

Americold Logistics, LLC and Karen Cox, Petitioner and Retail, Wholesale and Department Store Union, UFCW, Local 578. Case 25–RD–108194

March 31, 2015

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On July 26, 2013, the Regional Director for Region 25 issued a Decision and Direction of Election in the above-captioned proceeding finding that the instant petition should be processed because it was filed more than 1 year after the Employer voluntarily recognized the Union.¹ Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Union filed a timely request for review of the Regional Director's decision, contending that there was a recognition bar to processing the petition.

By Order dated September 9, 2013, the Board granted the request for review and directed the parties to respond to the following questions:

(1) Whether the Regional Director correctly found under *Lamons Gasket Co.*, 357 NLRB 739 (2011), that there is no recognition bar because the petition was filed more than 1 year after the Employer recognized the Union.

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

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the record in this case, including the parties' briefs, we find, contrary to the Regional Director, that the petition is barred. First, we clarify that, under *Lamons Gasket*, supra, a reasonable period of time for bargaining before the union's majority status can be challenged is a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer. Because the petition here was filed less than 1 year after the parties' first bargaining meeting, the Regional Director erred by finding that, as a matter of law, he was required to process the petition.²

¹ A mail-ballot election was conducted on August 20, 2013, and the returned ballots were impounded.

² The Petitioner filed two earlier decertification petitions. The first petition was filed on November 19, 2012 (Case 25–RD–093419). The Regional Director dismissed the petition, which was filed less than 6 months from the date of recognition; no request for review was filed. The second petition was filed on April 8, 2013 (Case 25–RD–102210).

Second, applying the multifactor test set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002), we find that a reasonable period of time for bargaining had not elapsed when the petition was filed and thus conclude that the petition is barred.

I. FACTS

The Employer operates food storage warehouses nationwide, including two warehouses located in Rochelle, Illinois. The Union conducted an organizing drive at both warehouses during the first half of 2012 and filed an election petition in May 2012. The Employer agreed to a card check by a neutral third party, who found that a majority of the approximately 110 employees in the combined warehouse unit had signed valid authorization cards. By June 18, 2012, both parties had executed a recognition agreement, which covered all warehouse employees.³

Dennis Williams, one of the Union's lead negotiators, testified that it took time for the Union to meet with the employees at both warehouses, elect stewards, and set bargaining goals; he stated that the Union was ready to start bargaining in mid-September 2012. The Employer, however, was unavailable until October 2012. As a result, the parties held their first bargaining meeting on October 9, followed by additional sessions on October 10 and 11. Although the negotiators for both parties were experienced at collective bargaining, these were the first negotiations between this Union and this Employer. The Employer presented a model contract proposal that retained employees' current wages and healthcare plan, and the parties reached tentative agreements on some noneconomic language.

The parties did not meet again until November 27, 28, and 29, 2012, at which time they tentatively agreed to language governing nondiscrimination, notification, dues checkoff, grievance and arbitration, probationary employment, seniority, layoff/recall, and the duration of the agreement. Williams testified that issues regarding seniority were difficult to resolve because of disparities be-

The Regional Director issued a Decision and Order dismissing the petition based on his finding that a reasonable period of time for bargaining had not elapsed. The Petitioner's request for review of that dismissal is pending before the Board. Consistent with today's decision, we will by separate Order deny the request for review in Case 25–RD–102210.

³ The recognized unit includes:

All full-time and regular part-time warehouse employees, including warehouse employees, janitorial employees, and porter employees employed by the Employer, at its Rochelle, Illinois warehouses; but excluding office clerical employees, maintenance employees, customer service representatives, foremen, temporary employees, guards, and supervisors as defined in the Act.

tween the two warehouses. The parties also engaged in extensive discussions regarding the Employer's proposed management-rights clause, which the Union stated was different from what it had agreed to in its other contracts.

