

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 05-1991

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

UNITE HERE

Intervenor

v.

ALPHA ASSOCIATES

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board to enforce an order of the Board finding that Alpha Associates (“the Company”) violated Section 8(a)(5) and (1) of the National

Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)). The Decision and Order, issued on May 31, 2005, and reported at 344 NLRB No. 95 (A 103-08),¹ is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to remedy unfair labor practices. The Board's application for enforcement was filed on August 26, 2005. The application was timely filed, as the Act places no time limitation on such filings. UNITE HERE ("the Union"), the charging party before the Board in the underlying unfair labor practice proceeding, has intervened on behalf of the Board. This Court has jurisdiction over the application for enforcement pursuant to Section 10(e) of the Act, the unfair labor practices having occurred in North Charleston, South Carolina.

STATEMENT OF THE ISSUE PRESENTED

The ultimate issue of whether the Company's uncontested unilateral changes in terms of employment and its refusal to bargain violated Section 8(a)(5) and (1) of the Act turns on whether the Board reasonably concluded

¹"A" refers to the Appendix filed with the Court. "Br" refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

that the Company was time barred and estopped from challenging its own voluntary recognition of the Union as an affirmative defense to the violations because it bargained with the Union and did not question the validity of its recognition for more than a year.

STATEMENT OF THE CASE

Based upon unfair labor practice charges filed against the Company by the Union, the Board's General Counsel issued a consolidated complaint on March 31, 2003, alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §§ 151, 158(a)(5) and (1)). (A 13-18.) The Company filed an answer admitting in part and denying in part the complaint allegations. (A 19-21.) After the General Counsel filed a motion for summary judgment, the Board issued an order transferring the proceeding to the Board and a notice to show cause why the motion should not be granted. (A 23, 58.) The Union filed a memorandum in support of the motion for summary judgment, and the Company filed an opposition to the motion, to which the General Counsel filed a response. (A 59-83, 99-101.) The Board issued its Decision and Order on May 31, 2005, granting the motion for summary judgment. (A 103-08.) The undisputed facts before the Board on summary judgment are summarized immediately below, followed by a summary of the Board's Decision and Order.

STATEMENT OF FACTS

A. In Response to an Unfair Labor Practice Charge Filed by the Union, the Company Voluntarily Recognizes the Union and Negotiates for a Collective-Bargaining Agreement

The Company purchased a facility in North Charleston, South Carolina, whose production and maintenance employees had long been represented in a bargaining unit by the Union. (A 107; A 73, 82 at ¶ 3, 84.) The Company continued to operate the North Charleston facility, manufacturing and selling fabrics and composites for use in thermal insulation and other products. (A 107; A 14 at ¶ 2, 19 at ¶ 1.) In July of 2001, the Union filed an unfair labor practice charge alleging that the Company was a successor employer obligated to recognize and bargain with the Union, and had violated the Act by refusing to do so. (A 105 at n.9; A 73, 82 at ¶5, 85.)²

Rather than litigating whether it was in fact a successor obligated to bargain with the Union, the Company chose instead to send a letter to the Board regional office that was investigating the Union's unfair labor practice

² Upon acquiring a business, a new employer is obligated to bargain with the union that represented its predecessor's employees if the employer conducts essentially the same business as the former employer, and a majority of the work force was formerly employed by the predecessor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 279-81 (1972); *NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1288 (4th Cir. 1995).

charge in hopes of settling the dispute. (A 104 at n.6, 105 at n.9; A 27 at ¶ 6, 55.) Specifically, the Company's August 14, 2001 letter stated that it was sent by the Company's counsel to "confirm my prior telephonic advice that [the Company] has elected to recognize and bargain with [the Union] regarding the employees in the unit." *Id.* Thereafter, the Union withdrew its charge against the Company and the parties bargained concerning the terms and conditions of employment of the unit employees. (A 105; A 73-75, 82-83, 87-89, 91-98.)

