Lee Lumber and Building Material Corp. ***and*** **Carpenter Local No. 1027, Mill-Cabinet Industrial Division, a/w the United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District Council of Carpenters, AFL–CIO.** Cases 13–CA–29377, 13–CA–29441, 13–CA–29578, and 13–CA–29619

June 28, 2001

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, TRUESDALE, AND WALSH

It is well established that an incumbent union's representative status cannot lawfully be challenged in an atmosphere of unremedied unfair labor practices that undermine employees' support for the union.[1] In an earlier decision in this proceeding, the Board reaffirmed that an employer's unlawful failure to recognize or bargain is presumed to cause any employee disaffection from the union that arises during the course of the employer's unlawful conduct.[2] Absent unusual circumstances, the presumption can be rebutted only if the employer can show that the disaffection arose after it resumed recognizing the union and bargained for a reasonable period of time, without committing further unfair labor practices that would adversely affect the bargaining.[3] And when an employer has been adjudged to have unlawfully failed or refused to bargain with an incumbent union, the Board will order it to bargain in good faith, and the bargaining obligation is understood to bar any challenge to the union's majority status for a reasonable period of time.[4]

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.[5] 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.[6] Whether a "reasonable period of time" is only 6 months, or some longer period up to 1 year, will depend on a multifactor analysis. Under that analysis, we shall consider whether the parties are 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 are to agreement, and the presence or absence of a bargaining impasse.[7]

As we explain in section II below, we find that the Respondent here did not bargain for a reasonable time before withdrawing recognition from the Union in July 1990, and therefore that its withdrawal of recognition violated Section 8(a)(5). For the reasons discussed in section III below, however, we shall not impose an affirmative bargaining order as a remedy for the violation in the particular circumstances of this case.

Background

The relevant facts can be summarized briefly. The Union was certified as the representative of the Respondent's mill shop employees in October 1988. The parties' first collective-bargaining agreement was effective from May 26, 1989, through May 25, 1990. The Union informed the Respondent on February 1, 1990,[8] that it wished to bargain for a new contract. On March 20, before bargaining began, the employees filed a decertification petition. On April 11, relying on the petition, the Respondent declined to bargain with the Union. On May 8, after the Union filed an unfair labor practice charge, the Respondent agreed to bargain. On May 23, the parties held the first of five bargaining sessions, the last of which occurred on June 25. The negotiations were productive, and the Respondent's president testified that accord was almost reached on a new collective-

[1] See, e.g., *Williams Enterprises*, 312 NLRB 937, 939–940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995).

[2] *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), affd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997).

[3] 322 NLRB at 178.

[4] Id. See also *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).

[5] An employer may engage in conduct other than a general refusal to recognize or bargain that will taint any subsequent employee disaffection from the union and therefore preclude a challenge to the union's majority status. In those cases, however, the causal relationship between the unfair labor practices and the disaffection is not presumed, but must be demonstrated. *Lee Lumber & Building Material Corp.*, 322 NLRB at 177 (citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984)).

[6] The "reasonable period" begins when the offending employer commences bargaining in good faith.

[7] The standard we announce today applies only to situations in which employers have unlawfully refused to recognize or bargain with incumbent unions. We shall decide in other cases, where the issues are presented, what constitutes a reasonable time for bargaining when an employer has voluntarily extended recognition, see, e.g., *Keller Plastics Eastern*, 157 NLRB 583 (1966); entered into a settlement agreement requiring bargaining, see, e.g., *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952); or succeeded to the bargaining obligation of a predecessor employer, see *St. Elizabeth Manor*, 329 NLRB 341 (1999).

[8] Hereafter, all dates refer to 1990.

bargaining agreement. A sixth meeting was scheduled for July 3. However, on July 2, the Respondent received a second petition, signed by a majority of the unit employees, stating that they no longer wanted representation and that they thereby were decertifying the Union. In reliance on the second petition, the Respondent refused to bargain on July 3 as scheduled, and later withdrew recognition from the Union and unilaterally changed several of the unit employees' terms and conditions of employment.

On February 27, 1992, the Board issued its initial Decision and Order in this proceeding.[9] The Board found that the Respondent had violated Section 8(a)(1) of the Act by providing unlawful assistance to employees filing the first decertification petition. In addition, the Board found that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union on the basis of the petition, by failing to provide the Union with requested relevant information when bargaining resumed, by subsequently withdrawing recognition from the Union on the basis of the second petition, and thereafter by making unilateral changes in the unit employees' terms and conditions of employment. The Board ordered the Respondent to, inter alia, recognize and bargain with the Union.

On March 26, 1992, the Respondent petitioned the U. S. Court of Appeals for the District of Columbia Circuit for review of the Board's Order. On May 11, 1992, the Board moved to dismiss the petition without prejudice so that the Board could reconsider its Order in light of later decisions by that court.[10] On November 27, 1992, the court granted the Board's motion.