Following the November 2012 negotiations, the parties did not meet again until March 2013 owing to the unavailability of the Employer. The Union requested bargaining in December 2012 and January 2013; a session scheduled for late January was canceled when the Employer's lead negotiator became unavailable. The Employer also stated that it was unavailable for the entire month of February 2013.⁴

The parties reconvened for seven bargaining sessions from March 4 through 16, 2013.⁵ By the end of those sessions, the parties had tentatively agreed on most non-economic terms and had started negotiating economic terms, including health and welfare benefits. At their April 9 and 16, 2013 sessions, the parties orally agreed on a 401(k) provision and devoted the rest of the time to discussing both parties' proposed health insurance plans. During their five sessions from May 8 through 22, 2013, the parties focused on wages, lump-sum payments, and health insurance coverage, but also discussed vacation leave, an incentive program, and production standards. The Regional Director found that the parties exchanged various proposals and counterproposals and "engaged in the give and take of bargaining."

After the May 22, 2013 session, the Union sent the Employer a list of 10 prospective meeting dates in June. The Employer did not respond until June 13, when it suggested meeting on June 25 and 26. During the June 25 session, the parties reached a tentative agreement on the economic provisions of the contract, including wages and health insurance. The Employer put together a draft of all tentatively agreed-on provisions and presented it to the Union on June 26, 2013. The parties reviewed the document, made minor changes, and signed the contract on that date.

Pursuant to a provision in the signed contract, it would not take effect until ratified by the Union's members. The Union scheduled the ratification vote for June 29, 2013, and notified unit employees of the vote by posting notices on bulletin boards at the facilities and phoning employees. Of the 55 unit employees in attendance at the

vote, 31 voted to ratify the contract and 22 voted not to ratify, with 2 employees abstaining.

The Petitioner filed the decertification petition on June 28, 2013—1 day before the ratification vote and just over 1 year after the parties entered into their recognition agreement.

II. THE REGIONAL DIRECTOR'S DECISION AND THE PARTIES' POSITIONS

In determining whether the decertification petition could be processed, the Regional Director relied on the Board's decision in *Lamons Gasket*, supra, which defined a reasonable period of bargaining after voluntary recognition to be "no less than 6 months after the parties' first bargaining session and no more than 1 year." 357 NLRB at 748. The Regional Director interpreted this language to mean that the reasonable period of bargaining could not exceed 1 year from the date of recognition. In support of this interpretation, he stated that to extend the recognition bar beyond 1 year would confer greater protection on a voluntarily-recognized union than a Board-certified union—a result that the Board could not have intended. Accordingly, he concluded that, as a matter of law, the petition here was not barred because it was filed over 1 year after the Employer granted recognition.

The Union argues, contrary to the Regional Director, that the Board in *Lamons Gasket* intended for the maximum 1-year period under the recognition bar to be measured from the date of the parties' first bargaining meeting rather than the date of recognition. Because the parties did not begin bargaining until October 2012, the bar could potentially extend through October 2013. Accordingly, it contends that the Regional Director erred by finding that, as a matter of law, the petition was not barred. In addition, the Union argues that a reasonable period of time for bargaining had not elapsed at the time the petition was filed. It emphasizes that the parties were negotiating their first contract, bargaining involved complex issues, the Employer was unavailable to negotiate for 3-1/2 months during the course of negotiations, and the petition was filed 1 day before the contract was scheduled for a ratification vote.

The Petitioner and the Employer agree with the Regional Director that the Board's holding in *Lamons Gasket* dictates that, as a matter of law, the petition could not be barred because it was filed over 1 year after recognition. Both contend that the Union's interpretation would privilege the recognition bar over the certification bar, which is capped at 1 year from the certification date. They also contend that, even assuming the recognition bar could extend beyond 1 year after recognition, the parties had a reasonable period of time to bargain by the time the petition was filed. They rely on the following

⁴ The Regional Director, in dismissing the Petitioner's April 2013 petition, found that "[a]lthough the number of times that the parties bargained is not inconsequential, the three-month gap in negotiations negatively affected the parties' ability to make progress in negotiations."

