

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CTS CONSTRUCTION, INC.
Employer

and

Case 09-RD-187368

JAMES D. MONAHAN II
Petitioner

and

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, (CWA), LOCAL 4322
Union

ORDER

The Employer's Request for Review of the Regional Director's administrative dismissal of the petition is denied as it raises no substantial issues warranting review.¹

¹ Although the Regional Director did not specifically discuss each of the relevant factors under *Poole Foundry* when assessing whether the parties had bargained for a reasonable period of time when the instant petition was filed, we find that his analysis and conclusions are consistent with *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), *enfd.* 192 F.2d 740 (4th Cir. 1951), *cert. denied* 342 U.S. 954 (1952), and its progeny. Under *Poole Foundry*, the relevant factors are: "whether the parties were bargaining for an initial agreement, the complexity of the issues being negotiated and the parties' bargaining procedures, the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions, the amount of progress made in negotiations and how near the parties were to agreement, and the presence or absence of a bargaining impasse." *AT Systems West, Inc.*, 341 NLRB 57, 61 (1989) (citing *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), *enfd.* 310 F.3d 209 (D.C. Cir. 2002)). The first two factors - whether the parties were bargaining for an initial agreement and the complexity of the issues being negotiated - weigh in favor of finding that a reasonable period of time to bargain had elapsed. However, all of the remaining factors support the opposite conclusion. The petition in this case was filed only 34 days after the parties entered into a settlement agreement requiring the Employer to post a remedial notice for 60 days and bargain with the Union "until agreement or lawful impasse is reached or until the parties agree to a respite in bargaining." Further, the parties met only one time after the settlement agreement was executed. They made substantial progress in that bargaining session and reached a tentative agreement, conditioned on ratification. "[T]he Board has long declined to hold that a reasonable period for bargaining has elapsed in situations where parties were on the cusp of finalizing an agreement." *Americold Logistics, LLC*, 362 NLRB No. 58, slip op. at 5 (2015) (finding that reasonable period for

MARK GASTON PEARCE,

MEMBER

LAUREN McFERRAN,

MEMBER

Dated, Washington, D.C., May 31, 2017

Chairman Miscimarra, dissenting:

In this case, my colleagues find that the Regional Director properly dismissed a decertification petition filed five weeks after the Employer and the Union entered into a settlement agreement that included a bargaining provision. Contrary to my colleagues, I believe that the Requests for Review raise substantial issues warranting review with respect to this action.

On February 10, 2016,¹ the Employer and Union began bargaining for a successor collective-bargaining agreement but were unable to reach agreement prior to the expiration of their contract on February 28. On or about April 27, an employee filed a decertification petition. The Union immediately filed unfair labor practice charges alleging that the Employer had not bargained in good faith and had aided the decertification petition, and requested that the Region block the petition. On May 2, the Regional Director granted the Union's blocking request; the petition was voluntarily withdrawn on September 8.

On September 23, the Employer and Union entered into a settlement agreement whereby the Employer was required to post a remedial notice for 60 days and bargain with the Union for a minimum of 18 hours per month over several six-hour sessions. The settlement agreement provided that bargaining would continue until the parties reached agreement, lawful impasse, or until the parties agreed to a break in bargaining. The Employer posted the notice on October 4, and the parties scheduled their first bargaining session for October 25. Although not mentioned

bargaining had not elapsed where parties had "finalized a written agreement" and the union had scheduled a ratification vote). See also *Lee Lumber*, 334 NLRB at 404 ("One of the best indicators of success in collective bargaining is reaching a contract. 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."). The short amount of time elapsed since the commencement of bargaining, the number of bargaining sessions, the fact that the parties were on the cusp of finalizing an agreement, and the absence of a bargaining impasse clearly outweigh any other factors which might suggest that a reasonable period of time to bargain had elapsed.

Member McFerran notes that the dismissal of the petition is also consistent with *Hertz Equipment Rental Corp.*, 328 NLRB 28 (1999), where the Board applied the rule that no question concerning representation can be raised during the posting period of a settlement agreement.

¹ All dates are in 2016 unless stated otherwise.

by the Regional Director, the Requests for Review indicate that the Employer and Union reached a tentative agreement on October 25, which was reduced to writing and submitted to the Union on October 28 and agreed to by the Union subject to a planned ratification vote.² The Employer's Request for Review further indicates that the principal issue negotiated was wages. On November 1, the Petitioner filed the instant decertification petition, which the Regional Director summarily dismissed on the grounds that the parties had not been afforded a reasonable period of time to bargain following the settlement agreement. The Regional Director reasoned that the petition was filed after the execution and approval of the settlement agreement, within the 60-day notice posting period, and just seven days after the parties' first post-settlement negotiating session.

Under the Board's settlement bar doctrine, as stated in *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), *enfd.* 192 F.2d 740 (4th Cir. 1951), and its progeny, an employer that enters into a settlement agreement requiring it to bargain with a union must bargain for a reasonable period of time before the union's majority status can be questioned. In deciding whether the parties have bargained for a reasonable period of time, the Board considers the following five factors: whether the parties were bargaining for an initial agreement; the complexity of the issues negotiated and the parties' bargaining procedures; the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions; the amount of progress made in negotiations and how near the parties were to agreement; and the presence or absence of a bargaining impasse. *AT Systems West, Inc.*, 341 NLRB 57, 61 (1989) (citing *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), *enfd.* 310 F.3d 209 (D.C. Cir. 2002)).