After receiving position statements from the parties and holding oral argument, the Board on September 6, 1996, issued its Supplemental Decision and Order.[11] In the Supplemental Decision, the Board reaffirmed its previous finding that the Respondent had violated Section 8(a)(5) by withdrawing recognition from the Union. The Board also reaffirmed that when an employer has unlawfully failed or refused to recognize or bargain with an incumbent union, employee disaffection from the union that arises during the course of that unlawful conduct will be presumed to be the result of that conduct. Absent unusual circumstances, the Board held, this presumption of taint is rebuttable only by a showing that the employee disaffection arose after the employer resumed recognizing and bargaining with the union for a reasonable period of time without committing any more unfair labor practices that would have an adverse effect on the bargaining.[12] As the Board observed,

> [W]hen a bargaining relationship has been initially established, or has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed before an employer may question the union's representative status.[13]

The Board explained:

> There are no rules concerning what constitutes a "reasonable time"; each case must rest on its own particular facts. However, a "reasonable time" does not depend on either the passage of time or on the number of meetings between the parties, but instead on what transpired and what was accomplished during the meetings. The Board considers the degree of progress made in negotiations, whether or not the parties were at impasse, and whether the parties were negotiating for an initial contract.[[14]]

Analyzing these factors, the Board found that a reasonable time for bargaining had not elapsed before the Respondent withdrew recognition on the basis of the second petition, and therefore that the withdrawal of recognition and subsequent unilateral changes were unlawful.[15] Thus, after resuming bargaining, the parties in this case met five times over a period of just over a month, during which time they had "conducted fruitful negotiations that nearly produced a complete agreement, and they had agreed to meet again"[16] when the Respondent withdrew recognition from the Union. The Board reaffirmed its earlier finding that an affirmative bargaining order was the appropriate remedy for the unlawful withdrawal of recognition.[17]

The Respondent again petitioned for review of the Board's Order in the District of Columbia Circuit. In its decision issued July 8, 1997,[18] the court affirmed the Board's findings that the Respondent had acted unlawfully when it assisted the employees in filing the first decertification petition, refused to bargain with the Union on the basis of the pending petition, and refused to provide requested information when bargaining resumed.[19]

The court then held that the Board acted rationally and consistently with the Act in adopting the rebuttable presumption that any failure or refusal to recognize or bar-

[9] 306 NLRB 408.

[10] *Williams Enterprises v. NLRB*, 956 F.2d 1226 (1992); *Sullivan Industries v. NLRB*, 957 F.2d 890 (1992).

[11] 322 NLRB 175.

[12] Id. at 178.

[13] Id.

[14] Id. at 179, and cases cited at fn. 41.

[15] Id. at 179–180, and cases cited.

[16] Id. at 179.

[17] Id. at 180.

[18] 117 F.3d 1454.

[19] Id. at 1462.

gain with an incumbent union taints any subsequent showing of employee disaffection from the union. The court endorsed the Board's holding that such an action foreseeably undermines the union in the eyes of employees and leads to their disaffection from the union.[20] And the court agreed that a failure or refusal to recognize or bargain with an incumbent union is "a particularly egregious kind of Section 8(a)(5) violation."[21] The court also upheld the Board's holding that the presumption is rebuttable only by a showing that the employer has bargained in good faith for a reasonable time in the interim.[22] But the court found that the Board had applied the presumption arbitrarily.

Thus, the Board had said that whether a reasonable time for bargaining had passed does not depend on the passage of time or the number of bargaining sessions, but rather on the degree of progress made in negotiations, whether impasse was reached, and whether the parties are bargaining for an initial contract. But, the court found, the Board had not looked to those factors; instead, it had looked primarily at the number of meetings and the length of time that had elapsed since the Respondent had agreed to meet and bargain. Plus, the court found, the Board had ignored the parties' considerable progress in bargaining and had overruled without explanation two prior cases[23] that held that progress toward reaching agreement and the absence of impasse are factors indicating that a reasonable time *has* elapsed. In the court's view, overruling those cases was inconsistent with the Board's emphasis on what is accomplished in negotiations. In sum, the court found a "clear and fundamental inconsistency" between the standard enunciated by the Board and the application of that standard in this case. The court remanded the case to the Board for "correction of this flaw," and suggested that the Board on remand explain more fully its "reasonable time" standard. As the court put it, "it is not entirely clear how any of the three factors cut."[24]

The court also found that the Board had failed to explain why an affirmative bargaining order (i.e., one that bars a challenge to the union's majority status for a reasonable time) was an appropriate remedy for the Respondent's July withdrawal of recognition. It, therefore, remanded the case on this issue as well. It directed the Board either to vacate the bargaining order or to explain, consistent with the law of the circuit, why an affirmative bargaining order was necessary.[25]

The Board accepted the court's remand, and the General Counsel and the Charging Party timely filed position statements.[26] The General Counsel argues that the Board should find, under the law of the case, that a reasonable time for bargaining had passed when the Respondent withdrew recognition from the Union, and, therefore, that the withdrawal of recognition was lawful and a bargaining order is not appropriate. The Charging Party contends that a reasonable time for bargaining had not elapsed, that the withdrawal of recognition was unlawful, and that a bargaining order is appropriate.