B. The Company Unilaterally Lays Off Multiple Employees, Grants a Wage Increase, and Subsequently Refuses to Recognize and Bargain with the Union

On March 8, 2002, the Company began unilaterally laying off unit employees, eventually terminating six unit employees without giving notice or an opportunity for bargaining to the Union. (A 103, 107; A 16 at ¶ 11(a), 20 at ¶ 5.) Additionally, on July 29, 2002, the Company unilaterally granted a wage increase to the unit employees. (A 103, 107; A 16 at ¶ 11(b), 20 at ¶ 5.) On January 16, 2003, the Union sent the Company a letter requesting further bargaining. (A 106 at n.11; A 54, 83 at ¶ 12.) Since that time, however, the Company admits, it has refused to meet or bargain with the Union. (A 103, 107; A 16 at ¶ 11(c), 21 at ¶ 5.) In response to these actions,

the Union filed the unfair labor practice charges forming the basis of the instant case. (A 103; A 8-12.)

C. The Board's Conclusions and Order

The Board (Chairman Battista and Members Liebman and Schaumber) granted the General Counsel's motion for summary judgment, concluding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) by laying off employees and increasing wages without notifying the Union or affording the Union an opportunity to bargain, as well as by its continuing refusal to meet and bargain with the Union. (A 107.) The Board's order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 109.) Affirmatively, the Board's order requires the Company, upon request, to bargain with the Union, and to post copies of a remedial notice. *Id.* Additionally, the order requires the Company to offer to reinstate the unlawfully laid off employees and make them whole for any lost earnings and benefits, and to rescind the wage increase if so requested by the Union. *Id.*

SUMMARY OF ARGUMENT

As the Board has repeatedly observed, “[t]he policies of the Act are not served by allowing [an employer] to use the process of voluntary recognition to gain [a] benefit, only to cast off this process when it does not achieve what it desires in negotiations.” (A 105, *quoting Red Coats, Inc.*, 328 NLRB 205, 207 (1999).) Here, the Company seeks to do precisely that which Board policy disallows: it gained stability in its labor relations, avoided costly litigation, and perhaps headed off a potentially disruptive organizing campaign through its agreement to voluntarily recognize and bargain with the Union, only to shift position nearly one year and half later, claiming that it had never validly recognized the Union and had no legal obligation to do so. The Board reasonably concluded that two separate lines of authority foreclosed the Company’s eleventh-hour attempt to challenge its previous recognition of the Union in order to avoid the bargaining obligations flowing therefrom.

Decades of Board and Circuit decisions support the Board’s conclusion that the policies underlying the 6-month limitations period prescribed by Section 10(b) of the Act precluded the Company from challenging its prior recognition of the Union once more than 6 months had elapsed. The Board’s consistent policy in this regard is reasonably premised

on the concept that a party should not be able to defend itself against a timely unfair labor practice charge by raising evidence of conduct amounting to an unfair labor practice that could no longer be charged by the Board. By delaying repudiation of its prior recognition of the Union by almost one year and a half, the Company lost the ability to challenge the validity of that recognition in its own defense.

A chain of reasonable and consistent authority based on equitable principles likewise supports the Board's conclusion that the Company should be estopped from disavowing its voluntary recognition of the Union. Acting on similar facts, the Board has repeatedly prevented employers from withdrawing recognition from unions, where, as here, the employer received a benefit from the union's detrimental reliance on its actions.

Rather than raising any significant argument with the rationales underlying these twin lines of authority, the Company instead seeks to muddy the waters by conflating irrelevant principles of recognition from the construction-industry context with those applicable to the instant circumstances. Moreover, the Company grounds its arguments not on reasoned holdings of the Board or Circuits, but on a lone sentence of dicta in the footnote of one of this Court's construction-industry cases.

ARGUMENT

THE COMPANY IS TIME-BARRED AND ESTOPPED FROM CHALLENGING ITS VOLUNTARY RECOGNITION OF THE UNION

A. Introduction and Standard of Review

In its opening brief, the Company neither denies taking the actions that the Board found to violate the Act, nor raises any affirmative defenses to justify its conduct, outside of a belated challenge to its own voluntary recognition of the Union. Indeed, the Company's brief does no more than hint at an explanation for its fickle course of conduct, which appears puzzling at best and devious at worst.

