

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SEVEN**

**LAGRASSO BROS., INCORPORATED<sup>1</sup>**

**Employer**

**and**

**Case 07-RD-087446**

**JEROME ASHFORD, An Individual**

**Petitioner**

**and**

**LOCAL 337, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS (IBT)<sup>2</sup>**

**Union**

**APPEARANCES:**

Raymond Carey, Attorney, of Detroit, Michigan, for the Employer  
Kevin O'Neill, Attorney, of Dearborn, Michigan, for the Union  
Jerome Ashford, Petitioner, of Detroit, Michigan

**DECISION AND DIRECTION OF ELECTION**

The Employer, located in Detroit, Michigan, engages in the wholesale distribution and delivery of produce to the restaurant industry. On July 13, 2009, the Employer and Union entered into a Memorandum of Agreement (MOA) detailing the procedure governing how and when voluntary recognition of a unit of drivers and warehouse employees would be granted if the Union conducted an organizing campaign among those employees. Pursuant to the terms of the MOA, if the Union obtained authorization cards from at least 55 percent of unit employees within 60 days from the effective date of the MOA, the Employer would grant recognition to the Union following a review of the authorization cards by Arbitrator Donald F. Sugerman. On February 8, 2010, Sugerman issued a decision finding that a majority of employees in the bargaining unit had designated the Union as their collective bargaining representative, and directing the Employer to voluntarily recognize the Union, effective September 12, 2009, the date provided for in the MOA.

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<sup>1</sup> The name of the Employer appears as stipulated at the hearing.

<sup>2</sup> The name of the Union appears as stipulated at the hearing.

On May 7, 2010, the Employer notified the Detroit Regional Office of the National Labor Relations Board, in writing, that it voluntarily recognized the Union as the exclusive bargaining representative of the unit pursuant to the procedures in place on that date outlined in *Dana Corp.*, 351 NLRB 434 (2007). On May 11, 2010, the Detroit Regional Office sent notices for the Employer to post which advised employees about its voluntary recognition of the Union and the employees' right to file a decertification petition with the NLRB. On May 17, 2010, the Employer posted the notices at its facility. On June 7, 2010, a decertification petition (7-RD-3669) was filed. On July 2, 2010, the Regional Director for Region 7 issued a Decision and Direction of election in which he determined the petition was timely filed within the requirements set out in *Dana*.<sup>3</sup> On September 30, 2011, because *Dana Corp.* was overruled by the Board, that petition was dismissed.

Commencing January 31, 2012 and continuing through July 11, 2012, the parties met for first contract bargaining on 16 occasions. On July 11, the parties entered into a tentative agreement that the Union presented to its membership for ratification. On August 1 and again on August 18 the membership rejected the agreement.

The instant petition was filed on August 16, 2012. The sole issue presented at the hearing is whether a recognition bar exists. As discussed below, based on the record and relevant Board law, I reject the Union's contention that the recognition bar is applicable and find that a reasonable time for bargaining has elapsed. Therefore, the petition should proceed to an election.

## **Board Law**

The Board has held that an employer's voluntary recognition of a union bars an election for a reasonable period of time. *Lamons Gasket Co.*, 357 NLRB No. 72 (August 26, 2011). The principle behind the recognition bar is "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944). Underlying that principle is the recognition that "a union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out." *Brooks v. NLRB*, 348 U.S. 96, 100 (1954). "Taken together, the *Franks* and *Brooks* decisions provided the underlying foundations for the 'general Board policy of protecting validly established bargaining relationships during their embryonic stages.'" *Lamons Gasket* slip op. at 9, citing *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1384 fn. 5 (2d Cir. 1973).

In *Lamons*, the Board defined a reasonable period of bargaining to be "no less than 6 months after the parties' first bargaining session and no more than 1 year." 357 NLRB No. 72 slip op. at 10. In determining whether a reasonable period has elapsed, the Board will apply a multifactor test that considers: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse. *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001).

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<sup>3</sup> Administrative notice of the Decision and Direction of Election is herein taken.

The burden rests with the Union, as the party asserting the recognition bar. *See, e.g. UGL-UNICCO Service Company*, 357 NLRB No. 76 fn.31 (The burden of proof will be on the party who invokes the “successor bar” to establish that a reasonable period of bargaining has not elapsed); *In re Coca-Cola Enterprises, Inc.*, 352 NLRB 1044, 1045 (2008) (citing *Roosevelt Memorial Park*, 187 NLRB 517 (1970)) (the burden of proving the existence of a contract bar rests upon the party asserting the doctrine); *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10<sup>th</sup> Cir. 2000) (union asserting 9(a) status has burden to prove majority support).

