

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LIFT TRUCK SALES AND SERVICES, INC.,

Employer,

Case 14-RD-153982

and

WILLIAM HUBBARD,

RD Petitioner,

and

BUILDING MATERIALS, EXCAVATING,
HEAVY HAULERS, DRIVERS,
WAREHOUSEMEN AND HELPERS, LOCAL
UNION NO. 541, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Incumbent Union.

**REQUEST FOR BOARD REVIEW OF REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

I. INTRODUCTION

Building Materials, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers Local Union No. 541, affiliated with the International Brotherhood of Teamsters ("Teamsters Local 541), the Incumbent Union, hereby requests, pursuant to Section 102.67(c) of the Board's Rules and Regulations, that the Board grant review of the Decision and Direction of Election issued by Region 14 Director Daniel L. Hubbel in this matter on June 25, 2015.

II. GROUNDS FOR SEEKING REVIEW OF THE REGIONAL DIRECTOR'S DECISION

Pursuant to Section 102.67(d) of the Board's Rules and Regulations, a request for review of a Regional Director's decision in a representation case may be granted, *inter alia*, upon the following grounds:

- (1) That a substantial question of law or policy is raised because of:
 - (i) the absence of, or

- (ii) A departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
 - (3) That the conduct of any hearing or ruling made in connection with the proceeding has resulted in prejudicial error.
 - (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

In the present case review should be granted because of the Regional Director's departure from officially reported Board precedent (1) by applying the Board's decision in ***Master Slack Corp.*** 271 NLRB 78 (1984) rather than the Board's decision in ***Lee Lumber & Building Material Corp.***, 322 NLRB 175 (1996) (***Lee Lumber I***) as to the issue of unlawful taint of the present petition and (2) by applying the Board's decision in ***Poole Foundry & Machine Co.***, 95 NLRB 34 (1951) enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952) rather than applying the precedent established by the Board's decision in ***Lee Lumber & Building Material Corp.***, 334 NLRB 399 (2001) (***Lee Lumber II***) requiring a minimum 6 month insulated period of bargaining following resumption of good faith bargaining after resolution of the underlying unfair labor practices in Cases 14-CA-137740 and 14-CA-140117.

III. FACTUAL AND PROCEDURAL BACKGROUND

For ease of reference, the Union submits the following chronology of events which are relevant to the Union's position in this matter. Teamsters Local 541 has been the exclusive bargaining representative of the Employer's full-time and regular part-time mechanics, parts and utility employees, including apprentices, for over forty years. The most recent collective bargaining agreement between the Union and the Employer expired on May 21, 2014. The parties commenced bargaining for a new agreement on May 22, 2014. In September, 2014 the Union filed unfair labor practices alleging that the employer was bargaining in bad faith in violation of Section 8(a)(5) of the Act. On December 17, 2014 a formal Complaint and Notice of

Hearing was issued by the General Counsel alleging violations of Section 8(a)(1) and (5) of the Act. A hearing before an Administrative Law Judge was scheduled for February 18, 2015.

Thereafter the following events transpired:

- **February 17, 2015:** Settlement Agreement reached in cases 14-CA-137740 and 14-CA-140117 in which the Employer admitted to engaging in bad faith bargaining and agreed to engage in good faith bargaining with the Union;
- **March 2, 2015:** Email received from Employer's bargaining representative Brian Carroll proposing resumption of bargaining, but stating his unavailability to do so until March 20, 2015.
- **March 3, 2015:** Union agrees to meet for negotiations on March 20, 2015.
- **March 20, 2015:** The Union Committee, Union Counsel and Brian Carroll meet for bargaining at the Employer's facility. No agreement is reached. The next bargaining session is scheduled for April 20, 2015 due to Brian Carroll's scheduling conflicts;
- **April 7, 2015:** Employer's President Jeff Stevens advises the Union that Stevens will be taking over future bargaining on behalf of Employer (replacing Brian Carroll in that role) and requesting summary of negotiations to date;
- **April 9, 2015:** Ron Johnson, on behalf of Union, emails a new Union proposal for an Agreement to Stevens;
- **April 9, 2015:** Jeff Stevens emails the Employer's proposal to Union, which is unchanged from proposals made on March 20, 2015 by Brian Carroll;
- **April 20, 2015:** Bargaining session attended by Union Committee (without Union Counsel) and Jeff Stevens. Tentative Agreement reached on Drug Policy, Term of Agreement (3 years with annual wage and Health and Welfare reopener) and Funeral Leave. Supplemental Dues and Union Access remain open issues;
- **April 30–May 28, 2015:** Multiple email exchanges between Employer and Union discussing open issues;