Discussion

I. THE "REASONABLE TIME" STANDARD

As stated in the Board's earlier decision in this case, "when a bargaining relationship . . . has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed" before the union's representative status can properly be challenged.[27] Thus, before the lingering effects of an employer's unlawful refusal to recognize or bargain can be overcome, the union must be given enough time to demonstrate what it can do for the employees in collective bargaining. In determining what constitutes a "reasonable period of time for bargaining," the proper focus is on the need to give unions a fair chance to succeed in contract negotiations before their representative status can be challenged.

This approach, as the court of appeals agreed, is consistent with the central purposes of the Act, which are to encourage the practice of collective bargaining and to protect the right of employees to freely choose or reject a bargaining representative.[28] In our view, a remedial order requiring the employer to bargain for a reasonable period of time serves the Act's purposes by restoring the bargaining relationship and ensuring that it will remain intact during that period. It also promotes employee free choice. The Board has long held that when such unfair labor practices have been committed, the lingering effects of the unlawful conduct must be effectively eliminated before employees can exercise *free* choice.[29] Moreover, the "reasonable time" standard does not fore-

[20] 322 NLRB at 177.
[21] 117 F.3d at 1459.
[22] Id.
[23] *Tajon, Inc.*, 269 NLRB 327 (1984); and *Brennan's Cadillac*, 231 NLRB 225 (1977).
[24] 117 F.3d at 1460.
[25] Id. at 1462.
[26] The Respondent submitted a position statement, but it was rejected as untimely.
[27] 322 NLRB at 178, citing, inter alia, *Franks Bros. Co. v. NLRB*, 321 U.S. at 705 ("[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.")
[28] See Secs. 1 and 7 of the Act. See also *Levitz*, 333 NLRB 717 (2001).
[29] See, e.g., *Robertshaw Controls Co.*, 263 NLRB 958, 959 (1982); and *Olson Bodies, Inc.*, 206 NLRB 779, 780 (1973).

close employees from ever rejecting a collective-bargaining representative; it only postpones a challenge to the union's representative status until the parties have had a reasonable time to bargain.[30]

A. A "Reasonable Time" Must be at Least 6 Months

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 Board, with court approval, has long applied an insulated period of defined length in situations where a union has been newly certified following a Board-conducted election. Under the so-called "certification year" rule, a newly certified union's representative status ordinarily cannot be questioned for 1 year after certification.[31] The certainty provided by that simple rule has undoubtedly prevented premature challenges to unions' representative status and thus avoided much litigation.

We believe that when an employer has unlawfully failed or refused to recognize or bargain with an incumbent union there should also be an insulated period of a defined length during which the union's majority status cannot be questioned. A defined period will provide a measure of certainty that is lacking under existing law. It will give employers, unions, and employees advance notice that the bargaining relationship cannot be disturbed for that period. It should also remove from employers the temptation to test unions' representative status prematurely, either by withdrawing recognition or filing RM petitions, and thus should help to minimize litigation.

After careful consideration, we have decided that the insulated period in these circumstances should be at least 6 months. In reaching this conclusion, we have drawn on our experience and relevant data. Experience teaches that a period of around 6 months approximates the time typically required for employers and unions to negotiate renewal collective-bargaining agreements. Data collected by the Federal Mediation and Conciliation Service (FMCS) confirm the accuracy of that time period.[32] Data from fiscal years 1998 through 2000 reveal the average length of time between the filing by either party of a notice with the FMCS of proposed termination or modification of the agreement and the conclusion of a renewal contract. In FY 1998, the average time was 170 days; in FY 1999, it was 172 days, and in FY 2000, 183 days.[33] Assuming good-faith bargaining by the parties, it appears that 6 months is a fair estimate of the time unions need to show what they can accomplish in renewal contract negotiations.[34]

B. A "Reasonable Time" can be up to 1 Year: Applying a Multifactor Analysis

Of course, a potential drawback to a fixed time rule is that some employers may drag their feet in negotiations to avoid reaching a contract before the end of the 6-month period and then will withdraw recognition on the basis of evidence that the union has lost majority support. Negotiations also may be prolonged as a result of other circumstances. For these reasons, we have provided that the 6-month insulated period is only a *minimum* period, and may be extended up to an additional 6 months, depending on an analysis of other case-specific factors.[35]

We find that a "reasonable time for bargaining" should not exceed 1 year for two reasons. First, in our view, employers, unions, and employees should know the maximum as well as the minimum amount of time that any challenge to the union's majority status will be barred. Second, our experience with the 1-year insulated period for newly certified unions convinces us that 1 year is sufficient to enable unions to demonstrate their effectiveness in negotiations.

