

No. 17-17413

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUEEN OF THE VALLEY MEDICAL CENTER,

Appellant,

vs.

JILL COFFMAN, REGIONAL DIRECTOR OF REGION 20 OF THE
NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD

Appellee.

Appeal From the U.S. District Court for the Northern District of California,
The Honorable Yvonne Gonzalez Rogers, No. 4-17-cv-05575-YGR

**APPELLANT'S REPLY BRIEF
(PRELIMINARY INJUNCTION APPEAL –
NINTH CIRCUIT RULE 3-3)**

ELLEN M. BRONCHETTI (Bar No. 226975)
RONALD J. HOLLAND (Bar No. 148687)
PHILIP SHECTER (Bar. No. 300661)
DLA PIPER LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105-2933
Telephone: 415.836.2500

Attorneys for Appellant-Respondent
Queen Of The Valley Medical Center

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I. INTRODUCTION

The Region's opposition concedes the applicable legal standards, but refuses to accept their straightforward application to the facts presented.

The Region concedes that the National Labor Relations Act (the "Act") did not require QVMC to "bargain" with the Union until after certification issued on December 22, 2016. The Region concedes that QVMC continued to challenge the Union's certification by filing a timely request for review of the Union's certification with the National Labor Relations Board ("NLRB"). The Region further concedes that unconditional bargaining with a union is necessary to a finding of union recognition in this matter, and that bargaining while continuing to protest a union's certification is "conditional" and not "good-faith" bargaining.

Notwithstanding these undisputed facts and legal principles, the Region contends that even though QVMC continued to publicly and legally challenge the Union's certification, its simultaneous engagement with the Union on various issues constituted "unconditional bargaining" and waived its right to continue its challenge in the Circuit Court. However, the Region's opposition brief offers nothing more than the arguments previously offered in opposition to QVMC's Motion to Stay filed with this Court.

Succinctly, the Region argues for a standard that requires employers who legally challenge a union's certification to either: (1) announce immediately to the

union and without provocation its intent to contest the union's certification through to the Circuit Court; or, (2) make such an announcement and with every subsequent interaction continue to remind the union that it is challenging certification. Such a requirement is not supported by any case law, nor is it supported by a reasonable application of federal labor law to the workplace.

In an effort to create a novel theory upon which to rely, the Region suggests that any bargaining by an employer during the certification test process can be both "conditional" and "unconditional" depending on the circumstances. In essence, the Region advocates a standard where an employer's "bargaining" with a union while its request for review is pending may be deemed both "unlawful" and "lawful." Therein lies the fundamental flaw of the Region's theory: conduct cannot be both an unfair labor practice and good-faith bargaining at the same time. Were this the case, employers and unions alike would have no guidance for their conduct from the NLRB and the Act's purpose of promoting labor stability through predictable rules would be undermined.

Unfortunately, this flaw becomes the building block for other reversible errors in the order. First, the court's finding that QVMC unconditionally bargained with the Union from the election onwards is factually erroneous because during that time QVMC was *actually* challenging the Union's certification by first filing objections and then filing its request for review. This finding is also legally

erroneous because an employer's duty to bargain arises upon the union's certification and not before. Second, in finding that that QVMC unconditionally bargained with the Union while its request for review was pending, the order ignores longstanding NLRB precedent holding that any bargaining while contesting certification is conditional as a matter of law and thus not "good-faith" bargaining. Third, the court commits reversible error by failing to provide any factual support for its determination that QVMC unconditionally bargained with the Union as the order fails to identify instances where QVMC's conduct was both "unconditional" and "bargaining" sufficient to justify a waiver of QVMC's appeal to the NLRB and further pursuit of that appeal to the Circuit Court.

Furthermore, the district court abused its discretion with regard to its irreparable harm analysis, failing to identify sufficient factual support from the record and to make any individualized showing that Miguel Arroyo would be irreparably harmed absent an injunction.

Finally, the court erred in ignoring the hardships an injunction and the specific requirements of the district court's order place on QVMC in its analysis of the balance of hardships.

Because the district court's granting of an injunction against QVMC under section 10(j) of the Act is an abuse of discretion, the order should be reversed and vacated.

