

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

AMERICOLD LOGISTICS, LLC,

Employer,

and

KAREN COX,

Petitioner,

and

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

Union - Intervener.

Case No. 25-RD-108194

EMPLOYER'S BRIEF ON REVIEW

I. SUMMARY STATEMENT OF POSITION

The issues before the National Labor Relations Board (“NLRB” or “Board”) in this Brief on Review are: (1) whether the Regional Director correctly found under *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), that there is no recognition bar because the decertification petition was filed more than one year after the Employer recognized the Union; and (2) if the Regional Director erred, whether a reasonable period of time for bargaining had elapsed at the time the petition was filed.

By way of background, Petitioner Karen Cox filed the decertification petition¹ in this case on June 28, 2013—two days after the Union and Company had reached a tentative

¹ The decertification petition filed here was the third petition filed by the Petitioner. Her first two petitions, Case 25-RD-093419 and 25-RD-102210, were filed on November 19, 2012, and April 8, 2013, (footnote continued)

agreement and one day before the agreement was ratified by the union members. The Regional Director found that a recognition bar did not block the processing of the Petitioner's decertification petition and directed an election among the Company's bargaining unit employees. A decertification election was held, but the ballots were impounded because of the Union's pending Request for Review.

The Regional Director's decision to process the decertification petition in this case, as well as his reason for doing so, should be upheld by the Board. Contrary to the Union's allegation, the Regional Director did not "mechanically" apply a rule not found in Board case law; rather, the Regional Director examined *Lamons Gasket* in its entirety, along with the specific facts presented to him, to correctly find that because the decertification petition was filed over one year after the date of voluntary recognition, a recognition bar did not preclude the processing of Ms. Cox's decertification petition. In contrast, the Union's central argument—that the recognition bar should be extended up to one year from the date of the parties' first bargaining session—is narrow and misguided and ignores the important principles articulated by the Board in that seminal case. Most importantly, the Union would vitiate the Board's clear and well-articulated position that a union must seek a certification by secret ballot election if it desires the "attendant statutory advantages" that such status warrants, such as a 12-month certification bar. There is nothing in *Lamons Gasket* that even remotely suggests that a union is entitled to greater protection by virtue of its voluntary recognition by an employer than pursuant to an NLRB certification, an overriding legal principle recognized by the Regional Director and firmly grounded in his decision. With this legal principle firmly in mind, the Regional Director correctly analyzed the facts of this case—a decertification petition filed after a collective

respectively. Each was dismissed because the Regional Director found that a reasonable period of bargaining had not elapsed. See Decision and Direction of Election, Case 25-RD-108194, at 3.

bargaining agreement was reached, but before that agreement was ratified by the members of the bargaining unit—and concluded that no recognition bar existed, which is the very same conclusion that he would have had to reach if but one fact was changed, i.e., the Union had been **certified** by the NLRB on June 18, 2012, rather than **recognized** by the Employer on that day.

Assuming *arguendo* that the Board finds that the Regional Director erred by finding that a recognition bar did not exist because the petition here was filed more than one year after the date of voluntary recognition, the Board should still uphold the Regional Director’s decision to direct an election because a reasonable period of bargaining had elapsed by the time that Ms. Cox’s decertification petition was filed. First, as explained below in Section III.B., under the *Lee Lumber* standards, a reasonable period of bargaining has elapsed. Moreover, the goal of the recognition bar doctrine is to provide parties with a reasonable period of bargaining to enable the Union enough time to “prove its mettle in negotiations, so that when its representative status is questioned, the employees can make an informed choice....” *Lee Lumber & Building Material Corp.*, 334 NLRB 339, 405 (2001). Here, the parties reached a tentative agreement before the decertification petition was filed; thus, the Union does not need any more time to prove its “mettle” to its members.

II. STATEMENT OF FACTS

Americold Logistics (“Americold” or “Company”) operates food storage facilities through the United States, including two in Rochelle, Illinois that are located approximately a half mile apart from each other—one on Americold Drive and the other on Caron Road (collectively, the “Rochelle facility”).² Tr.1. 22:15-25:1.³ Both locations are storage warehouses where employees receive, sort, and ship customer product. Tr.1. 142:3-6.⁴

² Typically, Americold facilities are comprised of two warehouses. *See* Tr.1. 141:18-142:6; 150:1-6.

