NATIONAL LABOR RELATIONS BOARD

In the Matter of:	:	
AMERICOLD LOGISTICS, LLC,	:	
Employer,	:	
and	:	
KAREN E. COX,	:	**Case No. 25-RD-108194**
Petitioner,	:	
and	:	
RETAIL, WHOLESALE & DEPARTMENT STORE UNION, UFCW, LOCAL 578	:	
Intervener,	:	

UNION'S BRIEF FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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Table of Contents

TABLE OF AUTHORITIES

Page(s)

CASES

I. INTRODUCTION

On September 9, 2013, the National Labor Relations Board ("Board") granted the request of the Retail, Wholesale and Department Store Union, UFCW, Local 578 ("Union") for review of the Regional Director's Decision and Direction of Election ("D&DE") in the instant matter because it raises substantial issues warranting review. The parties were directed to respond to two questions:

1. Whether the Regional Director correctly found under *Lamons Gasket Co.* that there is no recognition bar because the petition was filed more than one year after the Employer recognized the Union;

2. If the Regional Director erred, whether a reasonable time for bargaining had elapsed at the time the petition was filed.

Under *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), once an employer has voluntarily recognized a majority-supported union, the parties are entitled to a recognition bar for a minimum of six months from the date of the first bargaining session – and up to a year – for 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 actively bargained for six months.

The Regional Director dispensed with *Lamons Gasket*, failed to apply the factors set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402

(2001) as *Lamons Gasket* requires, and instead substituted a *per se* rule not found in *Lamons Gasket* to mechanically cut short the reasonable minimum period for bargaining when that period extends beyond the first anniversary of an employer's recognition of a union.

The Director should have applied *Lamons Gasket* and *Lee Lumber's* criteria. Had he done so, the decertification petition would have been dismissed.

II. STATEMENT OF FACTS

The Union filed a petition in May of 2012 to represent employees working for Americold Logistics, LLC (the "Employer") at two plants in Rochelle, Illinois, one at Americold Drive and the other at Caron Road. 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]

The subsequent bargaining history is punctuated by Employer delays. For three significant periods of time the Employer was simply "unavailable" to bargain. First, the Employer was unavailable for over a month after the Union asked for bargaining. Second, after only two bargaining sessions, held over a

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[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 23, 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, U-Exh. 2.x to an exhibit from the second, July hearing.

month apart, the Employer became unavailable for a three and a half month period. Third, on the eve of finalizing the contract, when little separated the parties, the Employer again became unavailable for over a month. Contributing to the delays were a series of decertification petitions, to which the parties had to devote their time and attention, as well as the Employer's inadvertent failure to timely provide all requested information about its health insurance benefits.

Following recognition, the Union began holding numerous meetings with workers throughout the summer of 2012 in order to ensure maximum representation of diverse worker interests and desires by electing shop stewards at each of the two facilities and soliciting worker proposals for bargaining. Tr1.40-42. This was difficult and time consuming because the roughly 100 employees at Americold worked 10 different shifts with two completely different sets of schedules at the two facilities. Tr.1.36-37.

Ultimately the Union staggered several meetings at which stewards were elected to serve on the negotiating committee, issues for bargaining were discussed, and proposals from workers were solicited. Tr.1.41-42. The Union then consolidated workers' feedback into a set of union proposals for bargaining. Tr.1.46.

The Union made an information request at the end of July 2012, and after receiving the Employer's response, requested bargaining in early September, but the Employer was "unavailable" until October 9, 2012, to

bargain. Decision and Order of Regional Director dated May 23, 2013 ("D&O"), p.7.[3]

The parties first sat down to bargain on October 9, 2012, and despite the Employer's subsequent "unavailability" to bargain in excess of a cumulative four and a half months at two points along the way, they executed a first collective bargaining agreement ("CBA") on June 26, 2013, which was ratified by the employees on June 29, 2013. Tr.1.48-51, Tr.2.45-51, U.Exh.2-3.

Because of the Employer's repeated and unexplained suspension of the negotiations from the date bargaining began until the date the contract was ratified, the parties engaged in active bargaining for a period of time lasting for a total of only 132 days, at least 48 days less than a six month period.