⁵ During the March 2013 sessions, the Employer changed its lead negotiator. In his dismissal of the April 2013 petition, the Regional Director found that there was no evidence in the record that this hampered bargaining.

facts: (1) the parties had bargained for 21 separate sessions over nearly 9 months; (2) delays in bargaining were attributable to the Union as well as the Employer; (3) bargaining was not particularly complex; and (4) the parties had already reached an agreement by the time the petition was filed, thus demonstrating that a reasonable period had passed.

III. ANALYSIS

In *Lamons Gasket*, supra, the Board overruled *Dana Corp.*⁶ and returned to its well-established rule that an employer's voluntary recognition of a union, based on a showing of the union's majority status, bars an election petition for a reasonable period of time. In setting out this rule, the Board stated that, for the first time, it would provide benchmarks for determining whether a reasonable period of time had elapsed in any given case. 357 NLRB 739.

The Board in *Lamons Gasket* defined a reasonable period of bargaining to be "no less than 6 months after the parties' first bargaining session and no more than 1 year." 357 NLRB at 748. In determining whether a reasonable period of time has elapsed after the 6-month insulated period, the Board stated that it would apply the multifactor test set forth in *Lee Lumber*, supra, which considers: "(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." *Id.* at 748 fn. 14, quoting *Lee Lumber*, 334 NLRB at 402.

The issue presented in this case is whether the maximum 1-year period under the recognition bar runs from the date of recognition or from the start of bargaining. We make clear here that the "reasonable period of bargaining" under the recognition bar is a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the Union and the Employer. We thus find that the Regional Director erred in holding that, as a matter of law, the petition is not barred because it was filed more than 1 year after the recognition date.

⁶ 351 NLRB 434 (2007). In *Dana*, the Board established, among other things, a 45-day "window period" after voluntary recognition during which employees could file a decertification petition supported by a 30-percent showing of interest. Because the Board in *Lamons Gasket* provided an extensive rationale for overruling *Dana*, we need not address our dissenting colleague's initial contention that *Dana* was correctly decided.

Contrary to the Regional Director, the Board's decision in *Lamons Gasket* provides no support for his finding. It neither states nor suggests that the recognition bar is measured from the date of recognition. The only date identified in the Board's decision for measuring a reasonable period of bargaining is "the parties' first bargaining session." Similarly, the Board's decision in *UGL-UNICCO Service Co.*,⁷ a "successor bar" case which issued the same day as *Lamons Gasket*, defined a reasonable period of bargaining as "a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer."⁸

The Board explained in *Lamons Gasket* that "when a bargaining relationship has been initially established . . . it must be given a reasonable time to work and a fair chance to succeed."⁹ In our view, a union can only demonstrate its effectiveness in negotiations once bargaining has actually commenced. Our focus on the beginning of actual bargaining furthers the Board's fundamental statutory interest in the "process and the promotion of an autonomous relationship between the parties."¹⁰ Accordingly, in voluntary recognition cases, the relevant benchmarks identified in the *Lee Lumber* multifactor test are measured from the first bargaining meeting between the parties.

We reject the contention of our dissenting colleague, as well as the Employer and Petitioner, that, if a reasonable period of bargaining under the recognition bar lasts up to 1 year from the first bargaining meeting, it would provide a greater benefit to a union than the certification bar. To the contrary, the recognition bar guarantees an insulated period for only 6 months from the first bargaining meeting. Although this period may be extended up to an additional 6 months, depending on an analysis of case-specific factors, the certification bar guarantees a 1-year insulated period in every instance.

The mere prospect that the recognition bar may extend up to 1 year from the first bargaining meeting in certain cases does not make it more protective than the 1-year

⁷ 357 NLRB 801, 806 (2011).

⁸ Our dissenting colleague interprets this language to mean that the bar continues for no fewer than 6 months after the first bargaining session and no more than 1 year after the date of recognition. Even if the language, considered in isolation, arguably permits that interpretation, we believe that it is clear, especially when considered in conjunction with the decision in *UGL-UNICCO Service Co.* issued the same day, that the Board in *Lamons Gasket* intended for the voluntary recognition bar to run from the parties' first bargaining meeting.

⁹ 357 NLRB at 744, quoting *Lee Lumber*, supra, 322 NLRB at 178.