In Spring 2012, Local 578 of the Retail, Wholesale and Department Stores Union (“Union” or “RWDSU”) filed a petition to represent warehouse employees at Americold’s Rochelle facility. *See* Tr.1. 30:15-16. Shortly after, the Union asked the Company to voluntarily recognize the RWDSU as the exclusive bargaining representative of employees at this facility.⁵ Tr.1. 30:17-19. On June 18, 2012, after conducting a card check with an independent third party who determined that the Union had signed authorization cards from a majority of the employees in the bargaining unit, the Company recognized the RWDSU as the exclusive bargaining representative of the warehouse employees at its Rochelle facility. Tr.1. 31:18-32:2; Union Ex.1. 1-2. For reasons unknown, the Union waited until July 30, 2012—over one month after the date of voluntary recognition—before sending information requests to the Company. *See* Union Ex.1. 3. Michael Nelson, one of the Company’s lead negotiators in Rochelle,⁶ promptly responded to the Union’s information requests on August 16, 2013. *See* Union Exs.1. 3-4.

Although parties typically begin negotiations within a few weeks of the date of voluntary recognition, the Union delayed bargaining until October 9, 2012—practically four months after the Union was first recognized. *See* Tr.1. 139:13-23; Union Ex.1. 8. Part of this delay was attributable to the fact that Americold did not receive the Union’s information requests until over a month after the date of voluntary recognition (typically, these requests are received shortly after recognition). Tr.1. 140:2-20. The Company never rejected any requests to bargain from

³ Citations to Tr.1. X:X refer to the transcript from the April 2013 hearings; citations to Tr.2. X:X refer to the transcript from the July 2013 hearing.

⁴ The only significant difference between the two warehouses is the temperature inside the buildings (one is a cold storage facility and the other is a dry storage facility). *Id.*

⁵ At this point, the Union withdrew its representation application. Tr.1. 30:22-31:1.

⁶ Robert Hutchison, Americold’s Vice President Labor Relations, also served as the Company’s chief negotiator. Tr.1. 137:16-18; 140:24-141:1.

the Union prior to the parties' first bargaining session, nor did Americold ever tell the Union that it would not be ready to bargain until October.⁷ Tr.1. 99:2-5; 157:21-23.

From October 2012 until June 2013, in a nearly nine-month period, the Company and the Union engaged in face-to face bargaining over 21 days.⁸ In addition, the parties also had substantive conversations, mainly via telephone, regarding their bargaining positions on certain issues, such as health insurance. *See* Tr.1. 64:16-65:14; 146:2-20; 169:14-170:15. Throughout bargaining, the parties used a traditional bargaining structure⁹ and bargained off of a model agreement, which served as a foundation for almost all of the provisions that the Company and Union agreed to. *See* Tr.1. 141:9-17; 157:3-8. And, although the model agreement was tweaked, it was not heavily modified by the parties throughout the course of negotiations. Tr.1. 157:9-13. The parties reached a tentative agreement on June 26, 2013, which was ratified by union members on June 29, 2013. The decertification petition was filed on June 28, 2013. *See* Union Exs.2. 3-4.

In its Request for Review, the Union alleges that negotiations were suspended twice, for a total of four and a half months, due to the Company's unavailability. This is factually incorrect and unsupportable. Even more egregiously, the Union implies that the Company purposefully evaded its obligation to bargain and rejected the Union's attempts to schedule bargaining sessions. As described below, the Union's characterization is highly inaccurate and

⁷ Moreover, the RWDSU agreed that the Company neither caused nor added to the gap prior to negotiations and was available to commence the negotiation process prior to the October 2012 start date. Tr.1. 99:2-5; 157:21-23.

⁸ The bargaining sessions occurred on: October 9-11, 2012; November 27-29, 2012; March 4-6, 2013; March 11-13, 2012; April 9, 2013; April 16, 2013; May 8-10, 2013; May 21-22, 2013; and June 25-26, 2013. *See* Union Ex.1. 8; Tr.1. 71:10-25; Union Ex.2. 1A-1C; Tr.2. 27:25-28:3; 28:22-25; 31:10-11.