- **May 13, 2015:** Jeff Stevens confirms that Employer's proposal constitutes "last, best and final offer."
- **June 10, 2015:** Notice of ratification vote to be conducted on June 11, 2015 posted at Employer's facility;
- **June 11, 2015:** Decertification Petition filed in case 14-RD-153982;
- **June 11, 2015:** Ratification vote on Employer's Last, Best and Final offer. Proposed Tentative Agreement rejected 17-0.

The Settlement Agreement in Cases 14-CA-137740 and 14-CA-140117 was admitted into evidence at the representation hearing conducted on June 19, 2015 as Board Exhibit 5. A copy of Board Exhibit 5 is attached hereto for the Board's convenience. Copies of the emails referenced above were admitted into evidence as Board Exhibit 10 at the representation hearing conducted on June 19, 2015.

IV. ARGUMENT AND AUTHORITIES

Cases 14-CA- 137740 and 14-CA-140117 were resolved by a settlement agreement entered into by the parties on February 17, 2015, the eve of a hearing scheduled to commence on February 18, 2015. The Settlement Agreement (Board Exhibit 5, copy attached) contains an "Admission Clause" which reads as follows:

"ADMISSION CLAUSE -- By entering into this Settlement Agreement, the Charged Party admits that since on or about May 22, 2014 it violated Section 8(a)(1) and (5) of the National Labor Relations Act by engaging in bad faith bargaining designed to frustrate the parties' ability to achieve agreement on a new collective bargaining agreement. In addition, the Charged Party admits and acknowledges that its unfair labor practices admitted herein are sufficient to taint the petition in Case 14-RD-127434 filed on September 25, 2014, and to require dismissal of the petition."

At the representation hearing held on June 19, 2015, the Union raised two arguments in support of its position that the pending decertification petition should be dismissed. First, the Union argued pursuant to the Board's holding in *Lee Lumber I*, that the current petition was presumptively tainted due to unfair labor practices committed by the employer which resulted in the settlement agreement which included the Admission Clause quoted above. The Union

argued that the Employer had the burden under *Lee Lumber I* to rebut the presumption of taint as to the current petition by producing evidence that employee disaffection with the Union arose after the Employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining unit. The Union also argued that the minimum amount of time required for bargaining after resolution of the prior unfair labor practices was six (6) months after the Employer began bargaining in good faith as required by the Board in its decision in *Lee Lumber II*.

Teamsters Local 541 submits that the Regional Director departed from officially reported Board precedent in two material respects in his Decision and Direction of Election. First, the Regional Director misapplied and departed from officially reported Board precedent by applying the Board's decision in *Master Slack Corp.*, 271 NLRB 78 (1984) rather than the Board's decision in *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996) (*Lee Lumber I*) in ruling on the issue of unlawful taint of the current petition. Second, the Regional Director misapplied and departed from officially reported Board precedent by applying the Board's decision in *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951) enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952) rather than applying the precedent established by the Board in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001) (*Lee Lumber II*) in determining whether the Employer and Union had a reasonable insulated period of time to bargain following resolution of the unfair labor practice charges in Cases 14-CA-137740 and 14-CA-140117 and the resumption of good faith bargaining by the Employer.

