

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: January 24, 2003

TO : Dorothy L. Moore-Duncan, Regional Director
Daniel E. Halevy, Regional Attorney
John D. Breese, Assistant to the Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Brite -Clean, LLC 530-4001
Case 4-CA-31567 530-4001-6700
530-4040-5050
530-4050
530-4080-0175-9000

This case was submitted for advice as to whether the Employer, which entered into a settlement agreement in which it had agreed to recognize and bargain with the Union, had bargained with the Union for a reasonable amount of time before it withdrew recognition after receiving a decertification petition signed by a majority of the unit employees. We conclude that the Employer's withdrawal of recognition was unlawful because the Employer failed to bargain with the Union for a reasonable period of time.

FACTS

For approximately 30 years, Teamsters Local Union No. 312 (the Union) represented unit employees at Matlack, Inc. (Matlack), the nation's second largest chemical carrier. Matlack filed for bankruptcy in the spring of 2001 and liquidated its assets.

In July of 2001, Rich Parrillo, the president of Matlack Leasing and Mike Lynch, the general manager at Matlack's Bensalem, PA terminal organized Brite-Clean (the Employer) for the purpose of purchasing the Bensalem terminal and equipment. The Employer planned to use the terminal and equipment to operate a cleaning and repair business for trucks used in the hazardous material industry. On July 31, 2001,¹ the Employer entered into a lease-purchase agreement with Matlack for the Bensalem terminal and equipment. Matlack ceased operating the

¹ All dates 2001 unless otherwise noted.

terminal on August 3, and the Employer commenced operating the terminal on August 6. The Employer leased the terminal from Matlack until October 17, when it assumed ownership of the facility.

On July 24, before the Employer entered the lease-purchase agreement, Parrillo advised Union president Tim Lehman that the Employer would not recognize the Union because it would cost the Employer an additional \$150,000 per year. He also said that if the employees would not work non-union that the Employer would not buy the terminal because potential customers would not use the facility if it were Union. Parrillo told Lehman that he planned to approach the employees and ask them if they were willing to work without a union.

That same day, Parrillo and Chuck Vera, the terminal's operations manager, met with Matlack's cleaners and mechanics and told them that the terminal was going to be purchased by a non-union company that planned on hiring about nine of the employees. They also told the employees that the company would offer the same medical benefits as Matlack, a \$1 per hour wage increase, a 401(k) plan and a profit-sharing plan.

In late July, the Employer offered eight Matlack employees employment but refused to offer employment to Mike Pucci, a 32-year Matlack employee, because he needed to remain in the Union to get full pension benefits. When the Employer began operating the terminal on August 3, it had hired the eight employees and given written confirmation that they would receive the wages and benefits discussed by Lynch and Vera in the July 24 meeting with the employees. The Employer initially serviced two former Matlack customers using the same facility and equipment used by Matlack. The employees reported that their jobs were unchanged, that they had the same job titles and responsibilities, and that they reported to the same supervisors.²

In mid-August, the Employer offered Pucci employment on the condition that he abandon support for the Union but Pucci declined the offer. At about the same time, by letter dated August 16, the Union demanded that the Employer recognize the Union. When the Employer failed to respond, the Union filed a charge in Case 4-CA-30716 on September 24.

² Based on this and other information the Region determined that the Employer was a successor employer.

The Region investigated that case and concluded that the Employer violated Section 8(a)(1) and (5) by refusing to recognize the Union and by unilaterally establishing new terms and conditions of employment. The Region also concluded that the Employer violated Section 8(a)(1) by informing the employees that they would not be represented by a union, by offering the employees improved terms and conditions of employment in order to induce them to abandon the Union, and by telling Pucci that he would not be hired because he desired to continue his Union membership. The Region further concluded that the Employer violated Section 8(a)(1) and (3) when it refused to hire Pucci and by later offering him employment conditioned upon him abandoning his support for the Union.

On November 30, the Region issued complaint on the allegations, and scheduled a hearing before an ALJ for February 19, 2002.³ On February 15, with the Regional Director's approval, the Employer and Union entered into an informal settlement agreement with a non-admissions clause in which the Employer agreed to recognize and bargain with the Union and to post a notice to the employees for 60 days. In return, the Union agreed to conditionally withdraw the other merit allegations of the case.⁴

Following approval of the informal settlement agreement, the Union and Employer exchanged a series of letters concerning the initiation of bargaining. A bargaining session was subsequently scheduled for April 10, at which the parties engaged in initial discussions concerning a contract. The Union requested information about the Employer's wages and benefits to assist it in formulating contract proposals. On April 25, the Employer supplied the Union with the requested information and on June 24, the Union forwarded a complete contract proposal to the Employer. On July 18, the Employer faxed the Union a letter acknowledging receipt of the proposed contract and advising the Union that it would be in contact with the Union within the next seven to ten days.

³ All dates 2002 unless otherwise noted.

⁴ The Region also submitted the case for 10(j) consideration on January 24. However, at the time the parties entered their informal settlement agreement the 10(j) consideration was withdrawn. The case was closed on compliance on May 3 following the conclusion of the posting period.

