

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

No. 01-1282

**AT SYSTEMS WEST, INC.,
f/k/a ARMORED TRANSPORT, INC.**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION, SECURITY AND
FIRE PROFESSIONALS OF AMERICA**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

The National Labor Relations Board (“the Board”) had subject matter jurisdiction over the proceeding at issue pursuant to Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. § 151, 160(a)), which authorizes the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which permits any person aggrieved by a Board order to seek review in this Court. The Board’s Decision and Order, which is final under Section 10(f), issued on May 29, 2001, and is reported at 334 NLRB No. 24. (A 23-33.)¹ AT Systems West, Inc., f/k/a Armored Transport, Inc. (“the Company”) filed a petition for review on June 25, 2001, and the Board filed a cross-application for enforcement on August 10, 2001; the Act places no time limitation on such filings. On August 31, 2001, the Court granted the motion of the International Union of Security and Fire Professionals of America, f/k/a United Plant Guard Workers of America, to intervene in support of the Board’s order.

¹ “A” references are to the Joint Appendix filed by the Company with its brief. “SA” reference is to the Supplemental Appendix filed by the Board with this brief. References preceding a semicolon are to the findings of the Board; those following are to the supporting evidence. “Br” references are to the Company’s brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board's conclusion that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with CASHA was rational and consistent with the Act and supported by substantial evidence.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing with the Temecula employees.

STATEMENT OF THE CASE

Acting on charges filed by the Currency and Security Handlers Association ("CASHA") and the United Plant Guard Workers of America Amalgamated Local No. 100 ("Local 100"), the Board's General Counsel issued complaints alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). After a hearing, the administrative law judge found that the Company engaged in the alleged unfair labor practices. (A 23-33.) The Company timely filed exceptions to the violations; however, the Board found no merit to the exceptions and adopted the judge's findings and recommended order. (A 23.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. **Background; the Company Enters into Collective-Bargaining Agreements with Each Facility's "Employee Association"**

The Company operates an armored car company that warehouses and transports cash and valuables for banks and businesses. (A 24.) In California, the Company had facilities in the cities of Bakersfield, Fresno, Merced, Santa Maria, and Temecula. (A 24.) Each of those facilities had a bargaining unit made up of all full-time and regularly scheduled part-time driver/messenger guards and vault-driver messenger guards, excluding supervisors. (A 24.)

The Company recognized and entered into collective-bargaining agreements with the Armored Transport Bakersfield Employee Association, Armored Transport Fresno Employee Association, Armored Transport Merced Employee Association, Armored Transport Santa Maria Employee Association, and Armored Transport Temecula Employee Association (the "Employee Associations"), each of which was the exclusive representative of the unit employees at its respective facility. (A 24.) The collective-bargaining agreements were effective for three years from the following dates: Bakersfield, July 1, 1997; Fresno, June 1, 1997; Merced, June 1, 1997; Santa Maria, October 12, 1997; and Temecula, June 30, 1996. (A 25.)

B. The Employee Associations Elect CASHA as Their Collective-Bargaining Agent; the Company Refuses To Recognize or Bargain with CASHA

In late February and early March 1998, notices announcing an election to decide whether to designate CASHA as the Employee Associations' bargaining agent were placed in areas conspicuous to both employees and management.

(A 28; 37-39, 182, 255-58, 277-78, 323-24, 340-41.) Employees at various facilities discussed the upcoming elections with their managers—one manager even said that if a union came in, “he was out.” (A 28; 253, 284, 325-28, 341-43.)

Around March 23, 1998, the Santa Maria Employee Association voted to designate CASHA as its collective-bargaining agent. (A 25; 184, 232.) CASHA was also elected on the dates noted as the collective-bargaining agent for the following Employee Associations: Temecula, March 27, 1998; Fresno, April 1, 1998; Merced, April 2, 1998; and Bakersfield, April 3, 1998. (A 25; 184, 231-32.)

On April 6, 1998, the president of CASHA, David Troy Nelson, sent letters to the Company notifying it that the Temecula, Fresno, and Santa Maria Employee Associations had affiliated with CASHA, that CASHA was the associations' bargaining agent, and that CASHA was requesting that the Company recognize it as the associations' representative. (A 25; 178-80, 355-57.) Although the letters also asked for a reply by April 20, the Company did not respond to CASHA's request. (A 25; 357.)

C. Temecula Employees Ask To Renegotiate Their Contract; CASHA Again Demands Recognition and Bargaining; the Company Refuses CASHA's Request and Holds a Mandatory Meeting, During Which It Refuses To Negotiate Over Its Proposed Contract, Does Not Allow the Employees To Consult with CASHA, Disparages CASHA, and States that Only the Company Can Provide Benefits for the Employees

On April 23, 1998, 13 employees at the Temecula facility submitted a letter to the Company stating that they wanted to open the current collective-bargaining agreement, which was effective through July 31, 1999, to negotiate a wage increase. (A 26; 60, 501.) On May 18, Nelson wrote to the Company reiterating CASHA's demand for recognition and providing notification that the Bakersfield and Fresno Employee Associations had also designated CASHA as their bargaining agent. (A 25; 181, 357.) The letter stated as well that if the Company did not reply by May 29, CASHA would file with the Board unfair labor practice charges alleging that the Company was unlawfully refusing to bargain. (A 25; 181.)

The Company again did not respond to CASHA; rather, on May 20, 1998, it called a mandatory meeting of all Temecula employees. (A 26; 357, 489.) Carl Logrecco, the Company's regional vice-president, and Joel "Bud" Curnutt, the director of labor relations, attended. (A 26; 490.)

At the meeting, Curnutt told the employees that the Company was aware that an "outside source" had been giving incorrect information. (A 26; 496.)

According to Curnutt, that source told employees that it could get them additional benefits, which was untrue because only the Company could give the employees what they wanted. (A 26; 491-92, 496.) Curnutt continued by warning that it would be a mistake for the employees to associate with CASHA because only the Company could provide them more money and that involvement with outsiders could lead to a unsuccessful strike that would leave the employees worse off. (A 26; 491-92, 496-97.)

Curnutt then presented the employees with a proposed contract, telling them that it was the Company's final offer. (A 26; 490-91.) After an employee asked if they could spend a day or two looking over the proposal, Curnutt refused, lest it fall into the "wrong hands." (A 26; 493.)

Logrecco and Curnutt left the room to allow the employees a few minutes to look over the proposal, after which they voted to accept the offer. (A 26; 498.) The new contract, effective until May 31, 2001, included a wage increase and an additional paid holiday. (A 26; 63-80.)

D. The Company Maintains Its Refusal To Recognize and Bargain with CASHA; CASHA Files Refusal To Bargain Charges and Affiliates with Local 100; the Company Refuses To Recognize and Bargain with Local 100

During an unrelated June 11, 1998 meeting between CASHA and the Company, Nelson asked for a response to the April 6 and May 18 letters. The Company responded that it did not have to recognize CASHA because no

collective-bargaining agreements were set to expire. (A 25; 357-58.) Between June 24 and October 15, 1998, CASHA filed unfair labor practice charges alleging that the Company unlawfully refused to recognize and bargain with CASHA at the five facilities. (A 23; 83.)