Based upon the Regional Director's departure from officially reported Board precedent in the present matter, this Request for Review should be granted, the Decision and Direction of Election issued on June 25, 2015 should be reversed and the pending petition should be dismissed.

A. The Regional Director Departed from Officially Reported Board Precedent by Applying the Board's Decision in *Master Slack Corp.* rather than Applying the Board's Decision in *Lee Lumber & Building Material Corp., (Lee Lumber I)* in Ruling on the Issue of the Unlawful Taint of the Current Petition.

In the opening sentence of his "Analysis" entitled "ULP Taint" the Regional Director stated: "I do not find merit with the Union's argument that under *Master Slack Corp.*, 271 NLRB 78 (1984), the decertification petition should be dismissed because a causal relationship exists between the Employer's unfair labor practices and the petition." The biggest problem with this statement by the Regional Director is the fact that the Union *never* argued that *Master Slack Corp.* supra, should be applied to this case. Rather the basis for the Union 's argument that the current petition was fatally tainted was the Board's first supplemental decision in *Lee Lumber & Building Material Corp.*, 322 NLRB 175 (1996) (*Lee Lumber I*) which was subsequently reaffirmed in the second supplemental decision in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001)(*Lee Lumber II*).

In its first supplemental decision in *Lee Lumber I*, the Board stated:

"For the foregoing reasons, we reaffirm the Board's practice of presuming that, when an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any employee disaffection from the union that arises during the course of that failure or refusal results from the earlier unlawful conduct. In the absence of unusual circumstances, we find that this presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining unit." *Lee Lumber I* at page 178.

The Board in *Lee Lumber I* recognized the effect that bad faith bargaining by an employer could have on employee support for an incumbent union. The special circumstances involved in cases involving an 8(a)(5) refusal to bargain with an incumbent union led to the Board's adoption of the presumptive taint in such situations. In doing so the Board stated:

"Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices **other than a general refusal to recognize and bargain**, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. **In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, however, the causal relationship between**

unlawful act and subsequent loss of majority support may be presumed.”
(emphasis added) *Lee Lumber I* at page 177.

In *Lee Lumber I* the Board also recognized the detrimental effect that an Employer's unlawful refusal to bargain with an incumbent union can have on the morale of bargaining unit employees as follows:

“Our administrative experience in the intervening five decades has confirmed the validity of presuming that an employer's unlawful refusal to recognize and bargain with an incumbent union is likely to have a significant, continuing detrimental impact on employees, causing them to become disaffected from the union. This unlawful employer action is not a mere technical infraction. It is a most serious violation that ‘strikes at the heart of the Union's legitimate role as representative of the employees.’ If a union is unlawfully deprived of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them...

Lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming, if indeed they ever arrive. Thus, delays in bargaining caused by an employer's unlawful refusal to recognize and bargain with an incumbent union foreseeably results in loss of employee support for the union, whether or not the employees know what caused the delay.” *Lee Lumber I* at page 177.

Under the foregoing analysis, the Regional Director should have applied the presumption of unlawful taint set forth in *Lee Lumber I* rather than shifting the burden to the Union to provide specific proof of a causal relationship between the unfair labor practices and loss of majority support pursuant to *Master Slack*.

As set forth above, under *Lee Lumber I* in order to rebut the presumption of unlawful taint, the employer bears the burden to prove that the employee disaffection arose **after** the resumption of bargaining for a reasonable period of time. In the present case the Employer failed to carry this burden and the presumption of unlawful taint remained at the time of the filing of the current petition. The Board in *Lee Lumber I* did not define what constituted bargaining for “a reasonable period of time.” However, the answer to that question was provided in *Lee Lumber II* as a minimum of 6 months as will be discussed hereafter.

