

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE
SUBREGION THIRTY-THREE

AMERICOLD LOGISTICS, LLC.
Employer,

and

25-RD-108194

KAREN COX
Petitioner,

and

RETAIL, WHOLESALE AND DEPARTMENT
STORE UNION, UFCW, LOCAL 578
Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on July 9, 2013, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine if a recognition bar precludes the processing of the petition.¹

I. ISSUE

The Petitioner seeks a decertification election within a unit comprised of the approximately 111 individuals employed by the Employer in its two warehouse facilities in

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. 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.

Rochelle, Illinois.² The Intervenor, hereinafter called the Union, contends that the petition should be dismissed because a reasonable time to bargain has not passed since the Employer voluntarily recognized it as the exclusive collective-bargaining agent of the employees.³ In support of this contention the Union cites *Lamons Gasket Company, a Division of Trimas Corporation*, 357 NLRB No. 72 (August 26, 2011) (citing *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001)). The Union further contends that the standards set by the Board in *Lamons Gasket* defines a reasonable time to bargain as being up to a year beyond the initial date of bargaining, regardless of whether that date is more than a year after recognition occurred. The Petitioner and the Employer contend that a reasonable time to bargain has passed since the Employer voluntarily recognized the Union and that the Board in *Lamons Gasket* did not intend for the recognition bar to exceed one year after the date of recognition.

II. DECISION

For the reasons discussed in detail below, including the application of the Board's rulings in *Lee Lumber* and *Lamons Gasket*, I find that there is no recognition bar to an election. The Union's contention that the Board in *Lamons Gasket* held that the recognition bar can be extended up to a year after the first contract negotiation meeting, when that date is more than a year after the date of voluntary recognition, does not have merit. This specific scenario was not before the Board in *Lamons Gasket*, and therefore, it was not directly addressed by the Board. Yet, a review of *Lamons Gasket* in its entirety leads me to find that the Board did not intend a recognition bar to extend beyond a year from the date of recognition. Accordingly, I find that a recognition bar to an election did not exist at the time the petition was filed and order that an election be conducted in the Unit described herein.⁴

² The parties agree that the following employees of the Employer, herein called the Unit, 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, including warehouse employees, janitorial employees, and porter employees employed by the Employer, at its Rochelle, Illinois warehouses; but excluding office clerical employees, maintenance employees, customer service representatives, foremen, temporary employees, guards, and supervisors as defined in the Act.

³ Prior to the hearing the Union filed a Motion to Dismiss which was deferred until after record evidence was taken. For the reasons stated herein, the Union's motion is denied.

⁴ It is noted in the record that the Employer and the Union executed a contract contingent upon ratification by the unit employees prior to the petition being filed and that the unit employees ratified the contract one day after the petition was filed. There is no claim by the Union that a contract bar existed at the time the petition was filed, that the Employer engaged in unfair labor practices, or that any other bar to an election exists that would preclude an election.

III. STATEMENT OF FACTS

The Employer operates over 100 food storage warehouses nation-wide including two located in Rochelle, Illinois. The Rochelle, Illinois warehouses are separated by approximately a half mile with one being located on Americold Drive and the other on Caron Road. The Employer has operated the Americold Drive warehouse since at least 1993 and purchased the Caron Road warehouse in 2009. The Americold Drive warehouse is a perishable/cold food storage facility, and the Caron Road warehouse is a dry goods storage facility.

The Americold Drive warehouse employees were represented by the Teamsters for some period ending in 2004. The Union attempted to organize those employees in 2007 but lost the election. The Union attempted to organize both of the facilities in 2009 and again lost the election. The Union conducted another organizing drive during the first half of 2012 and filed a petition for election in May. The Employer agreed to a card check by a neutral party who found that the Union had valid authorization cards from 70 out of the 123 employees.⁵ The parties signed a recognition agreement that went into effect on June 18, 2012 for the Unit employees.

The Union and the Employer bargained on October 9, 10 and 11, and November 27, 28, and 29, 2012. There was an over three month break in bargaining caused by the unavailability of the Employer's lead negotiator due to the serious illness of a family member. The parties resumed negotiations on March 4, 2013, and also negotiated on March 5, 6, 11, 12, 13, and 16, 2013.