The factors we will consider in determining whether the initial 6-month insulated period should be extended are: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and 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.

These factors are similar to those that the Board has been examining for years. We recognize that there has been some confusion regarding the relevance or application of some of those factors. Thus, the Board in its earlier decision in this case stated that "a 'reasonable time' does not depend on either the passage of time or on the number of meetings between the parties, but instead on

[30] See, e.g., *MGM Grand Hotel*, 329 NLRB 464, 465 (1999); *Franks Bros. Co. v. NLRB*, 321 U.S. at 705–706.

[31] *Ray Brooks v. NLRB*, 348 U.S. 96, 98 (1954).

[32] Under Sec. 8(d) of the Act, a union or employer seeking to modify or terminate an agreement must file appropriate notices, including a notice to the FMCS.

[33] See app. B.

[34] As discussed below, a longer reasonable period for bargaining may be called for in initial bargaining cases.

[35] Of course if an employer bargains in bad faith, in violation of Sec. 8(a)(5), the time period of such a violation is not to be counted at all.

what transpired and what was accomplished during the meetings."[36] However, the court faulted the Board for basing its decision on the length of time the parties had bargained and the number of negotiating sessions, which the court found was inconsistent with the Board's foregoing statement.

We acknowledge that the Board's statement may have been misleading. It could be read (as the court apparently did) to mean that the passage of time and the number of meetings are irrelevant. However, it is evident from decisions cited by the Board that those factors are relevant but not alone dispositive of whether a "reasonable time" has elapsed.[37] In any event, we clarify here that we do consider the passage of time and the number of meetings to be relevant to this question.

As stated, the court also invited the Board to explain how each of the relevant factors bears on the determination of whether a reasonable time for bargaining has elapsed. We shall therefore do so.

1. Whether the parties are bargaining for an initial contract

Parties engaged in initial contract bargaining are likely to need more time to conclude an agreement than parties who are bargaining for a renewal contract. Initial bargaining typically involves special problems.[38] It is not unusual for it to take place in an atmosphere of hard feelings left over from an acrimonious organizing campaign, and the individuals sitting at the bargaining table may be inexperienced at collective bargaining.[39] In any event, in initial bargaining, unlike in renewal negotiations, the parties have to establish basic bargaining procedures and core terms and conditions of employment, which may make negotiations more protracted than in renewal contract bargaining.[40] As the Board noted in its Supplemental Decision and Order, "[w]hen parties are negotiating for an initial contract, the 'reasonable time' for bargaining is longer because of difficulties often encountered in hammering out fundamental procedures, rights, wage scales, and benefit plans in the absence of previously established practices."[41] Initial contract bargaining, then, is a factor that weighs against finding that a reasonable time has elapsed.

2. Complexity of the issues being negotiated and the procedures adopted for bargaining

When the issues being bargained are complex, or when the parties have structured negotiations so as to invite more employee input, it stands to reason that, other things being equal, those negotiations likely will take longer than when the issues are less complex and the structure is more streamlined. An example when the Board applied this reasoning was *MGM Grand Hotel*.[42] The Board in that case found that three election petitions were untimely even though the last was filed more than 11 months after the employer initially recognized the union. In addition to bargaining for an initial contract, the parties were departing from the union's usual practice of negotiating from an existing agreement. Instead, they were drafting an innovative "living contract" from the ground up. Also, the union formed committees and subcommittees comprising both union representatives and employees to study each aspect of the contract, evaluate employee satisfaction with existing terms, and draft and evaluate proposals. This innovative approach was complex and time-consuming, but also effective, and indeed had almost produced an agreement by the time the last petition was filed. In those circumstances, the Board held that a reasonable time for bargaining had not elapsed.[43]

We reaffirm this approach. Like the Board in *MGM Grand*, then, we think that complex issues and bargaining structures weigh against finding that a reasonable time has elapsed.

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[36] 322 NLRB at 179, and cases cited at fn. 41.

