 F.2d at 146. Acknowledging the holding of *Consolidated Edison Co. v. NLRB*, 306 U.S. 197, 219 (1938) that in the absence of express authorization in the Act to the Board to invalidate contracts, such authority would have to rest on Section 10(c)'s remedial provisions, the Court found in this

case that there was no relation between the employer's unfair labor practices and its contract with its employees and not even a suspicion that the assisted union did not remain the choice of the majority of the employees. 161 F.2d at 147-148.

In *Consolidated Edison, supra*, cited in *Scullin Steel*, the Supreme Court reversed a Board finding that invalidated contracts with an allegedly assisted union, where the Board also found that the employers had not violated then Section 8(2). 305 U.S. at 212. The Court held that authority to invalidate a contract under Section 10(c), if it existed, had to be remedial rather than punitive and exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violations which thwart the purposes of the Act. The Court held that existence of a union dominated by an employer is such a violation but that, in this case, there was no basis for finding that the contracts were a device to consummate and perpetuate the illegal conduct or that their invalidation would make the Board's cease and desist remedy any more effective because such a remedy would deprive the employees of the union they had chosen. *Id.* at 220-21. The Court cautioned, however, that the Board's order requiring the employer to cease and desist from recognizing the union as the exclusive representative stood on different footing, because the union had not been chosen under Section 9 of the Act and the contracts were members-only agreements. *Id.* at 221.

In *Lykes Bros.*, the earliest Board decision in the line of authority cited by the Court, the Board stated its disagreement with the general proposition that a cease recognition order is required whenever a violation of Section 8(a)(2) has been established, regardless of the nature of the violation or the surrounding circumstances. 128 NLRB at 609. The Board, one member dissenting, declined to adopt the ALJ's cease recognition order, under the circumstances of this case, finding that all of the assistance occurred after the execution of a presumptively lawful

contract (the General Counsel having withdrawn allegations attacking the contract, “it must be presumed for purposes of this case that its execution and maintenance were lawful”); at a time when, because of the contract, the employees could not appropriately seek to change their representative; and where there was no evidence of any background conduct before execution of the contract would could be said to have strengthened the assisted union’s representative status. *Id.* at 610-11. The Board distinguished two cases in which it had issued cease recognition orders, one in which the unlawful assistance had strengthened the assisted union’s representative status at a time when the employees could appropriately seek to change their representation and one in which the unlawful assistance had strengthened the assisted union’s status before execution of the contract. *Id.*

In *Eskin*, the Board, with Member Fanning partially disagreeing, declined to order the employer to cease giving effect to its collective bargaining agreement where the unlawful assistance was given and accepted after the employees struck in violation of an existing agreement with a no-strike clause and after the employer and union conditioned the employees’ return to work on their written affirmation of the union as bargaining agent, of the contract, and of checkoff and on withdrawal of a petition and charges filed by a rival union on their behalf. 135 NLRB at 669 and n.16. The contract at issue was mid-term at the time of the strike and appears to have been a renewal of an even earlier contract. *Id.* at 680.

In *Arden Furniture*, with Member Fanning dissenting, the Board, relying on *Eskin* and *Lykes*, declined to adopt an ALJ’s cease recognition order where the unlawful assistance occurred during the term of an otherwise lawful agreement, the execution and maintenance of which were not under attack, finding that it would need to rely on evidence concerning the execution and maintenance of the agreement outside the Section 10(b) period. 164 NLRB at

1163. Member Fanning cited Board and Supreme Court precedent allowing the Board to look to earlier events to determine the appropriate remedy. *Id.* at 1165-66. Notwithstanding its determination not to order the employer to cease giving effect to its then current agreement, the Board in *Arden Furniture* ordered that the employer “refrain from recognizing or bargaining with [the assisted union] as representative of its employees when the current contract expires . . . , unless and until it is certified by the Board as such representative.” *Id.* at 1164.

In none of *Zidell* line of cases did the Board’s remedy leaving in place the collective bargaining agreement enforce a change in the union representing the employees from one which had represented them for decades to an entirely new union they had no role in choosing. Applying the *Zidell* line of cases here would result in a remedy that leaves in effect a purported 8(f) agreement which was in place for a single Sunday, under which no employees were actually represented, under which a new union was imposed on employees, under which employees never even had a seven-day period to elect to join or not, and which was used as the vehicle by both Respondents for unlawful assistance. The *Zidell* line of cases did not establish a specific rule nor a hard-and-fast dividing line between entry into a contract and “subsequent” assistance. Here, of course, there was virtually no time between the Carpenters’ agreement and Respondents’ mutual unlawful assistance. The Board should find the *Zidell* line of cases inapposite.

Painters instead urges the Board to return to the ALJ’s original well-supported findings and conclusions in this case and to adopt them as the Board’s decision on remand.

The ALJ did not back into October 1 and consideration of a Section 8(f) agreement from October 2. Rather, the ALJ decided Respondents’ violations committed on October 1 straight on. First, the ALJ found, based on witness testimony and concessions by the parties, that, Raymond and the Carpenters intended to establish a 9(a) bargaining relationship upon expiration

of the Painters' agreement based on the 9(a) recognition language of the Carpenters master agreement and encompassing a broader unit to which Raymond's drywall finishing employees, previously represented by the Painters, would be accreted to the overall unit. 354 NLRB at 773-75.