The Petitioner has filed two earlier decertification petitions with regard to this Unit. The petition in Case 25-RD-093419 was filed on November 19, 2012, less than six months from the date of recognition. It was dismissed on November 31, 2012, based upon a finding that a reasonable time to bargain had not occurred pursuant to *Lee Lumber* and *Lamons Gasket*.

The petition in Case 25-RD-102210 was filed on April 8, 2013, and the hearing was conducted on April 19 and 23, 2013.⁶ On May 23, 2013, a decision was issued dismissing the petition in Case 25-RD-102210 and finding a recognition bar existed at the time the petition was filed. Based upon the application of the *Lee Lumber* multifactor standard it was determined that a reasonable time to bargain following the Employer's voluntary recognition under the circumstances had not elapsed at the time the April 8, 2013 petition was filed. The Petitioner's request for review in Case 25-RD-102210 is still pending before the Board.

Since April 8, 2013, the Employer and the Union met and negotiated on May 8, 9, 10, 12, and 22, and June 25 and 26, 2013. The witness presented by the Union testified that the Employer actively engaged in the give and take of bargaining and there have been no unfair labor practices filed by either party.

⁵ The record reflects that there were approximately 111 employees in the unit at the time the petition was filed.

⁶ Administrative notice is taken of the record in Case 25-RD-102210.

Before the April 23, 2013 negotiation meeting, the parties had reached tentative agreements on the non-economic provisions of the contract. During the negotiation meetings held in May and on June 25, 2013, the parties came to tentative agreements on the economic provisions of the contract. On June 25, 2013, the Employer made its last few economic concessions including increasing employee bonuses from \$500 to \$600 for years in which no wage increase was provided by the collective bargaining agreement and the requirement that it implement a financial incentive program for the facility that did not have an incentive program at that time. The parties agreed that they had a tentative agreement on June 25, 2013.

The Employer put together the complete draft of all of the tentatively agreed upon provisions and presented it to the Union on June 26, 2013. The parties reviewed that document and made minor changes on that date. Both parties understood that the contract as revised on June 26, 2013, to be the Employer's last, best, and final offer. Both the Employer and the Union signed the contract on June 26, 2013, but the implementation of the contract was contingent upon ratification by the Unit employees.⁷

Before the ratification meeting was held, the petition in the instant case was filed on June 28, 2013. The ratification vote was conducted on June 29, 2013. Out of the 55 Unit employees in attendance, 31 voted to ratify and 22 voted to not ratify the contract with two employees abstaining. Although the contract has been ratified and signed by the parties, the Union does not contend that a contract bar blocks the processing of the petition because the petition was filed before ratification occurred.

IV. DISCUSSION

A. The Law

In *Lamons Gasket Co.*, 357 NLRB No. 72 (Aug. 26, 2011), the Board held that an Employer's voluntary recognition bars an election for a reasonable period of time. The Board, drawing from its decision in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), defined a reasonable period of bargaining after voluntary recognition to be "no less than 6 months after the parties' first bargaining session and no more than 1 year." *Lamons Gasket*, 357 NLRB at slip op. 10. The Board did not explicitly state in its decision that a reasonable period of bargaining after voluntary recognition cannot exceed a year from the time of voluntary recognition, but a reading of the entire decision leaves no other reasonable interpretation. Any other reading would mean that the Board intended to confer greater protection to voluntary recognition than Board certification. However, the Board stated in *Lamons Gasket* that "[a]n election remains the only way for a union to obtain Board certification and its attendant benefits. [f.n. 35 omitted.] Neither the pre-*Dana* law nor the law after today equates the processes of voluntary recognition and certification following a Board-supervised election." *Id.* at slip op. 10.

⁷ The proposed contract states: "This document will serve as the new collective bargaining agreement for Americold warehouses located at 1010 Americold Drive and 915 South Caron Road, Rochelle, Illinois and Retail, Wholesale and Department Store Union, UFCW, Local 578 upon the Union membership ratification of the [contract]."