II. ARGUMENT

A. **The Region Is Unlikely To Succeed On The Merits Of Its Withdrawal-Of-Recognition Theory.**

The district court erred in finding that the Region is likely to succeed on the merits of its withdrawal-of-recognition theory. First, the district court concluded that QVMC unconditionally bargained *from the time of the election* through certification. However, during this period QVMC's objections were pending and no certification had issued. Indeed, the Region's theory of the case does not even make such an argument because the Region acknowledges QVMC had no duty to bargain prior to the Union being certified as the employees' representative. This error alone warrants reversal.

Second, the court's determination that QVMC recognized the Union when its request for review was pending is premised on the Region's legally erroneous theory that an employer's interactions with a union can simultaneously both be *conditional, bad-faith bargaining* in the context of an unfair labor practice charge challenging an employer's technical refusal to bargain and *unconditional, good-faith bargaining* for purposes of waiving the right to technically refusal to bargain. Opp. Br. 28–29, 32.

Finally, the Region's reliance on isolated interactions between QVMC and the Union are not enough, individually or collectively, to constitute unconditional bargaining or waiver of the right to test certification. The court committed

reversible error by concluding without factual support or analysis that any of the alleged conduct either was “unconditional” or constituted “bargaining.” As such, the district court abused its discretion in granting the injunction.

1. QVMC did not recognize the Union between the election and certification.

The district court abused its discretion in finding QVMC engaged in unconditional bargaining *from the time of the election* through certification. Specifically, the district court found “QVMC’s communications with NUHW *from the time of the election* to March 16, 2017, demonstrated unconditional bargaining” E.R. 3 (emphasis added). Yet, the court cites no facts or specific conduct of QVMC during this time period other than QVMC’s alleged “communications.” Indeed, the Region concedes that after the election, rather than unconditionally bargain, QVMC did the opposite by filing timely objections to the election to expressly contest the Union’s certification. Opp. Br. 4 (citing E.R. 258–63). Moreover, the Region concedes that an employer’s duty to recognize and to bargain in good faith begins *after* a union is certified as the employees’ collective-bargaining representative. Opp. Br. 26–27 (citing *Brooks v. NLRB*, 348 U.S. 96, 104 (1954)). Even on appeal, the Region argues that QVMC recognized the Union *after* certification issued and not before. Opp. Br. 4, 29. Thus, the district court’s order is flawed and its finding that QVMC engaged in unconditional bargaining

from the time of the election is unsupported by any facts and is an incorrect application of the law.

2. QVMC did not recognize the Union while its request for review was pending.

The district court also erred in finding QVMC unconditionally bargained with the Union while its request for review was pending. As the Region correctly notes, “‘conditional bargaining’ preserves an employer’s ability to test certification . . . [but] is considered by the Board to be unlawful bad-faith bargaining.” Opp. Br. 28 (citing *Fred’s Inc.*, 343 NLRB 138, 138–39 (2004)). The Region also correctly argues that an employer recognizes a union by unconditionally bargaining with it. Opp. Br. 29. Consequently, the Region can only succeed on its withdrawal-of-recognition theory if QVMC is found to have “unconditionally bargained” with the Union while it continued to challenge union certification. Because at all times QVMC was legally contesting certification, at no time could it have engaged in unconditional bargaining with the Union.

a. The Region disingenuously argues that QVMC never informed the Union that it intended to challenge certification.

The Region repeatedly asserts that QVMC negotiated with the Union “[w]ith no qualifications or indication that bargaining was conditioned on testing certification.” Opp. Br. 29. The Region further claims that QVMC “never” indicated any of its alleged “bargaining” was conditioned on its challenge to the

Union's certification. Opp. Br. 19–20. These claims are directly contradicted by the record.

First, the Region admits that “[f]ollowing the Union’s certification, QVMC filed a timely request for review with the Board on January 9, 2017.” Opp. Br. 4 (citing E.R. 265–92). It is undisputed that QVMC served the Union with the request for review that same day. E.R. 439. QVMC’s request for review expressly challenged the Union’s certification and the election process.¹ The Region does not dispute QVMC’s use of this time-honored NLRB process for challenging the Regional Director’s issuance of an election certification. It is also undisputed that a week later, on January 17, QVMC reiterated to all of its employees in a memorandum that it “has decided to appeal the decision of the local region” and that any bargaining “during the appeal process” was to “enable the negotiation process to move forward without delay *while we await the outcome of our appeal.*” E.R. 81 (emphasis added). After the NLRB denied QVMC’s request for review, on March 16, QVMC informed the Union that it would “continue its appeal” and “refuse to bargain with the Union so that it can pursue its review of the certification in the courts.” E.R. 802–03. Simply put, from certification through

