NATIONAL LABOR RELATIONS BOARD
REGION 25, SUBREGION 33

AMERICOLD LOGISTICS, INC. **Employer** **and** **RETAIL, WHOLESALE & DEPARTMENT STORE UNION, UFCW, LOCAL 578** **Union-Intervenor** **and** **KAREN E. COX, AN INDIVIDUAL** **Petitioner**	**25-RD-102210**

STATEMENT OF RETAIL, WHOLESALE & DEPARTMENT STORE UNION, UFCW, LOCAL 578 IN OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW

The National Labor Relations Board (NLRB, Board) should deny Petitioner's Request for Review. Petitioner's Request does not meet any of the Board's criteria for granting review:

- Petitioner makes no claim that a substantial question of law or policy is raised because of an absence of or departure from officially reported precedent;
- Petitioner has not challenged any aspect of the hearing's conduct or any rule made therein;
- Petitioner has not argued that there are compelling reasons for reconsideration of an important Board rule or policy; and
- While Petitioner may mean to argue a clear and prejudicial error on a substantial factual issue by the Regional Director, as discussed below, the Regional Director's factual decisions were all perfectly sound, particularly given that there are no credibility determinations made as to testimony in R hearings, and that the witness relied on by Petitioner acknowledged not being party to bargaining over a key six-month period.

NLRB Rules and Regulations, 102.67(c); Casehandling Manual §11181; Hearing Officer's Guide, §II.c.4. In this case, the Region applied the rules set forth in *Lee Lumber & Building Material Corp.* and *Lamons Gasket* as to the voluntary recognition bar to find that when Karen

Cox filed a decertification petition in April 2013, a reasonable period of time had not passed for the Union and Employer to bargain since their first bargaining session in October, 2012. Obviously Petitioner disagrees with the result, but such disagreement is no basis for granting a Request for Review. The Regional Director's decision provides no such basis under the Board's rules; the Request for Review should be denied.

I- STATEMENT OF FACTS

1) TWO DECERTIFICATION PETITIONS FILED; RD HEARING HELD

On November 19, 2012, Petitioner in the instant matter filed a decertification petition in case 25-RD-093419 which the Region dismissed as untimely under *Lamons Gasket,* 357 NLRB No. 72 (2011). *See* Letter of Regional Director Lineback dated Dec. 21, 2012. She filed a new petition on April 8, 2013, and a hearing was held in the Region's subregional office in Peoria IL on April 19, 2013 and continued telephonically on April 23, 2013. Initially, only the Union presented a case, putting on testimony and exhibits from Union Representative and Co-Lead Negotiator Dennis Williams. The Employer declined to present evidence, and took no position at the hearing. Only after the Union rested its case did Petitioner's counsel, who has represented Petitioner for months, and must have anticipated these proceedings were pending, decide to subpoena an Employer witness. Over the Union's strong objections, the Region granted a continuance to the Petitioner, and arranged for the hearing to continue. The Employer presented witness Robert Hutchinson, who conceded he was not involved in the bargaining, nor even employed by Employer, from August 2012 to February 2013. Hearing Transcript ("Tr."), p.160.

2) HISTORY OF ORGANIZING, UNION RECOGNIZED

Before the RWDSU was recognized in 2012, workers at Americold ("Company," "Employer") in Rochelle IL tried to organize with the RWDSU for at least five years. Tr.p.27-

28. After an initial failed attempt at the Amerciold Drive facility in 2007, they made another effort, but the Company took the position that organizing one facility was not appropriate – that an appropriate bargaining unit must include facilities both on Americold Drive and Caron Road. Tr.p.28-29. This followed a reorganization by the Company where Americold acquired the Caron Road facility from ConAgra. *Id.* The NLRB found for the Company's unit, doubling its size. The Union lost the vote on its 2009 petition. Tr.p.29-30. Workers reached out to the Union a third time in late 2011, believing they had made headway at Caron Road. The Union engaged in an organizing drive, and was confident enough in a victory to file a new election petition with the NLRB in May 2012. Tr.p.30. But the Union and Company were able to agree to a voluntary recognition process. The Union had 72 of 123 eligible cards in a card count conducted by a neutral party on June 13, 2012; on June 18, 2012, the parties executed a recognition agreement. Tr.p.30-31. The Union proceeded with recognition instead of the NLRB vote, in Williams' words, because of "all the havoc that goes through with a petition for a drive, it cuts all that out. It gives employees – it's a lot less of a drama." Tr.p.31.