[37] See, e.g., *W. B. Johnston Grain Co.*, 154 NLRB 1115, 1116 (1965), enfd. 365 F.2d 582 (10th Cir. 1966) (relying in part on time lapse of only 6 weeks and fact that only two meetings had been held); and *Shangri-La Health Care Center*, 288 NLRB 334 fn. 2 and 336 (1988) (number of meetings and passage of time considered together with progress in negotiations; passage of time alone insufficient to determine reasonable time; other factors viewed in a "blended focusing analysis"). See also *Driftwood Convalescent Hospital*, 302 NLRB 586, 589 (1991) (elapsed time and number of meetings considered but not dispositive); and *Van Ben Industries*, 285 NLRB 77, 79 (1987) (while reasonable time test is what transpires during negotiations rather than length of time elapsed, bargaining occurred in such short time frame and was of such limited nature that no reasonable period of time had elapsed).

[38] *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71 (1965).

[39] See *APT Medical Transportation*, 333 NLRB 760 fn. 4 (Member Liebman concurring) (2001).

[40] FMCS data also support this proposition. The average length of time after certification for newly certified unions to reach initial contracts was 296 days in FY 1998, 313 days in FY 1999, and 347 days in FY 2000. See app. B. That was almost twice the average length of time, indicated above, required to conclude renewal agreements.

These data indicate only the average length of time taken in negotiations by parties who successfully concluded collective-bargaining agreements. They do not reflect the fact that a relatively high percentage of initial contract negotiations do not end in contracts.

[41] 322 NLRB at 180, fn. 43; see also *MGM Grand Hotel*, 329 NLRB 464; *Ford Center for the Performing Arts*, 328 NLRB 1 (1999); *Shangri-La Health Care Center*, 288 NLRB at 338; *VIP Limousine*, 276 NLRB 871, 877 (1985).

[42] 329 NLRB 464.

Chairman Hurtgen dissented in *MGM Grand Hotel*. Accordingly, in reaching the result here, he does not rely on the holding of that case.

[43] Id.

3. Passage of time and number of bargaining sessions

The relevance of the passage of time and number of bargaining sessions to a reasonable time for bargaining is obvious. Negotiations generally require time and meetings to bear fruit. The more time that has elapsed since the parties began to bargain and the more negotiating sessions they have engaged in, the more opportunity they have had to reach a contract, and vice versa.

4. Presence or absence of impasse

The Board has defined impasse as the point in negotiations when the parties are warranted in assuming that further bargaining would be futile.[44] When the parties have bargained in good faith to impasse, they have made all the progress they are capable of making, unless circumstances change and the impasse is broken. In the meantime, the parties are temporarily relieved of their duty to negotiate further, provided the preimpasse bargaining has been conducted in good faith.[45] As long as a good-faith impasse exists, then, there is no reason to expect additional results from further bargaining. By contrast, if the parties are not at impasse, there is still hope that they can reach agreement. Accordingly, the existence of impasse is a factor weighing in favor of a finding that a reasonable time for bargaining has passed, and the absence of impasse weighs against such a finding.[46]

5. Proximity to agreement

The Board has often indicated that bargaining progress, and in particular the likelihood of concluding an agreement in the near future, indicates that a reasonable time for bargaining has *not* elapsed.[47] It could be contended, however, that progress in negotiations indicates that a reasonable time for bargaining *has* elapsed. Under this view, the union needs to be given only a reasonable *chance* to succeed, and substantial progress toward an agreement indicates that the union has had that chance.[48]

After careful consideration, we continue to hold that progress (or lack of progress) toward reaching a contract is relevant to whether a reasonable time for bargaining has elapsed, because it can indicate whether the bargaining process has had "a fair chance to succeed." We have concluded, however, that which way the factor cuts depends on the context.[49]

Thus, 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. 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. Thus, for example, in *Top Job Building Maintenance Co.*, the Board found that a reasonable time for bargaining had not elapsed where the parties were in the midst of negotiations, had resolved some questions, and had reasonable prospects of soon concluding an agreement.[50] In *N.J. MacDonald & Sons*, a reasonable time had not elapsed where the parties had reduced their agreement to writing and the union had said that it would submit the employer's offers on the final issues of wage increases and union security to the employees for their approval).[51] And in *MGM Grand Hotel*, the Board held that three decertification petitions were untimely, even though the last was filed more than 11 months after the employer initially recognized the union, where (among other things) the parties had nearly reached a contract when the last petition was filed and a contract was in fact achieved only days after the petition was filed.[52]

That reasoning applies, however, only when parties are near to reaching agreement, not when they have merely made progress in negotiations. Given our holding that a "reasonable period of time" is not less than 6 months, parties in future cases will have bargained for at least 6 months, normally in numerous negotiating sessions, before the union's representative status can be challenged.

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[44] *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993).

[45] See P. Hardin, Ed., *The Developing Labor Law*, 3d ed., pp. 696–698 (1992).