⁹ That is, the Union and Company representatives at the bargaining table had full authority to reach a tentative agreement without the need for the Union to consult with any employee committees—in fact, the RWDSU decided not to share proposals with employees until after the parties reached a complete tentative agreement. *See* Tr. 72:24-73:24.

disingenuous. Although the Company had to cancel two bargaining sessions (one in January 2013 and one in February 2013) because of serious illness, Americold never “suspended” negotiations and the Union never complained that the Company was intentionally avoiding its statutory obligations to bargain in good faith.

More importantly, the Company’s unavailability is not the reason for the gaps between bargaining sessions. The Union alleges that the Company’s unavailability resulted in a three-month break in negotiations between the November 27-29, 2012 bargaining sessions and the March 4-6, 2013 bargaining sessions. This is simply not accurate. During the first seven-and-a-half weeks of this thirteen-and-a-half week period, the parties mutually decided not to meet: after the parties’ November bargaining sessions, the Company and the Union could not find any dates in December, due in part to the holidays, when *both* parties were available. *See* Tr.1. 147:5-8. Indeed, in November, the parties scheduled their next bargaining sessions for sometime during the week of January 21, 2013. *See* Tr.1. 61:7-10; 151:1-9; 153:2-8; Union Ex.1. 6. Therefore, the fact that no bargaining sessions were scheduled during the first seven-and-a-half weeks between the November and March bargaining sessions cannot be attributed to either party and cannot be characterized as the Company’s “suspension of the negotiations.”

In regard to the remaining five weeks of this thirteen-and-a-half week period, the parties had scheduled negotiations for this timeframe. However, shortly before the parties were supposed to meet in January 2013, Mr. Nelson’s wife was unexpectedly diagnosed with a serious illness and Mr. Nelson, unable to travel to Illinois, was forced to cancel the January bargaining sessions. *See* Tr.1. 147:8-12; 152:2-6; Union Ex.1. 6. The parties rescheduled the bargaining sessions for February 4-6, 2013, but again, Mr. Nelson was forced to cancel because his wife was starting chemotherapy. Tr.1. 153:20-24. Curiously, in its Request for Review, the Union fails to

mention why the Company was unavailable to meet during this time period; it also neglects to inform the Board that the parties doubled the number of bargaining session they held in March to make up for the missed sessions in January and February. *See* Tr.1. 154:3-7.

What is even more egregious is the Union's allegation that the Company suspended negotiations between May 22, 2013 and June 25, 2013. In its Request for Review, the Union implies that the Company purposefully chose dates after June 18, 2013 because the Company did not want to reach a tentative agreement until one year after the date of voluntary recognition. *See* Union's Request for Review at 2. On May 22, 2013, the Union sent an e-mail to the Company listing ten dates on which the Union was available to meet for negotiations. *See* Union Ex.2. 2A. This list included dates as early as June 4, 2013, and as late as June 28, 2013; half of these dates were after June 18, 2013. *See id.* The Company chose the dates of June 25 and June 26, 2013—two of the dates *proposed by the Union*—which were the first dates that the Company was available. *See* Tr.2. 84:15-18; Union Ex.2. 2B. If the Union was so concerned about the looming June 18th date, it would have only included dates prior to then. The fact that it did not do so confirms that the Union was either unconcerned that Petitioner would file a third petition or unconcerned that it had lost the support of the Rochelle bargaining unit. In either case, the allegation that the Company “suspended” bargaining from May 22, 2013 until June 25, 2013 when it chose a date *proposed by the Union* is meritless on its face.¹⁰

Finally, it must be noted that the fact that these negotiations have been conducted in good faith by both parties is not an issue before the Board. Throughout the negotiations, the Union has never accused the Company of failing to bargain in good faith, nor filed any 8(a)(5) unfair

¹⁰ Although the Company did not respond to the Union's May 22, 2013 email until June 13, 2013, due to an oversight on the Company's part, this delay in response was inconsequential, as the parties were still able to meet within the time frame proposed by the Union in its May 22, 2013 e-mail. *See* Tr.2. 84:24-85:3.

labor charges against the Company. The first time that the Union raised an issue with the Company's alleged "suspensions of bargaining" was at the hearings held in this case.

III. ARGUMENT

- A. **The Regional Director correctly found that a recognition bar did not exist because under the principles articulated by the Board in *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), a recognition bar may not extend beyond the one-year certification bar.**

The Board should affirm the Regional Director's decision to hold a decertification election in this case because a recognition bar cannot run longer than the one-year certification bar. If the Regional Director had found that a recognition bar precluded the processing of Ms. Cox's decertification petition and allowed the recognition bar to extend beyond the one-year certification bar, he would have raised the recognition bar to a higher status than that of the certification bar—a result that is antithetical to the National Labor Relations Act and well-established Board doctrine.