¹⁰ *Lamons Gasket*, supra, 357 NLRB at 746, quoting *International Paper Co.*, 319 NLRB 1253, 1270 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997).

certification bar. Instead, it properly acknowledges the right of the majority of employees who designated a bargaining representative to a reasonable opportunity for their representative to negotiate an agreement on their behalf. Tellingly, our dissenting colleague fails to acknowledge the more demanding standard of employee support required for voluntary recognition: unlike Board-conducted elections where a labor organization is certified if a majority of the employees who vote cast votes in favor of representation, for voluntary recognition to be valid, the union must demonstrate support of a majority of *all* employees in the bargaining unit. Nor does our colleague acknowledge that Board certification carries other unique benefits that do not attach to recognition.¹¹ Thus, contrary to the Petitioner, our decision does not “elevate voluntary recognition above certification.”

Our dissenting colleague notes that, before *Lamons Gasket*, supra, the Board generally held that the recognition bar ran for a reasonable period of time from the date of recognition.¹² We agree that the recognition bar takes effect on the date of recognition.¹³ However, the issue in this case is not when the bar begins, but when it ends. In *Lamons Gasket*, the Board introduced the framework that we apply here—that a reasonable period of time for bargaining is no less than 6 months and no more than 1 year, measured from the date of the parties’ first bargaining meeting.¹⁴ The Board in *Lamons Gasket* acknowledged that, although the various election bars arise in different contexts, “they share the same animating principle: that a newly created bargaining relationship should be given a reasonable chance to succeed before being subject to challenge.”¹⁵ Thus, unlike our colleague, we see no tension in applying the same approach in the recognition context that the Board has applied in the remedial and successorship contexts. Although our colleague faults our decision for failing to provide “concrete guidelines for determining when the Board will process election petitions,” the *Lamons Gasket* multifactor framework that we apply today actually provides more specific

guidance to parties than the earlier decisions on which he relies.¹⁶

Finally, we reject our dissenting colleague’s contention that our holding “reverse[s] direction from” the Board’s recent rule regarding representation case procedures. The purpose of the rule is to enhance the Board’s ability to fairly and expeditiously resolve questions concerning representation; it has nothing to do with the Board’s recognition bar doctrine, which serves to foster collective bargaining *after* employees have already selected a bargaining representative. Likewise, the issue in this case is whether the petition may go forward, not how to process it. For these reasons, our colleague’s depiction of today’s decision as being inconsistent with the rule is misplaced.

IV. ASSESSING WHETHER A REASONABLE PERIOD HAD ELAPSED AT THE TIME THE PETITION WAS FILED

We must next consider, under the *Lee Lumber* factors, whether the Union established that a reasonable period of bargaining had not elapsed at the time the petition was filed.¹⁷ For the reasons discussed below, we find that the Union met its burden and therefore conclude that the petition is barred.

On the one hand, we agree with the Regional Director that the parties were not facing unusually complex issues, nor had they adopted complicated approaches to bargaining.¹⁸ Moreover, with regard to the passage of time and the number of bargaining sessions, the parties engaged in about 21 negotiating sessions over the course of 8-1/2 months, during which time they bargained constructively and made significant progress toward an agreement.

On the other side of the balance, it is undisputed that the parties were bargaining their first contract and were not at impasse, both of which are factors that weigh against finding that a reasonable period of time had elapsed. See *Lee Lumber*, supra, 334 NLRB at 403–404. Of particular significance in this case is the progress the parties made in bargaining and their proximity to con-

¹¹ Such benefits include protection against recognition picketing by rival unions under Sec. 8(b)(4)(C); the right to engage in certain secondary and recognition activity under Sec. 8(b)(4)(B) and (7); and, in certain circumstances, a defense to allegations of unlawful jurisdictional picketing under Sec. 8(b)(4)(D). *Id.* at 10 fn. 35.

¹² See, e.g. *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966).

¹³ This is in contrast to the Board’s decision in *Dana Corp.*, to which our dissenting colleague would adhere, which held that the recognition bar would not take effect until 45 days after the posting of a notice following recognition.