On December 10, 1998, CASHA affiliated with Local 100. (A 25; 185, 232-33.) On February 10, 1999, Nelson, who became president of the affiliated Local 100, sent the Company a letter noting that CASHA had requested recognition in Bakersfield, Fresno, Merced, and Santa Maria, and that CASHA had subsequently affiliated with Local 100. (A 25-26; 183, 361.) Curnutt responded to Nelson by telephone on or about the same day and said that the Company's position had not changed and that it would not recognize CASHA or Local 100 absent a Board election. (A 26; 364.) The Company never sought clarification or inquired about the validity of CASHA's and Local 100's assertion that they were the Employee Associations' collective-bargaining agent. (A 27; 367.)

E. Local 100 Files Refusal To Bargain Charges; the Company Holds Another Mandatory Meeting at Temecula, During Which It Provides the Employees with Another New Contract Containing a Wage Increase, Again Refuses To Negotiate, and Reemphasizes that Only the Company, Not CASHA, Can Provide for the Employees

Between February 11 and 16, 1999, Local 100 filed unfair labor practice charges with the Board, alleging that the Company unlawfully refused to recognize and bargain with Local 100 at the five facilities. (A 23.) On March 18, 1999, the

Company held another mandatory meeting at the Temecula facility. (A 26; 507-09, 526.) Carl Logrecco; Sean Logrecco, Temecula's facility manager; and Eric Goldwurm, Temecula's assistant facility manager, attended. (A 26; 507-09.)

Carl Logrecco asked the employees if they had any problems at the facility and offered them a new contract, which increased starting wages by \$2 an hour. (A 26; 510-11.) Moreover, after a part-time employee complained about his status, Carl Logrecco told Sean Logrecco to "make them full-time." (A 26; 511, 513.) Carl Logrecco stated also that the employees should not be fooled by anything that CASHA said and he emphasized that Curnutt's previous comments were correct. He repeated that the Company—not CASHA—was the only entity that could give the employees what they wanted. (A 27; 515.) After briefly looking over the offer, the employees signed the contract, which was effective until March 31, 2002. (A 27; 86-103.)

On June 6, 1999, a majority of the Fresno unit employees signed a petition stating that they were the Fresno Employee Association and were not represented by CASHA or Local 100. (A 29; 187-88, 288.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On May 29, 2001, the Board (Chairman Hurtgen and Members Liebman and Truesdale) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and

(1)) by refusing to recognize and bargain with CASHA and Local 100 as agents of the Employee Associations for purposes of collective bargaining and by dealing directly with the Temecula employees by negotiating and entering into purported collective-bargaining agreements with the employees, thereby bypassing Local 100, the designated agent of the Temecula Employee Association. (A 31.)

The Board's order requires the Company to cease and desist from engaging in the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A 32.) Affirmatively, the Board's order requires that the Company recognize, meet, and bargain on request with Local 100 as the designated agent of the Employee Associations for the purposes of collective bargaining; at Local 100's request, restore the terms of the original June 30, 1996 to July 31, 1999 Temecula contract, except for the increased wages and other terms and conditions of employment currently in effect, and continue to maintain such conditions unless and until an agreement has been reached with Local 100 respecting their modification or discontinuance, or a new contract has been reached, or until proper changes have been made following a genuine impasse in bargaining; and post appropriate notices. (A 32.)

SUMMARY OF ARGUMENT

The Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with its employees' bargaining agent. The Company had extensive knowledge of the elections in which its employees designated CASHA, a union that it had frequently bargained with at other facilities. Moreover, CASHA provided the Company with several explicit notifications of its designation and desire for recognition and bargaining. In spite of that wealth of information pointing towards CASHA's agency status, the Company never sought to clarify its purported uncertainty about the designation by contacting representatives of CASHA or the Employee Associations, even though it could have easily done so. Given those circumstances, the Board reasonably concluded that the Company had constructive knowledge of the designation and that it unlawfully rejected CASHA's valid demands for recognition and bargaining.

The Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by dealing directly with the Temecula employees was also appropriate. Rather than negotiating a new contract with the employees' designated bargaining agent, the Company twice held mandatory meetings during which it refused to negotiate over its proposal, did not allow the employees to consult with CASHA, and told the employees that only the Company could give them what they wanted. Accordingly, substantial evidence supports the Board's finding that the Company

dealt with the employees as employees, not as bargaining representatives, and therefore engaged in unlawful direct dealing.

STATEMENT OF THE APPLICABLE STANDARD OF REVIEW

The Company is incorrect (Br 15) in asserting that this Court reviews the Board's interpretation of the Act, such as the propriety of the constructive knowledge doctrine, de novo.² It is well-established that the Board's legal determinations under the Act are given heightened deference: "If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) (internal citation omitted); *accord Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001).

The Board's finding that the Company had constructive knowledge of CASHA's designation involves the issue of proper notification under general agency common law and, "[g]enerally, the existence and scope of agency relationships are factual matters . . . [which] will not be disturbed on appeal if supported by substantial evidence on the record as a whole." *Metco Prods., Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989); *accord Local 1814, Int'l*

² In support of its erroneous standard of review, the Company cites (Br 15) two inapposite cases: *Conoco, Inc. v. NLRB*, 91 F.3d 1523, 1525 (D.C. Cir. 1996), which expressly limits its standard of review holding to the Board's interpretation of collective-bargaining agreements, and *United States v. Maccado*, 225 F.3d 766, 769 (D.C. Cir. 2000), which involved the review of a district court, not the Board.

Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1394 (D.C. Cir. 1984). Moreover, this Court will not disturb the Board's finding that CASHA made valid bargaining demands or that the Company unlawfully engaged in direct dealing with the Temecula employees if they are supported by substantial evidence, "even if the [C]ourt would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord *Truserv Corp. v. NLRB*, 254 F.3d 1105, 1119 (D.C. Cir. 2001).

ARGUMENT

Introduction

This case involves an employer that obstinately disregarded its employees' statutory right to freely choose a collective-bargaining representative. After the Employee Associations voted to designate CASHA as their bargaining agent, the Company repeatedly sought to avoid, demean, and undermine that choice.

The Company's continual refusal to recognize and bargain with CASHA³ was not the necessary result of any confusion about the identity of its employees' agent, but instead reflects the Company's desire to avoid bargaining with that representative. Contrary to the Company's assertions, CASHA was not an

³ The Board's brief, unless noted otherwise, will refer to "CASHA" to indicate "CASHA, and subsequently Local 100." It is uncontested that the Board's rationale for finding that the Company unlawfully refused to bargain with CASHA extends to the affiliated Local 100, as well.

unknown third-party trying to intrude upon an established relationship; rather, the Company had extensive knowledge of the elections to designate CASHA, a union that had been bargaining with the Company at other facilities. The Company could easily have cleared up any ambiguity about CASHA's status or its demands. In spite of its easy access to the knowledge it claims to have lacked, the Company now seeks to avoid its obligation to bargain by arguing that the Board improperly imputed such knowledge to it under the constructive knowledge doctrine. The Board, however, applied the doctrine in a manner consistent with traditional agency principles and Board law. Thus, the Board reasonably found that the Company's refusals to recognize and bargain with CASHA were unlawful.