Second, the ALJ considered and rejected Respondents' arguments that either the Carpenters' master agreement or the Confidential Settlement Agreement constituted an 8(f) agreement. The ALJ determined that the Carpenters' master agreement did not give rise to an 8(f) agreement for many of the same reasons, based on both testimony and findings, that the parties intended Section 9(a) recognition: Raymond and the Carpenters intended to include the drywall finishers in the overall Carpenters' unit and did not intend a separate drywall finisher unit which would have formed the basis for Section 8(f) recognition. *Id.* at 775-76. The Confidential Settlement Agreement did not constitute an 8(f) agreement because the document does not purport to be a collective bargaining agreement, does not recite that it is a collective bargaining agreement, does not set terms and conditions of employment, binds the employer to two separate other collective bargaining agreements, describes no bargaining unit, contains no expiration date, and, in any event, would be unlawful as an 8(f) agreement because it was entered into during the term of the Painters' agreement. *Id.* at 776-77.

The ALJ's decision concerning Respondents' independent violations on October 1, 2006, is thorough, well reasoned, and based on his assessment of witness credibility and the parties' contentions before him in the hearing.

Alternatively, the Board may conclude that October 1 and 2 constituted a single course of conduct such that, even if Respondents had an arguable prehire relationship on October 1, it did not meet the standards of Section 8(f). *Bear Creek Construc. Co.*, 135 NLRB 1285 (1962). In

Bear Creek, the Board ordered an employer to cease giving effect to a Section 8(f) agreement where, during a several week period it recognized the union, agreed to enter into a written construction industry agreement, hired employees, signed a prehire agreement, and contemporaneously before and after signing solicited employees to sign membership and dues and initiation fee checkoff cards during the hiring process. The Board, upholding the ALJ, stated,

Section (f), by its express terms, does not validate prehire agreements where the union has been ‘established, maintained, or assisted by any action defined in Section 9(a) of this Act as an unfair labor practice.’ In short, the validity which Section 8(f) gives to prehire agreements is removed where it is shown that the union has been illegally ‘established, maintained, or assisted’ by the employer.

135 NLRB at 1285-86.

The Board concluded that the employer unlawfully assisted the union in obtaining membership and checkoff cards and that the assistance invalidated the prehire agreement. *Id.* at 1286. The Board noted the absence of any showing that the employees were notified that they were not required to join the union for at least seven days or of the agreement’s 16-day grace period. *Id.* at n.4. The ALJ relied on the employer’s conduct both before and after execution of the prehire agreement. *Id.* at 1294. Under a similar analysis, applying *Bear Creek*, the Board should reject Respondents’ Section 8(f) contention.

DATE: July 26, 2016

ELLEN GREENSTONE
MARIA KEEGAN MYERS
ROTHNER, SEGALL & GREENSTONE

By 
ELLEN GREENSTONE

Attorneys for Charging Party Southern California Painters
and Allied Trades District Council No. 36, International
Union of Painters and Allied Trades, AFL-CIO

ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1047 (Consolidated with Case Nos. 12-1011, 12-1012, and 12-1013)

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

RAYMOND INTERIOR SYSTEMS, INC.; SOUTHWEST REGIONAL
COUNCIL OF CARPENTERS,
Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT
COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO,
Intervenor for Respondent/Cross-
Petitioner.

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 PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT
OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

**CONSOLIDATED INTERVENOR AND REPLY BRIEF OF
SOUTHERN CALIFORNIA PAINTERS AND ALLIED
TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL
UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO**

ELLEN GREENSTONE
MARIA KEEGAN MYERS
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101-3115
Tel: (626) 796-7555

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GLOSSARY OF ABBREVIATIONS

Act	The National Labor Relations Act
ALJ	Administrative Law Judge
Board	National Labor Relations Board
Br.	Brief
Carpenters	Southwest Regional Council of Carpenters
CSA	The September 12, 2006 Confidential Settlement Agreement between Raymond and the Carpenters
JA	Joint Appendix
NLRB	National Labor Relations Board
NLRA	National Labor Relations Act
Master Agreement	The Carpenters' 2006-10 Southern California Drywall/Lathing Master Agreement
Memorandum Agreement	The Carpenters' 2006-10 Drywall/Lathing Memorandum Agreement
Painters	The Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO
Raymond	Raymond Interior Systems, Inc.
<i>Raymond I</i>	The Board's September 30, 2009 Decision and Order reported at 354 NLRB No. 85.

GLOSSARY OF ABBREVIATIONS

(Continued)

- Raymond III* The Board's December 30, 2011 Decision and Order reported at 357 NLRB No. 166.
- WWCCA Western Wall and Ceiling Contractors Association, Inc.
(California Finishers Conference)

STATUTES AND REGULATIONS

The relevant statutory provisions are contained in the Addendum to this brief.

SUMMARY OF ARGUMENT

This Consolidated Intervenor and Reply Brief submitted by the Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO ("Painters Union"): 1) addresses certain contentions of Petitioners Raymond Interior Systems ("Raymond") and the Southwest Regional Council of Carpenters ("Carpenters Union") in their Joint Opening Brief; and 2) replies to the arguments in the Brief of the National Labor Relations Board ("Board") opposing the Painters Union's petition for review of the remedy ordered by the Board in this case.