¹ See, e.g., E.R. 270 (“Region 20’s blatant abrogation of its Section 9 duties at the direct expense of employees’ Section 7 rights is incompatible with the most fundamental underpinnings of the Act. The Board must reverse the erroneous decisions of the [Acting Regional Director], set aside the election results and either dismiss the petition or remand this matter to Region 20 for further hearing on the appropriateness of the petitioned unit . . .”).

March 16, 2017 and thereafter, QVMC maintained its challenge to the Union's certification as the employees' representative. That the Union was on notice that QVMC was unequivocally testing certification is perhaps best demonstrated by the Union's own repeated internal and external communications to that effect. *See* Opening Br. 13–16 (describing the Union's extensive public and private communications demonstrating its knowledge of QVMC's certification test).

b. The Region's "Catch-22" standard for alleged conditional bargaining is inconsistent with the law.

The Region attempts to support the district court's erroneous determination of unconditional bargaining by advancing a "Catch-22" reading of the applicable law in this case. To distinguish the plain holding in *Fred's Inc.*, 343 NLRB 138, 138–39 (2004), the Region argues that negotiating with the union while testing certification is conditional, bad-faith bargaining in the context of an unfair labor practice charge, but is unconditional, good-faith bargaining in the context of recognition and waiver. Opp. Br. 28–29, 32. The Region cites no legal authority for its novel theory because there is none. This is because by arguing that the same conduct could be simultaneously unlawful (*i.e.*, an unfair labor practice) and lawful (*i.e.*, good-faith bargaining), the Region seeks to turn section 8(a)(5) of the Act on

its head.²

The NLRB, in an Advice Memorandum regarding the *Fred's* case, states unequivocally:

An employer unlawfully refuses to bargain when it conditions its recognition of the union on the outcome of its certification challenge, even when it simultaneously agrees to meet and negotiate with the union. In such a circumstance, since the employer has not unconditionally recognized and bargained with the union, it has not waived its right to challenge the union's certification.

NLRB Off. of Gen. Counsel, Advice Memorandum, No. 26-CA-21528, at 2 (May 26, 2004).³ In *Fred's*, the employer filed objections to the union election, which the Region rejected, and the Region certified the union. *Id.* at 1. The *Fred's* employer never filed a request for review, but instead informed the union in “off the record” meetings that it was “reserving its right” to “test the union’s certification.” *Id.* Four months after certification, and after several “off the record” meetings with the union, the *Fred's* employer sent two letters to the union

² Later in its brief, the Region argues that *any* bargaining is sufficient to waive QVMC’s ability to challenge certification, Opp. Br. 32, despite earlier conceding that conditional bargaining “is considered by the Board to be unlawful bad-faith bargaining” and cannot waive the employer’s right to test the certification of the Union through to the federal courts. Opp. Br. 28 (citing *Fred's Inc.*, 343 NLRB at 138–39). This intellectually inconsistent argument must be rejected.

³ QVMC requests that the Court take judicial notice of the NLRB Advice Memorandum, which is available on the NLRB’s website at <http://apps.nlr.gov/link/document.aspx/09031d45802072c8>. This Court may properly “take judicial notice of ‘official information posted on a governmental website, the accuracy of which [is] undisputed.’” *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 (9th Cir. 2015) (citation omitted).

expressing for the first time its “intent to test [the union’s] certification by technically refusing to bargain.” *Id.* at 2. Based on these facts, the NLRB concluded that “[a]lthough the Employer entered into negotiations with the Union, it did not waive its right to test the Board certification” *Id.* at 3.

Here, QVMC did not simply “reserve” its right to test certification. Instead, QVMC filed a formal challenge of the Union’s certification using the proper NLRB procedures, which it served on the Union and the Union publicly acknowledged. Moreover, QVMC subsequently informed all employees that any bargaining with the Union was conditional and dependent “[on] the outcome of [its] appeal.” E.R. 81. In *Fred’s*, the NLRB found the employer’s “off the record” reservation of its right to test certification enough to constitute conditional bargaining. Here, QVMC did not simply *threaten* to challenge the union’s certification, QVMC *actually* initiated an immediate challenge to the union’s certification. It would defy logic if the reservation of the right to appeal was sufficient to prevent waiver, but filing an appeal was not.