That the Company was merely attempting to avoid bargaining with a new representative is amply illustrated by its actions following CASHA's attempts to bargain. Rather than fulfill its obligation to respect the employees' choice of representatives, the Company ignored CASHA's repeated bargaining demands. The Company then—twice—imposed new contracts on the Temecula employees after calling mandatory meetings in which it refused to negotiate over its proposal, forbade the employees from consulting with CASHA, openly disparaged CASHA, and told the employees that only the Company could provide them benefits that they wanted. Such conduct leaves no doubt that the Board properly found that the

Company repeatedly violated its duty to recognize and bargain with its employees' collective-bargaining representative.

I. THE BOARD'S CONCLUSION THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH CASHA WAS RATIONAL AND CONSISTENT WITH THE ACT AND SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Act Prohibits an Employer from Refusing To Recognize and Bargain with Its Employees' Bargaining Agent After It Has Knowledge of the Agent's Status and the Agent Has Made a Valid Bargaining Demand

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Thus, an employer violates Section 8(a)(5) and (1) by refusing to recognize and bargain with its employees' representative once that representative has made a valid bargaining demand. *See Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1278, 1281 (D.C. Cir. 1990).

Absent exceptional circumstances, the employer's duty to bargain extends both to the employees' collective-bargaining representative and to that representative's designated agent. *See Minn. Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 177-78 (8th Cir. 1969); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963). That duty is exclusive to the employees' representative and agent; therefore, an employer cannot bargain with an entity that its employees have not properly chosen as their representative. *See* Section 9(a) of the Act (29 U.S.C.

§ 159(a)); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944).

However, if an employer is unsure whether a union demanding bargaining has genuine authority, it cannot simply refuse to bargain. Rather, the Board has concluded that where an employer is sincerely confused about the identity of its employees' legitimate collective-bargaining agent, the employer must engage in a reasonable inquiry to clarify the uncertainty. *See Hampton Lumber Mills-Wa., Inc.*, 334 NLRB No. 30, 2001 WL 618204, at *10 (2001); *Tree-Free Fiber Co.*, 328 NLRB No. 51, 1999 WL 305507, at *1 n.4 (1999); *Parkview Manor*, 321 NLRB 477, 477 n.2 (1996).

Once such uncertainty has been resolved, an employer must respond to a valid bargaining demand from a legitimate representative. Whether a demand is sufficient to trigger an employer's duty to bargain depends on factors such as whether the union proposed a method of initiating negotiations, stated how the employer was to reply to the demand, specifically requested bargaining or recognition, and claimed that the union represented a majority of the employees.⁴

See NLRB v. Williams Enters., Inc., 956 F.2d 1226, 1233-34 (D.C. Cir. 1992)

(“*Williams I*”) (citing *K & S Circuits, Inc.*, 255 NLRB 1270, 1297 (1981), and

⁴ The validity of a union's bargaining demand is usually at issue where a new, “successor,” employer takes over operations of a company. In such instances, a union that represented employees under the old employer must make a bargaining demand before the successor has a duty to bargain. *See Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001) (noting other required factors).

Sheboygan Sausage Co., 156 NLRB 1490, 1500-01 (1966)). However, the Board has concluded, with court approval, that “[a] valid request to bargain need not be made in any particular form, or *in haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit.” *Stanford Realty Assocs., Inc. v. NLRB*, 306 NLRB 1061, 1066 (1992), *quoted in NLRB v. Williams Enters., Inc.*, 50 F.3d 1280, 1286-87 (4th Cir. 1995) (“*Williams II*”) (citing and approving Board cases); *accord Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001); *Scobell Chem. Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959).

B. Because the Company Had Constructive Knowledge that CASHA Was the Employee Associations’ Agent and Because CASHA Validly Demanded Recognition and Bargaining, the Company’s Refusal To Recognize and Bargain with CASHA Was Unlawful

Only two questions are at issue in assessing the propriety of the Company’s refusal to recognize and bargain with CASHA: (1) whether the Company knew, or should have known, of CASHA’s agency status, and (2) whether CASHA made a valid bargaining demand. Because, as we show, the answer to both questions is affirmative, the Company’s refusal to recognize and bargain with CASHA violated Section 8(a)(5) and (1) of the Act. *See Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1278, 1281 (D.C. Cir. 1990).

1. The Company had constructive knowledge that CASHA was the Employee Associations' agent

That CASHA was the Employee Associations' properly designated bargaining agent is not in dispute. Before the Board, the parties stipulated that the Employee Associations were the official representatives of the unit employees at issue and that the associations properly designated CASHA as their collective-bargaining agent. (A 24-25, 27-28; 184-85, 231-33.) Thus, the central issue is whether the Company had knowledge of that designation.

Again, the basic facts are uncontested. There is no disagreement that the Company lacked actual knowledge of CASHA's agency designation. (A 28.) The Board reasonably found (A 28-29), however, that the Company could be charged with such knowledge pursuant to the constructive knowledge doctrine.

As discussed above (pp. 15-16), where confusion surrounds the identity of employees' bargaining representative, an employer may not rely on that confusion to justify a refusal to recognize and bargain with the representative without engaging in a reasonable inquiry to clarify its uncertainty. Substantial evidence supports the Board's finding (A 28-29) that the circumstances surrounding CASHA's communication of its agency status created sufficient confusion to give rise to the Company's duty to inquire.

Indeed, the Company had many signs that the identity of the employees' bargaining agent was in flux. First, as the Board noted (A 28), the Company and

CASHA had an ongoing relationship, including frequent bargaining, at the many other facilities where CASHA was also the bargaining agent. (A 29; 352.)

Second, the circumstances surrounding the employees' official designation of CASHA as their bargaining agent would have given the Company significant information about the coming change. Notices announcing the elections to designate CASHA were placed on conspicuous bulletin boards at every relevant facility. (A 28; 37-39, 182, 255-58, 277-78, 323-24, 340-41.) In addition, testimony established that several company officials discussed CASHA's designation with employees both before and after the elections. (A 28; 253, 284, 325-28, 341-43.) For example, within a week of the election, an employee at the Merced facility expressly told his manager that the Employee Association had voted for CASHA's designation. (A 325-28.)

Finally, the letters CASHA sent to the Company announcing its designation as the Employee Associations' bargaining agent, although insufficient to create actual knowledge, certainly notified the Company that an issue regarding CASHA's status existed. The letters explicitly stated that the Employee Associations "voted to affiliate with [CASHA]," and that "CASHA is now the bargaining representative for the [Employee Associations]." (A 178-80.)

Moreover, substantial evidence supports the Board's finding (A 28-29) that had the Company undertaken a simple inquiry regarding CASHA's status based on

the above information, it would have easily ascertained that CASHA was the Employee Associations' bargaining agent. As the Board found (A 29), the Company knew and had regular contact with CASHA agents who could have provided proof of their status. (A 352.) The Company also does not dispute that it could have easily communicated with agents of the Employee Associations who could have confirmed CASHA's assertions of bargaining authority. Indeed, CASHA's letters invited further discussions which could have served to dispel any confusion. (A 178-80.)

The Company, however, ignored the numerous signs indicating that an inquiry into CASHA's status was necessary and failed to make any effort to clarify its uncertainty, despite the ease with which it could have done so. Accordingly, the Board (A 28-29) reasonably charged the Company with the knowledge that such an inquiry would have yielded, and found that its refusal to recognize and bargain with CASHA violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). *See Hampton Lumber Mills-Wa., Inc.*, 334 NLRB No. 30, 2001 WL 618204, at *10 (2001); *Tree-Free Fiber Co.*, 328 NLRB No. 51, 1999 WL 305507, at *1 n.4 (1999); *Parkview Manor*, 321 NLRB 477, 477 n.2 (1996).