Accordingly, the Company has waived its opportunity to reargue to this Court many of the contentions that it pressed before the Board, including, *inter alia*, the alleged inappropriateness of the bargaining unit, the claimed existence of extreme economic pressures that would justify its unilateral layoffs, a past practice of granting wage increases at other facilities, and a potential impasse in bargaining with the Union. (A 105-07; A 66-69.) *See U.S. v. Brower*, 336 F.3d 274, 277 n.2 (4th Cir. 2003) (arguments not raised in opening appellate brief deemed waived); *see also NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991) (summarily enforcing uncontested violations). The only issues remaining for this Court

are the propriety of the Board's conclusion that the policies underlying Section 10(b) of the Act, as well as the estoppel doctrine, precluded the Company's attempt to avoid culpability for its unilateral layoffs, wage increase, and its continuing refusal to recognize and bargain with the Union.

The Board's determination that the Company's defenses were precluded is entitled to deference from this Court. The Company's arguments essentially challenge the application of Board rules developed years ago concerning the circumstances in which parties should be held to their bargaining obligations when they have been dilatory in pursuing objections to those obligations. The Supreme Court, in *Auciello Iron Works v. NLRB*, affirmed the Board's limitation of employers' ability to sit on their doubts as to a union's majority status. 517 U.S. 781, 787 (1996). In so doing, the Court clarified that when the Board develops rules concerning parties' collective bargaining obligations, its choices are due "considerable deference[.]" 517 U.S. at 787-88. Indeed, so long as a Board rule is "rational and consistent with the Act," and its application supported by substantial evidence, the Board's order must be enforced. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) (affirming the application of Board rules concerning successor employers).

B. The Board Reasonably Applied Its Long Established Rule that the Policies Underlying Section 10(b) of the Act Precluded the Company from Defending Against Its Refusal to Bargain with the Union by Challenging Its Own Voluntary Recognition Some 17 Months Earlier

The Board, in its decision and order, prevented the Company from challenging its own apparent recognition of the Union months after the relevant limitations period had expired. The factual basis for the Board's conclusion was the Company's written statement that it intended to recognize the Union and the Company's actual bargaining with the Union well over one year prior to its attempt to disclaim an effective recognition. The Board's legal basis for its conclusion was a longstanding rule drawing its rationale from the limitations provision of Section 10(b) of the Act, and the case law interpreting that section.

Section 10(b) of the Act (29 U.S.C. § 160(b)) provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board" The Supreme Court interpreted Section 10(b) in *Local Lodge No. 1424 Int'l Assn. Of Machinists, AFL-CIO (Bryan Mfg.) v. NLRB*, to decide whether the enforcement of a collective-bargaining agreement was illegal on the sole basis that the union lacked majority support within the bargaining unit at the time the agreement was executed. 362 U.S. 411

(1960). Despite its concerns regarding such minority unions, the Court held that Section 10(b) barred the Board from issuing a complaint because the execution of the agreement took place more than 6 months prior to the filing of the relevant unfair labor practice charges. 362 U.S. at 416-17, 419. As the Court noted, the policies that Congress sought to vindicate in enacting Section 10(b) were the stability of bargaining relationships, the promotion of industrial peace, and barring litigation “over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused[.]” 362 U.S. at 419, 425-26, 428.

Consistent with *Bryan Mfg.*, the Board and the Courts have held for decades that the policies underlying Section 10(b) apply equally to defenses as well as complaints, and that evidence of conduct amounting to an unfair labor practice that occurred outside the 10(b) period may not be raised as part of a party’s defense to a distinct and timely filed charge against it. *See, e.g., NLRB v. District 30, United Mine Workers of America*, 422 F.2d 115, 122 (6th Cir. 1969); *R.P.C., Inc.*, 311 NLRB 232, 234 (1993).

Circumstances involving potentially unlawful recognitions are fully covered by this rule. For, as the Board explained here, its “policy in this regard is premised on the notion that, if the time limitations prescribed by Section

10(b) foreclose a direct attack on the validity of an employer's recognition of a union—through the filing of unfair labor practice charges alleging a violation of Section 8(a)(2) or 8(b)(1)(A)—an employer should not be permitted to attack that recognition indirectly via a defense to an 8(a)(5) charge after the 6-month period has elapsed.”³ (A 104 n.4).