3) UNION DEVELOPS WORKER LEADERSHIP, SOLICITS BARGAINING PROPOSALS

Following execution of the recognition agreement in late June, the Union held numerous meetings with workers throughout summer of 2012 to ensure maximal representation of diverse worker interests and desires, electing shop stewards at each of the two facilities, and soliciting worker proposals for bargaining. Tr.p.40-42. This was not easy; the 110 employees work approximately 10 different shifts, with completely different schedules at Americold Drive and Caron Road. Tr.p.36-37. Ultimately the Union staggered several meetings to elect stewards for each facility, discussed issues for bargaining, and solicited proposals from workers. Tr.p.41-42. This included extra meetings the Union held after realizing Americold Drive facility workers had

not been properly informed about the steward election process. Tr.p.41. The Union consolidated workers' feedback into union bargaining proposals. Tr.p.46.

4) AMERICOLD HAS DOZENS OF COLLECTIVE BARGAINING RELATIONSHIPS; WORKERS HAVE DISPARATE CONCERNS

Americold did not introduce evidence as to its global operations or corporate structure, but Union Representative Dennis Williams testified that the company owns and operates over 100 temperature-controlled warehouses with over 60 different collective bargaining agreements with numerous unions that represent their employees. Tr.p39. Labor relations for all facilities are managed out of the Company's headquarters in Atlanta, GA. Tr.p50. Americold acquired the Caron Road facility down the road from the original Americold Drive facility, from ConAgra in 2009. Tr.p.28. The shifts at Americold Drive are stable, while Caron Road fluctuates. Caron Road has more docks, and can handle higher cargo turnover (Tr.p.45) as a result of which it is busier than the Americold Road facility. Discrepancies in scheduling and overtime is a major issue for workers; the schedule at Americold Drive is more consistent than Caron Road, but workers at that facility are less likely to work 40 hours per week, or receive overtime. Caron Road workers wish they had less overtime. Tr.p.47-48. Workers at both facilities have felt strongly about maintaining seniority on a facility-wide basis, instead of for the workforce overall. Tr.p.47. Historically, Caron Road workers have had more conflict with their supervisors than on Americold Drive, where the workers have had more success at resolving disputes. Tr.p.37.

5) INFORMATION REQUEST/ UNION ASKS FOR BARGAINING DATES/ FIRST SESSION is OCTOBER 9, 2012

While electing stewards and developing priorities for bargaining with the workers, at the end of July the Union submitted an extensive information request to Consultant Robert

Hutchison, the Employer's contact for Union matters at the time. Tr.p.43-44. The Union received a response from Michael Nelson, Vice-President of Labor Relations for Americold, with hundreds of pages of documents to Roger Grobstich, a Union Representative and one of the Union's leads at Americold. It took him several weeks to review all of the material. Tr.p.44-45. In the first or second week of September, once he had completed this review, Grobstich called Mike Nelson to request bargaining dates. Tr.p.48. Nelson is based in Atlanta, GA and has, for much of the bargaining, been chief negotiator for Americold. He offered three consecutive days in October: the 9th through 12th; the Company was not available any earlier. Tr.p.48. The Union agreed to those dates. *Id.*

6) THE PARTIES BARGAIN

The first bargaining session between the parties was held October 9, 10 and 11, 2012; the parties had productive discussions, reviewing initial proposals in-depth. While the Union had prepared extensive proposals based on their work with the employees, the Employer began by presenting its "model" contract. Much of the first session in October was spent in caucuses and discussions to ensure the Union understood the Employer's proposals, which included time that was needed for first-time negotiators on the Union's committee (the shop stewards) to work through all the material, and concluded with counterproposals on most items from the Union. Tr.p.49-51. At the second session in November, significant progress was made, and the parties were able to reach tentative agreements on more than half the provisions over which the parties have bargained. Tr.p.55-56, 58-59. The Union's Hearing Exhibit 5 (Exhibit A to Petitioner's Request), a list of all proposals with notes as to the date tentative agreement ("TA") was reached as to each provision showed that 55 out of 112 provisions were "TA'd" by November 29, 2012. *Id.* This was notwithstanding that significant time was spent discussing an extensive

management rights clause that the Union strongly objected to, but from which, in the end, the Company would not budge. Tr.p.51-52, 77-78. Another issue that consumed a great deal of time was the question of how to structure seniority and related matters, given workers' desires in the two different facilities; on this point the parties worked together constructively, but it took time to come up with a framework to accommodate the concepts. Tr.p.52-53.

