NATIONAL LABOR RELATIONS BOARD

AMERICOLD LOGISTICS, INC. Employer and RETAIL, WHOLESALE & DEPARTMENT STORE UNION, UFCW, LOCAL 578 Union-Intervenor and KAREN E. COX, AN INDIVIDUAL Petitioner	25-RD-108194

REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION SUBMITTED BY RETAIL, WHOLESALE & DEPARTMENT STORE UNION, UFCW, LOCAL 578

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I. INTRODUCTION

The issue in this case is one of first impression. Under *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), the parties are entitled to a recognition bar for a minimum of six months – and up to a year – of bargaining if it is reasonable to extend the bar under the circumstances of the specific case. When the instant decertification petition (Petitioner's third in eight months) was filed the day before the workers ratified a new collective bargaining agreement, the Regional Director of Region 25 decided to conduct an election even though the parties had not even bargained for six months. The Regional Director found that *Lamons Gasket* does not mean what it says. Instead, he mechanically applied a *per se* rule not found in the case to cut short the reasonable minimum period for bargaining when that period extends beyond the anniversary of an employer's recognition of the union. The Board should grant this request for review under Section 102.67(c)(1) of the Board's Rules and Regulations because it is a case of first impression and the Region has disregarded applicable Board precedent.

II. STATEMENT OF FACTS

The Retail, Wholesale and Department Store Union, UFCW, Local 578 (the "Union") filed a petition in May of 2012 to represent employees working for Americold Logistics, LLC (the "Employer"). Tr.1.30.[1] Following a card count by a neutral proving that the Union had majority support, the Employer voluntarily recognized the Union, executing an agreement to that effect on June 18, 2012. The Union withdrew its petition. Tr.1.30-31, U-Exh.1.1, 2.[2]

[1] Cites herein are to the April (Tr.1.x) and July (Tr.2.x) Transcripts from the hearings conducted on Petitioner's Second (25-RD-102210) and Third (25-RD-108194) petitions. The parties agreed at the July hearing on the third petition that the facts up through April 19, 2013 are those put into the record at the April hearing, while the July hearing established the facts thereafter. The Region stated that it administratively considered the record in the previous case. Tr.2-8.

[2] Cites to Exhibits mirror the transcript citations: U-Exh.1.x refers to a Union exhibit from the first, April hearing.

The parties first sat down to bargain on October 9, 2012, and despite employer "unavailability" in excess of four and a half months at various points along the way, they executed a first collective bargaining agreement ("CBA") on June 26, which was ratified by the employees on June 29, 2013. Tr.1.48-51, Decision and Order of Regional Director dated May 23, 2013 ("D&O"), p.7. From the date bargaining began until the date the contract was ratified, the parties engaged in active bargaining which lasted for a total of only 132 days, at least 48 days less than a six month period, because of the Employer's repeated suspension of the negotiations.

Only two sessions were held between October 9 and the end of November, 2012. Thereafter, the Employer became "unavailable" to meet for over three months, despite numerous Union requests for meetings and protests when none materialized. Tr.1.61-64, U.Exh.1.6, 7. Bargaining resumed March 4, 2013 and continued in April but was again suspended by the Employer for over a month, from May 22, 2013 until June 25.

Without explanation, the Employer ignored the Union's May 22, 2013, written request for negotiations to finalize the CBA by meeting on June 4, or 5, 6, 17, 18, 21, 25, 26, 27, or 28. The Union's representatives were physically available on these dates but also suggested that a conference telephone call could be used to deal with finalizing the CBA. Tr.2.32-34, 53-54. U.Exh.2.2a, 2b. The Employer ignored the Union's request to resume bargaining until June 13, when it wrote that it would be available on June 25 and 26, which, of course, was after the anniversary of its recognition of the Union. *Id.*

The only explanation offered by the Employer at the hearing for ignoring the Union's request in May for bargaining that could have taken place in early June, well before the anniversary of its recognition, was that it was busy. Tr.2.83-85. The Employer acknowledged that had negotiations taken place earlier, the "potential [for an agreement] exist[ed]." Tr.2.84.