Thus, an employer may not challenge the validity of its initial voluntary recognition of a union in defense of its subsequent refusal to meet its statutory bargaining obligations, where the recognition took place more than 6 months prior to the filing of the refusal to bargain charge. *NLRB v. Marin Operating, Inc.*, 822 F.2d 890, 893-94 (9th Cir. 1987); *Route 22 Honda*, 337 NLRB 84, 85 (2001); *Sewell-Allen Big Star, Inc.*, 294 NLRB 312, 313 (1989), *enforced mem.*, 943 F.2d 52 (6th Cir. 1991). Indeed, the Board's use of this rule to bar nonconstruction-industry employers from raising acts occurring outside of the 10(b) period as the sole defense to timely unfair labor practice charges against them has uniformly met with

³ Outside of the construction industry, and its potential for an alternative relationship governed by Section 8(f) of the Act (29 U.S.C. § 158(f)), recognition is lawful only where a union enjoys the support of a majority of the relevant bargaining unit's members. An employer violates Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by granting recognition, and a union violates Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)) by accepting it, if the union does not in fact have majority support, even if the parties believe in good faith that such majority support exists. *Garment Workers v. NLRB*, 366 U.S. 731, 738-39 (1961).

judicial approval. *NLRB v. Marin Operating, Inc.*, 822 F.2d 890, 893-94 (9th Cir. 1987); *Pick Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 483-84 (3d Cir. 1980); *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 501 (5th Cir. 1972); *Browsers Moving & Storage Co.*, 297 NLRB 207, 210 n.11 (1989), *enforced mem.*, 914 F.2d 239 (2d Cir. 1990); *Sewell-Allen Big Star, Inc.*, 294 NLRB 312, 313 (1989), *enforced mem.*, 943 F.2d 52 (6th Cir. 1991).

Here, the Board reasonably applied its rule to conclude that the Company, having recognized and bargained with the Union for more than 6 months, was time-barred from questioning the validity of its initial recognition for the first time in response to the Union's timely unfair labor practice charge. As the Board emphasized, the Company's August 14, 2001 letter confirming that the Company had "elected to recognize and bargain with the Union[.]" predated the first of the unfair labor practice charges by more than a year. (A 104 n.6; A 8, 55.) Furthermore, the Company presented no evidence that it had repudiated its bargaining obligations until January of 2003, almost a year and a half after voluntarily accepting those obligations.

Contrary to the Company's contentions (Br 10-19), there can be no doubt that the Company in fact recognized the Union in its August 14 letter. The letter itself so states, and any possible doubts as to the Company's intent

were soon dispelled by its sharing of payroll information with the Union over the course of the following months, including a document dating from November of 2001, showing the Company's designation of 17 of its own employees as "union." (A 87-89.) Furthermore, some 7 months after its letter of recognition, in March of 2002, the Company was still exchanging proposals with the Union in a purported attempt to arrive at a mutually acceptable collective-bargaining agreement.⁴ (A 91-98.) *See 3750 Orange Place Ltd. P'ship v. NLRB*, 333 F.3d 646, 659-60 (6th Cir. 2003) (finding a valid voluntary recognition by a successor employer on similar facts). The fact that the Company waited until January of 2003—long after the expiration of the period during which it could be charged with having unlawfully recognized the union—before definitively refusing to bargain any further, left the Board with little alternative than to rule that the policies underlying Section 10(b) precluded the Company's defensive attempt to raise any alleged invalidity of the recognition. (A 54, 83.)

Although the Company contends that the Board should not have applied Section 10(b)'s 6-month limitations period to bar its affirmative defense, the case on which it relies, *American Automatic Sprinkler System*,

⁴ Indeed, the Company admitted in its brief to the Board that "[v]arious negotiations did take place between [the Company] and the Union concerning wages, and other terms and conditions of employment." (A 69.)

Inc. v. NLRB, does not advance its argument. 163 F.3d 209, 218 n.6 (4th Cir. 1998). *American Automatic Sprinkler* involved a construction-industry employer, and therefore presented a very different legal context. Section 8(f) of the Act (29 U.S.C. § 158(f)) authorizes a construction-industry employer to enter into a “prehire agreement” with a union, irrespective of whether the union represents a majority of the employees.