The Company presented no direct evidence as to what happened at bargaining in October and November in general, and with respect to these specific items in particular.

The next development in the bargaining was that bargaining essentially stopped. The Union presented evidence, which the Employer did not contest, that between the second session in November and the third session in March – for close to four months – the Employer was virtually unavailable to meet. At the end of the November session (the 27, 28 and 29), Mike Nelson indicated that the Company had no available dates in December, and the first available dates it could guarantee were for January 22, 23 and 24. The Union emphasized its willingness to meet earlier if dates became available. But not only did the Employer offer no earlier dates, it cancelled the January dates. Tr.p.61. It postponed that session until February 4, but soon cancelled those dates as well. Tr.p.62-63. At this point, the Union considered filing an Unfair Labor Practice charge alleging a failure to bargain, viewing the situation as "ludicrous" to have to wait "almost four months" before getting back to the bargaining table. *Id.* It decided not to, as it believed the Employer genuinely faced difficulties given Nelson's wife's health issues. *Id.*

When bargaining finally resumed in March, the parties began discussing economics, with the Union focusing on health care at the two three-day sessions that were held (March 4, 5, 6, and 11, 12 and 13). Tr.p.64. In the Union's view, health care represents the most challenging issue and had to be agreed upon before resolving the other economic issues. Tr.p.66-67. This

view is shared by the Employer. Tr.p.173. The Union proposed, and the Employer is reviewing the possibility that it would become a participating employer in the Union's health funds. Tr.p.64-67. This process has been delayed by the fact that the Employer provided certain key information about its own current health insurance policy to the Union for the first time in March, requiring the Union's fund staff to re-tool their plan analyses and comparison, so the Employer could assess the potential costs and benefits of becoming a participating employer. Tr.p.65-66. This information had not been included with other information about the Employer's health plans in their initial submission to the Union in August, notwithstanding the Union's request for all such material. Tr.p.180-181.

As of the date the petition was filed, the parties had met to bargain four times, each time for three-day sessions. As of the hearing date, they had met twice more for one day each, on April 9 and 16, and had scheduled additional sessions for May 10-12 and 20-23. Tr.p.68. On the record, the Union entered sign-in sheets for each day of bargaining, with the exception of October 11, March 12 and 13. Williams stated that was not a sign-in sheet for October 11, but that bargaining had occurred, and that the parties signed the March 11 sign-in sheet to the effect that the same individuals also participated in bargaining on March 12 and 13. Tr.p.69-71.

Robert Hutchison became involved in bargaining in March; he briefly attended on March 4, then led bargaining March 11 – 13, and then appears to have attended bargaining on April 16,[1] but not April 4. Tr.p.165. Hutchison was not employed by Americold between August 2012 and February 2013, and did not participate in any bargaining sessions during that time. Tr.p.160. Since he was re-employed by Americold, he described a system of switching off with Mike Nelson in terms of who leads negotiations for Americold. Tr.p.168. This has imposed some constraint on bargaining. Williams expressed frustration that "it kind of seems like there's

[1] Williams testified that the April 16 sign-in sheet was mislabeled with the date of March 16. Tr.p.70-71.

nobody with a real definitive answer to be able to help get the ball rolling, to keep it rolling...we didn't get a lot done through some of that [switching back and forth]." Tr.p.75.