The instant petition is Petitioner's third decertification petition filed with the counsel of the National Right to Work Foundation. Cox is an employee in the bargaining unit; she filed her first petition on November 19, 2012 (25-RD-093419) a little more than a month after bargaining began. The Region dismissed the petition administratively on December 21, 2012 because "it has not been demonstrated that a reasonable period for bargaining has passed since voluntary recognition was granted." Letter of Regional Director dated December 21, 2012 ("Letter").

Cox filed her second decertification petition on April 8, 2013 (25–RD-102210) "one day short of six month after negotiations commenced." D&O p.4. The Employer took the position before the Region that a reasonable period for bargaining had already passed.[3] Employer Post-Hearing Brief dated May 7, 2013, p.13.

In its dismissal of the second petition[4] the Region followed *Lamons Gasket* to apply the multifactor analysis required under *Lee Lumber.* The Region extended the six-month bargaining period because 1) "the time the Union took to initiate bargaining should not alter the standard applied in *Lamons Gasket* extending the recognition bar to 'no less than 6 months after the parties' first bargaining session,'" and 2) "the three-month gap in negotiations negatively affected the parties' ability to make progress in negotiations." D&O p.7. The Regional Director cited *Lamons Gasket* for the proposition that:

> "[L]engthy delays in bargaining results in the "undermining of the 'nascent relationship between the employer and the lawfully recognized union.'" ... Thus, the Employer's unavailability for more than 90 days had, in these circumstances, a significant negative impact on the parties' bargaining. This lengthy unavailability during a critical time for bargaining supports the Union's position that a reasonable time to bargain has not elapsed.

Id.

[3] The Employer also argued that a reasonable period for bargaining had passed when the third decertification petition was investigated. Tr.2.17.

[4] Petitioner's Request for Review in 25-RD-102210 is still pending before the Board.

In his Decision and Direction of Election ("DD&E") following the June 28, 2013, filing of the third decertification petition, the Regional Director ignored his prior analysis from the investigation of the second decertification petition. He failed to measure the reasonable period of time for bargaining from the date negotiations commenced, to take into account the impact of the Employer's "unavailability" to begin negotiations in September 2012 or the 101-day hiatus in negotiations which he previously found to have extended the six-month bargaining period. He also ignored the Employer's renewed "unavailability" for another 34 days in negotiations at the critical point just before the CBA was to be finalized.

Instead of following *Lamons Gasket*, the Regional Director applied a *per se* rule that a recognition bar cannot exist because the third petition was filed after the anniversary of the Employer's recognition of the Union.

For the reasons to be discussed herein, the Regional Director is incorrect.

III. ARGUMENT

1) *Lamons Gasket* is clear that voluntary recognition bars are for a minimum of six months, and up to a year from the date of the first bargaining session. Beyond six months, application of the *Lee Lumber* factors is required. Contrary to the DD&E here, the rule is not ambiguous.

In *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), the Board announced a new rule about the length of time that must be given to permit bargaining when an employer voluntarily recognizes a union. Under *Lamons Gasket*, in order to permit a reasonable time for the parties to bargain, a recognition bar exists for at least six months after bargaining begins and up to a year if it is reasonable under the particular facts and circumstances. ("We define a reasonable period of bargaining, during which the recognition bar will apply, to be no less than 6 months after the parties' first bargaining session and no more than 1 year." 357 NLRB No. 72 at 10.)

Significantly, and contrary to the Region's action in this case, the Board did not choose to measure the time a recognition bar is in place from the date of recognition, but rather from the date that bargaining begins. In this case it took the parties eight months and twenty days of actual bargaining to reach a fully ratified and signed collective bargaining agreement, but the negotiations were delayed by several lengthy periods, ranging from over one month to over three months and totaling four and a half months, during which time the Employer was simply "unavailable" to bargain. Thus the parties were able to *actually bargain* for less than six months.

Lamons Gasket dictates that any determination over whether to extend the recognition bar or not beyond the minimum six months requires the Region to apply the multifactor analysis set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001):

> (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 commended and 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.

357 NLRB No. 72 at 10, n.34.

As *Lee Lumber* makes clear, one does not get to the multifactor test unless and until there has been six months of bargaining:

> [A] potential drawback to a fixed time rule is that some employers may drag their feet in negotiations to avoid reaching a contract before the end of the 6-month period and then will withdraw recognition on the basis of evidence that the union has lost majority support. Negotiations also may be prolonged as a result of other circumstances. For these reasons, we have provided that the 6-month insulated period is only a minimum period, and may be extended up to an additional 6 months, depending on an analysis of other case specific factors.