To the extent the Regional Director relied upon **Master Slack** in issuing his Decision and Direction of Election, that reliance was misplaced and constituted a departure from officially reported Board precedent. As stated above, the Union never argued for the application of **Master Slack** at any point in the proceeding. **Master Slack** involved unfair labor practices which occurred during the 1973-1974 time period. A decertification petition was filed in June of 1982. The petition was signed by a majority of unit employees. The Employer thereafter withdrew recognition from the union. At the hearing on the alleged unfair labor practices by the employer in withdrawing recognition from the union, 18 employees who signed the petition testified that, to the extent they heard talk about the prior and pending unfair labor practices, or to the extent they were aware of such matters, none of those matters had any impact on their signing the petition. The ALJ concluded, and the Board adopted his findings, that “it surely must be concluded that there is no direct evidence of a causal relationship between the Respondents unlawful conduct of 1973-1974 and the 1982 petition.”

The present case does not involve unfair labor practices which occurred 8 or 9 years prior to the filing of the instant decertification petition. It involves unfair labor practices which occurred in late 2014 and which were settled in February of 2015. It also involves an admission by the employer that it had failed to bargain in good faith, and that its unlawful conduct, which began on May 22, 2014, was sufficient to taint a separate decertification petition which had been filed in September of 2014. These factors require that the Regional Director apply the Board’s holding in **Lee Lumber I** and presume unlawful taint of the current decertification petition as a result of the Employer’s recent admitted unfair labor practices.

In his Decision and Direction of Election the Regional Director flipped the burden of proof with regard to the issue of unlawful taint of the current petition. Rather than following the Board’s directive as set forth in **Lee Lumber I** and finding a presumption of unlawful taint and requiring the Employer to introduce evidence to rebut that presumption, the Regional Director shifted the burden to the Union to produce direct evidence of a causal relationship between the

Employer's unlawful conduct and the filing of the decertification petition. Such a determination by the Regional Director is contrary to established Board precedent and requires that the Decision and Direction of Election be reversed and the pending decertification petition be dismissed.

B. The Regional Director Departed from Officially Reported Board Precedent by Applying the Board's Decision in *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951) enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952) Rather than Applying the Precedent Established by the Board in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001)(*Lee Lumber II*) in Determining Whether the Employer and Union had Engaged in a Reasonable Period of Bargaining Following Resolution of the Unfair Labor Practices in Cases 14-CA-137740 and 14-CA-140117.

At the hearing in this matter Teamsters Local 541 took the position that no challenge to its majority status may be entertained before the parties have engaged in a reasonable period of bargaining following resumption of bargaining following the settlement agreement in Cases 14-CA-137740 and 14-CA-140117. The Union contends that a reasonable period of time for bargaining is a minimum period of six (6) months following completion of compliance on the two settled unfair labor practice cases. At a minimum, the Union contends that such a reasonable period of time for bargaining should extend for six (6) months from the date that the Employer resumed bargaining on March 20, 2015. The Union bases its position on the Board's second supplemental decision in *Lee Lumber & Building Material Corp (Lee Lumber II)*, 334 NLRB 399 (2001) *enfd.* 310 F.3d 209 (D.C. Cir. 2002).

In his Decision and Direction of Election, the Regional Director rejected the Union's reliance on *Lee Lumber II* finding that it only applied where "an unlawful refusal to bargain had been adjudicated by the Board." Relying on footnote 7 in *Lee Lumber II* the Regional Director found that the proper standard to be applied was set forth in *Poole Foundry & Machine Co.*, 95 NLRB 34 (1952) *enfd.* 192 F.2d 740 (4th Cir. 1951). Applying *Poole Foundry* the Regional Director refused to apply the 6 month minimum time for bargaining following resumption of bargaining and applied an undefined "reasonable time" standard. Applying that undefined standard, the Regional Director determined that the parties herein had bargained for a

reasonable time following settlement of the prior unfair labor practice charges. As will be more fully explained hereafter, the facts of the present case call for the application of the 6 month minimum insulated period of bargaining prescribed by *Lee Lumber II*, and the Regional Director departed from established Board precedent by failing to apply that standard.