Hutchison has struggled to get up to speed (Tr.p.75); to date, he still lacks in-depth concrete knowledge as to key issues with the two facilities. For example, on direct examination, he stated there was no meaningful difference between Americold Drive and Caron Road, while on cross he acknowledged that Caron Road may have higher cargo turnover of its cargo due to its innate physical ability to process loads, echoing Williams' testimony. Tr.p.176-178. Hutchison was also not aware of what shifts exist at either facility, or the complicated scheduling problems requiring a multiplicity of shifts that were an important early issue in bargaining. *Id.*

Another challenge has been a knowledge gap that has emerged between local and corporate management. Williams described that:

> [W]hen Mr. Nelson would come to town, I think he was kind of learning on the fly on some of the stuff, what local management was actually doing in the process. So he would actually hear stuff from his local op managers that was news to him. So then they kind of had to update him on what the process here was in Rochelle. Some of the stuff was working with the op managers, made sense, and – but then when he would question it, it of course would be a caucus and they would have to have extensive discussion about it. At the end of the day, again, a lot of discussion around that to make that thing work, but there was a lot of time involved in that.

Tr.p.59-60.To date, the parties have secured agreement on 103 out of 112 discrete provisions among all proposals that have been discussed for a contract. Petitioner Exh. A. As stated above, they are deep into bargaining over health insurance – which has involved some delay due to the Employer's failure originally to provide all necessary information about its own existing policies. Williams was confident at the hearing that once health care is finalized, the few remaining issues, including wages, short and long term health insurance, dental insurance and part of a vacation proposal (the other parts have been agreed to), would not be too difficult to

resolve; Williams testified that after resolving health insurance, "the rest of it will follow in line. It just naturally does in any contract. It goes pretty quick after that." Tr.p.77.[2]

The Employer's attorney attempted to sow doubt as to a phantom pension proposal lurking in the wings, which presumably might drag out bargaining. Tr.p.144. But his speculative questions to Williams as to whether Americold's Hutchison had spoken offline to Union Rep. Randy Belliel about the issue were rendered moot by Hutchison's testimony; the latter stated he spoke to Belliel on the phone only a couple times and that their conversations only addressed scheduling of bargaining and issues related to health care. Tr.p.169-170.

Williams stated that Union Exhibit 5 represented all the proposals that existed between the parties. Tr.p.82. The Employer's attorney wondered upon cross examining Williams whether the "miscellaneous" proposal alluded to some kind of unidentified "defined benefit pension" proposal. Williams noted that the 401k issue was "resolved;" that the parties had agreed to memorialize the company's existing 401k plan in the contract (and thus there was no indication of a "tentative agreement," since there was no bargaining over the pension). Tr.p.115, 184.

II- ARGUMENT

1) *LAMONS GASKET* RESTORED VOLUNTARY RECOGNITION BAR DOCTRINE – AND IS CLEAR AS TO THE PROPER STARTING POINT FOR CALCULATING A REASONABLE PERIOD

In *Lamons Gasket* the National Labor Relations Board ("NLRB") resoundingly restored its historical deference to voluntary recognition as a legitimate means for a Union to gain §9(a) status under the Act, one no less valid than NLRB election certification. *Lamons Gasket Co.*, 357 NLRB No. 72 (Aug. 26, 2011). Four years earlier in *Dana Corp.*, the NLRB had questioned

[2] Williams testified that he did not know what the "miscellaneous" entry on the list was; that the Union had the right to withdraw that placeholder. Tr.p.95. Another outstanding issue relates to production process reviews currently in progress; this is not anticipated to require a great deal of attention in bargaining, since Hutchison stated the process had no impact on day-to-day operations at this time. Tr.p.175.

recognition, and instituted a new rule that enabled employees to immediately challenge a union's recognition by demanding an NLRB vote. 351 NLRB 434 (2007). *Dana* announced that such a petition would be permitted within 45 days of recognition. *Id.* at 447. As a practical matter, a notice advising workers of this right to petition had to be posted in the workplace for 45 days after the NLRB was notified of the recognition and provided the "*Dana*" notice. Thus the period during which a newly recognized union could be subject to challenge could – and did – extend well beyond the 45-day period, which began only once the notice was posted, no matter how long it had been since actual recognition. *Lamons Gasket*, 357 NLRB 72 slip op. at 9.