During the nine calendar months of bargaining, the parties only had nine sessions, most lasting more than a day, owing to the need of the Employer's representatives to travel considerable distance and their limited availability. Tr.1.48-50. Bargaining took place in October and November – then did not resume until March. The parties met for two multi-day sessions in March, two single day sessions in April, and two multi-day sessions in May. The last and final session was two days long in late June.

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

[3] Petitioner's Request for Review of the Decision and Order dismissing Petitioner's Second (25-RD-102210) decertification petition is still pending before the Board.

on their work with the employees, the Employer began by presenting its proposed "model" contract.

Much of the first session in October was spent in caucuses and discussions to ensure the Union understood the Employer's proposed collective bargaining agreement, 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.1.49-51.

At the second bargaining session, held November 27, 28 and 29, 2012, because that is when the Employer was next available to negotiate, significant progress was made, and the parties were able to reach tentative agreements on more than half the provisions over which they bargained. Tr.1.55-56, 58-59, U-Exh.1.5. (Fifty-five out of 112 provisions in the proposed collective bargaining agreement were "TA'd" by November 29, 2012. *Id.*)

Progress was achieved at the second bargaining session 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. Tr1.51-52, 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.1.52-53.

Thereafter, the Employer became "unavailable" to meet for three and a half months despite numerous Union requests for meetings and protests when none materialized. Tr.1.61-64, U.Exh.1.6, 7. At the end of the bargaining on November 29, the Employer told the Union it had no available dates in December. The Employer said its first available dates for bargaining were 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.1.61, U-Exh.6. It postponed that session until February 4, but soon cancelled those dates as well. Tr.1.62-63, U-Exh.7.[4]

When bargaining finally resumed in March, the parties began discussing economics, with the Union focusing on health care at the two three-day sessions held on March 4, 5, 6, and March 11, 12 and 13. Tr.1.64. In both the Union and Employer's view, health care represented the most challenging issue that had to be agreed upon before resolving the other economic issues. Tr.1.66-67, 173.

The Union proposed and the Employer reviewed the possibility that it would become a participating employer in the Union's health fund. Tr.1.64-67. Resolution of this issue was delayed because the Employer had inadvertently

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[4] In its prior decision on the second decertification petition, the Region evaluated the impact of this delay, stating that:

> In *Lamons Gasket,* the Board noted that lengthy delays in bargaining results in the "undermining of the 'nascent relationship between the employer and the lawfully recognized union.'" Thus, the Employers [sic] unavailability for more than 90 days had, in these circumstances, a significant negative impact on the parties' bargaining.

D&O p.7-8 (citations omitted).

failed to earlier provide the Union with certain requested key information about its current health insurance policy, something which the Union overlooked. This information had not been included with other information produced about the Employer's health plans in August 2012, notwithstanding the Union's request for it. Tr.1.180-181. Since the Union received all needed health care information for the first time in March 2013, more than nine months after asking for it, the Union had to re-tool its analyses and comparison to enable the Employer to assess the potential costs and benefits of becoming a participating employer. Tr.1.65-66.

The parties met for bargaining on April 8 and 16, and again in May on May 8, 9 and 10, and May 21 and 22. Tr.1.67-68, Tr.2.24-25. In April, the parties focused heavily on health care. As mentioned, the Union had to retool its proposal after learning that the Employer had a "plus one" option in addition to family and single options, which the Union had not known about. Tr.1.65-66. Further, financials from 2012 finally became available reflecting the utilization and costs of the Employer's plan, which also impacted the Union's original estimates of health care costs and utilization. *Id.*

The Union made its first wage proposal in April, though that proposal did not include concrete wage numbers, as the Union was waiting to see where the parties ended up on health care. Tr.1.68, 85-86. Also, at the April sessions, the parties began discussing specific grandfathering issues relating to a few employees, as well as production standards. By April 16, the parties had reached agreement on 103 out of 112 discrete provisions making up the

proposals that were at one time or another on the table for discussion. U-Exh.5.

Five days of negotiations took place in May. In the two sessions held that month the parties finally made their way through the health care discussion, which also enabled them to talk more concretely about wages. Tr.2.26-30. Eventually the Union agreed to keep the Employer health plan, though additional bargaining was done over certain terms of that plan. Tr.2.35-36. This enabled the parties to begin wage discussions in earnest, which included numerical proposals. Tr.2.76-77. They also began drafting specific side letters to address the issues requiring grandfathering, including certain employees who had additional vacation time, and certain employees who had earned higher weekend rates of pay; the parties were most of the way to agreement on all the issues by the end of bargaining in May.