The finding by the Regional Director which requires the Board to grant the Union's Request for Review appears at page 5 of the Decision and Direction of Election as follows:

"The Union argues that *Lee Lumber, supra*, sets a minimum of six months for determining whether a reasonable time to engage in collective bargaining has passed. However, in *Lee Lumber* the Board stated that it was deciding only the standard to be applied where an unlawful refusal to bargain had been adjudicated by the Board. In footnote 7 of the *Lee Lumber* decision, the Board stated that it would determine in other cases what constituted a reasonable time to bargain in situations where the Board had not adjudicated the conduct. In its footnote, the Board specifically referred to the standard for reasonable time to bargain pursuant to a settlement that required bargaining being set forth in *Poole Foundry & Machine Co.*, 95 NLRB 34 (1952), *enfd.* 192 F.2d 740 (4th Cir. 1951)."

The Union submits that the Regional Director departed from established Board precedent by failing to equate the settlement agreement at issue herein, *which included an admission of unlawful conduct by the Employer*, with an "adjudication by the Board" as referenced in *Lee Lumber II*. The Board has consistently distinguished settlement agreements containing non-admission clauses, or even without such clauses, from settlement agreements in which there is an admission of unlawful conduct by the Employer. See, *Truserv Corporation*, 349 NLRB 227 (2007); *Jefferson Hotel*, 309 NLRB 705 (1992); *Nu-Aimco, Inc.*, 306 NLRB 978 (1992) and *Island Spring, Inc.*, 278 NLRB 913 (1986). In the same vein, the Board has treated settlement agreements containing an admission of unlawful conduct as the functional equivalent of a Board adjudication of unlawful conduct. *Truserv Corporation, supra*. In discussing the effect of a settlement agreement containing an admission of unlawful conduct versus one which does not, the Board in *Truserv* stated:

"Our dissenting colleagues argue that *Douglas-Randall's* limitation of the petitioner's right to seek a decertification is justified by the unfair labor practice allegations and the remedial steps that the employer agreed to take. This

assumes, however, that the employer is guilty of the conduct with which it has been charged. We reject this assumption. Without a finding of liability **or an admission of wrongdoing**, there is no substantial evidence that the employer engaged in the alleged unfair labor practices.” *Truserv Corporation*, supra at page 231-232 (emphasis added).

The Union submits that the decision in *Lee Lumber II* mandates that the Union’s majority status cannot be subject to challenge for at least 6 months following resumption of bargaining pursuant to the terms of the parties’ settlement agreement. Any period shorter than six (6) months does not constitute a reasonable insulated period for bargaining under *Lee Lumber II*. In *Lee Lumber I*, the Board stated that following resumption of bargaining as the result of a settlement agreement wherein the Employer agrees to engage in good faith bargaining, the parties must be afforded a reasonable period of time to engage in such bargaining before any challenge to the Union’s majority status may be entertained. The Board did not set out a hard definition of what constitutes a “reasonable period of time” for such bargaining in *Lee Lumber I*. On remand from the United States Court of Appeals for the D.C. Circuit, the Board, in its second supplemental decision, determined that such a “reasonable time” must be for a minimum of six (6) months, calculated from when the offending employer commences bargaining in good faith. *Lee Lumber II*, at page 399, fn. 6. The Board, in its second supplemental decision in *Lee Lumber II*, stated:

“Pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit, we have reconsidered our ‘reasonable period of time for bargaining’ standard for cases involving an unlawful refusal to recognize and bargain with an incumbent union. **As we explain in section I below, we have decided that when an employer has unlawfully refused to recognize or bargain with an incumbent union, a reasonable time for bargaining before the union’s majority status can be challenged will be no less than 6 months, but no more than 1 year.**” *Lee Lumber II* at page 399 (emphasis added).