Dana's impact on voluntary recognitions was profound – it removed the insulation traditionally afforded to parties finding themselves in a new collective bargaining relationship to facilitate earnest, serious bargaining in order to reach a first contract. Statutorily, that opportunity exists pursuant to an NLRB election following the Board's certification of a Union that has won the election. The Union then enjoys a "certification bar" – it has up to a year from its certification to obtain a new contract before any challenge can be made to its §9(a) status. 29 U.S.C. §§159(a), (c)(3) (2012); *Brooks v. NLRB*, 348 U.S. 96 (1954).

In *Lamons Gasket*, the NLRB noted that the statute is silent as to the existence of such a bar in the case of voluntary recognition. However by 1966 the NLRB had established the concept of a "recognition bar," giving a voluntarily recognized union a "reasonable" period of time to engage in bargaining before it could be subject to decertification. *Keller Plastics Eastern,* 157 NLRB 583 (1966). The recognition bar has historically been based on the same principles on which the certification bar relies: "'a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period of time in which it can be given a fair chance to succeed'" since "...the statutory policies that underlie [recognition and other bars to

elections] extend to voluntary recognition." *Id.*, at 2 (citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)). The "reasonable period" that a voluntarily recognized union is entitled to has generally been defined as no less than six months, and up to one year, before the union's §9(a) status can be challenged. *Keller Plastics,* 157 NLRB 583. As the *Lamons Gasket* decision noted, this had been "settled Board law since 1966." 357 NLRB No. 72 slip. op at 1.

Lamons Gasket restored and strengthened the recognition bar doctrine. The Board refined the rule of "six months" that was the baseline for a "reasonable period" in recognition bar cases. *Lamons Gasket* states explicitly that the six-month period begins with "the parties' first bargaining session," not the date of recognition. 357 NLRB 72 slip op. at 10. The Board was clear that it was establishing a new rule, not making a suggestion for future consideration, stating that its decision "define[s], for the first time, the benchmarks for determining a 'reasonable period of time,'" and that it was "alter[ing] the rule of *Keller Plastics* to define a reasonable period of *bargaining*, during which the recognition bar will apply..." 357 NLRB 72 slip op. at 1, 10 (internal citations omitted) (emphasis added). The need for such a bright-line date to start the clock could easily be found in earlier cases such as *Town & Country Plumbing & Heating, Inc.*, 352 N.L.R.B. 1212 (2008), where the parties argued over how to fix precisely this starting point.

The clear rule announced in *Lamons Gasket* has not yet been explicitly tested at the Board. In *Columbus Transit*, apparently the only case to date where the NLRB has examined *Lamons Gasket* in any depth,[3] the NLRB overruled an ALJ who had decided a "reasonable period of time" for bargaining had elapsed where a union had waited four months after

[3] A handful of other decisions have summarily denied or granted requests for review from Decisions by Regional Directors. *See*, e.g. *LaGrasso Bros. Inc.*, 2012 NLRB Lexis 731 (Oct. 22, 2012), *Lori's Diner Int'l, Inc.*, 2012 NLRB Lexis 297 (May 23, 2012), *AT&T Mobility, LLC*, 2011 NLRB Lexis 509 (Aug. 26, 2011), *Aramark Unif. & Career Apparel, LLC*, 2011 NLRB Lexis 507 (Aug. 26. 2011).

recognition before requesting bargaining. 357 NLRB No. 146 (2011). This case involved facts unlikely to repeat themselves; the Union appeared to have waited out the *Dana* notice posting period that *Lamons Gasket* rendered obsolete. In rejecting the ALJ's critique of the Union's wait on requesting bargaining, the Board seemed to borrow from the "reasonable time for bargaining" concept to determine whether the Union had "reasonably" waited to *initiate* bargaining. Where it was faced with an organizing campaign to counteract a decertification petition, and preelection proceedings in addition to preparing for an initial contract, the Board relied on an earlier *Lee Lumber* proceeding to find that "what transpired during that period" before the Union requested bargaining made it a "reasonable time" for the Union to wait. 357 NLRB at *6, citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 179 (1996), enfd. in relevant part 117 F.3d 1454, 1459 (D.C. Cir. 1997). *Columbus Transit* did not review, nor have other cases assessed more generally a Union's timeframe for requesting bargaining following voluntary recognition vis a vis the *Lamons Gasket* "first bargaining session" rule.