3. The Region’s technical arguments rely on a misreading of the Eighth Circuit’s decision in *Technicolor*.

Failing to sufficiently distinguish applicable law or demonstrate that any of QVMC’s conduct was unconditional, the Region seeks the protection of a tortured interpretation of *Technicolor Government Services v. NLRB*, 739 F.2d 323, 326–27 (8th Cir. 1984), *enf’g*, 268 NLRB 258 (1983). The Region acknowledges that the

basic process for seeking judicial review of a union's certification entails a refusal to bargain, triggering an unfair labor practice charge which the NLRB adjudicates summarily in the union's favor. Opp. Br. 27–28. However, the Region argues, and the district court seemingly adopts, an expanded reading of *Technicolor* that goes far beyond its holding. The Region advocates a standard that requires an employer who wants to challenge a union's certification to either (1) immediately, and without waiting for a request to bargain, announce to the union it is refusing to recognize it and then ignore the union's every request, or (2) make such an announcement and then remind the union it is challenging its certification in every subsequent communication. *Technicolor* does not stand for the proposition that an employer must either remain silent in the face of a union demand for bargaining or that it must affirmatively say, "No, we will not bargain." While both are legal options for an employer, the Region concedes that employers often engage in "conditional" bargaining while contesting certification. Opp. Br. 28. The Region's proposed standard is not supported by any case law or by a reasonable understanding of the practical realities of the workplace.

- a. *There is no requirement that an employer challenging certification do so immediately upon certification or else risk waiver.*

Relying on *Technicolor*, the Region advances the false proposition that an employer waives the right to challenge certification unless it notifies the union that

it intends to engage in a technical challenge through to the federal court *immediately* after certification. This is not the law. While the Region argues that the NLRB's refusal-to-bargain jurisprudence "do[es] not address what type of conduct preserves (or waives) an employer's ability to test certification," an examination of *Fred's* reveals that *Technicolor's* "immediate" notice is not the standard. Opp. Br. 20–21. In *Fred's* (which the Region admits is good law and which was decided 20 years after *Technicolor*), the NLRB found the employer had refused to bargain with the union despite only having informed the union of its intent to engage in a technical refusal to bargain *nearly four months* after certification, far longer than the "immediate" notice the Region claims is required by *Technicolor*. 343 NLRB at 138 n.2 & 139.⁴ Here, by contrast, not only did QVMC raise its challenge to the Union's certification by filing objections to the election as the employer did in *Fred's*, but it further availed itself to the NLRB's established rules and procedures for testing certification by filing a request for review of that certification with the NLRB. E.R. 237–38, 258–63, 265–437. In

⁴ Given the facts in *Technicolor*—where the employer waited until three years after it began bargaining with the union to challenge certification in an unrelated collateral proceeding and, as a result, was found to have waived its right to do so—the issue of immediate notice to the union was not properly before the court. 739 F.2d at 327. The Eighth Circuit's statement in a footnote regarding immediate notice to the union is nothing more than dictum. No other case since *Technicolor* has even suggested that an employer must immediately announce to a union, while its appeal is pending, that it is not recognizing the union.

fact, the record before the district court shows the Union clearly knew from the election onwards that QVMC was challenging the validity of the election.⁵

Moreover, the Region's immediate notice theory is inconsistent with its position throughout this dispute. Assuming, *arguendo*, that QVMC unconditionally bargained with the Union after the election while its objections were pending (as the district court found) and did not immediately notify the Union that it intended to challenge certification (as the Region argues), according to the Region's theory this would have waived QVMC's right to file a request for review of the Union's certification with the NLRB. Yet, neither the Union nor the Region has claimed that QVMC waived the right to request review or that the NLRB was without jurisdiction to decide it. This is because filing such a request for review is one of the employer's options when seeking to overturn an election and contest the certification of the union. This fact, and admission, cannot be squared with the Region's premise that bargaining while a request for review is pending waives the employer's right to appeal.