Thus, as this Court recognized in *American Automatic Sprinkler*, the construction-industry context is unique in that an employer may lawfully recognize a nonmajority union as the employees’ representative for a limited time. Accordingly, a construction-industry employer’s defense that it merely entered into a Section 8(f) prehire agreement, and did not grant full majority-status recognition is not, as in the nonconstruction-industries, “tantamount to a charge of unlawful conduct.” *American Automatic Sprinkler*, 163 F.3d at 218 n.6. In such circumstances, where the employer’s defense is not based on conduct that would constitute an independent unfair labor practice, this Court found no basis for applying 10(b)’s limitation to bar consideration of inadequacies in the employer’s original recognition of the union.⁵ *Id.*

⁵ As this Court acknowledged in *American Automatic Sprinkler*, 163 F.3d at 218 n.6, however, other circuits have nonetheless approved of the 10(b) bar to construction-industry employers’ attempted defenses, despite the

With *American Automatic Sprinkler* distinguishable on a basis expressly recognized by this Court, the Company is compelled to rest the bulk of its 10(b) argument on this Court's comment in a footnote that "it is not immediately clear to us that the Board's rule applying the 10(b) time-bar to nonconstruction industry employer defenses of invalid voluntary recognition is a reasonable construction of a provision that, on its face, applies only to complaints filed by the Board. However, we need not decide that question today." *Id.* Leaving aside its status as express dicta, the comment on which the Company so heavily relies merely expresses skepticism, not an unequivocal conclusion. Moreover, it does nothing to undermine the Board's rationale for applying the bar to a nonconstruction-industry employer who, as here, waits until the statute of limitations has run for its own culpability in allegedly recognizing a union with only minority support, before attempting to revive its stale, and potentially illegal, act as a defense to freshly committed unfair labor practices. Contrary to the Company's suggestion, it would have been patently unreasonable for the Board to seize upon the dicta in *American Automatic Sprinkler* to reach a result that is at odds with decades of settled Board and Circuit law.

ambiguity created by the anomalous 8(f) provision that is relevant in only those contexts. *See, e.g., NLRB v. Triple C Maintenance*, 219 F.3d 1147, 1156-59 (10th Cir. 2000) (and cases cited therein); *NLRB v. Triple A Fire Protection*, 136 F.3d 727, 736-37 (11th Cir. 1998).

C. The Board Reasonably Concluded that the Company Is Estopped from Challenging Its Voluntary Recognition of the Union

The estoppel doctrine provided the Board a separate and compelling reason to prevent the Company's tardy attack on its recognition of the Union. As the Board explained, "the principle of equitable estoppel is premised on the notion that a party that obtains a benefit by engaging in conduct that causes a second party to rely on 'the truth of certain facts' should not be permitted to later controvert those facts to the prejudice of the second party." (A 104, *quoting R.P.C., Inc.* 311 NLRB 232, 233 (1993).)

Following this principle, the Board has consistently prevented employers from withdrawing grants of voluntary recognition to unions where the elements of estoppel—"knowledge, intent, mistaken belief, and detrimental reliance"—are found to be present. *See, e.g., Red Coats, Inc.*, 328 NLRB 205, 206 (1999); *R.P.C.*, 311 NLRB at 233; *cf. In re Varat Enterprises*, 81 F.3d 1310, 1317 (4th Cir. 1996) (setting forth similar requisite elements for equitable estoppel in a bankruptcy context). Here, the Board's conclusion that the Company should now be estopped from challenging its prior recognition of the Union is amply supported by the uncontested facts in the record, together with the reasonable inference that

the Company “received a benefit as result of its actions.” (A 104, *citing Red Coats*, 328 NLRB at 207; *R.P.C.*, 311 NLRB at 233.)

As the Board’s decision made clear, the elements of knowledge and intent, as required under the estoppel doctrine, were sufficiently demonstrated by the Company’s recognition of the Union via letter on August 14, 2001, in response to the Union’s previous demands for recognition through its own letter and later filing of an unfair labor practice charge challenging the Company’s refusal to recognize and bargain with it. (A 104-05 n.8, *citing R.P.C.*, 311 NLRB at 233 n.10; A 84, 85.) The Company clearly had the opportunity to accept or reject the legal consequences attendant to its recognition of the Union, and thus its knowledge for estoppel purposes was conclusively established. *See R.P.C.*, 311 NLRB at 233 n.10.⁶ The wording of the Company’s letter manifested

⁶ As the Board explained (A 104 n.8), whether the Company had independent knowledge of facts underlying its recognition of the Union, such as the appropriateness of the bargaining unit or the Union’s majority support, is irrelevant to an estoppel analysis. *R.P.C.*, 311 NLRB at 233 n.10. However, even if such issues were germane, at this late date, despite the Company’s grand protests of challenging its voluntary recognition of the Union “in all respects” (Br 23), its brief makes no specific claim that it lacked any necessary information to evaluate the Union’s demand. Nor does the Company argue that its belated repudiation was based on new information, or on anything other than its newfound preference not to remain in the bargaining relationship.

an explicit intent to recognize the Union in an attempt to settle the dispute.