334 NLRB at 402.

The Region conducted the multifactor analysis required by *Lamons Gasket* and *Lee Lumber* in the investigation of the second decertification petition and found that a reasonable

period of time to bargain extended beyond the first six calendar months from the date of the first bargaining session chiefly because the Employer had been "unavailable" for bargaining for more than three months. But it failed to conduct the same analysis when considering the instant petition. If it had, the Region would have determined that under *Lamons Gasket* and *Lee Lumber* the petition should be dismissed because, in addition to the delays addressed under the second petition, the Employer again became unavailable for bargaining for over a month just before finalizing the agreement.

Employers should not be allowed to manipulate the rule created by the Board in *Lamons Gasket* by failing or refusing to negotiate for substantial periods of time and thereby defeat the rule's purpose of promoting stability of labor relations by allowing a union a reasonable period of time to prove its mettle to the employees. This principal was explicitly recognized by the Board in *Lamons Gasket*.

2) The Regional Director's DD&E ignored key facts in the record, namely that the Employer was "unavailable" to bargain for substantial periods and that the Union had not enjoyed the minimum six months of bargaining on the date the petition was filed.

The DD&E in the instant matter completely ignores the Region's own findings during the investigation of the first and second petitions as well as the evidence adduced in the hearing on the third petition about another substantial period of the Employer's "unavailability."

In its Decision and Order of May 23, 2013, the Region rejected Petitioner's argument that the Board's determination of a reasonable period of bargaining should include the period before the Union requested bargaining or before bargaining commenced. After fully developing a factual record – the same record that governs up through April 2013 for purposes of the present petition – the Region rejected the Petitioner's argument and found that:

> Because of the new relationship between the Union and the employees as well as between the Union and the Employer, the time the Union took to initiate bargaining should not alter the standard applied in *Lamons Gasket* extending the recognition bar for 'no less than 6 months after the parties' first bargaining session.'

D&O, p.7. The Region also recognized that bargaining was delayed for a month after the Union made its request to bargain because the Employer was simply "unavailable" to bargain. *Id.*

The instant DD&E also ignores the Region's finding in its previous Decision and Order dismissing the second petition that because of the Employer's more than three-month "unavailability" from November 2012 to March 2013, the recognition bar had to be extended because the parties had not yet had a full six months of actual bargaining. The Region found that, "This lengthy unavailability during a critical time for bargaining supports the Union's position that a reasonable time to bargain has not elapsed." D&O p.7-8.

The Regional Director's DD&E does not even mention the fact that the Employer also became "unavailable" for a third time for over a month just prior to finalizing the terms of the CBA. And it also fails to assess the impact of the Employer's admission at the hearing that a contract could have been reached, and thus presumably ratified, before the anniversary of the Employer's recognition of the Union had the Employer not been "unavailable" and accepted the Union's offer to more timely meet.

While the record shows that on May 22, 2013, the last day of bargaining during the month of May, the Union proposed numerous dates to continue bargaining and that it even proposed doing a telephone conference call to finalize the agreement, the Decision fails to mention that the Employer's response was to completely ignore the Union's proposal for nearly three weeks. And the Decision ignores that when it did respond, the Employer said it would agree to resume negotiations nearly two weeks later, on June 24 and 25; thus the Employer was

again "unavailable" for over a month in the critical period just before the CBA was to be finalized. The Region's Decision merely states that, "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." DD&E p.4.

By ignoring new evidence of employer delays, and disregarding its previous factual findings of the earlier delays, the Region handled key facts in this case in an erroneous manner, thereby prejudicing the Union. Had the Region instead fulfilled its obligation to acknowledge and assess these facts, it would have properly concluded that the Union had less than six months to actually bargain a first contract, since the periods of the employer's unavailability – November 30-March 5 and May 23-June 24 – must be discounted from the eight months and twenty days between initial bargaining, and ratification of the contract.

3) The Regional Director's consideration of *Lamons Gasket* misapplies its holding and ignores the authorities relied upon by the Board in reaching its decision.