⁵ For example, on December 16, 2016—prior to certification—the Union stated in a private communication with Union-supporting employees that “[w]e’ve all heard that [QVMC] administration has filed objections with the labor board, which is delaying the legal certification of our union [T]he team is respectfully asking hospital administration to withdraw these objections as a gesture of good faith.” E.R. 560. It is undisputed that QVMC never withdrew its objections and sought further review of the election process and certification.

b. *The Region's "continuous disclaimer" requirement is not supported by the law and ignores the practical realities of the workplace.*

In an attempt to support the district court's finding of "unconditional bargaining" and "waiver," the Region seeks to require an employer to continuously and expressly disclaim recognition of the union at all times even though the employer's certification challenge is pending before the NLRB. The Region cites no legal authority for this supposed "continuous disclaimer" requirement because there is none. More concerning, this requirement sets up a true trap for the unwary. It makes no sense, legally or practically, to require an employer (through its many agents, managers and supervisors) to continuously announce "that it is planning to seek review" to preserve its right to do so when the employer, by filing a request for review, has announced and is *actually* and actively testing certification. Opp. Br. 28.

The Region attempts to downplay this position in its brief, claiming that "to avoid waiver, the employer must simply make clear that its communications and negotiations with the union are conditional and that it intends to challenge the union's certification." Opp. Br. 36. However, this is misleading and directly contradicts the Region's position at the hearing before the district court:

THE COURT: So how many times do they have to say it?

MS. NOVOA [for the Region]: I think any time there's a manner in which they are complying with their statutory obligation I think they have a burden to be clear and say this is not recognition, this is not

complying with our statutory obligation to furnish information, for instance.

[. . .]

THE COURT: I'm asking you: *If they communicate it by being very public about it, is it your position that every single time they engage or discuss anything that impacts what you claim are their statutory obligations that they have to say it every time?* Should they put footers on their emails that say, by the way, remember we're challenging. What is your position?

MS. NOVOA: Yes, your Honor, I think *they should make it clear every time.*

E.R. 21–22 (emphasis added).

The Region's position that an employer seeking judicial review of the union's certification must include an express disclaimer with every communication or interaction with the union is untenable. In essence, the Region is asking this Court to impose strict liability on employers for every action or statement of a manager or low-level supervisor. If accepted, this theory of liability would undermine the Act's purpose of minimizing industrial strife and fostering cooperative labor-management operations, 29 U.S.C. § 141(b), pmb., while simultaneously expanding the definition of collective bargaining to include virtually any post-election interaction with a union. The consequences of such an overbroad rule are severe: an employer would need to bar all of its supervisors from having any dialogue whatsoever with the union or its employees (about the union) for fear of waiving the employer's legal right to challenge certification even if it already has legal challenges pending.

Moreover, such a rule would be near-impossible for an employer to implement. This would be particularly onerous for an institution like QVMC, whose leadership must maintain a cooperative relationship with the Union as the Union is the certified collective bargaining representative of certain employees at its sister hospitals.⁶

4. QVMC’s interactions with the Union from the election through the denial of the request for review did not waive QVMC’s right to challenge certification.

Because the Region cannot show recognition between the election and the denial of the request for review as a matter of law, the Region can only succeed on the merits of its withdrawal-of-recognition claim by trying to show recognition between February 28, when QVMC’s request for review was denied, and March 16, when QVMC again reiterated its challenge to certification and its intention to continue its appeal through to the Circuit Court. While the Region identifies “seven” isolated instances it claims constitute unconditional bargaining, none of them, either individually or together, are sufficient to constitute recognition and

⁶ As the interchange between the Region and the district court reveals, the Region’s insistence on a “continuous disclaimer” rule is not just extreme, but serves no legitimate purpose. If the purpose is to provide notice to the Union, there is no reason why a clear statement of intent to challenge certification, such as filing and serving a request for review, is not enough. Requiring an employer to notify the Union again and again while its request for review is pending (and where it has not disavowed that request) only serves to make it difficult for the employer to avoid inadvertent waiver. Such a “gotcha” rule is inconsistent with Board law and undercuts the stabilizing purpose of the Act.

waiver. Moreover, the district court failed to sufficiently analyze any of them in order to support its finding.⁷

a. March 2, 2017 meeting with Sterile Processing Department employees.