(A 86.) Specifically, the Company's letter, sent to the Board Regional Office with responsibility for investigating the Union's charge against the Company, confirmed that the Company had "elected to recognize and bargain with the Union [] regarding the employees in the unit." (A 55.)

That the Company subsequently bargained with the Union for many months only adds to the force of the letter's unambiguous language. *See Knapp-Sherrill Co.*, 263 NLRB 396, 398 & n.5 (1982) (finding that an employer intended to induce a union to rely on its voluntary recognition where it dealt with the union as a bargaining representative for 2 years thereafter).

The Union quickly demonstrated that the Company had induced it into mistakenly believing that the Company would not dispute its obligation to bargain by withdrawing the unfair labor practice charge against the Company. The Union's detrimental reliance on that mistaken belief was evidenced by its entering into a lengthy period of negotiations with the Company, rather than immediately litigating the successorship issue or availing itself of Board processes to independently establish itself as the employees' bargaining representative. *Red Coats*, 328 NLRB at 206-07; *Sewell-Allen Big Star, Inc.*, 294 NLRB 312, 313 (1989), *enforced mem.*, 943 F.2d 52 (6th Cir. 1991). Some 17 months later, the Union found itself in a

significantly weaker position from which to begin an organizing drive, after the Company had laid off multiple bargaining unit members and granted raises to others without so much as consulting the Union, not to mention that the Company's then-definitive refusal to negotiate any further towards a collective-bargaining agreement would tend to undermine the Union in the eyes of the employees.

As the Board found, the Company's course of conduct enabled it to "obtain the benefit of avoiding potentially costly and time-consuming litigation (or, alternatively, a union organizing campaign), as well as the continued stability of its labor relations[,]” while simultaneously sapping the Union's strength in any future organizing drives. (A 105.) Thus, it was eminently reasonable for the Board to conclude that “the policies of the Act” would only be served by estopping the Company from casting off the responsibilities attendant to a collective-bargaining relationship when it did “not achieve what it desire[d] in negotiations.” *Red Coats*, 328 NLRB at 207; *cf. Randall Div. of Textron, Inc. v. NLRB*, 965 F.2d 141 (7th Cir. 1992) (precluding alleged successor employer from withdrawing recognition from union, after previously granting recognition as a means of settling a refusal to bargain charge filed by the union), *cited in Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 251 (7th Cir. 1992), as a “true estoppel case[.]”

D. The Company's Contentions Lack Merit

The Company, in its lead argument and throughout its brief (Br 10-19, 21-22), suggests that its recognition of the Union was on its face legally insufficient to give rise to a bargaining obligation. As shown, however, that challenge was precluded by the Board's reasonable use of a 6-month limitation for raising such defenses. Moreover, the Company's attempt to assert the facial invalidity of the recognition as the basis for its challenge only serves to show that it was particularly appropriate for the Board to apply estoppel principles, as it demonstrates that all of information necessary to raise the challenge was available at the time that the Company chose to take a course of action directly at odds with its current legal position.

In any event, the Company's argument that its letter was facially inadequate to give rise to a bargaining obligation is fundamentally flawed because it is based on rules that are simply inapplicable outside of the construction industry. In construction-industry decisions such as *American Automatic Sprinkler* and *Staunton Fuel*, both the Board and this Court have carefully evaluated voluntary recognition standards out of concern for "the potential for confusion in the construction industry over which type of relationship—8(f) [prehire agreements] or 9(a) [majority representative

agreements]—the parties intended to create[.]”⁷ *American Automatic Sprinkler*, 163 F.3d at 219; *see also Staunton Fuel*, 335 NLRB 717, 718-20 (2001). No such confusion is possible in a nonconstruction context such as this one, where only one type of recognition can potentially be granted. A nonconstruction employer like the Company may choose to recognize a union as its employees’ 9(a) representative or not at all; no alternative form of recognition is available under Section 8(f) or any other provision of the Act. Thus, the Company’s rhetoric regarding unequivocal demands, grants, and recitations of the Union’s majority support flowing from analytical language in *American Automatic Sprinkler* or *Staunton Fuel*, is irrelevant to the instant dispute.