On July 19, Employer manager Lynch received a three-page petition from a unit employee. [FOIA Exemptions 6, 7(C), and 7(D)] stated that the employee told him, We made a decision. We want to move forward, or words to that effect. The legend on the first page of the petition read as follows:

**PETITION FOR DECERTIFICATION (RD) -
REMOVAL OF REPRESENTATIVE**

The undersigned employees of BRITE-CLEAN, INC., constituting 30% or more of the bargaining unit represented by TEAMSTERS no longer wish to be represented by LOCAL 312. The undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether the majority of employees also no longer wish to be represented by this union.

The document contained the signature of nine of the 12 employees in the unit at that time, and each signature was accompanied by the printed name of the employee and date 7-19-02. Lynch maintained that he took the petition, read it briefly, and thanked the employee.

Lynch said that after receiving the petition the Employer consulted with counsel and verified the signatures on the petition by comparing them with its payroll records. Lynch then sent a letter, that same day, to the Union stating:

This letter is to advise you that the Company has received clear objective evidence that Local 312 no longer has the support of a majority of employees in the bargaining unit.

Based on this evidence, and in accordance with its legal obligations under the National Labor Relations Act, the Company hereby withdraws recognition of the Union as the bargaining representative of its employees effective July 19, 2002. Therefore the company will not negotiate a collective bargaining agreement with Local 312.

The Union filed the charge in the instant case on September 10, alleging that the Employer violated Section 8(a)(1) and (5) by withdrawing recognition of the Union on July 19.

ACTION

We conclude that the Employer's withdrawal of recognition was unlawful because the Employer failed to bargain with the Union for a reasonable period of time after agreeing to do so as part of a settlement agreement.

The Board has held that "a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a *reasonable time* in which to conclude a contract," without regard to whether or not there are fluctuations in the majority status of the union in that period of time.⁵ The Poole Foundry principle has also been extended to bargaining provisions contained in private out-of-Board settlements,⁶ and applies in circumstances where a charge has been filed but settlement reached prior to a complaint issuing,⁷ and to settlements reached after complaint issues.⁸

In determining whether a reasonable period of time for reaching a contract has passed, the passage of time and the number of times that the parties have met are relevant factors but are not alone dispositive of whether a "reasonable time" has elapsed.⁹ Other relevant factors include whether the parties are negotiating their first

⁵ Poole Foundry & Machine Co., 95 NLRB 34, 36 (1951), *enfd.* 192 F.2d 740 (4th Cir. 1951), *cert. denied* 342 U.S. 954 (1952) (emphasis added). In Lee Lumber, 322 NLRB 175, 178 (1996), *affd.* in relevant part 117 F.3d 1454, 1459 (D.C. Cir. 1997), the Board reaffirmed the Poole Foundry principle and noted that "when a bargaining relationship has been initially established, or has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed before an employer may question the union's representative status."

⁶ See e.g. Ted Mansour's Market, 199 NLRB 218 (1972); Pride Refining, 224 NLRB 1353 (1976), *enf. den.* on other grounds 555 F. 2d 453 (5th Cir. 1977); VIP Limousine, Inc., 276 NLRB 871 (1985).

⁷ Ted Mansour, *supra*.

⁸ See e.g. Pride Refining, 224 NLRB at 1354-1355; VIP Limousine, Inc., 276 NLRB at 876.

⁹ See generally Lee Lumber 334 NLRB No. 62, slip op. at 6 (June 2001), *enfd.* 310 F.3d 209 (D.C. Cir. 2002).

contract, whether impasse was reached, and whether the employer engaged in meaningful good-faith negotiations over a substantial period of time.¹⁰

In Shangri-La Health Care Center, the Board held that the respondent failed to bargain for a reasonable period of time after agreeing to recognize and bargain with the union in exchange for the union's withdrawal of 8(a)(5) refusal to bargain charges. The parties entered into an informal settlement agreement and met five times during a two-month period. During the sessions a substantial number of agreements on important issues were reached. The parties had scheduled an additional meeting on the day that the respondent informed the union that it had evidence that the union no longer represented a majority of its employees and withdrew recognition.¹¹ The ALJ, affirmed by the Board, concluded that the positive achievements accomplished by the parties supported a conclusion that a reasonable time had not elapsed.¹² He reasoned that since the parties were moving toward an agreement, it could not be concluded that an impasse was near, and given that this was an initial contract between the parties, the respondent's withdrawal was premature.¹³

Similarly, in Gerrino Restaurant, the Board held that the respondent withdrew recognition and refused to bargain with the union before a reasonable time for reaching a contract had elapsed. The parties entered into an informal settlement agreement settling a refusal to bargain charge as well as other 8(a)(1) allegations.¹⁴ Six months elapsed between the time the settlement was approved and the time the respondent withdrew recognition, although only three months elapsed from the time bargaining began to the withdrawal of recognition. The parties were negotiating an initial contract, and the only meaningful negotiations were the transmittal of the union's proposal to the respondent.

