

UNITED STATES OF GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS

v.

NLRB and GARNER/MORRISON, LLC

v.

NLRB

Case 28-CA-21311

RESPONDENT SOUTHWEST
REGIONAL COUNCIL OF
CARPENTERS' STATEMENT OF
POSITION

Pursuant to the Board's September 13, 2016 letter, the Southwest Regional Council of Carpenters ("Carpenters Union" or "Carpenters") submits this Statement of Position with respect to the issues raised by the remand of the above-captioned case by the Court of Appeals for the District of Columbia Circuit in *NLRB v. Southwest Regional Council of Carpenters and Garner/Morrison LLC*, 2016 U.S. App. LEXIS 11181, Case No. 11-1212 (D.C. Cir. 2016).

I. STATEMENT OF POSITION

In its June 21, 2016 remand Order, the Court of Appeals stated that "[t]he Board's order denying reconsideration relies solely on the absence of a claim of unlawful surveillance in distinguishing *Coamo*, not on any factual differences between the cases." *Garner/Morrison LLC*, 2016 U.S. App. LEXIS 11181 at 13. The Court agreed with the Carpenters Union and Garner/Morrison, LLC, ("G/M") that "the Board's decision was arbitrary and capricious because

the Board did not provide a reasoned justification for its departure from *Coamo Knitting Mills*.” *Id.* at 10. It explained that “[n]ot only are the facts in *Coamo* similar to the facts here, but the legal issues in *Coamo* mirror those here.” *Id.* at 12. Both cases involved the question of whether sections 8(a)(1), (a)(2), and 8(b)(1)(A) were violated by the presence of management at a union meeting where employees signed authorization cards. *Id.*

“The similarities between *Coamo* and the present case are ‘significant enough’ that the Board needed to provide a reasoned explanation why *Coamo* ‘does not apply, or why departure from [*Coamo*] is warranted.” *Id.* (citing *Lone Mt. Processing v. Sec’y of Labor*, 709 F.3d 1161, 1164 (D.C.Cir. 2013)). This Statement of Position, therefore, is to show that there cannot be a reasoned explanation why *Coamo* does not apply because the significant facts in that case are very similar to the facts in this case. Further, the facts here are a lot more similar to the ones in *Coamo* than to the facts in the cases the Board relied upon.

II. PERTINENT FACTUAL SUMMARY

The underlying unfair labor practice charges are predicated solely on what transpired at a meeting on April 2, 2007. At the time of the meeting, G/M had a valid pre-existing labor agreement with the Carpenters Union. While G/M’s tapers and painters had previously been covered by Painters’ Section 8(f) agreements, those agreements expired on March 31, 2007. Dissatisfied with the Painters Union, G/M did not renew the agreements. By the terms of the collective bargaining agreement (“CBA”) with the Carpenters Union, the tapers and painters became covered by the Carpenters’ CBA. This meant that these employees would now receive Carpenters’ health and welfare and pension benefits.

G/M’s owners agreed to attend a meeting on April 2 where Carpenters’ representatives could explain the benefits under the existing Carpenters’ agreement which now covered G/M’s

painters and tapers. G/M did not know that anything other than explaining the Carpenters' benefits and enrolling the tapers and painters for the benefits coverage would occur at the meeting. The painters and tapers were told the Carpenters were going to make a presentation about their benefits and they should attend because "it affected their health coverage", but the employees were not ordered to attend.

Unbeknownst to G/M's owners, the Carpenters' representatives also utilized this meeting to solicit authorization cards. This was done at the conclusion of the meeting. Mike McCarron of the Carpenters Union told the attendees that there were representatives at the tables in the back of the room with "information packages and stuff." The G/M representatives present at the meeting, who stayed in the front of the conference room the entire time, therefore did not know that when the attendees went to the back of the room where there were tables set up, there were also authorization cards there that could be signed by the attendees. From about 60 or 70 feet away, the G/M representatives could see the employees' movements in the back of the room, but could not hear their conversations or see whether they were signing authorization cards.

At the conclusion of the meeting, the Carpenters then presented the cards to G/M and demanded Section 9(a) recognition as to the tapers and painters. G/M's representatives granted the Carpenters' demand for recognition and executed another agreement that specifically covered the tapers and painters under Section 9(a).

III. LEGAL ARGUMENT

A. Coamo May Not Be Reasonably Distinguished From This Case As Having Less Coercive Conduct Than Was Present Here

The relevant facts in *Coamo* are very similar to the facts in this case. In *Coamo*, the General Counsel alleged that the company provided unlawful assistance and support to a union that the union unlawfully accepted. *Coamo Knitting Mills, Inc.*, 150 NLRB 579, 583 (1964).