[46] Compare *Daily Press, Inc.*, 112 NLRB 1434, 1441–1442 (1955), overruled on other grounds, *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962) (reasonable time for bargaining found to have elapsed, in part because of impasse); with *Top Job Building Maintenance Co.*, 304 NLRB 902, 908 (1991); *Driftwood Convalescent Hospital*, 302 NLRB at 589; and *Shangri-La Health Care Center*, 288 NLRB at 335, 338 (all finding that reasonable time had not elapsed, in part because of absence of impasse). See also *Lahey's of Muskegon*, 176 NLRB 537 fn. 1 (1969) (presence or absence of impasse not given controlling weight).

[47] See, e.g., *MGM Grand Hotel*, 329 NLRB at 465 (decertification petition untimely where parties had made substantial progress toward reaching agreement, had few remaining issues to resolve, and finalized agreement only days after petition was filed); *Ford Center for the Performing Arts*, 328 NLRB 1 (representation petition untimely where parties were on the verge of complete agreement when petition was filed).

[48] The court of appeals apparently took this view. Otherwise, it would not have found that overruling *Tajon* and *Brennan's Cadillac*, which so indicated, was inconsistent with the Board's emphasis on what was accomplished in negotiations.

[49] Some of the Board's earlier statements suggest that, whatever the relevance of other factors, progress toward reaching agreement may be more important than some other factors. On reflection, we do not believe that progress toward reaching a contract should necessarily be given special weight.

[50] 304 NLRB at 908.

[51] 155 NLRB at 71.

[52] 329 NLRB at 465.

In that setting, if the parties are still not close to reaching a contract after bargaining for 6 months or more (whether or not they have made progress), giving them a bit more time for negotiations is unlikely to enable them to conclude an agreement.

In such circumstances, we think that the parties have had a reasonable opportunity to reach agreement. If they have not come close to doing so, we will view that fact as evidence that a reasonable time for bargaining *has* elapsed.

6. Summary and burden of proof

In sum, the factors tending to establish that a reasonable period of time for bargaining has elapsed are: negotiations for a renewal, as opposed to an initial contract, the absence of unusually complex issues or bargaining processes, the passage of a relatively long period of time after the 6-month insulated period, a relatively large number of bargaining sessions, the parties' failure to come close to reaching agreement, and the existence of impasse. The factors tending to establish that a reasonable time for bargaining has not elapsed: are negotiations for an initial contract, the use of complex bargaining processes, the existence of complex issues to be negotiated, relatively little passage of time beyond the 6-month period, relatively few negotiating sessions, the absence of impasse, and a strong likelihood that a contract can be reached in the near future. The factors must be considered together, and none is dispositive individually or necessarily entitled to special weight. In every case, the issue is whether the union has had enough time to prove its mettle in negotiations, so that when its representative status is questioned, the employees can make an informed choice, without the taint of the employer's prior unlawful conduct. To the extent that *Brennan's Cadillac*, *Tajon*, *Lee Lumber*, 322 NLRB 175, and other Board decisions are inconsistent with the foregoing analysis, they are overruled.

There remains the issue of the burden of proof: who has the burden of proving that a reasonable time for bargaining has or has not elapsed. In its earlier decision in this case, the Board held that the employer bears the burden of demonstrating that it had bargained for a reasonable period of time.[53] We affirm that general principle that an employer has the burden of establishing its defense to a refusal to bargain allegation. In this decision, however, we have in effect established an irrebuttable presumption that a reasonable period for bargaining will be at least 6 months. Once 6 months has elapsed, if the General Counsel contends that a reasonable period for bargaining has still not elapsed under the multifactor analysis described above, we think it appropriate in that circumstance to shift the burden of proof to the General Counsel to establish his claim.[54]

II. APPLICATION OF THE STANDARD

We turn now to the application of the "reasonable time" standard to the facts of this case. Unlike the General Counsel, we do not believe that we are foreclosed by the law of the case from reaffirming the Board's earlier finding that a reasonable time for bargaining had not elapsed when the Respondent withdrew recognition. The court did not hold that the Board reached the wrong result. Rather, it voiced concern over what it perceived as an unexplained inconsistency between the standard and its application. The court remanded the case to the Board "for correction of this flaw." For the reasons discussed below, we reaffirm the Board's previous finding that a reasonable time for bargaining had not elapsed in this case when the Respondent refused to bargain and withdrew recognition in July.

Not quite 2 months elapsed between the Respondent's May 8 agreement to bargain and its July 3 refusal to meet with the Union. During that period, the parties engaged in only five negotiating sessions over a little more than 4 weeks. Their efforts nearly produced a new agreement, they were not at impasse, and they had agreed to meet again.

In these circumstances, we cannot conclude that a reasonable time for bargaining had elapsed. To begin with, the Respondent had not bargained for 6 months before it was presented with the second petition on July 2. Thus, under the standard we have announced today, the Respondent's withdrawal of recognition was unlawful.