2. CASHA made several valid bargaining demands

The Company's refusal to bargain with CASHA flouted not only its knowledge of the numerous facts pointing towards the agency designation, but also

CASHA's repeated demands for both recognition and bargaining. Those demands sufficiently indicated a desire to negotiate, thereby triggering the Company's duty to recognize and bargain with CASHA.

CASHA's first set of letters sufficiently expressed its desire to bargain. Those letters stated that the Employee Associations had designated CASHA as their agent, noted that future bargaining would occur with the same representatives, specifically sought recognition from the Company, and gave explicit instructions on how the Company was to reply. (A 40, 178-80.) In *Williams I*, this Court stated that a similar letter was sufficient to trigger an employer's duty to bargain because it "specifically request[ed] recognition, state[d] that the Union was ready to negotiate at any time, and ask[ed] for a prompt reply." 956 F.2d at 1233-34; *see also Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1239 (D.C. Cir. 2001) (holding that the union made a valid request to bargain by demanding recognition and discussing bargaining locations).

Even if the Company was uncertain that CASHA's initial set of letters indicated its desire to negotiate and bargain on behalf of the Employee Associations, CASHA's subsequent actions removed all doubt. The agent sent a second set of letters warning that it would "file charges for [the Company's] *refusal to bargain*," and then actually filed such charges. (A 23; 181) (emphasis in original). The explicit threat to file charges over the Company's failure to bargain

unequivocally indicated CASHA's desire to negotiate. Moreover, the actual filing of the charges further clarified any possible ambiguity about that desire. *See Williams II*, 50 F.3d at 1286-87 (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 53-54 & n.20 (1987) (union's premature demand for recognition, in combination with a later charge alleging the employer's failure to bargain, constituted a valid bargaining request); *Sterling Processing Corp.*, 291 NLRB 208, 217 (1988) (a "refusal-to-bargain charge" is "itself tantamount to a valid request for recognition under established Board policy")).⁵

The Company's own conduct also shows that CASHA sought bargaining. Following CASHA's demands, the Company's sole rationale for its refusals was that none of the contracts was expiring. (A 25; 357-58.) That response indicates that the Company believed that CASHA had demanded bargaining and provides substantial evidence that the Company rejected valid demands for recognition and bargaining in violation of Section 8(a)(5) and (1) of the Act. *See Stanford Realty Assocs., Inc. v. NLRB*, 306 NLRB 1061, 1066 (1992) (finding violation, in part, because the employer never told the union, as it had argued to the Board, that it was refusing to bargain because of a unit determination concern) (citing *David*

⁵ CASHA provided further indication of its desire to bargain by sending a letter to the Company seeking confirmation that another party was attempting to renegotiate the Temecula contract so that CASHA could petition the Board for a representation election. (A 83.)

Wolcott Kendall Mem'l Sch. v. NLRB, 866 F.2d 157, 161-62 (6th Cir. 1989)); accord *Scobell Chem. Co. v. NLRB*, 267 F.2d 922, 926 (2d Cir. 1959); cf. *News/Sun Sentinel Co. v. NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989) (employer's delay in questioning validity of union's bargaining demand substantially weakened its defense); *NLRB v. Quick Shop Mkts., Inc.*, 416 F.2d 601, 606 (7th Cir. 1969) (holding that "at no time did the company indicate an awareness of a demand made by the Union to bargain").

C. The Company's Contentions Are Without Merit

The Company does not dispute (Br 12) that it failed to recognize and bargain with CASHA. Instead, it mounts a series of challenges to the legal theories and facts that support the Board's conclusion that it had an obligation to recognize and bargain with the agent. First, the Company argues that the Board's use of constructive knowledge was irrational. Second, the Company contends that CASHA's bargaining demands failed to give rise to a bargaining obligation. Finally, the Company asserts that the Fresno Employee Association's repudiation of CASHA—over one year after the Company's initial refusal to bargain—moots that earlier unlawful conduct. As we now show, none of those contentions withstand scrutiny.

1. There is no merit to the Company’s contention that the Board’s use of constructive knowledge is irrational or inconsistent with the Act

The Company makes numerous arguments against the Board’s determination that the Company had constructive knowledge of CASHA’s agency designation. Those challenges fail, however, because the use of constructive knowledge is consistent with both traditional principles of agency law and the Act.

a. Constructive knowledge is a well-established doctrine under, and consistent with, traditional agency principles, Board precedent, and the Act’s policy objectives

i. The Board’s application of the constructive knowledge doctrine here was consistent with traditional agency law principles

The Company improperly asserts (Br 35) that traditional principles of agency law do not permit the Board to find that an employer has constructive notice of a fact. The Board has long acknowledged its reliance on the law of agency. *See Local 1814, Int’l Longshoremen’s Ass’n v. NLRB*, 735 F.2d 1384, 1393-94 (D.C. Cir. 1984) (discussing union’s liability for its agent’s conduct). Moreover, the Board, with this Court’s approval, has “expansively construed” the traditional principles of agency law. *Id.* at 1394. The Board’s determination here was consistent with those principles.

The Company bases its challenge (Br 36) to the Board’s use of constructive knowledge on principles of apparent authority. Such reliance is mistaken, for

apparent authority occurs only where the principal's conduct reasonably causes a third party to believe that another is the principal's agent, even though no such authority exists. *See Restatement (Second) of Agency* § 27. The Board never found that apparent authority existed here, and for good reason: it is uncontested that CASHA possessed *actual* authority to bargain on the Employee Associations' behalf. *See id.* § 8 cmt. a (apparent authority "is entirely distinct from authority, either express or implied"); *id.* § 26 (creation of authority). As the Company repeatedly notes (Br 16, 25, 28, 32), the principal here—the Employee Associations—did not make any manifestations to the Company about CASHA's authority; therefore, the apparent authority doctrine is irrelevant. Accordingly, the issue here is not whether CASHA had authority, for it is undisputed that it did, but whether the Board properly found that the Company had constructive knowledge of that authority.

The proper application of traditional agency law supports the Board's finding (A 29) that the Company had constructive knowledge of CASHA's designation as bargaining agent. Under the *Restatement (Second) of Agency*, a person has notice of a fact if she "has reason to know it, should know it, or has been given notification of it." *Id.* § 9(1). A person has received notification if "inform[ed] . . . of the fact by adequate or specified means or of other facts from which he has reason to know or should know the facts." *Id.* § 9(2)(a).

According to the *Restatement*, one “should know” a fact where the circumstances would lead a person of ordinary intelligence, who is fulfilling a duty to another, to ascertain that the fact exists or act as if the fact exists. *See id.* § 9(1) cmt. e. Thus, the Board’s conclusion (A 28) that an employer has a duty to inquire where it should know a fact is consistent with agency law. *See id.* (“[A] person is required to ascertain what would be ascertained by a person of ordinary intelligence exercising ordinary care in the protection of his own interests or those of others.”); *see also id.* cmt. d (one has “reason to know” a fact if “the likelihood of its existence is so great that a person of ordinary intelligence . . . would, if exercising ordinary prudence under the circumstances, govern his conduct as if the fact exists, until he could ascertain its existence or non-existence”).