While the parties ended May 22 on the verge of a complete agreement, the Employer again without explanation suspended the negotiations for over a month, and became unavailable to meet before June 25.

Before breaking up on May 22, the Union told the Employer it was emailing proposed dates to complete the contract, which it did that day. The Employer ignored the Union's May 22 email and its proffer of June 4, or 5, 6, 17, 18, 21, 25, 26, 27, or 28 to meet and finalize the contract. Tr.2.73. While the Union's representatives were physically available to meet on the proffered dates, the email 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. According

to the Employer, "I don't know that there was any response to" the Union's May 22 email (Tr.2.73); this was "purely an oversight." Tr.2.85.

The Employer's only explanation offered at the hearing for ignoring the Union's May 22 request for bargaining in early June was one company negotiator saying that the other company negotiator was busy (Tr.2.83-85), even though the negotiators had previously switched off when the other could not attend the negotiations. Tr.1.167-168.

The Employer ignored the Union's request to resume bargaining until June 13, when, after being prodded again by the Union for dates, it wrote that it would be available on June 25 and 26, which, of course, was after the first anniversary of its recognition of the Union. Tr.2.53-54.

The Employer acknowledged at the hearing that had negotiations taken place on a date offered by the Union before the first anniversary of its recognition, the "potential [for an agreement] exist[ed]." Tr.2.84.

From all indications in the record very little needed to be addressed on June 25 to reach a final tentative agreement and first contract. Chief company negotiator Hutchison said he was not surprised when an agreement was reached early on June 25 after only a few hours of bargaining because there "wasn't a whole lot of difference between that proposal and what had been proposed in early May." Tr.2.69.[5] The agreement was reached according to all

[5] The record is not very detailed about how agreement was reached on the various outstanding issues on the morning of June 25, probably because the Hearing Officer did not believe that was necessary under the law to be applied in this case. According to the Hearing Officer, the "main" question in the case was to be answered by application of the "*Lee Lumber* factors." For this reason the Hearing Officer was concerned with finding out "how close" the parties were between May 22 and June 25 to "an agreement, I would suppose that's relevant. So why don't

parties in the afternoon of June 25. Tr.2.31, 44, 70, 76. June 26 was used by the Union to review the Employer's rewrite of the draft agreement incorporating the changes that were agreed on the day before. Tr.2.45.

The parties executed the tentative agreement on June 26 (Tr.2.46-47) which by its terms would go into effect upon ratification by the bargaining unit. Tr.2.47.

Three days later a ratification vote was conducted on June 29, a Saturday, with notices being posted beforehand in the two plants. The Union also attempted to telephone all 111 members of the bargaining unit to alert them to come to the ratification meeting. In the secret ballot vote, the contract was ratified by a majority of those present and voting. Tr.2.48-49, 52, 59.

The instant petition is Petitioner's third decertification petition filed with the assistance of the National Right to Work Foundation. Karen 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").

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we go with that and let's discuss how close we were to an agreement. But we don't have to get into the nitty-gritty details of, you know, we passed this proposal, they passed [that] proposal, because that's more appropriate for an 8(a)(5) charge, and [here] there's no allegation of failure to bargain or bad faith bargaining. So let's go with that." Tr.2.56-57. The record shows that the parties reached agreement on June 25 concerning outstanding minor issues involving wages, production standards and an incentive plan, a shift differential involving one worker, and certain aspects of the Employer's health insurance. See Tr.2.38, 76.

Cox filed her second decertification petition on April 8, 2013 (25–RD-102210) "one day short of six months after negotiations commenced." D&O p.4. The Employer took the position before the Region that a reasonable period for bargaining had already passed.[6] Employer Post-Hearing Brief dated May 7, 2013, p.13.

In its dismissal of the second petition[7] the Region followed *Lamons Gasket* and that case's direction to apply the multifactor analysis required under *Lee Lumber.* The Region found that a reasonable period of time to bargain had not elapsed in the six months since the parties had begun bargaining.

Finding that the parties were bargaining for a first contract, and not at impasse, the Regional Director focused in particular on "the three-month gap in negotiations" which he held "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.