Of course, the Respondent withdrew recognition long before we imposed the 6 months' requirement. Even in the absence of that requirement, however, we would find, under the multifactor analysis discussed above, that a reasonable time had not elapsed. Thus, the parties had met in only five negotiating sessions over a span of a little more than a month. This brief time spent in bargaining, with few bargaining sessions, weigh heavily

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[53] 322 NLRB at 178.

[54] Member Walsh agrees with his colleagues that an employer has the burden of establishing its defense and rebutting the presumption that its earlier unlawful refusal to bargain tainted the employee disaffection petition. Member Walsh also agrees with the statement in the Board's prior decision that, absent unusual circumstances, "[o]nly . . . a showing of bargaining for a reasonable time will rebut the presumption." 322 NLRB at 178. Therefore, in Member Walsh's view, just as it is the employer's burden to rebut the presumption of taint, so, too, must it be the employer's burden to demonstrate that it bargained for a reasonable period of time. Accordingly, Member Walsh dissents from his colleagues' decision to bifurcate these burdens and "shift . . . to the General Counsel" the burden of proof on the question whether a reasonable time for bargaining has elapsed.

against finding that a reasonable time had elapsed. The parties' apparent nearness to concluding a contract, plus the fact that the parties were not at impasse—indeed, they had scheduled another negotiating session for the day after the July petition was presented—strongly demonstrate that additional progress in the near future was a real possibility. These facts thus support a finding that a reasonable time for bargaining had not elapsed.

True, the parties were not bargaining for an initial agreement, and there is no indication that the parties were facing unusually complex issues or had adopted complicated approaches to bargaining. In our view, though, those factors are greatly outweighed by the other factors.

Accordingly, we reaffirm the Board's finding that the Respondent did not bargain for a reasonable period of time, and therefore that it has not rebutted the presumption that its earlier unlawful refusal to bargain tainted the July petition. We therefore also reaffirm the Board's conclusion that the Respondent violated Section 8(a)(5) by refusing to bargain and withdrawing recognition from the Union on the basis of that petition, and later by unilaterally implementing changes in the terms and conditions of employment of its unit employees.

III. THE REMEDY

For reasons explained in detail in previous decisions, the Board holds that, regardless of the particular factual context, the only appropriate remedy for an unlawful failure or refusal to recognize and bargain with an incumbent union is an affirmative bargaining order—that is, one requiring the employer to recognize and bargain with the union for a reasonable time before challenging the union's majority support.[55] Consequently, the Board in its Supplemental Decision and Order did not explain why, under the particular facts of this case, an affirmative bargaining order was the appropriate remedy for the Respondent's July withdrawal of recognition.

The court found the Board's failure to substantiate the need for a bargaining order to be contrary to the law of the circuit, and remanded the case to the Board with instructions either to vacate the bargaining order or to explain its necessity in the context of this case. The court, however, "express[ed] serious doubt" that the Board could justify a bargaining order.[56] Thus, the court noted that 7 years had passed since the commission of the unfair labor practices, that the employees had twice indicated nonsupport of the Union, and that the unfair labor practices were "relatively slight."[57]

Although normally we would issue a bargaining order in a case such as this, given the court's observations quoted above and the unfortunate delays of the case here at the Board, we recognize that such an order would likely be unenforceable. Accordingly, rather than engender more litigation and further delay over the propriety of a bargaining order, we will limit our remedy to ordering the Respondent to cease and desist from further unlawful refusals to bargain.[58]

For the reasons discussed above, we shall modify the Board's earlier Order to vacate the affirmative bargaining provision. We shall, however, retain the provision of the Order enjoining the Respondent from withdrawing recognition from the Union.[59] It is understood that the latter provision will be effective until and unless, after complying with the other provisions of the Order, the Respondent is presented with objective evidence sufficient to warrant its challenging the Union's majority status again. See *Levitz*, 333 NLRB 717 (2001). We recognize, of course, that an order limited to a cease and desist remedy will not ensure that the Respondent will recognize and bargain with the Union for a reasonable period of time. However, this is the kind of remedial order that has been endorsed, and distinguished from affirmative bargaining orders, by the court of appeals. *Williams Enterprises v. NLRB,* 956 F.2d 1226, 1237 (D.C. Cir. 1992).

[55] See *Williams Enterprises*, 312 NLRB 937, 940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995); and *Caterair International*, 322 NLRB 64 (1996).

[56] 117 F.3d at 1462.

[57] Id. Elsewhere, however, the court also held that a refusal to recognize or bargain with an incumbent union—the unfair labor practice here—is "a particularly egregious kind of Section 8(a)(5) violation." 117 F.3d at 1459.