Given those principles, the Board properly concluded (A 29) that CASHA sufficiently notified the Company that it had been designated as the Employee Associations’ bargaining agent. CASHA’s explicit notifications of its agency designation, in light of the Company’s knowledge of the elections and familiarity with CASHA, would lead a prudent employer acting with ordinary intelligence to clarify any uncertainty about the designation before refusing to bargain.

Accordingly, under traditional agency law, the Company could not ignore the obvious facts pointing towards CASHA’s legitimacy without trying to determine that an agency relationship did not exist.

ii. The Board's application of the constructive knowledge doctrine here was consistent with Board precedent

Contrary to the Company's contention (Br 29), the Board's application of the constructive knowledge doctrine is supported by and entirely consistent with the Board's decision in *Parkview Manor*, 321 NLRB 477 (1996), and its progeny.⁶

In *Parkview Manor*, the employer received a letter requesting bargaining on the letterhead of a union other than its employees' certified representative. *See* 321 NLRB at 477. The letter did not explain the two unions' relationship, and the employer refused to bargain, arguing in part that the union's letter was not a valid bargaining demand because it did not mention the certified representative. *See id.* According to the employer, it had no duty to bargain with the union that sent the letter because, under *Newell Porcelain Co.*, 307 NLRB 877 (1992), *enforced sub nom. United Elec., Radio & Mach. Workers of Am. v. NLRB*, 986 F.2d 70 (4th Cir. 1993), it need only bargain with the certified union. *See* 321 NLRB at 477.

That defense failed. The Board initially found that the letter constituted a valid bargaining demand, particularly in light of the certified union's subsequent unfair labor practice charge. *See id.* More important, the Board rejected the

⁶ In any event, for the reasons shown elsewhere (pp. 24-26, 29-33), the Company has failed to show that, even if the Board has never previously applied the constructive knowledge doctrine, its application here was irrational or inconsistent with the Act.

employer's interpretation of *Newell Porcelain* because that case involved the unusual circumstance of a genuinely confused employer that attempted to resolve its uncertainty about the identity of its employees' representative. *See id.* n.2. In contrast, the Board concluded that the *Parkview Manor* employer could not claim confusion as a defense because it "made no attempt to clarify the ambiguity and ascertain the relationship between" the two unions. *Id.*

The Company erroneously characterizes (Br 33-34) that conclusion as dicta. However, the distinguishing of a case relied upon by a party is not necessarily dicta. Indeed, in *Parkview Manor*, had the employer's interpretation of *Newell Porcelain*—that an employer need only respond to a certified union's request for bargaining—been correct, the Board could not have found that the refusal to bargain was unlawful.

Moreover, the Company's assertion (Br 32) that *Parkview Manor* is different from this case because, here, the Employee Associations did not demand bargaining or file an unfair labor practice charge, whereas the certified union in *Parkview Manor* filed such a charge, is immaterial. That distinction does not address the critical question at issue in both cases: whether the employer knew the identity of its employees' bargaining agent. In both *Parkview Manor* and this case, the Board concluded that an employer can be charged with constructive knowledge of the identity of its employees' representative. *See id.*

CASHA made a valid bargaining demand (see pp. 20-23, 36-39) and, as in *Parkview Manor* and *Newell Porcelain*, the Company cannot refuse to bargain absent genuine confusion and a reasonable attempt to resolve that uncertainty. Moreover, contrary to the Company's attempt to discount *Parkview Manor*, subsequent Board decisions have cited the case for the same proposition. See *Hampton Lumber Mills-Wa., Inc.*, 334 NLRB No. 30, at *10 (2001); *Tree-Free Fiber Co.*, 328 NLRB No. 51, at *1 n.4 (1999); see also *United Elec., Radio & Mach. Workers of Am. v. NLRB*, 986 F.2d 70, 74 (4th Cir. 1993) (holding that employer's refusal to bargain was lawful where it was genuinely confused about the identity of its employees' representatives after attempting to resolve the ambiguity), *enforcing Newell Porcelain Co.*, 307 NLRB 877 (1992). Thus, even if *Parkview Manor* did not establish the use of constructive knowledge, those later decisions provide further support for the Board's conclusion here.

Also, contrary to the Company's contention (Br 26, 29), the Board's use of constructive knowledge here was unremarkable. Indeed, the Board has charged a party with constructive knowledge of a fact in many different contexts. See, e.g., *Schaeff, Inc. v. NLRB*, 113 F.3d 264, 268 n.8 (D.C. Cir. 1997) (discussing constructive knowledge under the "small plant doctrine"); *NLRB v. McEver Eng'r, Inc.*, 784 F.2d 634, 640 (5th Cir. 1986) (employer charged with constructive knowledge of information obtained by its agent); *Amcar Div., ACF Indus., Inc. v.*

NLRB, 596 F.2d 1344, 1352 (8th Cir. 1979) (union charged with constructive knowledge of fact at issue); *H.C. Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1201-02 (9th Cir. 1977) (employer has a duty to inquire when it is aware of facts suggesting that union’s demand for an employee to be discharged for failure to pay dues was improper); *NLRB v. Zoe Chem. Co.*, 406 F.2d 574, 580 (2d Cir. 1969) (same); *Iowa Beef Packers, Inc. v. NLRB*, 331 F.2d 176, 182 (8th Cir. 1964) (an employer violates the Act by recognizing a union when it “had actual or *constructive knowledge* that a real question concerning the representation of [its] employees existed”) (emphasis added). Accordingly, the Board’s conclusion that the Company had constructive knowledge of CASHA’s agency designation was reasonable and consistent with the Act.⁷

Thus, the Company’s attempt to derive a contrary line of cases is unsuccessful. The Company’s reliance (Br 26-28) on *Alaska Roughnecks & Drillers Assoc. v. NLRB*, 555 F.2d 732 (9th Cir. 1997), and *National Can Corp. v.*

⁷ Indeed, the constructive knowledge doctrine is a familiar concept under many statutes. *See, e.g., Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 282 (2d Cir. 1992) (constructive knowledge of union official’s breach of fiduciary duty); *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir. 1989) (employer’s constructive knowledge of the immigration status of its employees); *Harvey v. Merit Sys. Prot. Bd.*, 802 F.2d 537, 547 (D.C. Cir. 1986) (noting constructive knowledge requirement in retaliation claim by federal employee); *cf. Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363-64 (D.C. Cir. 1997) (discussing agencies’ reasonable interpretations of “knowledge” under various statutes).

NLRB, 374 F.2d 796 (7th Cir. 1967), to establish such a line is lacking. Contrary to the Company's contention, neither of those cases stand for the proposition that the Board may not require an employer to clarify its doubt regarding the identity of a bargaining agent.

As the Company's own description of *Alaska Roughnecks* indicates, that case merely held that notice of a joint employer's bargaining obligation must satisfy due process concerns. *See* 555 F.2d at 735. In *Alaska Roughnecks*, such notice did not exist because, in violation of Board regulations, the employer was never provided an opportunity to challenge the claim that it was a joint employer, and thereby had a duty to bargain. *See id.* Nowhere did *Alaska Roughnecks* suggest that due process concerns preclude the Board from finding that an employer had constructive knowledge of a fact.