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

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

The Director also found that "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.'"[8]

In his July 26, 2013 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 and to apply *Lee Lumber* to assess its five factors in determining whether the parties had bargained for a reasonable period of time. Doing so would have required him to take into account the impact of the Employer's "unavailability" for more than a month to begin negotiations in September 2012 and the 101-day hiatus in

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[8] Petitioner had argued that the four-plus months between recognition and the start of bargaining should be counted against the Union, such that the Region should discount *Lamons Gasket's* rule that six months to bargain is measured from the date of the first session. In reviewing the history of the bargaining, the Region found that:

> The Union presented evidence that it took longer than usual for the Union to establish its bargaining committee and strategies because the Unit involves two facilities where one facility works on six shifts and the other on three shifts. This caused communication problems which resulted in the Union having to hold two meetings to elect Union stewards. Also, it is the Union's practice to meet with the employees to gather their input on contract negotiations. Because of the different shifts at the two facilities, the Union conducted six meetings to gather that input. The Union then submitted a comprehensive request for information to the Employer on July 30, 2012, and received a timely response from the Employer on August 16, 2012. Shortly thereafter the Union requested bargaining dates in September but the Employer was not available until October. Therefore, the evidence reveals that it was only a little over two months between recognition and the Union's request to bargain.

D&O, p.7. See also Tr.1.43-45, 48. U-Exh. 3, 4.

negotiations from November 30, 2012 to March 4, 2013 which he previously found to have extended the six-month bargaining period.

In addition, the Regional Director also ignored the Employer's renewed "unavailability" to negotiate for another 34 days at the negotiation's most critical juncture – when the parties were "in the zone" of reaching agreement.

Instead of following *Lamons Gasket*, the Regional Director applied a *per se* rule that a recognition bar cannot exist whenever the bargaining extends beyond the first-year anniversary of the Employer's recognition of the Union. For the reasons to be discussed below the Regional Director's decision should be reversed and the petition dismissed as untimely due to the recognition bar in place as of the date the petition was filed.

III. ARGUMENT

A. The Regional Director did not correctly find under *Lamons Gasket Co.* that there is no recognition bar because the petition was filed more than one year after the Employer recognized the Union.

Nothing in *Lamons Gasket Co.*, 357 NLRB No. 72 (2011) suggests that it contemplates a *per se* rule cutting off the bar to a petition filed more than one year after the date of voluntary recognition. Indeed, to the contrary, under the rule announced in *Lamons Gasket* the recognition bar as a matter of law can exist for more than one year after the date of recognition because the bar is measured from the date bargaining begins, not the date recognition was granted.

Under *Lamons Gasket*, in order to permit a reasonable time for the parties to bargain, a recognition bar exists for at least six months from the date 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.)

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

> (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and 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. Significantly, none of the tests concern whether it is more than a year after recognition was granted.

For the same reasons that *Lee Lumber* eschews a fixed six month rule, the Board should not now superimpose onto the rule a fixed one year time limit measured from the date of recognition:

> [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.

While it goes without saying that 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 realities of bargaining, well known to practitioners and the Board, requires this timetable if the "up-to-a-year-recognition bar" is to be meaningful.

The fact that the Board measures the duration of the recognition bar from the beginning of negotiations and not from the recognition date shows that the Board appreciates the practical realities of collective bargaining. While it is theoretically possible for bargaining to begin on the date of recognition, as a practical matter it is much more likely that, as in the instant case, bargaining will begin sometime after recognition is granted. Like the Union in the instant matter, unions will frequently take time to meet with the workers, elect shop stewards and find out what the workers want in a contract. In addition, most unions make an information request and do not begin to bargain until they have received the employer's response and have analyzed it for purposes of formulating demands.

Lamons Gasket and *Lee Lumber* clearly contemplate a recognition bar being available beyond the recognition's first anniversary. For if the recognition bar could not extend beyond the one-year anniversary of recognition, then *Lamons Gasket's* rule would be rendered meaningless, as no Union could ever actually be granted a year of protected bargaining unless it began bargaining the same day as recognition.

This is similar to the rule in the context of a certified union where unfair labor practices can extend the certification bar beyond the certification year. 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 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 an additional six months beyond the ten the parties had already bargained under the *Lee Lumber* factors), vacated on other grounds 700 F.3d 17 (D.C. Cir. 2012). No less should be allowed in the voluntary recognition context when the specific facts and circumstances warrant it, even when the facts and circumstances do not necessarily constitute an unfair labor practice.