¹⁴ 357 NLRB at 478 (expressly “alter(ing) the rule of *Keller Plastics* in one respect”).

¹⁵ *Id.* at 6.

¹⁶ Notably, even in the cases cited by our colleague, the Board held that a “[r]easonable time does not depend upon either the passage of time or the number of calendar days on which the parties met. Rather, the issue turns on what transpired during those meetings and what was accomplished therein.” *Tajon, Inc.*, 269 NLRB 327, 328 (1984), quoting *Brennan’s Cadillac*, 231 NLRB 225, 226 (1977).

¹⁷ In *Lamons Gasket*, the Board stated that “the burden is on the General Counsel to prove that a reasonable period of bargaining had not elapsed after 6 months.” 357 NLRB at 748 & fn. 34. We clarify that where, as here, the General Counsel is not a party to the case, the burden of proof will be on the party who invokes the recognition bar to establish that a reasonable period of bargaining has not elapsed after 6 months.

¹⁸ Cf. *MGM Grand Hotel*, supra, 329 NLRB at 466–467 (relying on the parties’ innovative approach to bargaining to justify a longer reasonable period for bargaining).

cluding an agreement. In *Lee Lumber*, supra, the Board stated that “[o]ne 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.” 334 NLRB at 404. Here, at the time the petition was filed, the parties had already finalized a written agreement and the Union had scheduled the necessary ratification vote shortly thereafter. Any reasonable period of bargaining must include time for the Union to conclude the agreement by holding a ratification vote.

Indeed, the 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. In *Ford Center for the Performing Arts*, 328 NLRB 1, 2 (1999), for instance, the Board held that a reasonable period for bargaining had not passed where the parties had completed a draft of the agreement and were “on the verge of complete agreement when the petition was filed.” The Board concluded that “it would frustrate the statutory goal of promoting stable bargaining relationships as well as the free choice of the unit employees” to allow the petition to go forward “when the parties’ efforts were on the verge of reaching finality.” Id. Similarly, in *N. J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71 (1965), cited in *Lee Lumber*, supra, 334 NLRB at 404, the Board found that a reasonable period for bargaining had not elapsed where the parties had reduced their agreement to writing and the union had stated that it would submit the employer’s final offers on wage increases and union security to the employees for their approval.¹⁹ Here, the parties’ nearness to concluding their contract—which was ratified only 1 day after the petition was filed—likewise weighs in favor of barring the petition.

Our dissenting colleague contends that, because the parties had already reached an agreement and reduced it to writing, there could be no question that a reasonable period of bargaining had passed. But he discounts the significance of this stage of the negotiations—where the parties were on the cusp of a final agreement—to the Board’s goal of promoting collective bargaining. Notably, a majority of employees expressed support for the

agreement when they ratified it at the June 29 ratification meeting. That vote plainly expressed the employees’ satisfaction with the Union as their bargaining representative in the negotiations.

Our colleague also urges us to “consider the plight of employees who, in the instant case, supported the filing of *three* successive petitions, each one seeking a Board-conducted election where they could vote on union representation.” In so doing, however, he overlooks the guiding principle of the bar: “that 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.”²⁰ It is worth noting that the first petition, which was filed less than 6 months from the date of recognition, was properly dismissed even under our colleague’s interpretation of *Lamons Gasket*. The second petition was filed less than 6 months from the first bargaining session, at which time the Regional Director concluded that a reasonable period for bargaining had not elapsed. In any event, the number of untimely petitions filed in this case is irrelevant; the Petitioner’s mere persistence does not strengthen her argument for disrupting a productive bargaining relationship that was endorsed by a majority of unit members. Indeed, the fact that the parties eventually reached and ratified an agreement is a testament to the importance of the Board’s recognition bar doctrine in providing the parties a reasonable period of time to succeed in collective bargaining, and not the suppression of free choice that our colleague claims.

Having weighed all of the *Lee Lumber* factors, we conclude that a reasonable period of time for bargaining had not elapsed when the petition was filed. We thus reverse the Regional Director’s decision and find that the petition here is barred.²¹

ORDER

This case is remanded to the Regional Director for further appropriate action consistent with this decision.