The charges stemmed in part from a meeting that occurred on July 17 at which company representative Angel Galinanes was present and whose presence the Trial Examiner found “necessarily had a coercive effect” on the employees who attended the meeting. *Id.* at 581. At this same meeting and in the presence of this individual, representatives of the union distributed to and collected from the assembled employees cards which were combined applications for membership, designations of the union as bargaining representative, and checkoff authorization. *Id.* at 580, 586.

The Board disagreed with the Trial Examiner that the very presence of the company representative had a coercive effect on the employees who signed the cards. It explained as follows:

It is admitted that Galinanes was not standing in a position that would have enabled him to observe individual employees signing cards. To the contrary, Galinanes credibly testified that during the meeting, he stood on the floor apart from the employees, and that he could not and did not see any employees signing the cards. His testimony was corroborated in this respect by employee Matos. Galinanes further testified, and the Trial Examiner found, that management made no attempt to ascertain which employees even attended the meeting.

Id. at 581-82. The Board made this conclusion despite the fact that Galinanes was present at the meeting where a union representative stated that the union would attempt to secure for the employees an additional holiday, additional vacation benefits, and a better welfare program. *Id.* at 586.

Here, as the Court pointed out, at the April 2, 2007 meeting, G/M’s three owners and a superintendent sat in the first row of seats in a conference room right behind the table in the front. The two tables at the back of the room at which the cards were signed were some 65 feet away from the front table. *Garner/Morrison LLC*, 2016 U.S. App. LEXIS 11181 at 4. During the entire time, the G/M owners and superintendent stayed at the front of the room, and, from

about 60 or 70 feet away, the owners said they could see the employees' movements in the back of the room, but could not hear their conversations or see whether they were signing authorization cards. *Id.* at 5. There is also no evidence that management made an attempt to ascertain which employees attended the meeting or signed the cards. Therefore, *Coamo's* key holding that the presence of supervisors at the meeting where employees are solicited to sign authorization cards is not coercive where the supervisors cannot and do not see employees signing the cards applies to this case.

In its appellate court brief, the Board attempted to distinguish *Coamo* on various alleged grounds. First, it argued that in *Coamo* the company representative could not and did not see any employees signing the cards and made no attempt to determine which employees attended, whereas here G/M's owners could watch as the Carpenters solicited employees to sign cards. (Bd. Br. 29.) However, as found by the ALJ, G/M's purpose for the meeting was to have the Carpenters explain their health benefits to G/M's painters and tapers and G/M's owners were unaware the Carpenters intended to solicit authorization cards, findings left undisturbed by the Board. (JA 50-51; *see* testimony at JA 268:1-11, JA 274:21-24; JA 352:22-23, JA 368:5-8, JA 370:5-8, JA 410:11-15, JA 412:9-14.) The fact that it is physically possible to see people 60-70 feet away is legally inconsequential when there is no evidence G/M's owners were aware that authorization cards were being solicited. They simply could not have engaged in surveillance of the signing of authorization cards when they did not know the authorization cards were being solicited. The G/M owners also could not have come to the meeting with the intent to engage in surveillance if they did not know the Carpenters were going to solicit authorization cards at the meeting. This case therefore does not involve any more "surveillance" than *Coamo*.

Further, the fact that in *Coamo* there was only one employer representative that was present at the meeting does not distinguish this case in any important way because the presence of more G/M representatives here does not change the fact that they could not have engaged in the surveillance of something they did not know would take place at the meeting. The Board's comment that there was a "single employer representative" present at *Coamo* is therefore inconsequential. (Bd. Br. 28.)

Second, the Board characterized G/M as having "corralled its employees to an off-site meeting". (Bd. Br. 29.) Despite using the word "coral", the Board did not explain what in the manner in which the employees were called to the meeting was somehow more coercive than the manner in which this was done in *Coamo*. Here, on the morning of April 2, G/M's representatives informed their tapers and painters about the meeting, telling them that the Carpenters were going to make a presentation about their benefits and they should attend because "it affected their health coverage". (JA 194, 242-43, 49.) The employees were *not* ordered to attend. (JA 194, 220, 242-43, 268, 291, 49.) Stating that the employees were "corralled" implies a degree of force in how the employees were told to go to the meeting and implies confinement, but there is no evidence that they were either forced to attend the meeting or could not leave it.

In *Coamo*, in contrast, just before the end of the first shift, Galinanes, the company representative who was present at the meeting, announced over the plant's public address system that representatives of the union would address the employees later that day. *Coamo Knitting Mills, Inc.*, 150 NLRB at 586. As the second shift employees were about to start working, Galinanez told the group, "Boys please stop working, let us go to the meeting." *Id.* This manner of encouraging attendance at the meeting is no less coercive than the manner in which the meeting attendance was encouraged here. There is therefore no logical reason to describe the

employees as having been “corralled” into the meeting here as a way to distinguish this case from *Coamo*.