The instant matter is a perfect illustration of the need for the bright line *Lamons Gasket* rule ("a reasonable period runs for a minimum of six months from the date of the parties' first bargaining session") and of the reasons underlying the Board's decision for making – and announcing – its modification of the law. In this case, a Union that has responded to numerous efforts by workers seeking union representation, and a global corporation with dozens of collective bargaining agreements, voluntarily agreed to enter into a collective bargaining relationship. A majority of the workforce supports the Union; the workforce is split over two different facilities, with difficult and disparate scheduling issues, and a desire to maintain seniority on a plant-wide basis only. Despite the strong majority that the Union enjoys, a core group of employees have long opposed union representation.

The Union has made numerous choices directed at maximizing worker representation and participation in the collective bargaining process, specifically in light of the above factors. It chose to enter into a voluntary recognition agreement with Americold, instead of pursuing an NLRB election it was already confident it could win (with a petition filed in late May, 2012). It made this choice despite the fact that foregoing an election also meant giving up the benefits of a certification bar – an election would have meant that someone "lost," a result the Union sought to avoid. The Union then proceeded to expend significant resources holding numerous meetings to ensure that workers at both facilities had a full and fair chance to elect shop stewards, who would be bargaining committee members, and to discuss priorities for bargaining. The Union submitted an extensive information request to the Company, which replied with hundreds of pages of information, all of which were carefully reviewed by the Union's chief negotiator, Roger Grobstich. Grobstich also made an effort to understand the terms and conditions of employment for other unionized Americold employees, and to take initial steps for addressing changes in and improvements to employees' health coverage, always a central issue at the bargaining table. It took Grobstich a few weeks to complete these tasks, at which point he reached out to Americold to request dates for bargaining – 2.5 months after the recognition agreement was executed on June 18, 2012. Americold would not set immediate dates, but proposed dates within one month, to which the Union agreed. The Union and Company's chief negotiators traveled from Cedar Rapids, Iowa and Atlanta, Georgia, respectively, and bargaining began on October 9, 2012.

Had the Union taken the same steps after an election, no question would be raised as to whether it should have to face a decertification challenge at this time. Indeed, had the Union headed straight into bargaining after an election – without consulting with workers, electing

worker representatives, and making an effort to understand key issues impacting the parties' initial bargaining positions – it would similarly still enjoy the insulation of a certification bar. The same would even be true had the Union done absolutely nothing following an election up through the date the second decertification petition was filed.

To allow a decertification challenge to the Union at this point would undermine the animating spirit of and concrete reasons for the *Lamons Gasket* decision. The Union here should be lauded – not subject to a speedy removal – for making sure that it initiated bargaining only once it had fully prepared itself and the workers to do so. Nor should the Union have to divert resources and attention from bargaining in order to conduct a campaign among workers who are waiting to see what results bargaining will generate. And the NLRB should be taken at its word when it set such a specific date – the first bargaining session – as Day 1.

Without doubt, in some extreme cases – such as where the parties make no efforts to begin bargaining at all – six months from the date of a *first bargaining session* may be an unreasonable period of time. Reading the *Lamons Gasket* rule literally does not require granting insulation to parties where this is the case, since the Board still requires that the time afforded to parties in a recognition context be "reasonable." If the time elapsed between recognition and bargaining has been unreasonable, or other factors suggest it is no longer reasonable to bar a new election petition – if indeed the Union seems to be avoiding bargaining altogether as a way to infinitely delay facing a decertification – nothing in *Lamons Gasket* prevents the Board from proceeding accordingly to deny the parties the protection that is provided by a recognition bar.

This is not the case here. The Union has had to litigate its bargaining progress before concluding negotiations, which is likely soon. Union Rep. Williams noted the strain that a looming decertification puts on bargaining for a first contract, and the conflict created with

respect to advertising results on specific proposals before a final package. Both the Employer and the Union declined to enter evidence as to the content of specific proposals and agreements between the parties. Williams noted that since November, when Petitioner filed her first petition:

> [I]t's put a real bind for stuff to get out there to common folk to try to interpret where we're at...It doesn't make sense. It wouldn't behoove me to tell you I'm buying you a new GM and I'll give it to you tomorrow and then you go up there tomorrow and, no, I guess I don't have it. That's the way we try to make sure for our integrity on top of that to make sure we know what we're talking about when we do get together....In our world, I guess that has put a burden on and real questions out there with our membership as to what's going on. Do we have a contract? Is a contract going on? Has it stopped now? There's rumors [sic] that they pick up what's going on here, and we try to acknowledge those as much as we can. But really, it has put a burden on the process since before the first of the year.