In *Lamons Gasket* the Board "[r]eturn[ed] to the previously settled rule that an employer's voluntary recognition of a union, based on a showing of the union's majority status, bars an election petition for a reasonable period of time...." In announcing a bright line rule for defining a reasonable period of time for bargaining: ("no less than 6 months after the parties' first bargaining session and no more than 1 year"), it held that, "In determining whether a reasonable period has elapsed in a given case, [that is to say, whether the bar will be extended beyond six months to as much as a full year] we will apply the multifactor test of *Lee Lumber*." 357 NLRB No. 72 slip op. at 10.

In his July 26, 2013, DD&E the Regional Director failed to apply this rule.[5] He ignored the 34-day May to June 2013 hiatus in bargaining, as well as the earlier periods when the Employer was "unavailable" to bargain (September 2012, November 2012 – March 2014), and made the finding that: "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." DD&E p.5.

The Regional Director's analysis of *Lamons Gasket* is based on his view that the decision must be disregarded under the facts of this case because applying it would mean that the Board "intend[ed] to confer greater protection to voluntary recognition than Board certification." *Id.* p.4. While clearly the Board did not intend in *Lamons Gasket* to confer greater protection to voluntary recognition than Board certification, the Board also did not intend to preclude a voluntary recognition bar from lasting for up to a full year after bargaining began if called for by the specific facts and circumstances in a particular case. This was the Board's explicit holding in *Lamons Gasket*, and the reason that it required application of the multifactor analysis set forth in *Lee Lumber* to determine whether to extend the six-month minimum safe harbor.

Numerous Board decisions bar an election on a petition filed beyond a certification's anniversary whenever an employer's refusal to bargain or other unfair labor practices have prevented bargaining. See, e.g. *Badlands Golf Course*, 355 NLRB 251 (2010) (six months remedial bargaining had been insufficient despite eight months of bargaining before that, due to circumstances of the case); *AT Systems, West, Inc.*, 341 NLRB 57 (2004) (reasonable time to

[5] In doing so, the Regional Director thus failed to proceed as *Lamons Gasket* clearly instructs – by applying the *Lee Lumber* factors to assess whether a reasonable period of time has passed. Between that and the Decision's cursory overview of the facts, the Region failed to set forth in its Decision a full and complete review of the facts needed by the Board to assess this case. Pursuant to Section 102.67(c)(1) of the Board's Rules and Regulations, the Region's failure to apply the law to the facts as it is clearly required to do in the governing case law, is in and of itself a compelling reason for the Board to grant this Request for Review of the Region's determination.

bargain had not passed, though the parties had been bargaining for 17 months) *Erie Brush & Mfg. Corp.*, 357 NLRB No. 46 n.11 (2011) (ordering the employer be required to bargain for one year under the *Lee Lumber* factors), vacated on other grounds 700 F.3d 17 (D.C. Cir.) 2012. By explicitly pointing to the multifactor analysis set forth in *Lee Lumber*, which was concerned with how long a remedial bargaining order would insulate the parties from a petition, *Lamons Gasket* imported *Lee Lumber's* principals for extending a bargaining obligation beyond six months into the context of a voluntary recognition. Thus it borrowed a concept used in the ULP setting, and firmly planted it in an R-case setting where no ULPs color the issue. And it approved the Board's position in *Lee Lumber* that the "'reasonable time' standard does not foreclose employees from ever rejecting a collective-bargaining representative; it only postpones a challenge to the union's representative status until the parties have had a reasonable time to bargain." 334 NLRB at 402.

There are good policy reasons for this approach:

> There is as much reason to require an employer to give [a bargaining relationship established by its voluntary recognition of a union as its employees' exclusive representative] a reasonable period in which to function without regard to a union's loss of majority status, as in the case of certifications, bargaining orders, and settlement agreements. In each, a bargaining obligation arises, whether by Board action pursuant to law, or by voluntary commitment, and it is similarly easy to visualize the obstruction to effective bargaining and denigration of statutory policy that could result if the employer in any of the given situations were permitted to repudiate his obligation solely because the union in question has lost majority status.