The Company's citation (Br 27) to *National Can* is similarly misplaced. *National Can*, and the cases it cites, held merely that an employer need not clarify a union's demand to bargain on behalf of an inappropriate bargaining unit; the decision addressed only ambiguities in unit determination, not uncertainty about the validity of a union's demand for bargaining. *See* 374 F.2d at 800 (citing cases and noting union's unique expertise in providing proper unit description); *see also NLRB v. Richman Bros. Co.*, 387 F.2d 809, 812 & n.1 (7th Cir. 1967) (stating that *National Can* held that ambiguity in a union's unit definition is a factor in

assessing an employer's "asserted doubt about the appropriateness of a unit"). As shown (see pp. 18-19), CASHA unequivocally expressed its intent to represent appropriate units of the Company's employees. *National Can*, therefore, has no bearing on the issue presented here.

iii. The constructive knowledge doctrine serves the Act's policy goals

The Company's argument (Br 37) that the constructive knowledge doctrine violates the Act's policy considerations is unwarranted. The Board's limited use of constructive knowledge provides employers with clear guidelines that promote the goals of the Act.

The Company erroneously contends (Br 37) that the duty to inquire is improperly vague. As is true for the many cases finding constructive knowledge (see pp. 29-30), an employer will have a duty to inquire only under circumstances where a reasonable actor would have sought more information. *See Restatement (Second) of Agency* § 9(1). That rule is far from vague, for, as noted in the *Restatement*, an employer faced with confusion need only "govern his conduct as if the fact exists, until he could ascertain its existence or non-existence." *Id.* § 9(1), cmt. d.

Moreover, permitting unions with very little structure, such as the Employee Associations (A 24-25), to vote for a representative and have that agent inform the employer of its designation, is consistent with the Act. The Supreme Court has

held that the Act's goal of promoting industrial peace through stable employer-employee bargaining relationships requires that a union's internal organizational change not disrupt bargaining. *See NLRB v. Fin. Inst. Employees of Am., Local 1182*, 475 U.S. 192, 202-03, 209 (1986) (“*Seattle First*”); *accord News/Sun Sentinel Co. v. NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989). The Company's conduct here frustrates that aim because, as the Board found when faced with a similarly “disingenuous” claim of uncertainty, “[t]he duty to bargain in good faith requires more than sitting back, picking at nits, and hoping that an inept phrase or an inartful expression . . . will provide a loophole through which one can avoid entirely all the elements of a bargaining obligation.” *Insulfab Plastics, Inc.*, 274 NLRB 817, 824 (1985), *enforced*, 789 F.2d 961 (1st Cir. 1986); *accord Seattle First*, 475 U.S. at 209 (holding that such action will allow “an employer [to] invoke a perceived procedural defect to cease bargaining even though the union succeeds the organization the employees chose”).

b. There is no merit to the Company's contention that it was prohibited from making a reasonable inquiry into CASHA's status

The Company argues (Br 39-42) that the Board's constructive knowledge finding means that the Company would have had to violate the Act to satisfy its duty to inquire. That argument is without merit.

First, contrary to the Company's contention (Br 39), the Board never said that it should have polled employees to confirm that CASHA was the Employee Associations' bargaining agent. Indeed, the Board specifically—and reasonably—stated (A 29) that the Company could have easily resolved its purported uncertainty by asking for clarification from one of the many familiar representatives of CASHA and the Employee Associations. Such an inquiry would not have violated the Act. *See United Elec., Radio & Mach. Workers of Am. v. NLRB*, 986 F.2d 70, 74 (4th Cir. 1993) (employer appropriately tried to resolve ambiguity by expressing its confusion to unions), *enforcing Newell Porcelain Co.*, 307 NLRB 877 (1992).

The Company also asserts (Br 41-42) that the Board's finding (discussed below, pp. 45-48) that it unlawfully engaged in direct dealing with the Temecula employees was inconsistent with the conclusion that it should have attempted to clarify any doubt about CASHA's agency designation.⁸ No such conflict exists.

Indeed, the Company's position is absurd. The Board's requirement that the Company inquire about CASHA's status certainly did not demand that it engage in

⁸ Moreover, the Company's contention (Br 40) that the issue here is whether CASHA was the bargaining agent, and not whether the Company had a duty to recognize and bargain with CASHA, is incorrect. As the Company's own brief indicates (Br 2, 10, 16, 20), it is undisputed that the Employee Associations properly designated CASHA as their bargaining agent. Therefore, the only question is whether the Board properly found that the Company had constructive knowledge of that designation.

unlawful conduct, such as calling a mandatory meeting of all facility employees or refusing to allow the employees to consult with their bargaining representative. But the Company did precisely that after the Temecula employees requested an opportunity to renegotiate their contract. Instead, the Board expressly found (A 29) that the Company could have easily contacted representatives of either CASHA or the Employee Association—there was no need for the Company to resort to unlawful conduct to meet its duty to inquire.

In short, the Company could have engaged in several minimal actions to clarify any questions it might have had about the numerous facts—including several explicit notifications—confirming CASHA’s agency designation. The Board, therefore, reasonably found (A 29) that the Company’s willful ignorance of those facts was inimical to the Act. Unlike situations where an unknown union inexplicably attempts to interject itself into a previously established bargaining relationship, the circumstances here warranted the Board’s imposition of constructive knowledge. To conclude otherwise would allow an employer, as the Company has done here, to avoid its bargaining obligation by relying on alleged uncertainty that it never communicated to the only parties who could clarify the confusion.

2. There is no merit to the Company's contention that CASHA's demands did not give rise to a bargaining obligation

There is no merit to the Company's contention (Br 21) that the Board has improperly created a duty for employers to initiate bargaining by finding, as discussed above (pp. 20-23), that CASHA's letters constituted valid bargaining demands. The Company's citation (Br 21) to *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), to support its contention is unavailing. In *Columbian Enameling*, the Supreme Court did hold that an employer does not have to ask its employees to participate in bargaining; however, that holding only spoke to an instance, unlike here, where the union gave no indication that it sought negotiations. *See id.* at 297-98. Indeed, the Court's only statement that employers may ignore requests for bargaining from third parties was limited to cases where such entities do not purport to act with employees' authority. *See id.* at 297. In contrast, CASHA notified the Company of its authority and its desire to negotiate.

The Company's reliance (Br 28) on *NLRB v. Quick Shop Mkts., Inc.*, 416 F.2d 601 (7th Cir. 1969), is similarly ineffective. That the employer in *Quick Shop* had no duty to bargain with the union does not support the Company's argument. *Quick Shop* held that the union did not make a sufficient bargaining demand because the only indications of the union's desire for bargaining were a letter that the employer never read for a legitimate reason and picket signs that protested the

lack of a reasonable contract. *See id.* at 606. Thus, the employer there, who “at no time . . . indicate[d] an awareness of a demand made by the Union to bargain,” had no burden to request negotiations. *Id.* In contrast, CASHA made several explicit demands for recognition and bargaining and the Company gave numerous indications—including its statement it did not need to bargain with the agent because no contracts were open—that it was well-aware that CASHA sought bargaining. Accordingly, *Quick Shop* is inapposite.