Additionally, the Board did not explain the legal significance of one of the facts the Board pointed to: that the meeting here was at an “off-site” location, specifically, a Marriott Hotel. In fact, the use of the company’s own facilities to solicit authorization cards is *more* likely to make the employees feel that they are being watched by the company than if this is done at a neutral location, such as a hotel conference room. The Board in *Coamo* acknowledged this when it explained that *despite* the use of the company property, there was no coercion:

Nor do we think that the Union’s status as lawful majority representative was impaired by the fact that the meeting took place on company property and during the working hours of five of the employees. We have held that the use of company time and property does not, *per se*, establish unlawful support and assistance. Rather, each case must be decided on the totality of the facts.

Id. at 582. Thus, if it is of any importance that the meeting took place at a hotel, as opposed to at the G/M facilities, that is a factor that makes the manner in which the meeting was set up less coercive than in *Coamo*.

Thus, none of the comments the Board has made regarding *Coamo* actually correspond to facts that point to more coercion leading up to the signing of the authorization cards than was present in *Coamo*. It should also be pointed out that in *Coamo*, on July 16, the day before the meeting, the Trial Examiner found that Richard Wolf, the company’s vice president, arrived to the facility “and spoke to five different groups of the Company’s employees in the lunch shelter, where they had been summoned by Galinanez for that purpose.” *Id.* at 585. At these meetings, Wolf praised the union, stated that the union’s representatives would soon solicit the employees to join, and urged the employees to do so. *Id.* There was no such preliminary meeting here

before the April 2 meeting, so there was even less likelihood here that the employees would feel compelled to attend the meeting where the authorization cards were collected than in *Coamo*.

At the April 2 meeting itself, there were statements made that indicated that G/M was not giving the Carpenters unlawful assistance and the attendees were free to leave. Co-owner Chris Morrison stated that the Carpenters had a lot to offer and they wanted to present their benefits package, and stated that “we think this is a good deal.” (JA 246-47, 346, 395-96, 691-719, 40-49.) After the presentation and the questions, which were mostly about health insurance and pension benefits, Mike McCarron of the Carpenters Union told the attendees that there were representatives at the tables in the back of the room with “information packages and stuff.” (JA 247-49, 325, 351-52, 397-98, 49-50, 223, 268, 274, 319, 368-70, 448-49.) There was thus no pressure to sign authorization cards that day, particularly when G/M did not even know that authorization cards would be collected that day, and no statements were made by the company to the effect that they must choose the Carpenters Union.

For all the foregoing reasons, *Coamo*’s key holding that the presence of supervisors at a meeting where employees are solicited to sign authorization cards, by itself, does not “taint” the collected cards, still applies here because, as in *Coamo*, the company representatives did not know the cards were being solicited. Additionally, the other facts do not render the April 2 meeting here any more coercive than the July 17 meeting in *Coamo*. There is therefore no reasonable way to distinguish *Coamo* in a way that could reasonably lead to a different result.

B. The Type of Threats and Coercive Conduct In the Cases the Board Relies Upon Are Not Present Here

The Board in its briefing has relied on several cases all of which involved threats and coercion that was not present here.

The Board has cited *Dairyland USA Corp.*, 347 NLRB 310 (2006) for the proposition that an “example[] of conduct constituting unlawful assistance [is] directing employees to meet with a union representative to sign an authorization card and having a supervisor or company official present when cards are signed . . .” *Id.* at 312. The Board asserted that that is “precisely what happened here.” (Bd. Br. 16.) That characterization, however, is far from the reality.

The facts in *Dairyland* were very different:

On January 23, 2003, the Union and Dairyland signed a neutrality agreement. The terms of that agreement allowed the Union to come to the Bronx facility to meet with Dairyland's employees. On January 27, representatives of the Union went to Dairyland's Bronx facility and were provided space in the dispatch office to meet the employees and solicit authorization cards. On that day, Warehouse Supervisor Kevin Kelly told 18 warehouse employees that they "ha[d] to go" to the dispatch office to meet with the Union "to sign" a card. Operations Manager Mineo Maldonado was present when warehouse employee Bobby Richardson was signing a card, and at various times Maldonado went "in and out" of the card-signing meetings. Maldonado also threatened delivery driver Santana by saying to him, "[I]f you don't sign the card, you won't be working here." Maldonado also told delivery driver Miguel Pierre that the Union was "there for us" and would "supply medical benefits."

Dairyland USA Corp., 347 NLRB at 310-11.