1. **A recognition bar cannot extend beyond the one-year certification bar because the certification bar has always been viewed by the Board as providing the highest level of protection to Unions.**

Because of the long-standing principle that Board elections are the most effective way to determine employee support for a union,¹¹ the Board has always viewed certification bars as providing the highest level of protection for unions—and the only way for a union to receive the "legal advantage" of a 12-month bar:

An election remains the only way for a union to obtain Board certification and its attendant benefits.^{FN 35} Neither the pre-*Dana* law nor the law after today equates the processes of voluntary recognition and certification following a Board-supervised election.

¹¹ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) ("The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."); see also *Levitz Furniture Co.*, 333 NLRB 717, 723 (2001) ("[W]e emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions.").

^{FN 35} Such benefits include a 12-month bar to election petitions under Sec. 9(c)(3) as well as to withdrawal of recognition....

Lamons Gasket, 357 NLRB at slip op. 4 & n. 35.¹² Thus, if the Board has stated that only certified unions can receive the benefit of a 12-month bar—and that recognition bars and certification bars cannot be treated equally—how can a voluntarily recognized union be permitted to enjoy the protection of a bar longer than 12 months? Thus, the perverse result advocated for by the RWDSU—a recognition bar that extends beyond the one-year certification bar—was not a result contemplated by the *Lamons Gasket* Board.¹³

Moreover, and most significantly, if the Union had been certified (versus “recognized”) on June 18, 2012, the Region would have processed Ms. Cox’s June 28, 2013 decertification petition without question because the decertification petition was filed **after** the expiration of the certification bar and **before** the labor contract reached by the parties was ratified on June 29, 2013, which would have triggered a contract bar. Thus, based on the facts at hand, the decertification petition filed by Petitioner Cox should be similarly processed. To do otherwise, the Board would provide to the RWDSU greater bar protection than the Union would have been entitled to if it had obtained a Board certification. Because the Board has found that unions can only receive the protection of a 12-month bar if they are certified by the Board, the Board here

¹² The fact that a union can only receive the “legal advantage” of a 12-month bar if it is certified by the Board through a Board-run election was repeated throughout the *Lamons Gasket* decision. For example, the Board noted that that it “has permitted unions to petition for an election after being voluntarily recognized in order to obtain certification and the attendant statutory advantages flowing therefrom.” *Lamons Gasket*, 357 NLRB at slip op. 3 n.6 (emphasis added). It also stated that “the Act provides that the Board can certify a representative, with the attendant legal advantages thereof (including a 12-month bar) only after a Board-supervised election.” *Id.* at 4.

¹³ Even the Union admits that “clearly the Board did not intend in *Lamons Gasket* to confer greater protection to a voluntary recognition than Board certification.” Union’s Request for Review at 9. Yet the Union fails to explain how dismissing Ms. Cox’s decertification petition—which was filed 10 days after the certification bar would have expired—does not elevate the recognition bar to a status higher than that of the certification bar in this case.

should not allow the recognition bar to extend beyond June 18, 2013—the 12-month mark. *See, e.g., Lamons Gasket*, 357 NLRB at slip op. 4.

The only other Regional Director who has faced this issue post-*Lamons Gasket* has agreed with Regional Director Rik Lineback in finding that the recognition bar cannot extend beyond the one-year certification bar.¹⁴ Faced with a similar situation—a decertification petition that was filed one year after the date of voluntary recognition—Region Four’s Regional Director and former Board Member Dennis Walsh, one of the architects of the *Lee Lumber* standards, stated that an “anomalous result” would occur if the recognition bar could extend one year beyond the date of voluntary recognition because this “would effectively grant a voluntarily recognized union greater rights than it would have achieved through Board certification.” *Americold Logistics, LLC*, 2013 Reg. Dir. Dec., Case 04-RD-109029 (Aug. 23, 2013).