In their Joint Opening Brief, Petitioners Raymond and the Carpenters Union argue that the Board erred by failing to find that Raymond and the Carpenters Union were parties to a lawful § 8(f) agreement on October 1, 2006, and by abrogating that agreement by ordering them to cease and desist giving effect to the

Carpenters' 2006-2010 Master Agreement. Yet even if Raymond and the Carpenters had been parties to a lawful § 8(f) agreement on October 1, such an arrangement would not have immunized the unlawful conduct the Board found they committed on October 2, nor would it have had any effect on the outcome of the case. As such, the Board did not err in declining to pass judgment on whether Raymond and the Carpenters were parties to a lawful § 8(f) agreement. As this Brief shows, none of Raymond's and the Carpenters' urged arguments, however, lead to a lawful § 8(f) agreement.

The Painters' petition for review challenges the Board's remedy as an abuse of discretion by failing to order complete disestablishment of the unlawful relationship between Raymond and the Carpenters. First, the Board erred by ordering Raymond to withhold recognition of the Carpenters unless or until it is duly certified as the exclusive bargaining representative of its drywall finishing employees, but then contradictorily including a footnote stating that Raymond may lawfully recognize the Carpenters (or any other union) as its employees' § 8(f) representative. This portion of the Order is inconsistent with the traditional remedy in unlawful assistance cases, which requires that recognition of an unlawfully assisted union be withheld absent a Board certification. The Board further erred by departing without explanation from well established precedent

regarding alternate benefits coverage without providing any explanation for this departure or justification for its adoption of a new policy.

ARGUMENT

I. THE BOARD DID NOT ERR IN DECLINING TO PASS JUDGMENT ON THE EXISTENCE OF A § 8(f) AGREEMENT BETWEEN RAYMOND AND THE CARPENTERS ON OCTOBER 1.

In their Joint Opening Brief, Raymond and the Carpenters Union argue that they had – or should be determined to have had – a lawful § 8(f) relationship and agreement as of October 1, 2006, either pursuant to the Carpenters' 2006-2010 Master Agreement or as a result of Raymond's and the Carpenters' September 12, 2006 Confidential Settlement Agreement ("CSA"). Brief at 26-31.¹ These arguments were considered and rejected several times by both the ALJ and the Board. Based on these rejected arguments, Raymond and the Carpenters further contend that the Board erred by ordering them to cease and desist from "maintaining, enforcing, or giving effect" to the Carpenters' 2006-2010 Master Agreement and to any related union security provisions because this remedy

¹ The Joint Opening Brief of Petitioners Raymond and the Carpenters Union will be referred to as "Brief," followed by the page number cited.

invalidates their alleged § 8(f) agreement. Brief at 31-35; JA 10.² Neither the law nor the facts support these contentions.

Consistent with its decision in *Raymond III* that the claimed existence of a § 8(f) agreement would not affect the outcome, the Board does not address the § 8(f) claim in its Brief to this Court. While the Painters Union agrees that Raymond's and the Carpenters' claim of a § 8(f) agreement would not substantively affect the outcome of the unfair labor practice case, the Painters Union believes, first, that a discussion of the § 8(f) contention will better explain the Painters Union's own petition for review challenging the Board's remedy in this case and, secondarily, that the argument to which Raymond and the Carpenters Union devote a significant portion of their petition warrants some response.

A. The Board's Unfair Labor Practice Findings Against Raymond and the Carpenters.

In *Raymond III*, which incorporated by reference *Raymond I*, the Board upheld the ALJ's findings that, on October 2, 2006, Raymond unlawfully assisted the Carpenters Union by coercively obtaining authorization cards from Raymond's drywall finishers; by granting the Carpenters § 9(a) recognition at a time when they

² The parties' Joint Appendix will be referred to as "JA," followed by the page number of the record cited.

did not represent an uncoerced majority of the finishers; and by unlawfully maintaining and applying the Carpenters Union 2006-2010 Master Agreement to Raymond's drywall finishers at a time when the Carpenters did not represent an uncoerced majority of the bargaining unit. JA 9.

Raymond and the Carpenters argued at trial that they had entered into a lawful § 8(f) agreement on October 1, 2006, the day before they committed the unlawful practices. The ALJ disagreed, finding instead that Raymond unlawfully granted, and the Carpenters unlawfully accepted, § 9(a) recognition that day.³ JA 43. Having already found unlawful assistance, coercion, and recognition arising out of Raymond's and the Carpenters' conduct on October 2, the Board in *Raymond* I found it "unnecessary to pass on the judge's additional findings that Raymond

³ There are critical distinctions between collective bargaining relationships under § 9(a) of the National Labor Relations Act ("NLRA" or "Act") and those governed by § 8(f) of the Act. Recognition under § 9(a) confers exclusive representative status on a union that represents a majority of employees in an appropriate bargaining unit. *See* 29 U.S.C. § 159(a). By contrast, § 8(f) permits construction industry employers to enter into collective bargaining agreements, often called "prehire" agreements, with labor organizations which have not established representation by authorization from a majority of the employer's employees. *See* 29 U.S.C. § 158(f). One important distinction between § 8(f) and § 9(a) relationships is that under a § 8(f) agreement, employees and rival unions may file election petitions at any time. 29 U.S.C. § 158(f); *NLRB v. Local Union No. 103*, 434 U.S. 335, 348-49 (1978). By contrast, during the term of a § 9(a) agreement, election petitions are barred for up to three years because the union is entitled to a conclusive presumption of majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996).

unlawfully granted § 9(a) recognition to the Carpenters on October 1st" because such findings would be "cumulative of the findings of unlawful conduct occurring on October 2 and would not materially affect the remedy in this proceeding." JA 42.