The Region claims that on March 2, QVMC “met and bargained with the Union over scheduling changes and other issues in the Sterile Processing Department.” Opp. Br. 30–31. This is inaccurate. QVMC never met with the Union to discuss scheduling changes. The record shows the Union was not present during the meeting when scheduling changes were discussed or involved with the proposed changes to the schedules, which were handled directly with Sterile Processing Department employees only. E.R. 178, 228–29. Likewise, the Union was not involved in the development of the employees’ proposed schedules. E.R. 179, 204, 229. QVMC implemented the schedules without first meeting or negotiating with the Union and actually refused the Union’s request to meet in a March 7 email. E.R. 151, 160–61, 178–79, 228–29.

In fact, one of the Region’s key witnesses in the underlying unfair labor practice proceedings, Sterile Processing Department employee Amanda David,

⁷ As stated more fully in its opening brief, QVMC argues that none of its alleged conduct during the time in question amounted to bargaining. Specifically, while there is an ongoing union organizing, it is not “bargaining” if the employer settles unfair labor practice charges, provides limited responses to union information requests or even provides the Union access to its premises. Indeed, all are often required where there is no bargaining relationship at all between an employer and a union.

submitted a declaration to the district court clarifying that the affidavits which the Region used to support its section 10(j) petition were inaccurately drafted by the Region's representative. E.R. 228. Ms. David explained that she corrected the first version of her affidavit by replacing references to "the Union" with "department employees" because "we were not attending the meeting on behalf of the Union; we were representing ourselves, as the employees of the Sterile Processing Department, at the meeting. No one from the Union participated in the meeting." *Id.* Thus, there is no evidence that the Union and QVMC bargained over the Sterile Processing Department scheduling changes—unconditionally or otherwise.

b. March 15, 2017 memorandum regarding scheduling changes in the Sterile Processing Department.

The Region further distorts the record by claiming on March 15, QVMC "formally responded to concerns raised in the March 2 meeting about changes to the Sterile Processing Department." Opp. Br. 31. However, the Union was not involved in the proposed schedule changes whatsoever. The memorandum referenced by the Region is far from an additional incident of bargaining or a "formal[] respon[se] to the Union's proposal," Opp. Br. 10, but is instead a memorandum written by the department's director and addressed to only "[a]ll Sterile Processing Staff." E.R. 920. The Union is neither mentioned in the memorandum nor listed as a recipient. E.R. 920–21.

c. *March 1, 2017 provision of additional information to the Union.*

Next, the Region claims that on March 1, QVMC “provided the Union with additional information to prepare for first-contract bargaining and promised more as it became available.” Opp. Br. 30. While the Region now argues that this communication “reflected an unconditional willingness to meet,” the Union’s contemporaneous statements reveal otherwise. On March 7, the Union’s chief labor negotiator emailed QVMC to complain that “[a]lmost two months ago, on January 10, we sent a letter to [QVMC] management requesting bargaining unit information” and that the Union attempted to follow up with QVMC on multiple occasions to little avail. E.R. 831. The Union also complained that QVMC was not responsive and that the Union “ha[s] not had the courtesy of a response” from the employer. *Id.*

According to the Union, on March 1 it received from QVMC “a very small amount of the information we requested.” *Id.* The Union further stated that it found it “troubling that [QVMC] has failed to produce the requested information after two months.” *Id.* An employer’s failure to respond to a union’s relevant information requests violates the duty to bargain under section 8(a)(5) of the Act. *Woodville Plant, Livingston Shipbuilding Co.*, 244 NLRB 119, 121 (1979). Thus, the Region’s claim that QVMC unconditionally bargained with the Union by providing “a very small amount of the information” requested conflicts with the

Union's contemporaneous belief—demonstrated by the Union filing an unfair labor practice charge making this allegation—that the QVMC's limited production constituted an unfair labor practice. *See* E.R. 831, 1066–67. Surely, the alleged commission of an unfair labor practice by failing to fully respond to the Union's request for information is insufficient to constitute “unconditional bargaining.”

d. March 7 & 10, 2017 communications responses to the Union's proposed bargaining dates.