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* principles 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 need 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 the Board's approach in *Lamons Gasket*:

> 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).

While a voluntarily recognized union may in an appropriate case file a refusal-to-bargain charge that extends the employer's obligation to bargain and insulates 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 promote negotiation of collective bargaining agreements while economizing 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. Instead the focus is on whether there are facts and circumstances which should insulate the parties beyond the six months in order to foster the full growth of a collective bargaining relationship. 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 representation 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 a highly fact-specific inquiry, where each case must stand on its own.

For example, in *MGM Grand Hotel, Inc.*, 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) (internal citations and quotes omitted). Thus *MGM* argued for the fact-specific nature of each case.

Even Member Brame III, who dissented from the result in *MGM*, 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*.

Drawing on 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 of it. For example, if the parties begin bargaining less than six months after recognition, and are not found to be entitled to a full additional six months under the "reasonable time analysis" 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 – 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 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 to delay facing decertification – nothing in *Lamons Gasket* prevents the Board from proceeding accordingly to deny the parties the protection that is provided by a recognition bar.

The Regional Director disregarded the holding in *Lamons Gasket* because, in his view, application would mean that the Board "intend[ed] to

confer greater protection to voluntary recognition than Board certification." DD&E, p.4. His view is wrong because of the differences between the two bars.

Allowing an obligation to bargain beyond the anniversary of a voluntary recognition, under particular facts and circumstances, does not render the recognition bar superior to a certification bar, as the Regional Director assumes. Only 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. The party asserting the recognition bar, most likely the union, has the burden of asserting facts showing that the bar should be extended beyond the first six month insulated period.

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 National Labor Relations Act, as amended, 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.

These considerations 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. That date clearly was not reached when the third decertification petition was filed.

B. A reasonable time for bargaining had not elapsed when the petition was filed.

In response to the two previous decertification petitions, the first filed a month after the start of bargaining and the second filed the day before the six month anniversary of the commencement of bargaining, the Region applied *Lamons Gasket* and *Lee Lumber's* multifactor test to determine that in both instances the collective bargaining parties had not had a reasonable time to bargain: when the first petition was filed, the initial six months of bargaining had not elapsed and when the second was filed, the recognition bar was found to extend beyond the six months after bargaining had begun. In dismissing the Second Petition, the Region relied on several of the *Lee Lumber* factors; most importantly, the Employer's discontinuing negotiations for three and a half months which caused the Director to hold that the parties were entitled to more time to bargain.

Application of the five factors set forth in *Lee Lumber* to the facts of this case requires the recognition bar to be extended beyond the filing date of the third decertification petition, particularly as the Regional Director's original factual and legal findings on the Employer's lengthy bargaining delays were just as meaningful in the context of the third petition as in the second.

(1) *Whether the parties are bargaining for an initial contract.*

It goes without saying that the instant negotiations were over a first contract and this factor mitigates in favor of extending the six month long recognition bar. But what strengthens this factor is that unlike other possible first contract negotiations, the Union and Employer have no other collective bargaining relationships at any other facility. Tr.1.39, 164. This truly was a first contract in every sense of the phrase, not only for the particular plants but also for the particular parties.[9] *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 showing that, twelve years ago in 2001, reaching first contracts took a year on average in those cases where the parties succeeded in reaching a contract at all. *Id.* at 403, n40. In this case an agreement was reached in less than nine months after

[9] By contrast the Regional Director of Region 4 held that where the parties are using a model contract created by the parent union and the employer and there is no need to develop brand new language, the significance of the agreement being a first contract is lessened. *See, Americold Logistics LLC*, 04-RD-109029 Slip Op. at 7 (August 23, 2013).

bargaining began, *including* the four and a half months that should be discounted due to the Employer's "unavailability."[10]

(2) The complexity of the issues being negotiated and of the parties' bargaining processes.