I believe that the Requests for Review have raised substantial issues regarding the Regional Director's application of *Poole*. As indicated above, the Regional Director only considered the amount of time that had elapsed since the settlement agreement was executed. Thus, the Regional Director gave no weight to the fact that the parties were not negotiating an initial contract, a factor that favors processing the petition under *Poole*. The Regional Director also gave no consideration to the complexity of the issues negotiated, as *Poole* requires. As noted, the Employer's Request for Review indicates that the issues were not complex. And the Regional Director fundamentally erred in failing to consider whether, as the Requests for Review indicate, the parties have reached a tentative agreement. As the Board stated in *Poole*, "a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time *in which to conclude a contract.*" 95 NLRB at 36 (emphasis added). If, as the Requests for Review assert, the parties reached a tentative agreement, then the settlement agreement has *already* accomplished its purpose and the decertification petition should be processed.

My colleagues acknowledge, contrary to the Regional Director, that the first two *Poole* factors – whether the parties were negotiating an initial contract and whether the issues being negotiated are complex—weigh in favor of finding that a reasonable period of time to bargain *has* elapsed. But they contend that the remaining *Poole* factors require a finding that no such

² The Union's brief in opposition to the Requests for Review does not dispute the existence of a tentative agreement.

reasonable period has passed. In particular, they contend that the fact that the parties were “on the cusp of finalizing an agreement” indicates that a reasonable period of time for bargaining has not elapsed. I respectfully disagree.

As discussed at the outset, the Employer and Union apparently reached a tentative agreement on a successor collective-bargaining agreement on the day of their first scheduled bargaining session. This agreement was allegedly contingent only on ratification by the Union; there is no indication that it was contingent on further bargaining, or agreement, on any other matters. In these circumstances, I believe that the majority errs in finding that the parties were merely “on the cusp of finalizing an agreement.” To the contrary, they had reached an agreement, subject only to ratification by the Union’s members, and concluded negotiations.³ To the extent that such an agreement exists, a reasonable period for bargaining must necessarily have elapsed. See *Americold Logistics, LLC*, 362 NLRB No. 58, slip op. at 12 (2015) (Member Miscimarra, dissenting) (finding that a decertification petition should be processed because a reasonable period of time for bargaining had elapsed at the point the parties signed an agreement).⁴ As I explained in *Americold Logistics*, this conclusion is compelled by Section 8(d) of the Act, which defines the duty to “bargain collectively” as “the *performance* of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times* and *confer in good faith* . . . and the *execution of a written contract incorporating any agreement reached* if requested by either party” (emphasis added). Once such an agreement is reached, the Union cannot possibly establish that further bargaining is required. *Id.*⁵

³ It may be the case that the parties’ agreement did not satisfy the Board’s contract bar standards at that time, but this circumstance, even if true, has no bearing on whether the *Poole* factors support processing the petition.

⁴ See also *King Soopers, Inc.*, 295 NLRB 35, 37 (1989) (internal citation omitted) (Board should focus on “what transpires during the time period under scrutiny rather than the length of time elapsed”).

⁵ Particularly in these circumstances, the Regional Director erred insofar as he relied on the fact that the petition was filed during the notice-posting period for the settlement agreement. In *Hertz Equipment Rental Corp.*, 328 NLRB 28 (1999), a Board majority, over a dissent by former Member Brame, stated that no question concerning representation can be raised during the notice-posting period. But the Board majority offered no justification for its view other than citing to *Freedom WLNE-TV*, 295 NLRB 634 (1989), a case that offers no support for the per se rule *Hertz* espouses. Instead, the Board found a settlement bar in *Freedom WLNE-TV* because there had been no post-settlement bargaining prior to the filing of a decertification petition. Here, there was not only post-settlement bargaining but, according to the Requests for Review, a post-settlement agreement.

Consistent with Member Brame’s dissent in *Hertz Equipment*, *supra*, I believe that the Board should engage in a “case-by-case analysis” of decertification petitions rather than applying “an automatic dismissal [rule that] fails to consider the Sec[.] 7 rights of [] employees.” Such individualized attention is particularly important in cases such as this where the parties have reached a tentative agreement and there is a history of decertification attempts.

Furthermore, as in *Americold Logistics*, supra, I find that the Board's refusal to process this petition unjustifiably denies the employees the opportunity to express their wishes concerning continued representation. As noted above, a prior decertification petition was blocked by charges filed by the Union that were resolved by a settlement agreement. If the instant decertification petition is not processed, and the Employer and Union execute a written agreement that satisfies the requirements of the contract bar doctrine, the employees will be denied that opportunity for an additional period of up to three years. See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). I believe the instant case illustrates the fact that the Board's blocking charge doctrine results in unfairness to the parties and, in the circumstances presented here, does violence to the Act's basic charge that the Board "in each case" ensure parties have "the fullest freedom in exercising the rights guaranteed by [the] Act." Sec. 9(b). I continue to favor reconsideration of the Board's blocking charge doctrine for the reasons expressed in the dissenting views that were contained within the Board's representation election rule, 79 Fed. Reg. 74308, at 74430-74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson).

For these reasons, I respectfully dissent.

PHILIP A. MISCIMARRA, CHAIRMAN,