Brennan's Cadillac, Inc., 231 NLRB 225, 228 (1977) (bracket material in the quote), dissent, Board Chairman Fanning and Board Member Jenkins, quoting *San Clemente Publishing Corp.*, 167 NLRB 6, 8 (1967).

These policy considerations explicitly motivated the Board in *Lamons Gasket* to define a "reasonable period of *bargaining* during which the recognition bar will apply, to be no less than 6 months after the parties' first bargaining session and no more than 1 year." 357 NLRB at slip

op. 10 (emphasis added). There is no ambiguity in the Board's announcement of the rule, and its application to the facts here should be clear: *a reasonable period of bargaining is no more than one year from the day bargaining begins, and that date clearly was not reached when the third decertification petition was filed.*

The Regional Director's decision in this case is based on the assumption that in the context of a voluntary recognition, the rule in *Lamons Gasket* must be trumped by the need to not allow a recognition bar to outlast the anniversary date of the original recognition, lest a recognition bar be effectively superior for the Union to a certification bar. This view overlooks the fact that in an appropriate case, as previously discussed, an obligation to bargain may continue beyond the anniversary date of a certification. No less can be said of the effect of the *Lamons Gasket* rule, namely, that in a appropriate case, like the instant one, the obligation to bargain may continue beyond the recognition's anniversary.

But it is also clear that allowing an obligation to bargain beyond the anniversary of the voluntary recognition does not render the recognition bar superior to a certification bar. Only a certification guarantees for a full year that a petition may not be filed and processed to an election, while voluntary recognition only guarantees six months. In addition, in an appropriate case, the obligation to bargain flowing from a voluntary certification can be no longer than a year from the date that bargaining began.

The petition was filed in the instant matter 10 days after the anniversary of the voluntary recognition. The Board's appreciation of the practical realities of collective bargaining are clear from *Lamons Gasket's* contemplation of just this sort of timing issue. While it is theoretically true that an employer and union can begin bargaining the date that voluntary recognition is granted, it is much more likely that, as in this case, time will pass from the date of recognition to

the date that bargaining begins. The Union in the instant matter, like most unions, will take time to have meetings with workers to find out what proposals they will want the union to make and to elect rank and file members of the negotiating committee. And as in this situation, it is likely that a union will make an information request and wait for the employer's response before beginning negotiations.

Lamons Gasket contemplates that in an appropriate case, such as this one, the recognition bar may be extended past the one-year anniversary of recognition, for example for the 10 days that were appropriate here. More importantly, the policy issue presented by *Lamons Gasket* is the articulated view that such extensions are to be decided administratively in a representation case as opposed to being litigated, as they are in an unfair labor practice context. While a union which is voluntarily recognized may in an appropriate case file a refusal-to-bargain charge that will extend the employer's obligation to bargain and insulate the parties from an election, under *Lamons Gasket* the issue is not whether the employer has committed an unfair labor practice but rather whether the obligation voluntarily assumed by the employer to bargain with the union has been maintained for a reasonable period of time.

Lamons Gasket seeks to economize Board resources and the costs attendant to the parties by not requiring that an unfair labor practice be adjudicated to determine whether the six month recognition bar should be enlarged. This procedure also eliminates the great delays associated with adjudicating charges and recognizes that it is better to simply insulate the parties from the problems associated with a question concerning recognition for six to twelve months depending on the specific facts of the case.

In making these policy choices, the Board in *Lamons Gasket* drew on a long line of cases that have found the analysis for determining a reasonable time to bargain in the voluntary recognition setting to be highly fact-specific inquiries, where each case must stand on its own.

For example, in *MGM Grand Hotel*, cited with approval in *Lamons Gasket*, the Board found that a reasonable period of time had not passed, though a petition was filed just short of a year from the recognition date, and a few days before eight months of bargaining successfully concluded. In a general assessment of the recognition bar issue, the Board stated that:

> What constitutes a 'reasonable time' is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions. In determining whether a reasonable time has passed, the Board examines the factual circumstances unique to the parties' recognition and bargaining to determine whether, under the circumstances, the parties have had sufficient time to reach agreement.... By this policy, the Board seeks to enable newly established bargaining relationships to become productive and harmonious....