The negotiations began with each party having independently thought out the terms of an entire contract. The Union spent a considerable amount of time and effort meeting with the workers and formulating demands, and came to the first bargaining session with a comprehensive set of initial proposals. Usually, a union presents its demands and the first session is devoted to the employer going through the demands and attempting to understand the issues they represent. In this instance, the Employer led off in the first session by presenting a full blown contract that it wanted the Union to adopt. Such an opening foreshadows that negotiations are likely to be long and difficult because both parties are now trying to shape every aspect of each sentence in

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[10] In finding the "first contract" factor weighed in favor of allowing more time to bargain in the context of the Second Petition, the Regional Director found as follows:

> The Union presented evidence to support a finding that the parties' new relationship had impacted bargaining. The Union's Business Agent testified that the Union's unfamiliarity with the type of management rights clause that the Employer contends is "model" language from its other contracts resulted in a significant amount of time spent negotiating over this language. Also, the Union noted that the practice of having six shifts in one facility and three in the other facility caused difficulty in negotiating issues such as how seniority would affect selection for layoffs, overtime, etc. There is also evidence that additional time has been taken to negotiate benefit plans because the Union is presenting its benefit plans to the Employer for the first time. This process was delayed first by the Employer inadvertently failing to provide the Union with information about its employee-plus-one dependent insurance plan for at least seven months. Once the Employer provided the information, the Union apparently overlooked receiving this information that was attached to an email for nearly a month. These delays in negotiation, caused mostly by lack of familiarity between the parties, serve as examples of the kind of difficulties the Board was attempting to account for in considering whether the parties were negotiating a first contract.

D&O, p 6.

the outcome of the negotiations and achieve language that tends to be more beneficial to their side. By the end of the negotiations the parties had to reach agreement on 112 provisions that had been on the table at one time or another, a figure that happens to exceed the number of bargaining unit members covered by the agreement.

Complex issues were negotiated. Changes to the company's health insurance including the Union's proposed adoption of its own health plan make for difficult negotiations, but here the process was complicated further by the Employer's inadvertent failure to timely provide all the information asked for by the Union before the beginning of the bargaining and the subsequent need to re-tool economic proposals and analyses to accommodate new information about the Employer's benefit program. Also complicating the issue was the Employer's need to increase co-pays and employee contributions for the same coverage provided before the union was recognized. As recognized by the parties on the record, health insurance is perhaps the central and most complex bargaining issue, which had to be resolved before other economic issues, like wages, could be resolved.

There were other complexities as well stemming from seniority and scheduling issues involving two plants with different schedules and the need to grandfather certain employees. The identification of individual situations requiring grandfathering often crop up only after the parties think they can live with the resolution of an issue and only after the negotiating committee members have had time to speak to the bargaining unit about what is being

agreed to and the committee members return to the negotiations with individual issues requiring grandfathering. For all these reasons, this factor weighs in favor of extending the recognition bar beyond the six months.

3) *The amount of time elapsed since bargaining commenced and the number of bargaining sessions.*

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, "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). ("...[T]he refusal to bargain itself...erodes the status of the Unions and discourages union membership. ... [D]etermining what a reasonable time [to bargain] should be is properly a decision for the Board") (citations omitted).

While the parties did have nine bargaining sessions, some lasting multiple days, collective bargaining in this case was twice interrupted by the Employer's unilateral and inexplicable failure to engage in negotiations for prolonged periods of time. The Region recognized that the six month rule is defined by actual bargaining, and it applied this principal in considering the second decertification petition. There the Region decided to extend the

recognition bar beyond six months after the bargaining began because of the Employer's "unavailability" to negotiate for three and a half months.

In its review of the third decertification petition, equal consideration should have been given by the Region to the fact that on the eve of reaching an agreement the Employer again became "unavailable" for more than a month. While in some cases a month between bargaining sessions might not be significant, in this case the second unilateral pause occurred on the verge of reaching a complete agreement. Not much was left to be done in the final session a month later. On the other hand, the Employer's renewed and unexplained "unavailability" to negotiate commenced when there was still time to finish up the contract before the first anniversary of the recognition.

The Employer's only explanation for its unavailability during this critical period was that it was an oversight to not respond to the Union's request for bargaining, and that one of two company negotiators was busy (though they had previously spelled each other for handling the bargaining). This contradiction as well as the fact that the Employer took the position that a reasonable period of time to bargain had already occurred when the second decertification petition was being processed, allows an inference to be drawn that the Employer's unavailability was not merely an oversight but rather a calculated effort to delay the negotiations beyond the first anniversary of its recognition. Whether this is the case or not, to disregard such a sudden, significant, unexplained and lengthy hiatus at this critical juncture in negotiations leaves open the door for employers to run the clock out when they

don't like where the negotiations have gone or are going, especially if the "first anniversary of recognition" rule applied by the Regional Director in this case is adopted by the Board.