Nor is there merit to the Company’s contention (Br 20) that CASHA’s letters only requested recognition and, therefore, the Company’s refusal to respond to the letters could not be the basis for a Section 8(a)(5) and (1) violation. First, as shown (pp. 20-23), the letters did constitute valid bargaining demands. Second, the very premise of the Company’s assertion is flawed.

Its argument (Br 20) that the Act imposes no duty to recognize its employees’ bargaining representative is wrong. The duty to bargain necessarily envisions recognition; indeed, it is difficult to imagine how an employer could satisfy its duty to bargain with an entity that it refused to recognize as its employees’ representative. *See United Steelworkers of Am. v. NLRB*, 389 F.2d 295, 300-01 (D.C. Cir. 1967) (“It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the

other party to recognize such representatives as have been designated”) (quoting S. Rep. No. 74-573, at 12 (1935)); *cf. Newell Porcelain Co.*, 307 NLRB 877, 878 (1992) (“[F]ollowing the affiliation election, the [employer] was obligated to recognize and, on request, bargain with the affiliated Union.”), *enforced sub nom. United Elec., Radio & Mach. Workers of Am. v. NLRB*, 986 F.2d 70 (4th Cir. 1993). In short, the Company’s refusal to recognize CASHA as the Employee Associations’ bargaining agent was an archetypal violation of Section 8(a)(5) and (1) of the Act. *See Food Store Employees Union, Local 347 v. NLRB*, 422 F.2d 685, 688 (D.C. Cir. 1969) (Section 8(a)(5) violation involves bad faith “denial of recognition”); *see also Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 836-37, 841 (8th Cir. 1998) (employer violated Section 8(a)(5) by refusing to recognize new bargaining agent after affiliation).

The Company argues as well (Br 22) that, even if there was a proper demand, it did not give rise to a duty to bargain with CASHA because none of the current collective-bargaining agreements was expiring soon. That argument also directly contradicts established law.

It is true that an employer has no duty to bargain over subjects covered by a collective-bargaining agreement until that contract is up for renegotiation. *See* Section 8(d) of the Act (29 U.S.C. § 158(d)). However, as the Board noted (A 29), “the role of a collective-bargaining agent is not limited to that of negotiating new

collective-bargaining agreements.” *See also NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939) (“[T]he Act imposes upon the employer the further obligation to meet and bargain with his employees’ representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation . . .”). Indeed, the Company’s own conduct belies its argument that CASHA’s bargaining demand was premature and, therefore, could be ignored with impunity. It twice reopened and modified the contract at the Temecula facility shortly after CASHA made its demands. The manner in which the Company presented those modifications—following a mandatory meeting of employees, during which the Company explicitly forbade the employees from consulting with CASHA (see pp. 46-48)—amply illustrates its employees’ need for a bargaining agent.

3. The Company’s unlawful refusal to bargain was not cured by the Fresno Employee Association’s petition

The Company attempts (Br 42-47) to defend its unlawful refusal to recognize and bargain with CASHA at the Fresno facility⁹ by arguing that the Fresno Employee Association withdrew its designation of CASHA, thereby

⁹ The Company argues that employees withdrew their designation of CASHA only at the Fresno and Temecula (see pp. 47 n.12) facilities. Accordingly, even if the Company’s erroneous contention was correct, the Board’s finding that the Company unlawfully refused to bargain with CASHA at the Bakersfield, Merced, and Santa Maria facilities would still be valid.

erasing the Company's prior unfair labor practice.¹⁰ The Board, however, properly rejected (A 38) that meritless contention.

Following the Fresno Employee Associations' vote to designate CASHA as its bargaining agent, CASHA repeatedly requested recognition and bargaining. (A 25; 178-81, 355-57.) The Company, however, continually refused. (A 25-26; 357-58.) After over one year of such refusals, a majority of the Fresno unit employees signed a petition stating that they were the Fresno Employee Association and were not represented by CASHA or Local 100. (A 29; 187-88, 288.)

The Company argues (Br 47) that the petition—signed over one year after its initial unlawful refusal to recognize and bargain with CASHA—“moots” its liability for that unfair labor practice. The attempt to erase over a year of unlawful

¹⁰ Moreover, the Company's apparent challenge (Br 43) to the Board's remedial order—that the Company recognize and bargain with Local 100—has not been preserved for appeal. Before the Board, the Company merely excepted to the “entire remedy” (SA 6-7), which is a generalized exception that this Court has held to be insufficient to grant appellate jurisdiction over a specific remedial issue. *See Prime Serv. Inc. v. NLRB*, 266 F.3d 1233, 1241 (D.C. Cir. 2001) (citing Section 10(e) of the Act (29 U.S.C. § 160(e)). Even if the remedy were at issue, the Board's remedial bargaining order was appropriate given the Company's unlawful refusal to bargain. *See Williams I*, 956 F.2d at 1238 (“[W]e assume that if [an] employer were to refuse to recognize a union [improperly] . . . the Board would . . . enter a remedial order . . .”) (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 51 n.18 (1987)).

refusals to bargain by relying on employees' dissatisfaction with the same representative that the Company refused to recognize is groundless.

At its core, the Company's argument is that employees' repudiation of their bargaining agent can go back in time and erase the earlier, unlawful refusal to bargain. Such an assertion defies both the law and common sense. Unlike a typical case where an employer seeks to justify a refusal to bargain based on employee repudiation of a union that occurred *before* the refusal, *see, e.g., Williams I*, 956 F.2d at 1234, here, the Company relies on a *later* repudiation. That argument ignores over a year of the Company's continual unwillingness to recognize and bargain with its employees' bargaining agent and erroneously tries to expunge that illicit conduct by citing subsequent events it obviously had no knowledge of when it made its unlawful refusals. *See News/Sun Sentinel Co. v. NLRB*, 890 F.2d 430, 434 (D.C. Cir. 1989) (stating that "no useful purpose is served by permitting the employer to defend the propriety of an earlier refusal to bargain by relying on subsequent events that had nothing to do with the refusal") (quoting *NLRB v. Fall River Dyeing & Finishing Corp.*, 775 F.2d 425, 433 (1st Cir. 1985), *affirmed*, 482 U.S. 27 (1987)).

It is unsurprising that the Company is unable to cite any precedent that even suggests that such an argument is valid. If this Court were to accept the Company's contention, employers would have a strong incentive to indefinitely

refuse to recognize and bargain with a union, no matter its legality. Under the Company's theory, an employer who effectively refuses to bargain with its employees' representative will be able to avoid all liability for its unlawful conduct by ensuring that its refusals so frustrate the employees' confidence in their agent's ability to reach an agreement that they repudiate their designation. Such a result is inimical to the Act's well-established goal of promoting collective bargaining. *See, e.g., NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939).

In rejecting the Company's theory, the Board noted the relevance of cases involving employer unfair labor practices that "tainted" employees' subsequent repudiation of the union, although it found it unnecessary to determine whether actual taint occurred here. (A 29-30, citing *Hearst Corp.*, 281 NLRB 764 (1986), *enforced mem.* 837 F.2d 1088 (5th Cir. 1988); *Fabric Warehouse*, 294 NLRB 189 (1989), *enforced mem. sub nom. Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990)). That conclusion was reasonable; this is not a traditional taint case because the unfair labor practice at issue is not a refusal to bargain that occurred *after* the employees repudiated the union.¹¹ However, those taint cases illustrate the principle that an employer, like the Company, generally cannot refuse to bargain

¹¹ In a typical taint case, an employer attempts to rely upon its employees' repudiation of a union as the basis to subsequently withdraw recognition. *See Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1458 (D.C. Cir. 1997). However, the employer cannot rely on such employee dissatisfaction if its own unfair labor practices contributed to the repudiation of the union. *See id.*

with an agent and then use its employees' subsequent repudiation of that representative as a defense to another refusal to bargain.