Against this backdrop, the Union has failed to provide a single case where the Board allowed the recognition bar to exceed the one-year certification bar in the absence of a successful unfair labor practice charge brought against the employer for failure to bargain. *See* Union’s Request for Review at 9. The cases cited by the Union are easily distinguishable from the situation here, as the Union has never filed, nor threatened to file, any 8(a)(5) unfair labor practice charges against the Company. Moreover, the first time the Union even raised its “delay in bargaining” theory was at the hearing regarding the Petitioner’s second decertification petition. If the Union seriously believed that the Company was improperly delaying negotiations, it could have filed an 8(a)(5) charge against the Company. (And, if meritorious, the

¹⁴ Moreover, the dissent in *MGM Grand Hotel*, 329 NLRB 464, 472 (1999), correctly noted that the recognition bar cannot extend beyond the one-year certification bar: “Undoubtedly aware that a reasonable time for bargaining cannot possibly extend past the 1-year period allowed certified unions, the Employer and the Union, faced with Petition III, quickened their bargaining pace, threw together a half-opened agreement, and executed it just in time to allow the Regional Director to declare the contract foreclosed these employees from Board processes for 3 more years.”

Company would have been required to bargain under a bargaining order and the Union would not have had to worry about the recognition bar.) Here, however, no such charge was filed, nor did the Union even threaten the Company with filing such a charge.

Further, the Union argues that by measuring the “reasonable period of bargaining” from the date of the parties’ first bargaining session, the Board did not preclude a recognition bar from running longer than a certification bar. The Union’s reliance on this language is misplaced. As the Regional Director correctly noted, the specific scenario at issue here—“whether the recognition bar can be extended up to a year after the first contract negotiation meeting, when that date is more than a year after the date of voluntary recognition”—was neither before nor addressed by the *Lamons Gasket* Board. Decision & Direction of Election, Case 25-RD-108194, at 2. Moreover, as evidenced by the Board’s overruling of *Dana Corp.*, 351 NLRB 434 (2007) in *Lamons Gasket*, the Board did not anticipate that there would be such a lengthy period of time between the date of voluntary recognition and the first bargaining session—and that this lengthy delay would be used by unions to claim greater protection from the recognition bar than they would be entitled to under the certification bar.

When the Board overturned the *Dana Corp.* decision, it explained that the *Dana Corp.* rule suspended meaningful bargaining for at least 63 days, which created a “lengthy period of uncertainty” that undermined the relationship between the employer and the union and “unnecessarily interfer[ed]” with the bargaining process. *See id.* at slip op. 9-10. To show how unpalatable a two-month delay was to the Board, it also noted that “[i]f an employer refused to agree on dates for bargaining to begin for that length of time, we likely would find a failure to bargain in good faith.” *Id.* at slip op. 9. Thus, the Board anticipated that once *Dana Corp.* was overturned, bargaining would start shortly after the date of voluntary recognition. Accordingly,

when it decided to measure the length of a “reasonable period of bargaining” from the date of the first bargaining session, the Board did not foresee that this date would be several months after the date of voluntary recognition—as it was here—and could drag the recognition bar out longer than the one-year certification bar. Thus, despite the plain language used by the Board in *Lamons Gasket*, as rightfully concluded by the Regional Director, “a review of *Lamons Gasket* in its entirety leads [to the conclusion] that the Board did not intend a recognition bar to extend beyond a year from the date of recognition.” Decision & Direction of Election, Case 25-RD-108194, at 2.

2. In finding that the recognition bar did not prohibit the processing of Ms. Cox’s decertification petition, the Regional Director correctly balanced employees’ Section 7 statutory rights and non-statutory recognition bar principles.

When determining whether a recognition bar precludes the processing of a decertification election, the Board “seeks to balance the competing goals of effectuating employee free choice while promoting voluntary recognition and protecting the stability of collective-bargaining relationships.” *MGM Grand Hotel*, 329 NLRB 464, 466 (1999). In other words, the Board must strike a balance between: “(1) giving the employer and union a reasonable opportunity to reach a collective-bargaining agreement and (2) protecting the Section 7 rights of employees to reject or retain the union as their representative.” *Id.* at 468 (Member Hurtgen, dissenting). The first factor is a policy choice, whereas the second is a statutory requirement that “lies at the heart of the [National Labor Relations Act.]” *Id.*