The Company’s claims concerning an inadequate showing of majority status (Br 18-19, 22) are likewise ill-suited to the analysis at hand (as well as being precluded by the Company’s failure to assert them earlier, as shown), because the Union claimed a bargaining obligation with the Company not through a recent organizing effort, but rather due to the Company’s status as a successor employer. Indeed, the Union’s demand for recognition, through its letter to the Company and its filing of an unfair labor practice charge, effectively asserted its majority status through the operation of established

⁷ *See* Section 9(a) of the Act (29 U.S.C. § 159(a)).

successorship principles. *See NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1286-87 (4th Cir. 1995) (holding that a refusal to bargain charge clarified a union's previous vague demand for recognition); *see also, Williams Enterprises, Inc. v. NLRB*, 956 F.2d 1226, 1233 (D.C. Cir. 1992) (“the Union's failure to state that it represented a majority of the employees carries less significance in a successorship case, where the Union's majority status is presumed during the transition period between employers”). Moreover, the majority status of an incumbent union is presumed, whether its status with the predecessor was based on a recent Board certification or longstanding recognition. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *International Union of Elec. Workers v. NLRB*, 604 F.2d 689, 694-95 (D.C. Cir. 1979); *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1139-40, 1142 (7th Cir. 1974).

Faced with the Union's claims of successorship, the Company had two possible approaches with which it could lawfully challenge the Union's representative status, neither of which it pursued. First, the Company could have admitted its status as a successor, but nonetheless refused to bargain by showing that the Union had in fact lost its majority status at the time of the refusal to bargain, or, if it harbored a good-faith doubt in the Union's majority status, petitioned the Board for an election. *See M.V. Transp.*, 337

NLRB 770, 770, 774 & n.13 (2002). The Company, however, has never contended that the Union has lost its majority status.⁸ The other approach available to the Company was to dispute its status as a successor, and, if it prevailed, to require the Union to make a showing of majority support before extending voluntary recognition.

Rather than pursuing either of these lawful options, the Company signaled to both the Union and the Board that it would extend voluntary recognition to the Union, effectively ending the litigation over its successorship status. As shown in Section B and footnote 8, *supra*, the Company's failure to make a timely challenge within the 10(b) period is fatal to its current suggestion that a lack of proof concerning the Union's majority support has any bearing on the Company's current bargaining obligations.

⁸ As a result, the Company implicitly concedes that the instant record contains no suggestion of an impairment of employee free choice; the issue that troubled this Court in *American Automatic Sprinkler*. Were the Company to have raised such evidence at the moment of its eventual repudiation of its bargaining relationship with the Union, however, its defenses would nevertheless be barred by the policies underlying Section 10(b). See, e.g., *NLRB v. Morse Shoe, Inc.*, 591 F.2d 542, 545-46 (9th Cir. 1979) (applying 10(b) to bar claims that union lacked majority support despite manager's affidavit that one of the two represented employees had stated his desire to be free from the union); *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 501 (5th Cir. 1972) (applying 10(b) to bar attack on the union's majority status at the time of recognition despite evidence of current disestablishment petitions signed by the majority of the unit's employees).

Finally, there is no precedential support for the Company's perfunctory argument that it was denied due process by the Board's disposition of its defenses without a hearing. (Br 24-25.) The Company has failed at every stage of this litigation to controvert facts that would have any material effect on the Board's decision, relying instead on legal arguments that are adequately expressed in written briefs. Especially telling is the absence of affidavits supporting the Company's brief to the Board, effectively forecasting that it had no witness testimony that would inform the Board's decision. As this Court has explained, "it is clear that the company is not entitled to a hearing, by constitutional mandate or otherwise, in the absence of a dispute concerning substantial and material factual issues." *Aerovox Corp. v. NLRB*, 409 F.2d 1004, 1008 (4th Cir. 1969). Accordingly, the Board was well within its discretion to decide this case via summary judgment.

CONCLUSION

For the foregoing reasons, the Board respectfully requests this Court to enter judgment enforcing the Board's order in full.

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