Tr.p.73-74. The new bargaining relationship between the RWDSU and Americold must be allowed to take hold, and the Union must be given a real chance to achieve a first contract for workers that allows them to judge concretely what union representation will mean for them. Particularly given the parties' activities in the three and a half months between recognition and bargaining, *Lamons Gasket* should be applied strictly in this case, with the date of the first bargaining session – October 9, 2012 – considered to be the first day of a reasonable period, as the Regional Director correctly found.

2) UNDER *LEE LUMBER*, A REASONABLE PERIOD HAS NOT ELAPSED FOR PURPOSES OF BARGAINING

In *Lamons Gasket*, the Board announced its rule that a "Reasonable Period of time" for bargaining following voluntary recognition shall be no less than six months and no more than a year. Whether the period is to extend beyond the initial six months depends on a review of five factors announced in *Lee Lumber*, namely: 1) Whether the parties are bargaining for a first contract; 2) Whether the issues and bargaining process involved are complex; 3) How many

sessions have been held and over what period of time; 4) Whether the parties are close to agreement; and 5) Whether the parties are at impasse. *Lamons Gasket Co.*, 357 NLRB No. 72, slip op. at 10, n34 (Aug. 26, 2011), citing *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001). All five factors argue in favor of giving the parties more time to bargain. As discussed above *Lamons Gasket* articulated a clear policy position in favor of supporting bargaining in the context of voluntary recognition. "Testing the Union's mettle" means "the union must be given enough time to demonstrate what it can do for employees in collective bargaining…the focus is on the need to give unions a fair chance to succeed in contract negotiations before their representative status can be challenged." *Lee Lumber*, 334 NLRB at 401. In order to have its "fair chance" here, the Union needs and is entitled to more time.

A. **Impasse and First Contract.** The parties agree on several issues; first that the parties are not at impasse, and second, that they are bargaining for a first contract at the Rochelle facilities, and that the RWDSU and Americold have no other collective bargaining relationships at any facility. Both of these factors argue in favor of extending the recognition bar per *Lamons Gasket/Lee Lumber* to allow additional time for bargaining. "[I]f the parties are not at impasse, there is still hope that they can reach agreement. Accordingly…the absence of impasse weighs against…a finding [that a reasonable time for bargaining has passed]." *Lee Lumber*, 334 NLRB at 404.

As for a first contract, *Lee Lumber* established six months as the minimum period of time as "a fair estimate of the time unions need to accomplish in *renewal* contract negotiations… [while] a longer reasonable period of time may be called for in *initial* bargaining cases." *Id.*, at 402 and n37 (emphasis added). The *Lee Lumber* Board noted FMCS data that, twelve years ago in 2001, first contracts took an average of a year to reach, in those cases where the parties

succeeded in reaching a contract at all. *Id.*, at 403, n40. As of the hearing, barely six months had passed; three discounting those when the employer could not meet, as the Regional Director did.

The usual first contract issues underlying FMCS' data are alive and well in the Americold bargaining. There are significant challenges attendant to setting the rules of the road in a first-time relationship – as typified by the battle the parties had over the Employer's management rights proposal, where the Employer presented an extensive proposal beyond anything the Union expected, and ultimately refused to amend their initial proposal at all. At the table for the first time, and so lacking a pre-existing relationship and knowledge of the other party, the Union had no way to know that this was an issue where the Employer would not agree to budge. Similarly, working out a seniority system presented difficulties, the more so as the Union represents two facilities that historically have been part of different companies (one of which previously had union representation – Tr.p.38), and which maintain distinct identities and issues to this day. And the RWDSU represents another significant facility in Rochelle, meaning they have established something of an "area standard" which they seek to maintain. Tr.p.39.