Moreover, and contrary to the Company's assertion (Br 46) that the Board should have found a connection between its unlawful refusal to bargain and the Fresno employees' repudiation of CASHA, proof of a causal connection is unnecessary. Indeed, it is the Company's burden to prove that such a connection did not exist. *See Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1458-59 (D.C. Cir. 1997). Because a refusal to bargain is a serious unfair labor practice that directly undermines the union's ability to maintain the employees' support, the Board, with this Court's approval, presumes that an employer's unlawful refusal to bargain is a foreseeable cause of employees' subsequent repudiation of their representative. *See id.*; *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 51 n.18 (1987). The employer can rebut that presumption "only by . . . showing that employee disaffection arose *after the employer resumed its recognition of the union and bargained for a reasonable period of time.*" *Lee Lumber*, 117 F.3d at 1458 (emphasis added); *see also Prime Serv. Inc. v. NLRB*, 266 F.3d 1233, 1240 (D.C. Cir. 2001).

It is undisputed that the Company never recognized or bargained with CASHA. Accordingly, as the Board concluded (A 29), the Company's continual

failure to bargain precludes it—as a matter of law—from relying on the employees’ repudiation as a defense to its unlawful conduct.

Similarly, the Company’s contention (Br 45, 47) that it did not have to bargain with CASHA because the Employee Associations can terminate their agent at any time is immaterial. The Board found (A 28) that the Company’s refusal to bargain with CASHA was unlawful, and the employees’ repudiation one year later does nothing to justify that illicit conduct. Moreover, as noted, because the Company never satisfied its obligation to recognize and bargain with CASHA, it cannot use the Fresno employees’ subsequent repudiation as a defense for its refusal to bargain. *See Lee Lumber*, 117 F.3d at 1458; *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678, 687 (1944) (employer cannot deal directly with employees after they repudiated the union because the Act “was enacted in the public interest for the protection of the employees’ right to collective bargaining and it may not be ignored by the employer, even though the employees consent”).

Here, the Fresno Employee Association’s foreseeable dissatisfaction with CASHA arose only after the Company refused to recognize and bargain with the agent for over a year. Accordingly, the Board properly found (A 29) that CASHA’s agency designation could not be rescinded while the Company sustained its unlawful refusals to bargain.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY ENGAGING IN DIRECT DEALING WITH THE TEMECULA EMPLOYEES

A. The Act Requires that Employers Deal Only with Employees' Bargaining Representative

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by dealing directly with union-represented employees without first bargaining with the union. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944); *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222 (D.C. Cir. 1990) (“*Toledo Blade*”). The Supreme Court long ago characterized such direct dealing as “a violation of the essential principle of collective bargaining” and “subversive of the mode of collective bargaining which the statute has ordained.” *Medo Photo Supply*, 321 U.S. at 684. Such conduct can “exert a highly divisive force among the members of [a] bargaining unit” and “gives the [e]mployer the opportunity to destroy the cohesiveness of the [u]nion’s membership.” *Toledo Blade*, 907 F.2d at 1224; *see also May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 384-85 (1945) (by “minimiz[ing] the influence of organized bargaining[,]” direct dealing—like an employer’s unilateral changes to terms and conditions of employment—has the effect of “emphasizing to the employees that there is no necessity for a collective bargaining agent”); *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1159 (D.C. Cir. 1992) (stating that “[d]irect

dealing between the employer and its employees cuts to the heart of collective bargaining and substantially weakens the union's role as collective representative of the workers") (Edwards, J., concurring).

B. The Company Unlawfully Engaged in Direct Dealing with the Temecula Employees

As shown above (pp. 5-9), shortly after the Temecula Employee Association voted to designate CASHA as its bargaining agent, Temecula employees asked the Company to renegotiate the current collective-bargaining agreement. The Company ignored CASHA's extant bargaining demands and, instead, ordered all Temecula employees to attend a meeting. At the meeting, after denigrating CASHA, the Company gave the employees a proposed contract, which it required them to accept or reject immediately, with little discussion. Ten months later, the Company repeated the entire process.

The Company's conduct during the two mandatory meetings—particularly its refusals to allow the employees to consult with their bargaining agent over proposed contracts and its warnings that associating with CASHA would lead to a failed strike that would make them worse off—clearly violated the Act because its actions expressly bypassed the employees' collective-bargaining representative and effectively informed the employees that their right to freely choose such representation was futile. *See May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 384-85 (1945); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944).

There is no merit to the Company's assertion (Br 47-49) that it was permitted to bargain with the employees because they were all members of the Temecula Employee Association.¹² That the employees were, by the Company's own definition, members of the Employee Association does not deprive them of their rights under the Act. For example, the Second Circuit has held in a similar case that an employer engaged in unlawful direct dealing by negotiating with the chief shop steward in her capacity as an employee rather than as a union official. *See Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218, 223-24 (2d Cir. 1996). Thus, the Board properly found (A 30) that the Company violated the Act because it "did not deal with the Temecula employees as the representing Association or labor organization. Rather the [Company] at all times material . . . treated the employees as employees."

The Company's argument (Br 48-49) that it dealt with the Temecula employees in their capacity as bargaining representatives is disingenuous, for its actions plainly reveal that it was dealing with the employees as employees to avoid its obligation to bargain with CASHA. Indeed, it is incomprehensible that the

¹² The Company argues (Br 47, 49) as well that the Temecula employees' request for, and agreement to, a new contract constituted a repudiation of CASHA's designation that mooted the Company's previous unlawful refusals to bargain. As the Board found (A 30), that argument fails for the same reasons discussed above (pp. 39-44) with relation to the Fresno petition. Moreover, the Temecula employees, unlike those at Fresno, never explicitly repudiated CASHA or Local 100.

Company sincerely believed that it was dealing with the employees as representatives of the Employee Association. The Company twice ordered the employees to a meeting, a mandate that no reasonable employer would expect a genuine bargaining representative to accept. *Cf. Gen. Motors Acceptance Corp. v. NLRB*, 476 F.2d 850, 855-56 (1st Cir. 1973) (unlawful bad-faith bargaining because, in part, employer insisted that union representatives travel to negotiations). Moreover, at both of those meetings, the Company provided the employees only a few minutes to consider its proposal, criticized their bargaining agent, and told employees that only the Company could help them. The Company also expressly refused to negotiate over its proposal, which, even if it were dealing with the employees as bargaining representatives, would likely constitute an unlawful failure to bargain in good faith. *See, e.g., Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 800 (D.C. Cir. 1997) (citing *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 756-59 (2d Cir. 1969)). Accordingly, there is substantial evidence supporting the Board's finding (A 38) that the Company "clearly treated the group as employees," and thereby violated Section 8(a)(5) and (1) of the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Company's petition for review should be denied and that the Board's order should be enforced in full.

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