The accompanying footnote states: “Such benefits include a 12-month bar to election petitions under Sec. 9(c)(3) as well as to withdrawal of recognition. . .” *Id.* at slip op. 10, f.n. 35.

Further, in *Lamons Gasket*, 357 NLRB at slip op. 3, f.n. 6, the Board in recognizing the practice of voluntary recognition states that the Board has permitted unions to petition for an election after being voluntarily recognized *in order to obtain certification and the attendant statutory advantages flowing there from* (emphasis added). Citing, *General Box Co.*, 82 NLRB 678 (1949). In *Lee Lumber* the Board, in defining that a reasonable period of time should not exceed one year, noted that the experience with the one year insulated period for newly certified unions demonstrates that one year is sufficient time for a union to demonstrate its effectiveness in negotiations on behalf of the employees. *Lee Lumber*, 334 NLRB at 402. To find that a “reasonable time to bargain” can extend beyond one year after voluntary recognition would result in voluntarily recognized representatives receiving an advantage beyond what the Board has stated is *only* available for certified bargaining representatives.⁸ Such a result was clearly not the intent of the Board in *Lamons Gasket*. A recognition bar for a time period extending no longer than 1 year from the date of voluntary recognition is consistent with Board doctrine.

B. Application of the Law to this Case

The Employer recognized the Union as the bargaining representative of the Unit employees on June 18, 2012. Therefore, the recognition bar, in the absence unfair labor practices, cannot exceed June 18, 2013. The petition in this matter was filed on June 28, 2013, which is beyond the 1 year time period since recognition was granted. Therefore, no recognition bar existed at the time the petition was filed. Furthermore, there is no evidence that any other bar to an election exists.

The Union’s contention that the Decision and Order issued by the Regional Director in Case 25-RD-102210 adjudicated the issues raised by the instant petition is without merit. That Decision only resolved the issue of whether a reasonable time to bargain had occurred before April 8, 2013, the date on which the petition in that case was filed. Furthermore, footnote 4 on page 10 of that Decision noted that the Board in *Lamons Gasket* was not enlarging the benefits of voluntary recognition to exceed those of a certified representative.⁹

⁸ Certainly, as the Union states, the Board has extended the certification bar beyond a year. However, in those situations the employer engaged in unfair labor practices and failed to carry out its duty to bargain in good faith. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962). In the instant case, it is unnecessary to address that issue, because no unfair labor practices relating to bargaining or employee disaffection from the Union have been filed against the Employer.

⁹ The footnote states: “The Board notes in *Lamons Gasket* that it was not making “changes to established law regarding secret-ballot elections” and that “an election remains the only way for a union to obtain Board certification and its attendant benefits” including a 12-month bar to election petitions under Section 9(c)(3). *Id.* at slip op. 10.”

C. Conclusion

In accordance with the Board's long-standing election bar rules articulated in *Lamons Gasket* and *Lee Lumber*, the recognition bar in this case cannot exceed one year from the date of recognition. Therefore, a recognition bar does not block the processing of the petition to an election.

V. 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 the Petitioner. 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 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 Subregional 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.). This list may initially be used by the undersigned to assist in determining an adequate showing of interest. In turn, the list shall be made available to all parties to the election.

To be timely filed, the list must be received in the Subregional Office, 300 Hamilton Boulevard, Suite 200, Peoria, Illinois, 61602-1246 **on or before August 2, 2013**. 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 website, www.nlr.gov,¹⁰ by mail, or by facsimile transmission at (309) 671-7095. 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 electronically filed, in which case no copies need be submitted. If you have any questions, please contact the Subregional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. 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.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **August 9, 2013**, at 5:00 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later

¹⁰ To file the list electronically, go to the Agency's website at www.nlr.gov, select **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹¹ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

SIGNED IN Indianapolis, Indiana, this 26th day of July 2013.

A handwritten signature in black ink that reads "Rik Lineback". The signature is written in a cursive, slightly slanted style.

Rik Lineback
Regional Director
National Labor Relations Board
Region 25, Subregion 33
300 Hamilton Boulevard, Suite 200
Peoria, IL 61602-1246

¹¹ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.