Applying the *Lee Lumber* factors, I find that a reasonable period for bargaining has elapsed.

### **Application of Board Law to this Case**

In reaching the conclusion that a recognition bar is not appropriate and that the petition should proceed to an election, I rely on the following analysis and record evidence.

#### ***(1) Initial Contract Bargaining***

As noted above, the parties were negotiating their first contract. This factor often weighs against a finding that a reasonable period of time has elapsed because bargaining for an initial contract often involves “special problems,” including establishing basic bargaining procedures and difficulties in “hammering out fundamental procedures, rights, wage scales, and benefit plans in the absence of previously established practices.” 334 NLRB at 403. The Union presented no evidence establishing the presence of any “special problems” occurring during its negotiations with the Employer. Accordingly, this factor does not support the Union’s position.

#### ***(2) Complexity of Issues and Bargaining Process***

The Union presented no evidence that complex issues or procedures were present in the bargaining between the Employer and Union. Indeed, all issues, including the recognition clause, management rights, wages, benefits, health and safety, and work hours were on the table and ultimately agreed upon by the parties. Accordingly, this factor does not support the Union’s position.

#### ***(3) Passage of Time and Number of Bargaining Sessions***

The Employer and Union met for bargaining on 16 occasions from January 31, 2012 through July 11, 2012, resulting in a tentative agreement. After a ratification vote conducted on July 31 and August 1 failed, the Employer agreed to “red circle” salaried employees’ pay so that they would not receive a pay cut by moving from salaried to hourly pay. A letter<sup>4</sup> regarding the “red circling” agreement was signed by the Employer and Union.<sup>5</sup> On August 18, 2012, employees again voted against contract ratification despite the modification regarding the “red circling.”

The more time that has elapsed since bargaining begins and the more negotiating sessions, the more opportunity the parties have to reach a contract. Here, the parties agree that they met a

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<sup>4</sup> A copy of the letter is not part of the record.

<sup>5</sup> The record does not indicate the date of this letter.

sufficient number of times so that they succeeded in reaching tentative agreements twice. Accordingly, this factor does not support the Union's position.

#### ***(4) Extent of Progress Made in Negotiations***

In weighing this factor, the context of the parties' negotiations must be considered: "if the parties are still not close to reaching a contract after bargaining for 6 months or more (whether or not they have made progress), giving them a bit more time for negotiations is unlikely to enable them to conclude an agreement." In this case, the parties agreed to terms, but were not able to finalize the agreement. In that regard, the Union concedes that additional bargaining is pointless because the parties were unsuccessful twice in finalizing a contract. Accordingly, this factor does not support the Union's position.

#### ***(5) Presence or Absence of Impasse***

The Employer and Union both assert that there was no impasse. The absence of impasse generally weighs against a finding that a reasonable time has elapsed because "there is still hope that [the parties] can reach agreement." 334 NLRB at 404. In the instant case, while there was no impasse, the employees rejected both of the tentative agreements presented to them. The Union presented the second tentative agreement to the employees as the "best deal" it could put together. Accordingly, this factor does not support the Union's position.

### **Summary**

No one factor is dispositive or entitled to special weight. Ultimately, "the issue is whether the union has had enough time to prove its mettle in negotiations, so that when its representative status is questioned, the employees can make an informed choice." 334 NLRB at 405. Based on the evidence in the record in this case and as explained above, I find that the Union did have a reasonable period of time to "prove its mettle" such that the employees could make an informed choice and that the recognition bar doctrine, as defined in *Lamons*, does not bar an election in this proceeding.

### **CONCLUSIONS AND FINDINGS**

Based on the foregoing discussion and on the entire record,<sup>6</sup> I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.<sup>7</sup>
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.

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<sup>6</sup> Briefs were due from the parties on September 5, 2012. No party filed a brief.

<sup>7</sup> At the hearing, the Union made an oral motion to dismiss the instant petition. For the reasons set forth above, the hearing officer properly denied the motion. The Union has not renewed its motion.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time warehouse employees and drivers, excluding office clerical employees, other employees, and guards and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 26th day of September 2012.

(SEAL)

*/s/ Terry Morgan*

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Terry Morgan, Regional Director  
National Labor Relations Board, Region 7  
Patrick V. McNamara Federal Building  
477 Michigan Avenue, Room 300  
Detroit, Michigan 48226

## **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **LOCAL 337, INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT)**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **October 3, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever

proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>8</sup> by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Posting of Election Notices**

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **October 10, 2012**. The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>9</sup> but may **not** be filed by facsimile.

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<sup>8</sup> To file the eligibility list electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

<sup>9</sup> To file a Request for Review electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.