329 NLRB 464, 466 (1999). Thus *MGM* argued for the fact-specific nature of each case. Even Member Brame III, who dissented from the result, and claimed the supremacy of election certification over recognition, nonetheless conceded that, "Determining what constitutes a reasonable time for bargaining ... is not always a clear-cut task. The analysis is fact-intensive and depends on the particular circumstances of each case for 'there are no rules concerning what constitutes a reasonable time [and] each case must rest on its own particular facts.'" 329 NLRB at 472, citing *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 179 (1996), Affirmed by, in part, Vacated by, in part, as modified by *Lee Lumber*, 334 NLRB 399, *supra*.

Given the policy choices embodied in *Lee Lumber*, which gave a union more than a year to complete bargaining, and the policy choices expressed in *MGM*, which make the amount of bargaining occasioned by voluntary recognition a fact-specific inquiry, where each case must stand on its own, the Board in *Lamons Gasket* created a rule that a reasonable time to bargain

may extend beyond a one-year recognition anniversary – or may fall short it. For example, if the parties begin bargaining less than six months after recognition, they may be subject to a decertification challenge before the recognition year expires. Under *Lamons Gasket*, no union can rely on the certainty of at least a year to get a first contract. Thus, a voluntary recognition bar is simply different from a certification bar.

Moreover, taking the language of the *Lamons Gasket* rule to mean exactly what it says – as the NLRB intended, and as applied above – does not require granting insulation to parties who appear to be abusing the process set forth by that case. The Board still requires that the time afforded to parties in a recognition context be "reasonable." Thus, 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 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.

Instead of creating a dry, technical rule, *Lamons Gasket* sought to realize the goal, favored in both law and policy, of allowing a new collective bargaining relationship to take hold in the voluntary recognition context. The Board recognized the absence in the statute of a parallel to the statutory grant of a one year-certification bar in the case of elections, but thoroughly explicated the legitimacy and value of voluntary recognition to productive labor relations (357 NLRB 72 slip op. at 2-4). Workers are entitled to have a chance to test the union's "mettle," which 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.

Here, in order to have its "fair chance," the Union was entitled to at least the amount of time that it actually took to reach a contract. Excluding the period from November 29 to March 6 when the Company simply would not make itself available to meet, and a second such period from late May to late June, the Union and the Employer reached a contract in under six months of actual bargaining, which began on October 9, 2012 and ran to June 29, 2013. By any measure, the parties' bargaining here exceeded reasonable expectations, as they were bargaining for a first contract, for which an average of a year is commonly required. And the parties were able to reach an agreement despite the constant pendency of a decertification effort supported by the National Right to Work Foundation, which has represented Petitioner throughout these proceedings. The workers have had the chance to test the union's mettle, with their first contract, and they approve.

In cases like this, the Board's role in protecting the Union's "fair chance" means that they are empowered to consider the real facts on the ground. Key here were the employer's bargaining delays. This specific issue has been addressed in earlier cases that are foundational to *Lamons Gasket. MGM* cited *Keller* for the policy purpose of a recognition bar, where the presumption of continuing majority status enjoyed by a Union after voluntary recognition "removes from the employer the temptation to delay the bargaining process in the hope that such a delay would undermine the majority support of the Union." 329 at 466, *Keller Plastics* at 587. Yet in this case, and notwithstanding the absence of ULPs, the Union's status was questioned from virtually the moment it began bargaining. And whether the employer engaged in dilatory tactics because it was tempted by the possibility of the Union's removal is unknown, but it is a

conclusion that is hard to avoid, based on the Employer's eager participation in the cases here where it urged that the Board find no recognition bar.

Thus, granting the parties more time due to the Employer's unavailability demonstrates the purpose of the "reasonable period" rule; to allow the NLRB to make adjustments as necessary to ensure the realization of the goals of the Act. The Board has found that in a first contract setting, delays such as those here entitle the Union to more time. See, e.g. *Blue Valley Machine & Manufacturing Co.*, 180 NLRB 298, 304 (1969) (Where the parties were bargaining for a first contract and "a reasonable period for the conclusion of the negotiations [had not] elapsed by October 8, regardless of whether the bargaining be considered as having covered a period of 8 months from February to October, or a total of only 6 months, the time when, in fact, bargaining was in progress.") See also *National Labor Relations Board v. Cayuga Crushed Stone*, 474 F.2d 1380, 1384 (2d Cir. 1973) ("...the refusal to bargain itself...erodes the status of the Unions and discourages union membership...determining what a reasonable time [to bargain] should be is properly a decision for the Board.")