In its Motion for Reconsideration to the Board, Raymond argued the Board erred by issuing a remedy that unwound Raymond's and the Carpenters' purported § 8(f) agreement without passing judgment on the ALJ's findings.⁴ JA 28-34. In *Raymond III*, the Board addressed this claim:

Raymond also argues that the Board erred in failing to decide whether the "Confidential Settlement Agreement" (CSA) reached between Raymond and the Carpenters 3 weeks before the unlawful assistance constituted a valid 8(f) agreement that was not invalidated by Raymond's subsequent acts of unlawful assistance. We deny this aspect of the motion, 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.

JA 10 (emphasis added).

⁴ The Carpenters joined in Raymond's Motion for Reconsideration. See JA 16.

B. The Claimed Existence of a § 8(f) Agreement Would Have No Effect on the Board's Conclusion That Raymond and the Carpenters Union Violated the Act.

Raymond and the Carpenters offer several complicated arguments in an attempt to convince the Court that, even if they engaged in the violations found by the Board on October 2, as of October 1 they had a valid § 8(f) agreement which the Board may not disestablish. *See generally* Brief at 23-34. Raymond's and the Carpenters' contentions ignore the heart of the Board's decision – that both Raymond and the Carpenters committed unfair labor practices on October 2 when Raymond unlawfully granted and the Carpenters unlawfully accepted § 9(a) recognition at a time when they did not represent an uncoerced majority of Raymond's drywall finishers. JA 9. Neither Raymond nor the Carpenters argues that their purported October 1 § 8(f) agreement privileged or immunized their subsequent conduct such that it would constitute a basis for reversing the Board's finding of violations arising out of on their October 2 conduct. Thus, as the Board correctly found, the § 8(f) arguments are irrelevant to the Board's determination of violations occurring on October 2. JA 10.

Despite Raymond and the Carpenters' assertions to the contrary, the Board is not required to rule on issues that are cumulative and would not materially affect the remedy. *See Palace Sports Entm't, Inc. v. NLRB*, 411 F.3d 211-12, 220 (D.C.

Cir. 2011). The Board's conclusion in that respect is entitled to substantial deference. *See Fortuna Enter., LP v. NLRB*, 665 F.3d 1295, 1305 (D.C. Cir. 2011).

Furthermore, the existence of a § 8(f) agreement would have no effect on the Board's remedy. In unlawful assistance cases, the Board's traditional remedy is to order that the relationship between the employer and the unlawfully assisted union be disestablished. *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1401 (D.C. Cir. 1984). Where, as here, the employer and unlawfully assisted union enter into a collective bargaining agreement, the Board will order that the agreement be set aside. *See, e.g., Jeffrey Mfg. Co.*, 208 NLRB 75 (1974).

Even so, Raymond and the Carpenters rely on *Zidell Explorations, Inc.*, 175 NLRB 887 (1969), to argue that even if they engaged in the unlawful conduct found by the Board on October 2, the Board may not issue a remedy which disestablishes their alleged October 1 § 8(f) agreement. Brief at 31-34. Unlike this case, *Zidell* involved one-sided employer assistance without the involvement or consent of the union that was party to a § 8(f) agreement. *Id.* at 888. The Board held that the innocent union's § 8(f) agreement should not be rescinded solely on the basis of the *employer's* wrongful subsequent actions. *Id.* Here, by contrast, the Board found that both Raymond and the Carpenters Union engaged in collusive

unlawful assistance. By undoing their purported § 8(f) agreement, the Board properly issued a remedy that runs against both Raymond and the Carpenters Union as joint wrongdoers.

The purpose of disestablishment is to sever the relationship between the employer and unlawfully assisted union. The Board did not abuse its discretion by ordering disestablishment of a § 9(a) – or backup § 8(f) – bargaining relationship, because the wrongdoer parties coercively imposed that relationship and agreement on Raymond's employees.

C. Raymond's and the Carpenters' Contention That They Were Parties to a Lawful § 8(f) Agreement on October 1 Is Not Supported by the Evidence or the Law.

1. The Carpenters' 2006-2010 Master Agreement Was Not a § 8(f) Agreement.

Although the Board did not err in declining to pass judgment on the existence of a § 8(f) agreement between Raymond and the Carpenters, substantial evidence supports the ALJ's original finding that there was no § 8(f) agreement.

On September 12, 2006, Raymond and the Carpenters entered into a Confidential Settlement Agreement ("CSA") which purported to resolve an unfiled hypothetical grievance over the "proper assignment of drywall finishing and other

work to the proper trade, craft, and group of employees." JA 49-50, 1080-82.