It should also be stressed that during both of the Employer's bouts of "unavailability" the Union repeatedly attempted to meet and negotiate; this is not a case where both parties failed to actively engage in the bargaining process. *See, cf., Americold Logistics LLC*, 04-RD-109029, Slip Op. at 7-8 (August 23, 2013) (Region applied *Lee Lumber's* multifactor analysis to process petition to an election where petition filed later than six months after bargaining began and after first anniversary of recognition; considered delay in the conduct in negotiations due to both parties as eliminating the significance of the issue).

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 deciding a reasonable period can extend to a full year from the first date of bargaining 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.

The rule in *Lamons Gasket* gives an absolute six month recognition bar to a petition, but in this case the actual time that bargaining took place was less than six months when one deducts the Employer's two bouts of

unavailability. Clearly this factor supports extending the recognition bar beyond six calendar months.

> *(4) The amount of progress made in negotiations and how near the parties are to concluding an agreement.*

The Regional Director's assessment of the proximity to agreement factor for purposes of the second petition illustrates that there was a need at that juncture to extend the reasonable period of time to bargain. The parties' ability to reach a contract just over a month after this decision issued bore out the Director's reasoning:

> In weighing the extent of progress in negotiations, the context of the parties' negotiations must be considered. *Lee Lumber,* 334 NLRB at 404. Thus, if the parties have engaged in a significant amount of bargaining over a six month period and are still not close to an agreement, additional time is unlikely to allow them to reach an agreement. Conversely, the closer the parties are to reaching a contract the more likely additional time will allow them to do so. *Id.* In the instant case, the parties agreed to most of the non-economic terms during their negotiations in March. The parties had just turned their full attention to economic proposals when the petition was filed on April 8, 2013. It is impossible to tell what would have occurred had the parties negotiated during the three months the Employer was unavailable. Although the parties are not close to an agreement, additional time in the context of this case still may facilitate an agreement

D&O, p.7.

Consideration of this factor from the vantage point of when the third decertification petition was filed argues strongly that a reasonable period to bargain had not passed when the petition was filed, and that the reasonable period should include the filing date of the instant petition. The parties reached agreement on a collective bargaining agreement in less than six

months of actual bargaining, and less than nine months on the calendar, which should be considered a real accomplishment, given the difficulties inherent in first contract bargaining, not to mention the constant looming threat of a decertification from practically the inception of bargaining. At the time the petition was filed, the parties had executed their agreement just two days earlier, and it was ratified by the workers the next day. Surely under the facts of the instant case where the actual bargaining was much less than the guaranteed six months, a reasonable period of time to bargain here includes a reasonable opportunity for the workers to vote on the contract, since it is their decision that brings into existence an actual binding agreement. As the Board stated in *Lee Lumber*, "the proper focus [must be] on the need to give unions a fair chance to succeed in contract negotiations before their representative status can be challenged." 334 NLRB at 401.[11]

(5) Whether the parties are at impasse.

The Employer and Union have never asserted that they were at impasse at any time during the negotiations. The absence of impasse generally weighs against a finding that a reasonable time has elapsed because "there is still hope that [the parties] can reach agreement." *Lee Lumber,* 334 NLRB at 404.

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[11] It should also be noted that if the Board excludes the three days it took to ratify the agreement from the reasonable period of time for bargaining on the theory that the recognition bar only lasts until the tentative agreement is reached, it would mean that whenever a union is voluntarily recognized it cannot allow the workers to vote on ratification of the agreement for fear that a petition could be filed or that an employer could withdraw its recognition between the bargaining for the tentative agreement and the expeditious processing of the tentative agreement to ratification. Because the constitution of some unions requires ratification of agreements these unions would be disabled under such a holding from pursuing voluntary recognition.

Thus, this factor also weighs in favor of a finding that a reasonable time to bargain had not passed in this case.

IV. CONCLUSION

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 and fair choice. And in light of the above circumstances, the fact that bargaining here bore fruit in the form of a ratified contract 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 (citations omitted). That the result here is a "reasonable period to bargain" which happens to have concluded about ten days after the recognition anniversary does no offense to law or policy, and vindicates both the letter and spirit of *Lamons Gasket*. The Board is thus respectfully urged to overturn the Regional Director's Decision and Direction of an Election and administratively order the dismissal of the instant petition.

Dated: New York, New York
September 23, 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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