Here, by processing Ms. Cox’s decertification petition, the Regional Director correctly balanced the employees’ Section 7 rights against the importance of giving the Union and Company time to reach a collective bargaining agreement. Ms. Cox has filed three decertification petition since the date of voluntary recognition—and the first two petitions were

denied, not for lack of support, but because a reasonable period of bargaining had not elapsed. Ms. Cox's third petition was filed ten days after the one-year anniversary of the date of voluntary recognition—at this point, the RWDSU and the Company had already reached a tentative agreement. If the Regional Director had dismissed Petitioner's third decertification petition, the employees' opportunity to challenge its union representation would be foreclosed for the next three years. Thus, the balancing should weigh in favor of the employees' Section 7 rights because these rights are at risk of being sharply curtailed—and because at the time that the decertification petition was filed, the parties had already reached a tentative agreement, which shows that the parties had had a reasonable time to bargain. To do otherwise would be inimical to the purpose of the National Labor Relations Act. Accordingly, the Regional Director correctly decided to process Ms. Cox's decertification petition.

B. Even if the Board finds that the Regional Director erred in finding there was no recognition bar because the decertification petition was filed more than one year after the date of voluntary recognition, a reasonable period of bargaining had elapsed at the time the decertification petition was filed and the Board should affirm the Regional Director's decision to hold an election.

Assuming *arguendo* that the Board does not affirm the Regional Director's decision that there was no recognition bar because the decertification petition was filed one year after the date of voluntary recognition, the Board should still affirm the Regional Director's decision to hold a decertification election here because at the time the decertification petition was filed, a reasonable period of bargaining had elapsed under the *Lee Lumber* standards. To determine whether a "reasonable period of bargaining" has elapsed after the first six months of negotiations, the Board considers the following five factors: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining process; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near

the parties are to concluding an agreement; and (5) whether the parties are at impasse. *Lamons Gasket*, 357 NLRB at slip op. 10 n. 34 (citing *Lee Lumber*, 334 NLRB at 402).¹⁵ The burden is on the Board's General Counsel to prove that a reasonable period of bargaining has not elapsed after the first six months of bargaining. *See id.*

Lamons Gasket defines a reasonable period of bargaining as “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). In its Request for Review, the Union makes the argument that the parties had not even been in bargaining for six months at the time the labor agreement was reached, apparently taking the absurd position that any days not in active negotiations should not be counted as days in bargaining during this 6 month period. It would thus require, under the Union's formulation, that the parties negotiate for 180 days to meet the 6-month test, and that those days be consecutive, to meet the test in a 6-month contiguous period. As the Board well knows, a collective bargaining agreement is not negotiated over a continuous period of time; rather, it is typical to have breaks, for various reasons, between bargaining sessions. Indeed, in the instant matter, the parties met in direct, “active” negotiations for 21 days, spread out in 9 bargaining sessions, over a 9-month period. In view of the fact that the parties were negotiating with a “model agreement” as a format, this experience is not unusual.

Thus, the Union's moving target proposal must be rejected. As established in *Lamons Gasket*, the Board examines whether a reasonable period of bargaining has occurred after 6 *calendar* months of bargaining—and here, 6 calendar months have elapsed from the parties' first

¹⁵ Although *Lamons Gasket* imposes a five-factor test to govern this analysis, the purpose of this test is to determine whether the union had “enough time to prove its mettle in negotiations, so that when its representative status is questioned, the employees can make an informed choice....” *Lee Lumber*, 334 NLRB at 405. Here, the answer is clear. The Union does not need any more time to prove what it can do for its members—the parties reached a tentative agreement by the time that the decertification petition was filed. What additional time could the Union need to bargain?

bargaining session (October 9, 2012) to the date that the Petitioner filed her decertification petition (June 28, 2013).

Finally, the Union's mischaracterization of the Regional Director's decision to dismiss the Petitioner's second decertification petition must be addressed. The Union states that the Regional Director dismissed this petition because he found that, due to the Employer's unavailability, "the parties had not yet had a full six months of actual bargaining." See Union's Request for Review at 7. The Regional Director, however, merely stated that the "lengthy unavailability during a critical time for bargaining supports the Union's position *that a reasonable time to bargain has not elapsed.*" See Decision and Order, Case 25-RD-102210, at 7-8 (May 23, 2013) (emphasis added). Thus, he did not find that this period of "unavailability" supported the Union's contention that the parties had not engaged in six months of bargaining. Moreover, by noting that this second petition was filed "one day before the expiration of the six month insulated period," it is clear that the Regional Director was looking solely at whether 6 *calendar* months had passed since the start of negotiations. See *id.* at 2.