Balancing the equities, as the Board has historically done when examining the question of a "reasonable time to bargain" argues that the Union in this case should have the time when the company constructively refused to meet credited back to it. The equities argue an extra cushion in time as well because of the constant pressure the Union was under to stave off a decertification drive, and prove its value to workers being told they were being denied a free, fair choice. And in light of the above circumstances, the fact that bargaining here bore fruit should affirm that a reasonable period of time had not passed when the third petition was filed. "The Board has...expressed its reluctance to negate good-faith bargaining for an initial contract when the parties' efforts are on the verge of reaching finality." MGM, 329 NLRB at 466. That the

result here is a "reasonable period to bargain" which happens to have concluded about 10 days after the recognition anniversary does no offense to law or policy, and vindicates both the letter and spirit of *Lamons Gasket*.

4) Application of Lee Lumber's multifactor analysis to the uncontroverted facts of this case establishes that a recognition bar was in affect when the instant petition was filed.

As explained above, what the Region should have done in this case was to follow *Lamons Gasket's* instruction to apply the five *Lee Lumber* factors to the facts in this case. Doing so shows that the Union and Employer had not exhausted a reasonable period of time to bargain when they reached agreement on their first contract.

A. How many sessions and over how much time.

"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 over three months after the first two initial sessions in November and December and for over one month in May-June. Substantial periods of unavailability for bargaining should not have been counted towards "no less than six months" in assessing whether a reasonable period of time has elapsed.

The Union was clear – and the Employer did not contest – that it consistently made itself available to bargain. Tr.1.61-64, 101-103. Yet the Employer consistently presented only narrow windows for bargaining. The Union never said no to a date proposed by the Employer. *Id.* 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 had not had enough time to adequately bargain a first contract when the petition was filed.

B. Impasse and first contract

The parties have never disagreed on several issues; first that the parties were never at or close to impasse, and second, that they were bargaining for a first contract at the Rochelle facilities. Tr.1.9, Tr.2.56. (The Union and Employer have no other collective bargaining relationships at any other facility. Tr.1.39.) Both of these factors argue in favor of extending the recognition bar per *Lamons Gasket/Lee Lumber* beyond the minimum of six months under the rule. "[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.

Lee Lumber makes it clear that six months of bargaining is the average minimum period of time "unions need to accomplish [reaching a contract] 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 took note of FMCS data that, twelve years ago in 2001, first contracts took a year to reach on average, in those cases where the parties succeeded in reaching a contract at all. *Id.* at 403, n.40. In this case an agreement was reached in less than nine months after bargaining began, *including* the four months that should be discounted due to the Employer's "unavailability."

C. Proximity to Agreement

This factor is among the strongest weighing in favor of finding that the parties did not go beyond a reasonable time for bargaining; they have secured an agreement, which now governs

this workplace. At the time the petition was filed, the parties had executed their agreement just two days earlier; it awaited ratification by the workers the next day. The reaching of an agreement vindicates the policies set forth in *Lamons Gasket*.

D. Complexity of issues and bargaining procedures.

Lee Lumber identified complex issues or bargaining procedures as reasons for extending a "reasonable" period for bargaining. However, the Board did not give guidance as to what issues would be considered complex. In reviewing the Second Petition in this case, the Region did not perceive unusually complex issues or bargaining approaches, despite evidence the Union introduced to the contrary. D&O p.7. On the other hand, the Region's reductionist overview of the bargaining in June – and how little occurred there, in the Region's view (DD&E p.4) – simply underscores the likelihood that a contract would have been reached at any of the earlier dates the Union had requested for bargaining. Thus this factor also supports the notion that a reasonable period had not expired when the petition was filed, albeit indirectly.

IV. CONCLUSION

For the reasons stated herein, the Board is respectfully urged to grant the Union's Request for Review of the Regional Director's Decision and Direction of Election and order the dismissal of the instant petition.

Dated: New York, New York
August 16, 2013

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Union's Request for Review in case 25-RD-108194 was served on the parties today via email to:

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