Pursuant to the CSA, Raymond agreed to sign the Carpenters' 2006-2010 Drywall/Lathing Memorandum Agreement ("Memorandum Agreement") [JA 1213-17], and, at the expiration of Raymond's agreement with the Painters, to apply the Carpenters' 2006-2010 Master Agreement ("Master Agreement") [JA 1047-79] and Memorandum Agreement "to the fullest extent permitted by law." JA 1080. By its terms, the Master Agreement purported to apply automatically to Raymond's drywall finishers on October 1, 2006, at the expiration of the Painters Union agreement. JA 49.

Despite Raymond's and the Carpenters' arguments to the contrary, the ALJ found that the Master Agreement sought to confer § 9(a), not § 8(f), status on the parties. The ALJ noted – and Raymond and the Carpenters concede – that both the Master and Memorandum Agreements contain the specific language necessary to create a § 9(a) relationship as set forth by the Board in *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001).⁵ JA 59; Brief at 28. To make their § 8(f) argument,

⁵ In *Staunton Fuel*, 335 NLRB 717 (2001), the Board held that a union in the construction industry may acquire § 9(a) status through contract language which meets specific standards: a recognition agreement or clause will be independently sufficient where the language expressly, unequivocally, and unconditionally indicates that (1) the union requested recognition as the majority or § 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or § 9(a) representative; (3) recognition was based on the union's having shown, or having offered to show, evidence of its majority support. 335

Raymond and the Carpenters contradictorily argue that their own § 9(a) language did not establish their intent to create a § 9(a) relationship. Brief at 28-29.

Yet the record contains several admissions by Raymond and the Carpenters that unequivocally demonstrate their intent to enter a § 9(a) relationship covering Raymond's drywall finishers. In Raymond's position statement to Region 21 of the NLRB, counsel for Raymond stated, "the [October 2] meeting was privileged by the fact that Raymond's Carpenters' Agreement covered this work and Raymond *already recognized Carpenters as the Section 9(a) representative* of its drywall employees (both hangers and finishers)." JA 902 (emphasis added). Carpenters Contract Administrator Gordon Hubel testified that, as of October 1, Raymond was not free to repudiate its agreements with the Carpenters and that the Carpenters would have taken the position that Raymond's drywall finishers were a part of an overall § 9(a) bargaining unit – both of which indicate that the parties intended to create a § 9(a), not § 8(f), relationship. JA 815-16. There can be no question that Raymond and the Carpenters Union intended to enter into a § 9(a) relationship covering Raymond's finishers as of October 1, 2006, by operation of the Carpenters Master Agreement.

Next, Raymond and the Carpenters argue that even if the Master Agreement

NLRB at 719-20.

created a § 9(a) contract as to the other Raymond employees represented by the Carpenters, it simultaneously served as a § 8(f) agreement for Raymond's drywall finishers, citing *Comtel Sys. Tech., Inc.*, 305 NLRB 287 (1991). Brief at 29. *Comtel* does not support this contention. In *Comtel*, the Board held that a construction industry employer that designates a multi-employer association as its bargaining representative is bound by an agreement reached by the association, but that such an agreement will not have § 9(a) status unless a majority of the employees demonstrate their support for the union. 305 NLRB at 291. Absent such a showing, the Board observed that a multi-employer agreement could not apply *on more than* a § 8(f) basis. *Id.* at 289. The ALJ here rejected Raymond's and the Carpenters' *Comtel* argument.

[T]here exists no language in *Comtel* suggesting that the [same] agreement may also constitute [both a Section 9(a) and] a Section 8(f) agreement, covering a completely separate bargaining unit, and neither counsel for Respondent Raymond or counsel for Respondent Carpenters has cited any case authority for a contrary view of the law.

JA 61-62.

Neither *Comtel* nor any other Board precedent permits the Master Agreement to serve simultaneously as a § 9(a) agreement as to some of Raymond employees but also a § 8(f) agreement as to the drywall finishers. The evidence is

clear that Raymond and the Carpenters intended the Master Agreement to create a § 9(a) relationship as to Raymond's drywall finishers and, therefore, their argument that it should be interpreted to be a § 8(f) agreement fails.

2. **The Confidential Settlement Agreement Was Not a § 8(f) Agreement.**

As a fallback, Raymond and the Carpenters argue that even if the Master Agreement was not a § 8(f) agreement, the CSA provides an independent basis for a § 8(f) relationship. Brief at 30. This argument, like the others, was considered and rejected by both the ALJ and the Board. JA 10, 63.

However, as the ALJ noted, even if Raymond and the Carpenters had entered into a § 8(f) collective bargaining agreement through the CSA, "such would have been an unlawful act." JA 62. The Board has held that during the term of a § 8(f) agreement, an employer may not extend voluntary recognition to a second union for the same bargaining unit of employees, regardless of whether that recognition is pursuant to § 8(f) or § 9(a). *Builders, Woodworkers & Millwrights, Local Union No. 1 (Glens Falls Contractors Ass'n.)*, 341 NLRB 448, 454 (2004). Furthermore, contracting with a union while bound to maintain recognition of another union during the term of a collective bargaining agreement "falls outside the purpose and protection of Section 8(f)." *Oilfield Maint. Co.*,

Inc., 142 NLRB 1384, 1386 (1963); *see also Barney Wilkerson Constr. Co.*, 145 NLRB 704, 718, n.52 (1963); *Disney Roofing & Material Co.*, 145 NLRB 88, 96-97 (1963).