1. Whether the parties are negotiating a first contract

The first factor that the Board considers when determining if a reasonable period of bargaining has elapsed is whether the parties are negotiating a first contract. The Board has stated that parties negotiating a first contract will likely need more time to reach an agreement because the bargaining often takes place "in an atmosphere of hard feelings left over from an acrimonious organizing campaign," the negotiators at the bargaining table may be inexperienced, and the parties need to "establish basic bargaining procedures and core terms and conditions of employment." See *Lee Lumber*, 334 NLRB at 403.

It is undisputed that the parties are negotiating a first contract. See Tr.1. 40:11-13. Here, however, this fact should not weigh against a finding that a reasonable period of bargaining has

passed because the concerns that the Board has regarding first contracts are not present here. First, the fact that the Company voluntarily recognized the Union indicates that there was no acrimonious organizing campaign (and the Union has provided no additional evidence to show that bargaining was impeded by hard feelings from its organizing efforts). *See* Tr.1. 30:17-19. In addition, both the Company and Union negotiators are extremely experienced and have a long background in labor relations. *See, e.g.,* Tr.2. 21:20-23:12; Tr. 2:42:6-43:17; Tr.2. 65:15-66:11. Finally, due to the use of a model agreement (discussed further in Section III.B.2), the parties did not have to create the core terms and conditions of employment from scratch. Accordingly, the fact that the parties were negotiating a first contract should not be given much weight—if any—by the Board when determining whether a reasonable period of bargaining has elapsed.

2. The complexity of the issues being negotiated and of the parties' bargaining process

The second issue that the Board examines when determining whether to extend the recognition bar past the initial six-month period is the complexity of the issues and of the bargaining procedures. When the issues are complex and “the parties have structured negotiations so as to invite more employee input,” the Board assumes that the negotiations will take longer than if the issues and process were simple. *See Lee Lumber*, 334 NLRB at 403.

Here, neither the issues nor the bargaining process was complex. In regard to the issues, the Union has suggested that negotiations were complicated by the fact that there are two warehouses at the Rochelle facility, which has resulted in differences in seniority, scheduling, and overtime. *See* Tr.1. 36:18-37:26; 46:23-48:3. The fact that the bargaining unit is divided between two warehouses, however, does not result in any complexities that could have impeded the bargaining process—in fact, a two-warehouse facility is the Company's business model. *See* Tr.1. 141:18-142:6; 150:1-6. Additionally, employees at both warehouses perform the same job

duties (receiving, sorting, and shipping customer product)—the only significant difference between the warehouses is the temperature within the buildings. Tr.1. 142:3-6.

Similarly, the bargaining process here was not complex. As the Board has recognized, “negotiating from an existing agreement” is much less complex than “drafting an innovative ‘living contract’ from the ground up.” *Lee Lumber*, 334 NLRB at 403. Here, the Company presented the Union with its model agreement at the first bargaining session, which served as the foundation for almost all of the provisions that the Company and the Union agreed to.¹⁶ *See* Tr.1. 157:3-8. Using a model agreement should expedite the bargaining process and reduce the amount of time that initial contracts take to negotiate, particularly with respect to resolving non-economic issues. This occurred here, as the parties were able to reach agreement on a majority of the non-economic provisions by the March bargaining sessions. *See* Union Ex.1. 5.

Moreover, the parties did not implement any unique bargaining procedures: the Union and Company representatives met to negotiate the contract and used a “traditional ‘hierarchical’ approach” to bargaining. *See MGM Grand Hotel, Inc.*, 329 NLRB 464, 464 (1999). And when compared to the complex and time-consuming bargaining procedures used by the parties in *MGM Grand*—there, the union formed “committees, subcommittees, and task forces comprised of union representatives and employees to study each aspect of the contract, evaluate employee satisfaction with existing terms, and draft and evaluate proposals”—the bargaining process used here was very straightforward. *See id.* In fact, the Union did not seek employee input on proposals throughout the bargaining process; rather, the RWDSU did not share proposals with employees until after a complete tentative agreement was reached. *See* Tr.1. 72:24-73:24. Thus, the fact that the issues and bargaining processes here were not complex supports the conclusion

¹⁶ As expected, the model agreement was tweaked by the parties, but it was not heavily modified throughout the course of negotiations. *See* Tr.1. 157:9-13.

that a reasonable period of bargaining had elapsed by the time Ms. Cox filed her decertification petition.