The parties have also had the usual "getting to know you" hurdles, made more difficult by the Employer switching off lead negotiators, and the knowledge gap between local and corporate management, costing time at the table as the Employer clarifies its own position and understanding of how different proposals could affect the status quo. Americold's lack of day-to-day knowledge by corporate labor relations is yet one more factor common to first contract bargaining that argues for the parties being entitled to more time to reach an agreement.

B. Parties Need More Sessions, Company Scheduling Delays Cost Three Months

"Negotiations generally require time and meetings to bear fruit. The more time that has

elapsed since the parties began to bargain and the more negotiating sessions they have engaged in, the more opportunity they have had to reach a contract, and vice versa." *Lee Lumber*, 334 NLRB at 404. The Employer did not make itself available to bargain for nearly four months after the first two initial sessions. The Regional Director properly determined that this time should not be counted towards the initial six months, or the timeframe more broadly, in assessing whether a reasonable period of time has elapsed. An employer that has delayed bargaining in this matter should not receive the benefit of a speedier chance to rid itself of the Union, especially where the Union was pleading with the Employer to schedule more dates, and even considered filing unfair labor practice charges to compel it to do so. The Union was clear – and the Employer did not contest – that it has consistently made itself available while the Employer has consistently presented narrow windows for bargaining. The Union has never said no to a date proposed by the Employer. And in the sessions that have been held, significant progress has been made, in much the way that the Board has imagined in the context of a first contract negotiation. Indeed, part of the basis for the Board reserving its prerogative to extend a reasonable period to a full year is undoubtedly to accommodate bumps such as these. The parties simply have not had enough time yet adequately to bargain a first contract, as the Regional Director properly found.

C. **Complexity of Issues and Bargaining Procedures.** The Regional Director found that "it does not appear that the parties were facing unusually complex issues or had adopted complicated approaches to bargaining." Decision and Order of Regional Director Rik Lineback, dated May 23, 2013, p.7. The Union argued to the contrary, particularly because, although *Lee Lumber* identified complex issues or bargaining procedures as reasons for extending a "reasonable" period for bargaining, the Board did not give guidance there as to what issues would be considered complex. In terms of what would constitute complex bargaining

procedures, extensive committee structures and drafting a "living contract" instead of working off a template presented themselves as examples from the facts before the *Lee Lumber* Board. However, it did not elucidate other circumstances that might qualify as complex. 334 NLRB at 403. The Union did not and does not argue that getting a first contract at Americold in Rochelle Illinois is rocket science. But issues that may seem simple to a multi-national corporation are less so to a Union representing new members with all the particularities and prerogatives of that group of workers in that place and time. The Union maintains that this factor argues in favor of giving the parties more time to bargain. And notwithstanding the Union's disagreement with the Regional Director's determination on this point, "this factor is outweighed by the other factors, including the time spent bargaining and the availability of the parties." Decision and Order, p.7.

D. **Parties are Close to Agreement.** The parties have secured agreement on 103 out of 112 discrete provisions among all proposals that have been discussed for a contract. They are deep into bargaining over health insurance – which has involved some delay due to the Employer's failure originally to provide all necessary information about its own existing policies. Both parties were confident at the hearing that once health care is resolved, the few remaining issues, including wages, short and long term health insurance, dental insurance and some items related to vacations, would not be too difficult to resolve. No bargaining remains to be done over a pension plan.

Lee Lumber states that "which way the factor [of proximity to agreement] cuts depends on the context." 334 NLRB at 404. Parties on the verge of agreement may be considered to have enjoyed a reasonable amount of time to bargain; similarly time may be considered to have elapsed for parties for whom no agreement is anywhere in sight. *Lee Lumber* cited *Tob Job Building Maintenance Co.* for its finding a reasonable period of time had not elapsed where "'the

parties were in the midst of negotiations, had resolved some questions and had reasonable prospects of soon concluding an agreement.'" 334 NLRB at 404, citing 304 NLRB 902, 908 (1991). This is the case here. The Regional Director stated that "it is impossible to tell what would have occurred had the parties negotiated during the three months the Employer was unavailable...additional time in this context of this case may still facilitate an agreement." The Union firmly believes (and believes it showed at the hearing) that agreement is within reach.

III- CONCLUSION

For the reasons stated above, Petitioner's Request for Review of the Regional Director's Decision granting the parties more time to bargain should be denied.

Dated: New York, New York
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