¹⁰ See, e.g., Gerrino Restaurant, 306 NLRB 86, 88-89 (1992); Shangri-La Health Care Center, 288 NLRB 334, 337-338 (1988); VIP Limousine, 276 NLRB at 877.

¹¹ Shangri-La Health Care Center, 288 NLRB at 336-337.

¹² Id. at 338.

¹³ Id.

¹⁴ Gerrino Restaurant, 306 NLRB at 86.

At the first scheduled bargaining session the respondent appeared with a withdrawal letter. The ALJ reasoned that "[u]nder these circumstances, considering what occurred during the time in question, and not mere lapse of time, when even the first bargaining session was met by a withdrawal of recognition, it must be concluded that a reasonable period of time for bargaining had not elapsed."¹⁵

Finally, in Driftwood Convalescent Hospital,¹⁶ the Board also held that the respondent failed to bargain for a reasonable period after entering an informal settlement agreement that included a bargaining provision.¹⁷ Between the time the agreement was signed and the withdrawal of recognition, only 83 days passed. The parties met only twice and the first meeting was a "get-acquainted" session. However, the second session produced significant progress and the parties were not at an impasse.¹⁸ The ALJ reasoned that while elapsed time and the number of meetings were not dispositive, when considering all that had transpired, the respondent had not bargained for a reasonable amount of time.¹⁹

In the instant case the parties also entered into an informal settlement agreement with a bargaining provision. Similar to the cases above, the amount of time that elapsed from the time the settlement agreement was signed until the Employer withdrew recognition was relatively short, five months.²⁰ Further still, like the cases above, the Union and the Employer were negotiating an initial contract.

Moreover, like Gerrino Restaurant and Driftwood Convalescent Hospital, the Employer and Union's first session was nothing more than an initial discussion and a request for information. At the same time, when the positive achievements of the parties are considered as in

¹⁵ Id. at 89.

¹⁶ 302 NLRB 586 (1991).

¹⁷ Id. at 587.

¹⁸ Id. at 589.

¹⁹ Id.

²⁰ In the cases above the time ranged from two to six months.

Shangri-La Health Care Center, one can reason that the Employer and Union were moving forward in their process. Although the Employer and the Union met only once, the session resulted in a complete contract being placed on the bargaining table, which shows significant progress. The Union had presented the proposal to the Employer and the Employer had said that it would respond to the proposal over the next 7 to 10 days. Therefore, it cannot be said that an impasse existed or was imminent, but instead the parties were moving forward in the process. Thus, we conclude that under all of the circumstances, the Employer did not give the bargaining process a reasonable amount of time to reach agreement before withdrawing recognition.²¹

In its submission the Region urged that the standard recently adopted by the Board in Lee Lumber and Building Material Corp.,²² which set a minimum of six months as a "reasonable time" in cases involving Board bargaining orders, should be extended to cases involving bargaining provisions for Section 8(a)(5) settlement agreements. The justification for urging such use was the equitable reasons given by the Board in Lee Lumber,²³ and the additional reasons of clarity and ease of administration. Further, extension to settlement agreements would be consistent with the Board's apparent prior practice of interpreting "reasonable time" the same in a variety of contexts.²⁴

²¹ It should be noted that we do not rely upon the Employer's prior conduct in reaching our conclusion. The facts in the instant case fall squarely within Poole Foundry and its progeny, and we found no cases where the Board previously used prior unadjudicated or unadmitted conduct as a factor in deciding whether a "reasonable time" had passed under Poole Foundry.

²² 334 NLRB No. 62 (June 2001), enfd. 310 F3d 209 (D.C. Cir. 2002).

²³ Id., slip op. at 5.

²⁴ See, e.g., Keller Plastics Eastern, Inc., 157 NLRB 583, 587 (1966) (bargaining status established as the result of voluntary recognition is like situations involving Board orders and settlement agreements; therefore the standard in each situation is a "reasonable time" for bargaining).

Here we find it unnecessary to apply such a defined standard. First, it is not necessary to rely on a Lee Lumber analysis since the instant case falls within the case law of Poole Foundry. Second, we note that the time that elapsed from the signing of the agreement in the instant case to the withdrawal of recognition, only five months, is less than the six-month time which, the Board noted in Lee Lumber, generally unions need to show what they can accomplish in contract negotiation.²⁵ Finally, the Board's rationale in Lee Lumber was specifically premised on the circumstance that an employer had been found by the Board to have unlawfully failed to recognize or bargain with a union.²⁶ However, as in other settlement agreement cases, such adjudication of unlawful conduct does not exist here. Therefore, because the Lee Lumber rule arises from significant facts not present here and is unnecessary to find a violation here, we decline to apply the standard adopted in Lee Lumber here.

Accordingly, we conclude complaint should issue, absent settlement, alleging that the Employer unlawfully withdrew recognition because the Employer failed to bargain with the Union for a reasonable period time after agreeing to do so as part of a settlement agreement.

B.J.K.

²⁵ 334 NLRB No. 62, slip op. at 5.

²⁶ See Lee Lumber, 334 NLRB No. 62 at n. 7, where the Board clearly points out that it was deciding in that case only the standard where an unlawful refusal has been adjudicated.