Additionally, the Region claims that on March 7 and 10, QVMC “promised to contact its labor team and respond to the Union's outstanding first-contract bargaining information requests and the Union's proposed bargaining dates.” *Opp. Br.* 31. However, those emails simply show that QVMC deferred responding and said it would contact its labor attorney. E.R. 832. QVMC never offered or agreed to initial contract bargaining dates or provide responsive information. QVMC did not substantively respond to the Union's inquiries until its lawyer's March 16 letter. E.R. 802–04.

e. March 15, 2017 meeting with Pharmacy Department employees.

The Region claims that on March 15, QVMC “met with bargaining team members in the Pharmacy Department to discuss schedule and job assignment changes.” *Opp. Br.* 31. The record actually shows that an employee contacted the QVMC manager first, copying multiple employees and a Union representative, and

that the manager replied to all. E.R. 855. The Region conveniently leaves out the fact that the Union never participated in the meeting between the manager and the employees. E.R. 857. At best, this meeting amounted to direct dealing with QVMC's employees, as opposed to unconditional bargaining. *See Cent. Mgmt. Co.*, 314 NLRB 763, 767 (1994) (once an employer recognizes a union as the exclusive representative of its employees it engages in unlawful "direct dealing" by bargaining directly with employees regarding terms and conditions of employment). Incredibly, the Region neglects to mention that the Union sent a cease and desist letter to the manager on March 21 "provid[ing] dates for bargaining" and "request[ing] information," but the Union "did not hear back" from QVMC. E.R. 784. Again, the Union's own actions demonstrate that it knew QVMC was not unconditionally bargaining throughout this process.

f. March 6, 2017 communications regarding changes to phlebotomists' schedules.

Furthermore, the Region claims that "QVMC expressed willingness to bargain" with the Union over changes to the Laboratory Department. Opp. Br. 30. Record evidence does not show that QVMC negotiated with the Union over any such changes. *Id.* Indeed, the Region admits that QVMC and the Union never met to bargain over the issue. While the Region claims that QVMC "proposed dates for bargaining," *id.*, the record shows the manager of the Laboratory Department

did not provide any dates to the Union in response to the Union's request for "a few dates/times." E.R. 840.

g. *March 1–21, 2017 communications regarding an investigatory meeting.*

Finally, the Region claims that the same Laboratory Department manager "worked with the Union to schedule an investigatory meeting so that a unit employee's *Weingarten* representative could attend." Opp. Br. 30. The record shows that the manager approved the employee's request in keeping with her personal practice of permitting employees accompaniment to such meetings. E.R. 168–69. The manager also informed the Union that "management should not be coordinating meetings with the union" and said that Human Resources should be involved. E.R. 853. When the Human Resources director was looped in, she directly informed the Union (twice) that the Union representative was not allowed to attend the meeting. E.R. 854. Importantly, QVMC and the Union never bargained over the meeting and the Union representative did not attend the meeting.

None of these cherry-picked interactions, individually or collectively, are sufficient to show unconditional bargaining and waiver. Waiver must be "clear and unmistakable"—an axiomatic legal principle cutting across labor law that sets a high bar so as to protect the rights of employees, employers and unions. *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Resorts Int'l Hotel*

Casino v. NLRB, 996 F.2d 1553, 1559 (3d Cir. 1993).⁸ While the Region now claims that the instances clearly show unconditional bargaining, the Region conceded before the district court that QVMC’s conduct was “ambiguous.” E.R. 131. Ambiguous conduct is not sufficient to find that recognition occurred. *Terracon, Inc.*, 339 NLRB 221, 225 (2003).

What the Region’s selected instances demonstrate is how unreasonable and unforgiving the Region’s waiver theory is in practice. Take the last two instances discussed above. Both of those involve a mid-level supervisor—well-intentioned and striving to maintain a cordial relationship with its employees and the Union—whose unfamiliarity with the intricacies of labor law could under the Region’s proposed standard be exploited by the Union to unknowingly waive the employer’s right to contest certification.

B. The District Court Erred In Failing To Support Its Finding Of Irreparable Harm With Record Evidence.

The district court’s abuse of discretion is not limited to the likelihood of success on the merits prong. The court also erred by determining the Union would be irreparably harmed without basing this finding on any factual support.