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

The amount of time elapsed since bargaining commenced and the number of bargaining sessions that the parties have held supports the Company's position that a reasonable period of bargaining has elapsed. The Board examines this factor because, "[t]he more time that has elapsed since the parties began to bargain and the more negotiating session they have engaged in, the more opportunity they had to reach a contract, and vice versa." *Lee Lumber*, 334 NLRB at 404. Here, the parties had twenty-one bargaining sessions over a nearly nine month period, which unquestionably gave them enough time to reach a contract—a tentative agreement was reached on June 26, 2013. *See* Union Ex.1. 8; Tr.1. 71:10-25; Union Ex.2. 1A-1C, 3; Tr.2. 27:25-28:3; 28:22-25; 31:10-11. Moreover, when the Board finds that parties have not engaged in a "reasonable period of bargaining," parties will have met far fewer than twenty-one times. *See, e.g., Town & Country Plumbing & Heating*, 352 NLRB No. 139, slip op. at 6 (2008) (finding parties have not met for reasonable period of bargaining when parties had had only three, 2-hour bargaining sessions, plus one limited exchange outside of bargaining, over approximately six months); *see also Am. Golf Corp.*, 355 NLRB No. 42, slip op. at 3 (2010) (finding reasonable period of bargaining not met when parties met around six to eight times during a six month period). Accordingly, the fact that the parties have met twenty-one times in nearly nine months supports a finding that a reasonable period of bargaining has elapsed.

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

The Board also considers the amount of progress made in negotiations and how near the parties are to concluding an agreement. The Board has said "when the parties have almost

reached agreement and there is a strong probability that they will do so in the near future, we will view progress as evidence that a reasonable time for bargaining has *not* elapsed... When negotiations have nearly produced a contract, it is reasonable that the parties should have some extra time in which to attempt to conclude an agreement” *Lee Lumber*, 399 NLRB at 404. Such was the case in *MGM Grand Hotel*, where the parties were very close to reaching an agreement on the date that a decertification petition was filed. 329 NLRB at 465; *see also Lee Lumber*, 399 NLRB at 404 (describing other cases where the Board found that a reasonable period of bargaining had not elapsed when parties were near an agreement at the time a petition was filed). The instant case is distinguishable because on the date that the decertification petition was filed, the parties *had reached* an agreement; in *MGM Grand*, the parties were still in negotiations at the time of filing and did not reach an agreement until several days later. *See* 329 NLRB at 465. Therefore, the fact that the parties reached an agreement by the time the Petitioner filed her decertification petition supports a finding that a reasonable period of bargaining had elapsed.

5. Whether the parties are at impasse

The final *Lee Lumber* factor that the Board considers is whether the parties are at impasse. Typically, if the parties are not at impasse, this factor will weigh against a finding that a reasonable period of bargaining has passed because “there is still hope that [the parties] can reach an agreement.” *Lee Lumber*, 399 NLRB at 404.

Here, the parties agree that at the time of the filing of the decertification petition, the parties were not at impasse. *See* Tr.1. 56:19-21. However, given the fact that the parties had already reached a tentative agreement, this factor should not weigh against a finding that a reasonable period of bargaining has passed. Like parties at impasse, the Company and the Union here “have made all the progress they are capable of making...and there is no reason to expect additional results from further bargaining.” *See Lee Lumber*, 399 NLRB at 404. Accordingly,

here, the absence of impasse should actually support the Company's contention that a reasonable period of bargaining had elapsed at the time Ms. Cox filed her decertification petition.

IV. CONCLUSION

For the above-stated reasons, the Board should find that the Regional Director correctly found that there is no recognition bar because the petition was filed more than one year after the Company voluntarily recognized the RWDSU. And even if the Board finds that the Regional Director erred, the Board should still affirm the Regional Director's decision to hold a decertification election because a reasonable time for bargaining had elapsed at the time that the petition was filed.

Dated: September 23, 2013

Respectfully submitted,



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

AMERICOLD LOGISTICS, LLC,

Employer,

and

KAREN COX,

Petitioner,

and

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

Union - Intervener.

Case No. 25-RD-108194

CERTIFICATE OF SERVICE

I certify that on September 23, 2013, a copy of Employer's Brief on Review was sent, via e-mail and first class mail, to the following parties:

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