These cases are dispositive. During the term of the Painters' Agreement, Raymond and the Carpenters could not lawfully enter into either a voluntary § 9(a) agreement or a § 8(f) agreement covering Raymond's finishers. Accordingly, the secret settlement agreement during the term of the Painters Agreement cannot be construed as a basis for a lawful § 8(f) agreement.

It is clear, from the Board's decision and the discussion above, that this case does not turn on the fleeting existence or nonexistence of a § 8(f) agreement on October 1, 2006.

II. THE BOARD ERRED BY ISSUING A REMEDY THAT UNDERMINES DISESTABLISHMENT OF THE UNLAWFULLY ASSISTED RELATIONSHIP.

A. Well Settled Precedent Prohibits an Employer From Recognizing an Unlawfully Assisted Union Without Board Certification.

Casting aside well-settled precedent requiring employers to cease and desist from recognizing an unlawfully assisted union without Board-issued certification, the Board in *Raymond III* explicitly authorized Raymond to recognize the

Carpenters under § 8(f) without Board certification, even while also ordering Raymond to cease and desist from recognizing the Carpenters "unless or until it has been duly certified by the Board as the collective-bargaining representative of those employees." *See* JA 9-11.

In its Brief, the Board characterizes its self-contradictory Order as simply "noting the statutory availability of [8(f)] agreements" and asserts that, in so noting, it has not acted contrary to precedent. Bd. Br. 58.⁶ This because-I-said-so statement cannot bridge the contradiction in the remedy and ignores applicable precedent.

In unlawful assistance cases, the Board and courts have historically and uniformly ordered the employer to cease recognizing and bargaining with the unlawfully assisted union unless and until the union has been certified by the Board as the employees' bargaining representative. *See Int'l Ladies Garment*

⁶ The Board overstates the Painters' burden, arguing that the Painters will not be able to show that the Board's clarification is a "patent attempt to achieve ends other than those which can fairly be said to effectuate [the Act's] policies" [citation omitted]." Bd. Br. 56. The Painters Union submits that it has established that the Board's Order is "clearly inadequate in light of the findings of the Board." *Int'l Union of Elec., Radio & Mach. Workers, Local 806 v. NLRB*, 434 F.2d 473, 478 (D.C. Cir. 1970). Moreover, the Painters have demonstrated that the Board's Order "fails to distinguish adequately its applicable precedent" and is "inconsistent with its approach" in other cases. *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 46-47 (D.C. Cir. 2005).

Workers' Union v. NLRB, 366 U.S. 731, 735-37 (1961) ("*ILGWU*") (ordering employer to withhold recognition from unlawfully assisted union until the union demonstrated its majority support in a Board-conducted election); *Duane Reade, Inc.*, 338 NLRB 943, 944-45 (2003), *enforced* 99 Fed. Appx. 240 (D.C. Cir. 2004) (ordering employer to withhold recognition from unlawfully assisted union unless and until Board certified union as exclusive representative) ; *Dairyland USA Corp.*, 347 NLRB 310 (2006), *enforced sub nom. Local 348-S, UFCW*, 273 Fed. Appx. 40 (2d Cir. 2008) (ordering same remedy). Similarly, the Board has ordered construction industry employers to cease and desist from recognizing unlawfully assisted unions – as either a § 8(f) or § 9(a) representative – without Board certification. *See, e.g., Bear Creek Constr. Co.*, 135 NLRB 1285, 1286-87 (1962); *Oilfield Maint. Co., Inc.*, 142 NLRB 1384, 1389 (1963); *Clock Elec., Inc.*, 338 NLRB 806, 808 (2003). There is simply no room within a rule of no recognition unless or until Board certification for voluntary § 8(f) recognition.

The Board attempts to distinguish *Bear Creek* and *Oilfield* by noting that each of these cases involved the Board's invalidation of an *existing* § 8(f) agreement. Bd. Br. 59. The nature of the underlying agreement that was the product of unlawful assistance is immaterial – what is significant is that the Board ordered the employer to cease and desist recognizing the unlawfully assisted

union unless or until a Board certification issued. *See, e.g., Bear Creek Constr. Co.*, 135 NLRB 1285, 1286-87 (1962); *Oilfield Maint. Co., Inc.*, 142 NLRB 1384, 1389 (1963); *Clock Elec., Inc.*, 338 NLRB 806, 808 (2003).⁷

The Board attempts to diminish the precedential value of these cases by arguing that they "were silent about the *future* availability of an 8(f) agreement" and noting that "[t]hese cases do not . . . however, discuss whether this remedy eliminates the employer's statutory right to enter into Section 8(f) relationships." Bd. Br. 59 (emphasis added). To the contrary, in each case, the Board clearly prohibited the employer from recognizing the unlawfully-assisted union without Board certification – an event that necessarily could only happen in the future.⁸

⁷ As discussed in section I of this Brief, the Board held in *Raymond III* that a finding of a valid § 8(f) agreement on October 1, 2006, "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." JA 10. Thus, in finding a violation, the Board affirmatively held immaterial the distinction it now draws to justify its remedy. Adding even more inconsistency, if the Court were to accept Raymond's and the Carpenters' argument that there was an existing § 8(f) agreement, under the Board's distinction here, the remedy in *Bear Creek* and *Oilfield* would then reach back to invalidate Raymond's and the Carpenters' argued § 8(f) agreement.