At footnote 6 on page 399 the Board noted that “The ‘reasonable period’ begins when the offending employer commences bargaining in good faith. See also, *Americold Logistics, LLC*, 362 NLRB No. 58 (March 31, 2015).

In reaching its decision to impose an insulated bargaining period of at least 6 months, the Board in *Lee Lumber II* stated:

“In the past, the Board has not quantified a ‘reasonable time’ for bargaining or required that it exceed a certain minimum period. On reflection, however, we believe that **when an employer has unlawfully failed or refused to recognize or bargain with an incumbent union**, there should be an insulated period of a defined length during which the union’s majority status cannot be questioned. We have decided that the defined period should be at least 6 months.”

The Regional Director rejected application of the 6 month minimum time for bargaining as set forth in *Lee Lumber II* in the present case because *Lee Lumber II* involved an adjudication of wrongdoing by the Board as opposed to a settlement agreement as herein. As such, the Regional Director applied *Poole Foundry* because it also involved a settlement agreement rather than a Board adjudication. In doing so the Regional Director failed to take into consideration the fact that the settlement agreement in the present case involved an explicit and unequivocal admission by the Employer that it had engaged in unlawful bad faith bargaining AND an admission that its conduct was severe enough to taint the then-pending decertification petition in Case 14-RD-137434. These factors, which were not present in *Poole Foundry*, distinguish the present case from *Poole Foundry*, and make the application of *Poole Foundry* by the Regional Director improper herein.

The following facts were involved in *Poole Foundry*:

- Union is certified in 1947 and two subsequent one year agreements are negotiated;
- May 9, 1949, the Union filed unfair labor practice charges against the employer alleging discriminatory discharge of certain employees due to their union activities¹;
- Poole emphatically denies the allegations raised in the charges;

¹ It is not entirely clear from the decisions exactly what the allegations in the Charges were. The ALJ decision refers to unspecified charges; the Board decision refers to the allegations as including refusal to bargain; the opinion of the United States Court of Appeals for the Fourth Circuit reflects that the Charges were filed over the discriminatory discharge of certain employees for union activity. See, *Poole Foundry & Machine Co., v. NLRB*, 192 F.2d 740 (4th Cir. 1951). For the purposes of this Request for Review the precise nature of the underlying ULP charges is not material.

- Between May and December of 1949, the Regional Office investigated the charges but no formal complaint was ever filed against Poole by the Regional Director;
- December 27, 1949, the Union and Poole enter into a settlement agreement which is approved by the Regional Director on December 28, 1949 resulting in withdrawal of the charges;
- There is no indication that the settlement agreement contained an admission of unlawful conduct by Poole Foundry.

In the present case, the following facts are present:

- Union is certified prior to 1985 and multiple multi-year agreements are negotiated with the most recent agreement expiring May 31, 2014;
- September 30, 2014, the Union filed unfair labor practice charges alleging bad faith bargaining by Employer in violation of Section 8(a)(5) of the Act;
- From October to December, 2014 the Regional Office conducted its investigation;
- On December 17, 2014 a formal **Complaint and Notice of Hearing** is issued on the Union's charges and a hearing is scheduled to begin on February 18, 2015;
- On February 17, 2015, the parties entered into a settlement agreement in which the Employer:
 - - a. Admitted to engaging in bad faith bargaining since May 22, 2014;
 - b. Acknowledged that its unfair labor practices were sufficient to taint the petition in Case 14-RD-137434 and to require dismissal of the petition; and
 - c. Agreed to pay the costs incurred by the Union in bargaining for a new agreement between May 22, 2014 and approval of the settlement agreement.