[58] Although we are not issuing an affirmative bargaining order in this case, we note that, out of deference to the court of appeals, the Board has recently begun to explain why, on the particular facts presented, an affirmative bargaining order is an appropriate remedy for unlawful withdrawals of recognition. See, e.g., *Raven Government Services*, 331 NLRB 651 (2000).

[59] We shall also modify the Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

The court of appeals affirmed the Board's finding that, before it withdrew recognition in July, the Respondent unlawfully failed to provide the Union with requested relevant information. However, the court deleted from the Board's proposed judgment the provisions designed to remedy that violation. The court apparently took that action in agreement with the Respondent's argument that, as the case stood at the time of the court's remand, the Respondent had no bargaining obligation and hence no obligation to furnish information to the Union. The Respondent conceded, however, that its obligations toward the Union following the remand might be different, and so they are. As we have reaffirmed the Board's earlier findings that the Respondent unlawfully withdrew recognition from the Union, and are enjoining it from doing so in the future, the Respondent's obligation to furnish information to the Union, in our view, still exists. Accordingly, we do not believe that we are precluded by the court's judgment from including in our amended Order and notice the provisions addressing this violation.

ORDER

The National Labor Relations Board reaffirms its original Order, reported at 306 NLRB 408 (1992), as modified by its Supplemental Decision and Order, reported at 322 NLRB 175 (1996), and as further modified below and orders that the Respondent, Lee Lumber and Building Material Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) and reletter the subsequent paragraphs.

2. Substitute the following for current paragraph 2(d).

(d) Within 14 days after service by the Region, post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix A."[17] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 1990.

3. Substitute the attached notice for the one previously ordered by the Board.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT assist employees in repudiating Carpenter Local No. 1027, Mill-Cabinet-Industrial Division, a/w the United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District of Carpenters, AFL–CIO by showing our support for decertification by reimbursing wages and parking fees that would otherwise be lost by employees who filed that petition.

WE WILL NOT refuse to bargain in good faith with the Union concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

> All full-time, part-time, temporary, or seasonal production and maintenance foremen, leadmen, journeymen, millmen, apprentices and all other employees engaged in work covered by the "Occupational Jurisdiction of the Union (Mill-Cabinet-Industrial Division)," including, but not limited to, in-plant millwork production; fabrication of cabinets, tables, desks, doors, sash, window frames, millwork, store fixtures, plastic laminates and veneers of all types used in the manufacture thereof; component parts; installers of hardware; gluers, scrapers of glue, sprayers; handlers of materials to and from clamp; benchwork, assemblers, lay-out, operators of power machinery and hand power tools relating thereto.

WE WILL NOT refuse to bargain in good faith by suspending contract renewal negotiations solely because a decertification election petition has been filed.

WE WILL NOT refuse to bargain in good faith by refusing, on request, to furnish information relevant and necessary to the Union's performance as exclusive representative of employees in the unit.

WE WILL NOT refuse to bargain in good faith by withdrawing recognition from the Union.

WE WILL NOT refuse to bargain in good faith by unilaterally, and without notice to, or negotiate with the Union, discontinuing payments to the Chicago and Northeast Illinois District Council of Carpenters Apprentice and Training Program, and discontinuing union visitation.

WE WILL NOT refuse to bargain in good faith by unilaterally, and without notice to, or negotiate with the Union, granting wage increases to employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union with a copy of our health insurance policy and a list of unit employees who participate in the profit-sharing plan.

WE WILL resume payments to the Chicago and Northeast Illinois District Council of Carpenters Apprentice and Training Program, and make whole the latter by paying all delinquencies which have accrued, with interest.

LEE LUMBER AND BUILDING MATERIAL CORP.

APPENDIX B

GENERAL COUNSEL

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NO. 19502/02

FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
WASHINGTON, D.C. 20427

OFFICE OF THE GENERAL COUNSEL

June 19, 2001

John J. Toner
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11600
Washington, D.C. 20570

Dear Mr. Toner:

In response to our request on behalf of the National Labor Relations Board (NLRB), the Federal Mediation and Conciliation Service is happy to provide the following information regarding employers and unions that successfully negotiated collective-bargaining agreements in Fiscal Years 1998, 1999, and 2000:

1. The average time elapsed between the date of unions' certification by the NLRB and the conclusion of an initial collective-bargaining agreement was

FY 1998	296 days
FY 1999	313 days
FY 2000	347 days

2. The average time elapsed between the filing of an F& notice (stating an intention to terminate or modify a collective-bargaining agreement) with the FMCS by any party and the conclusion of a renewal agreement was

FY 1998	170 days
FY 1999	172 days
FY 2000	183 days

The FMCS considers the above to be public information that is available on request.

If I can be of any further assistance, please let me know.

Sincerely,

\s\
Karen D. Kline

Deputy General Counsel June 19 2001 17 572026065345 PAGE.02