⁸ The requirement that recognition be withheld absent a Board-issued certification was specific to the unlawfully assisted union in each case. *See Bear Creek*, 135 NLRB at 1286-87; *Clock Elec.*, 338 NLRB at 808; *Oilfield*, 142 NLRB at 1389. At most, these cases could be said to leave open the possibility that the employer could lawfully enter into a future § 8(f) relationship *with a different union*, although the Board did not so hold in any of the cases.

The Board is obligated to adhere to precedent and to fashion a remedy that is consistent with its unfair labor practice findings. Here, the Board's Order is internally inconsistent and utterly confusing. The longstanding remedy followed by the Board and courts, including the U.S. Supreme Court – which the Board does not dispute here – is that the employer be ordered to withhold recognition from unlawfully assisted union until the union demonstrates its majority support in a Board-conducted election. *See ILGWU*, 366 U.S. at 739 (requiring that an employer withdraw voluntary recognition of an unlawfully assisted union and requiring the employer to withhold such recognition "until the Board-conducted election results in majority selection of a representative"). Permitting Raymond and the Carpenters to resume their unlawful relationship under the cover of § 8(f) contradicts well-settled precedent and undermines the Board's unfair labor practice findings by effectively leaving Raymond's drywall finishing employees represented by the same union that coerced them in the exercise of their Section 7 rights and imposing no remedy at all.⁹

⁹ Indeed, the Board's muddled decision could conceivably permit voluntary recognition between parties outside the construction industry found to have engaged in unlawful assistance, thereby contradicting the U.S. Supreme Court's holding in *ILGWU* that the requirement that an employer withhold recognition unless or until a Board certification issues "proper in [unlawful assistance] cases." *ILGWU*, 366 U.S. at 740.

B. The Board's Statement Concerning Its Departure from Established Precedent Regarding Alternate Benefits Coverage Is Not Sufficient Under This Court's Precedent.

In *Raymond III*, the Board also departed from precedent by modifying its Order to eliminate the requirement that Raymond provide alternate benefits coverage to its drywall finishing employees. JA 9. In so doing, the Board stated that it had "not been consistent in requiring that alternate benefits coverage be provided" in unlawful assistance cases, and, in a footnote, string-cited two lines of cases. Noting that, in its most recent case, *Garner/Morrison LLC*, 356 NLRB No. 163 (2011), alternate benefits coverage had not been ordered, the Board announced that, consistent with *Garner/Morrison*, alternate benefits coverage was not required to effectuate the Act. JA 9. Although the Board did not distinguish among the cases, in one line of cases the Board ordered the employer to provide equivalent substitute benefits, and in the other, the benefits provided through plans sponsored by the unlawfully assisted union were left in place. JA 9, n. 3.

As the Board correctly notes (Bd. Br. 53), one issue before this Court is the adequacy of the Board's explanation for its departure from precedent. "If the Board decides to abandon its prior precedent, it must adequately justify any new policy it adopts." *Speedrack Prod. Group v. NLRB*, 114 F.3d 1276, 1282 (D.C. Cir. 1997). "[T]he Board cannot ignore its own relevant precedent but must

explain why it is not controlling." *Randell Warehouse of Arizona, Inc. v. NLRB*, 252 F.3d 445, 448 (D.C. Cir. 2001). Where "a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument." *Lemoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004); accord *Int'l Union of Operating Eng'r Local 147 v. NLRB*, 294 F.3d 186, 188 (D.C. Cir. 2002).

The Board argues that it "explicitly acknowledged its conflicting precedent and explained why it chose one strand [of case law] over the other." Bd. Br. 53. The Board's "explanation," however, was no explanation at all – by its own account, it followed *Garner/Morrison* simply because it was the most recently decided case. See JA 9. As raised in the Painters' Opening Brief, though, the Board in *Garner/Morrison* itself offered no reasoned explanation for choosing one formulation of remedy over the other; indeed, in *Garner/Morrison*, the Board did not acknowledge any conflict in the language used in disestablishment cases concerning alternate benefits. See *Garner/Morrison*, 356 NLRB No. 163, slip op. at 9.

Nor is there any discussion in either of the two lines of cases explaining the rationale for ordering – or not ordering – alternate benefits coverage. It appears that the Board's cases in this area have simply borrowed remedy and order language from one previous case or another, with no reasoned rationale offered to justify any specific approach. In the absence of any rationale, the selection of the last borrowed language, simply because it was used last, is clearly inadequate.