⁸ The Region attempts to limit the Board’s “clear and unmistakable” waiver standard to the waiver of statutory rights only. Opp. Br. 35. It does not cite any pertinent legal authority in support of this proposition. Regardless, an employer’s right to test certification is in essence a statutory right, as it is the only procedural mechanism through which an employer who seeks to challenge the validity of a union’s certification may do so consistent with the Act.

Moreover, the court failed to make any individualized showing that QVMC employee Miguel Arroyo would be irreparably harmed absent an injunction.

1. The Region is wrong that likely irreparable harm can be inferred from the speculative evidence in the record.

The Region advances the mistaken proposition that “independent evidence of irreparable harm is generally not required where an employer unlawfully refuses to recognize a union.” Opp. Br. 45. This misconstrues the law. *Bloedorn v. Francisco Foods, Inc.*, on which the Region heavily relies, explains that “[i]n appropriate circumstances, the same evidence that establishes the Director’s likelihood of providing a violation of the [Act] may provide evidentiary support for a finding of irreparable harm.” 276 F.3d 270, 297–98 (7th Cir. 2001) (emphasis added). *Bloedorn* does not excuse the district court from having to provide evidence to support its finding of irreparable harm.

Assuming, *arguendo*, that the district court inferred likely irreparable harm from the same record evidence on which it made its likelihood of success on the merits determination, the court nonetheless committed reversible error by relying on purely speculative evidence. While *concrete* evidence of union support resulting from an employer’s conduct can show irreparable harm, the Region’s

evidence is not concrete.⁹ *All* of the Region’s “evidence” is conjectural testimony that is, by the affiant’s own admission, speculative in nature.¹⁰ The Region simply fails to address the speculative nature of this “evidence.”

2. The district court’s order contains no individualized showing of any irreparable harm as to the Arroyo claim.

The district court also abused its discretion by granting an injunction without any individualized showing that Miguel Arroyo, whose shift was changed before the November 2016 election, would be irreparably harmed absent an injunction. The Region’s brief does not address this, nor does it address the line of cases from this Court and others establishing that monetary injury—such as Arroyo’s alleged wage differential—is not considered irreparable harm and will not support injunctive relief.¹¹

⁹ The Region’s only response is an appeal to the stone, calling QVMC’s argument “specious[]” and claiming that “the Director’s evidence, showing an ongoing loss of union support as a result of QVMC’s conduct, is exactly the type of evidence that courts rely on” Opp. Br. 49–50. Again, this misses the point.

¹⁰ *See, e.g.*, E.R. 981 (“the Employer’s behavior could potentially have a chilling effect . . .”); E.R. 982 (“the Employer’s behavior *could potentially harm* the Union’s standing . . .”); E.R. 977 (“Another *potential example* of chill . . .”).

¹¹ *See Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1057 (9th Cir. 2009); *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980); *Rubin ex rel. NLRB v. Vista Sol Health Servs., Inc.*, 80 F. Supp. 3d 1058, 1074 (C.D. Cal. 2015).

C. The District Court Erred By Ignoring The Harm To QVMC When Balancing The Hardships.

Finally, the district court erred when it ignored the hardship an injunction would place on QVMC when evaluating the balance of hardships. The record shows dozens of unilaterally implemented changes that the Region would be forced to unwind, touching everything from patient safety to employee benefits to construction. *See, e.g.*, E.R. 98–99, 993–94. Rescinding these changes will negatively impact QVMC, its employees and its patients. The Region’s brief fails to substantively address the court’s abuse of discretion, claiming instead that QVMC is engaging in “hyperbole” and “speculation.” Opp. Br. 54–55. Far from being speculative, the harm to QVMC from the injunction requiring it to “rescind any and all unilaterally implemented changes” at the Union’s behest is concrete. E.R. 9. Ignoring these hardships was reversible error.

III. CONCLUSION

For the foregoing reasons, the district court’s order granting an injunction under section 10(j) of the National Labor Relations Act should be reversed and vacated.

Dated: February 16, 2018

Respectfully submitted,

By /S/ ELLEN M. BRONCHETTI

ELLEN M. BRONCHETTI

RONALD J. HOLLAND

PHILIP SHECTER

DLA PIPER LLP (US)

555 Mission Street, Suite 2400

San Francisco, CA 94105-2933

Telephone: 415.836.2500

Attorneys for Appellant-Respondent

Queen Of The Valley Medical Center

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Signature of Attorney or
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