Here, in contrast with *Dairyland*, G/M did not direct its employees to meet with the Carpenters on April 2 to sign authorization cards. No one from the Carpenters Union had ever informed G/M's representatives that the Carpenters would be asking employees to sign authorization cards at the meeting. (JA 223, 249, 268, 274, 319, 351-52, 368-70, 397-98, 448-49, 50.) G/M management therefore could not have instructed the employees to go to a meeting for the purpose of signing authorization cards. There were, furthermore, unlike in *Dairyland*, no instructions to the employees that they *had to go* to a meeting to sign a card or for any other reason, and no one was threatened with a loss of job if they did not sign the card.

This case is also distinguishable from *Vernitron Electrical Components, Inc.*, 221 NLRB 464 (1975), *enfd.*, 548 F.2d 24 (1st Cir. 1977). *Vernitron* distinguished *Coamo* as follows:

“In *Coamo*, attendance at the union meeting was not compulsory; all but 5 of 170 employees at the meeting were on nonwork, nonpaid time; and no supervisor or other employer official was in a position to view the employees executing the authorizations.” *Id.* at 465. In contrast, in *Vernitron*, the company’s supervisors were told to, and did assemble their employees by departments, for meetings with the union representatives, and the foremen were in the room with the employees from their departments as the presentations were made to each group. *Id.* at 464, 468. “The series of organization meetings lasted *the entire day*, employees were directed to attend them, and all were paid for the time involved.” *Id.* at 464 (emphasis added). Here, the meeting at the Marriott Hotel started at about 2:00 pm and lasted at most one and a half hours. (JA 243-45, 270, 348, 433-34, 49.) There is also no evidence that they were ordered to attend or were paid to attend the meeting. The meeting was also *not* held during work time. (JA 220, 268.) Additionally, no evidence shows that the G/M representatives were aware that authorization cards were being solicited. These distinctions were ignored by the Board.

This case also does not have the kind of conduct present in the other cases relied upon by the Board. In *Indus., Tech. & Prof’l Emps. Div., etc. v. NLRB*, 683 F.2d 305 (9th Cir. 1982), the

[union] representatives were provided with virtually unlimited access to [the company’s] facilities and they had complete freedom to conduct their organizing activities during working hours with the full cooperation of [the company] supervisors. The [company] organizers made threats and misrepresentations to [the company] employees in order to obtain their signatures on authorization cards.

Id. at 307. No threats were made in the present case and G/M management did not even know prior to the relevant meetings, that authorization cards would be solicited at that meeting. There was also no “virtually unlimited access” to the company’s facilities to conduct organizing activities.

In *Duane Read, Inc.*, 338 NLRB 943, *enforced* 99 F. App’x. 240 (D.C. Cir. 2004),

“[t]he Company directed its employees to meet with UNITE representatives on store premises during paid work time for the purpose of signing authorization cards.” *Id.* As already discussed, here the purpose of the April 2 meeting was not to sign authorization cards and G/M was not even aware this would be done at the meeting. In *Distributive Workers of America v. NLRB*, 593 F.2d 1155 (D.C. Cir. 1978), the managers themselves attempted to induce employees to sign authorization cards by making either promises or threats. *Id.* at 1160. No such inducement by the management occurred here, either by threats or promises. In *Price Crusher Food Warehouse*, 249 NLRB 433 (1980), the Board found unlawful assistance where the employer granted a union access to its premise while denying such access to a rival union. *Id.* at 434. In *NLRB v. Midwestern Pers. Servs.*, 322 F.3d 969 (7th Cir. 2003), a high-ranking manager suggested to employees that they would lose their jobs if they did not sign authorization cards. *Id.* at 978. No such suggestion was made either by management or the Carpenter representatives, and there was no access given here at the expense of a rival union.

Thus, every case the Board has relied upon has facts clearly distinguishable from the ones present here. The type of coercive conduct present in those other cases, such as indicating to employees that they *had* to attend the meeting, the management knowing beforehand that authorization cards would be solicited at the meeting, or threatening employees with the loss of their jobs, is not present in this case.

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IV. CONCLUSION

For the foregoing reasons, the Carpenters Union respectfully requests that the Board provide a reasoned explanation that *Coamo* does apply to this case, and a departure from its ruling is not warranted.

DATED: September 26, 2016

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is DeCARLO & SHANLEY, A Professional Corporation, 533 South Fremont Avenue, Ninth Floor, Los Angeles, California 90071-1706.

I hereby certify that on September 26, 2016, I filed RESPONDENT SOUTHWEST REGIONAL COUNCIL OF CARPENTERS' STATEMENT OF POSITION in Case 28-CA-21311

I hereby certify that on September 26, 2016, I caused to be served the foregoing document described RESPONDENT SOUTHWEST REGIONAL COUNCIL OF CARPENTERS' STATEMENT OF POSITION in 28-CA-21311 on the interested parties in this action via e-mail:

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Executed on September 26, at Los Angeles, CA.

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