Teamsters Local 541 submits that the facts of the instant case line up much more closely with the facts in **Lee Lumber II** than with **Poole Foundry**. While it is true that the underlying unfair labor practices herein were resolved by a settlement agreement rather than by Board adjudication, there is no meaningful difference in the end result: in both **Lee Lumber II**

and the present case violations of the Act were conclusively established. Teamsters Local 541 respectfully submits that it should make no difference whether violations of the Act are established by Board adjudication or by an employer's admissions contained in a settlement agreement. In either case the minimum 6 month insulated bargaining period established by **Lee Lumber II** must be applied. Teamsters Local 541 further submits that the Board's decision in **Poole Foundry** should be limited in its application to cases in which no formal Complaint is issued, the employer denies the allegations of the charge, and the settlement agreement contains no admission of liability.

The Union's position that **Lee Lumber II** should control in the instant matter rather than **Poole Foundry** was raised at the representation hearing conducted on June 19, 2015. Following the admission of evidence the parties were invited by the Hearing Officer to state their final positions and contentions on the record. Based upon that invitation, counsel for the Union stated at page 99 of the hearing transcript as follows:

"13 The second point is with regard to the settlement
14 bar issue, and with regard to Lee Lumber (II), it is our
15 position that – you know, Lee Lumber (II) dealt with a
16 case where it was found that the Employer engaged in
17 Unfair Labor Practices and a bargaining order issued.
18 And in that case, it is clear that the Board established
19 a minimum of six months that the Employer is required to
20 bargain before union majority status can be questioned.
21 It is unclear from reading through the Poole Foundry
22 case as to what the nature of that settlement agreement
23 is. But, it is the Union's position in this case that
24 where the settlement agreement contains an admission from
25 the Employer that it has engaged in bad faith bargaining,

1 which underlies this case, and has already admitted that
2 that Unfair Labor – that those Unfair Labor Practices
3 have been sufficient to taint a prior decertification
4 petition, that that same six-month minimum in *Lee Lumber*
5 (II) should be applied where there is an admitted
6 violation, and that would be the distinction that we
7 would draw that if there is a settlement agreement
8 without admission of wrongdoing, then Footnote 7 might
9 come into play. But where there is an admitted violation
10 by the Employer, and they have admitted taint of a prior
11 petition, then the minimum period for bargaining should
12 be at least six months.”

Based upon the Board’s holding in *Lee Lumber II*, and the specific facts applicable to the present case, Teamsters Local 541 respectfully submits that the Regional Director departed from officially established Board precedent by applying the “reasonable time” test set forth in *Poole Foundry* instead of applying the 6 month minimum insulated period for bargaining established in *Lee Lumber II*. The Union respectfully submits that the Union’s Request for Review should be granted, the Regional Director’s Decision and Direction of Election should be reversed, and the pending decertification petition in Case 14-RD-153982 should be dismissed.

C. To the Extent there is an Absence of Officially Reported Board Precedent as to Whether the 6 Month Minimum Insulated Bargaining Period Established in *Lee Lumber II* Applies to Unfair Labor Practices Resolved by Settlement Agreements Which Include An Admission of Unlawful Refusal to Bargain In Good Faith By the Employer, Review Should be Granted to Resolve Such Issue.

As set forth above, Teamsters Local 541 believes that Board precedent is clear that unfair labor practices which are established via the admission of unlawful conduct by the employer in a settlement agreement are no different from those established by Board

adjudication. This is especially true with regard to cases involving an employer's admitted bad faith bargaining with an incumbent union. Alternatively, to the extent that such precedent is not clear, the Board should grant the Union's Request for Review herein to address and clarify that issue. In doing so the Board should find that, for the purposes of applying the 6 month minimum insulated bargaining period established in *Lee Lumber II*, a settlement agreement containing an admission of bad faith bargaining by an employer should be treated the same as a formal adjudication by the Board. Establishment of such precedent herein will require that the Regional Director's Decision and Direction of Election be vacated and the instant petition be dismissed.

V. CONCLUSION

For all of the above-stated reasons the Union's Request for Review should be granted, the Regional Director's Decision and Direction of Election should be vacated, and this case should be remanded to the Regional Director with instructions to dismiss the pending petition as tainted as a result of the unlawful Employer conduct.