Furthermore, although the Board acknowledged the conflicting precedent, it offered no justification for its conclusion now that "alternate benefits coverage is not required to effectuate the key proscription [of the Act] in unlawful assistance and recognition cases: that an employer not recognize a union as a 9(a) representative of its employees unless and until an uncoerced majority of employees favors such representation." JA 9. The Board failed to offer any explanation of its assumption that the purpose of alternate benefits coverage is to dissuade employers from unlawfully assisting unions. To the contrary, the purpose of providing alternative benefits coverage is to avoid penalizing employees by issuing a remedy that requires the employer to withdraw benefits that have inured to them under the unlawful agreement. *See Mego Corp.*, 254 NLRB 300, 301 (1981). A requirement that alternate benefits be provided meets the purpose, as stated in *Mego*, of not penalizing employees and, additionally, of

disestablishing the unlawful relationship by taking away the tangible fruits of the unlawful assistance.

The Board's lack of explanation of its decision to change course on alternate benefits constitutes an abuse of discretion because the Board does not discuss why the cases ordering alternate benefits coverage are not controlling, and fails to justify the adoption of this new policy.

C. The Board's Remedy Ties Raymond's Drywall Employees to Unlawfully-Assisted Carpenter-Sponsored Benefits.

The Board's Order requires Raymond to cease and desist from maintaining, enforcing, or giving effect to the Master Agreement, but contradictorily includes the proviso that "nothing in this Order shall require any changes in wages or other terms and conditions of employment that may have been established pursuant to said agreement." JA 10. Although the Board argues (Bd. Br. 54-55) that this remedy does not bind Raymond's drywall finishers to the Carpenters, this argument fails to acknowledge two important facts: first, that the benefits Raymond's employees received under the Master Agreement are now an

established term or condition of employment; and second, that those benefits *are sponsored by the Carpenters Union*.¹⁰

In its Brief, the Board characterizes this remedy as being merely permissive, "allowing—but not requiring—Raymond to continue terms and conditions of employment, including existing benefits" Bd. Br. at 54. Whether the Board's Order requires Raymond to continue the existing Carpenters benefits or merely allows them to do so is immaterial. Permitting (or requiring) Raymond and the Carpenters to continue to provide benefits to Raymond's drywall finishing employees defeats disestablishment and contributes further to the Carpenters ill-gotten advantage in securing employee support.

The goal for a disestablishment remedy is to unwind the relationship between the employer and the unlawfully assisted union. Leaving in place Carpenters-Union sponsored benefits effectively leaves Raymond's drywall employees with no remedy at all – the Carpenters are not disestablished, and the

¹⁰ The Master Agreement details the various Carpenter-administered trust funds. *See* JA 1065. Among the benefits provided directly by the Carpenters are the Carpenters Pension Plan (JA 1102-04), the Carpenters Health and Welfare Benefit Plan (JA 1105-11), and the Carpenters Life Insurance and Disability Benefit Plan (JA 1112).

workers remain caught in the web of the unlawful relationship between Raymond and the Carpenters.

/s/Ellen Greenstone

ELLEN GREENSTONE

MARIA KEEGAN MYERS

ROTHNER, SEGALL & GREENSTONE

510 South Marengo Avenue

Pasadena, California 91101-3115

Tel: (626) 796-7555

Counsel for Petitioner/Intervenor

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 5,146 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

/s/ Ellen Greenstone
ELLEN GREENSTONE

December 26, 2012

CERTIFICATE OF SERVICE

I certify that on December 26, 2012, the foregoing Consolidated Intervenor and Reply Brief of Southern California Painters and Allied Trades District Council No. 36, International Union of Painters and Allied Trades, AFL-CIO was filed using the Appellate CM/ECF system and service accomplished through the CM/ECF system on all participants in this case and by electronic mail upon the following counsel:

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Linda.Dreeben@nrlb.gov
appellatecourt@nrlb.gov

Attorneys for Respondent/Cross Petitioner

James A. Bowles
Hill, Farrer & Burrill, LLP
One California Plaza, 37th Floor
300 South Grand Avenue
Los Angeles, CA 90071
jbowles@hillfarrer.com

Attorneys for Petitioner/Cross-Respondent

Daniel M. Shanley
DeCarlo, Connor & Shanley
533 South Fremont Avenue, 9th Floor
Los Angeles, CA 90071
dshanley@deconsel.com

Attorneys for Petitioner/Cross-Respondent

/s/ Ellen Greenstone
ELLEN GREENSTONE

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29 U.S.C. §159(a)	Addendum 2

STATUTORY ADDENDUM

Sec. 7 [29 U.S.C. § 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 of 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 158(a)(3) of this title.

Sec. 8(f) [29 U.S.C. §158(f)] (f) Agreement 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 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 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 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 159(c) or 159(e) of this title.

Sec. 9(a) [29 U.S.C. §159(a)] (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: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of CHARGING PARTY SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO'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.

PARTIES RECEIVING ELECTRONIC MAIL

Lindsay R. Parker
Counsel for the General Counsel
National Labor Relations Board, Region 21
Lindsay.Parker@nlrb.gov

James A. Bowles, Esq.
Hill Farrer & Burrill LLP
JBowles@hillfarrer.com

Daniel M. Shanley, Esq.
DeCarlo & Shanley, APC
dshanley@deconsel.com

John T. DeCarlo, Esq.
DeCarlo & Shanley, APC
jdecarlo@deconsel.com

Richard Singh Zuniga, Esq.
Hill Farrer & Burrill LLP
rzuniga@hillfarrer.com

Executed on July 26, 2016, at Pasadena, California.



DOROTHY A. MARTINEZ