Respectfully submitted,

ARNOLD, NEWBOLD, WINTER & JACKSON, P.C.

By: 

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**COUNSEL FOR INCUMBENT UNION
TEAMSTERS LOCAL UNION NO. 541**

Dated: September 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via email and First Class mail, postage prepaid, true and correct copies of the foregoing upon:

Mr. William Hubbard (Petitioner)
1104 E. 25th Street Terrace
Lawrence, KS 66046
billhubb2007@yahoo.com

Mr. Jeff Stevens
Lift Truck Sales and Services, Inc.
2720 Nicholson Ave.
Kansas City, MO 64120
jskufan@aol.com

The following has been served via the Board's e-file system:

Daniel L. Hubbel, Regional Director
NLRB Region 14

By: 
Bruce C. Jackson, Jr.

**COUNSEL FOR INCUMBENT UNION
TEAMSTERS LOCAL UNION NO. 541**

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

Lift Truck Sales and Services, Inc.

Cases 14-CA-137740
14-CA-140117

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:**

POSTING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and immediately post them at 2720 Nicholson, Kansas City, Missouri. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting.

READING OF NOTICE—The Charged Party will hold a meeting or meetings, scheduled to ensure the widest possible attendance on each shift, at which a responsible management official of the Charged Party will read the Notice in English and in additional languages if the Regional Director decides that it is appropriate to do so, in the presence of a Board agent. The reading will take place at a time when the Charged Party would customarily hold meetings and must be completed prior to the completion of the 60-day Notice posting period. The date and time(s) of the reading must be approved by the Regional Director. The announcement of the meeting will be in the same manner the Charged Party normally announces meetings and must be approved by the Regional Director.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

BARGAINING COSTS – The Charged Party will pay the costs incurred by the Charging Party and its representatives, including its legal representatives, in bargaining for a new collective bargaining agreement with the Charged Party from the commencement of bargaining sessions on or about May 22, 2014 through the date of approval of this Settlement Agreement by the Regional Director.

ADMISSION CLAUSE — By entering into this Settlement Agreement, the Charged Party admits that since on or about May 22, 2014 it violated Section 8(a)(1) and (5) of the National Labor Relations Act by engaging in bad faith bargaining designed to frustrate the parties' ability to achieve agreement on a new collective bargaining agreement. In addition, the Charged Party admits and acknowledges that its unfair labor practices admitted herein are sufficient to taint the petition in Case 14-RD-137434 filed on September 25, 2014, and to require the dismissal of the petition.

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), including all allegations covered by the attached Notice to Employees made part of this agreement, and does not settle any other case(s) or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

Bd. Ex. 5

~~WITHDRAWAL OF RD PETITION~~ — As part of this agreement, William Hubbard, the Petitioner in 14-RD-137434 will withdraw the petition in 14-RD-137434 because the unfair labor practices herein admitted by the Charged Party tainted the decertification petition. Withdrawal of the petition by the petitioner Mr. Hubbard will occur prior to submission of the signed settlement agreement to the Regional Director for approval.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes _____ No _____
Initials _____ Initials _____

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a Complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon the RD Petitioner and the Charged Party at the last address provided to the General Counsel.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned case(s) provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

Charged Party Lift Truck Sales and Services, Inc.		Charging Party Building Materials, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union No. 541 Affiliated with the International Brotherhood of Teamsters	
By: Name and Title /s/ Jeffrey Stevens, President _____	Date 02/16/15 _____	By: Name and Title /s/ Bruce C. Jackson, Jr., Attorney	Date 02/17/15
Recommended By: /s/ Lyn R. Buckley LYN R. BUCKLEY, Field Attorney	Date 02/17/15	Approved By: /s/ Leonard J. Pérez, Acting Regional Director, Region 14	Date 02/17/15