MEMBER MISCIMARRA, dissenting.

I respectfully dissent because, in my view, the Regional Director correctly directed the holding of an election based on the filing of a timely election petition supported by an appropriate showing of interest among employees.

¹⁹ See also *MGM Grand Hotel*, 329 NLRB at 467 (noting that the parties “had made substantial progress toward reaching agreement, had few remaining issues to resolve, and worked steadily to finalize their agreement, which they achieved only days after the petition was filed”). See generally *Keller Plastics Eastern*, 157 NLRB at 587 (in the voluntary recognition context, “the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining”).

²⁰ *Lamons Gasket*, 357 NLRB at 740, quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).

²¹ In so holding, we note that “the employees are not forever foreclosed from changing or eliminating their bargaining representative at the appropriate time, i.e., during the window period prior to the expiration of the collective-bargaining agreement. The voluntary recognition bar extends for a reasonable period, not in perpetuity.” *MGM Grand Hotel*, supra, 329 NLRB at 467.

I believe several considerations warrant this outcome. First, contrary to the majority, I believe the Board in *Dana Corp.*, 351 NLRB 434 (2007), appropriately balanced the employee right to participate in a Board-conducted election against the Board's interest in fostering stable collective-bargaining relationships. Second, even if we apply a "recognition bar" as prescribed in *Lamons Gasket Co.*, 357 NLRB 739 (2011), which overruled *Dana*, the Board should adhere to its pre-*Dana* case law establishing that the recognition bar starts running when recognition is extended by the employer. Third, as the Regional Director explained in his well-reasoned decision, it is incongruous to adopt the expansive interpretation of the recognition bar that my colleagues embrace in today's decision, under which the election bar may continue for up to 1 year from the parties' first bargaining session rather than 1 year from the date recognition is granted. Finally, regardless of when the clock starts running on the recognition bar or its maximum duration, I believe the facts in the instant case demonstrate that a "reasonable period of bargaining" had elapsed at least when the parties reached and signed their new collective-bargaining agreement, which occurred before the petition at issue in the instant case was filed. Therefore, under any reading of *Lamons Gasket*, supra, I believe the Board is required to process the petition and conduct an election.

1. *The Board's Dana Decision.* One of the Board's primary functions is to conduct representation elections to determine whether a majority of employees favor union representation.¹ When a union is certified following an election, its majority status cannot be challenged for a year,² and any decertification or rival-union petition is barred. A union also may become employees' bargaining representative through voluntary recognition by the employer, based on evidence of majority employee support—typically, signed union authorization cards. For decades, the Board has held that various circumstances justify applying a limited-duration "bar" to the processing of election petitions.³ Among these, the Board has applied a "recognition bar," holding that voluntary recognition bars decertification or rival-union petitions

for a "reasonable" period of time.⁴ However, the Board has also acknowledged "substantial differences between Board elections and union authorization card solicitations as reliable indicators of employee free choice."⁵ Recognizing those differences, the Board in *Dana Corp.* provided for a "recognition bar" that would continue for a reasonable period, if (i) the employer and/or union notify the appropriate Board regional office that recognition has been granted; (ii) the employer posts a notice of recognition (provided by the Regional Office) informing employees that recognition has been granted and of their right, during a 45-day "window period," to file a decertification or rival-union petition; and (iii) 45 days pass without a properly supported petition being filed. If a properly supported petition is filed during the window period, under *Dana* the Board would process it.⁶ I think the approach reflected in *Dana* of providing a window period before a potential recognition bar attaches strikes an appropriate balance between what our statute "enshrines"—i.e., "a democratic framework for employee choice" (Final Rule, 79 FR at 74314)—and the desirability of stable bargaining relationships.⁷ As Chief Justice

⁴ See *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966); *Sound Contractors Assn.*, 162 NLRB 364 (1966). The Board's bar doctrines are an exception to the National Labor Relations Act's cornerstone tenet, which makes representation depend on whether the union has majority support. Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" (emphasis added).

⁵ *Dana Corp.*, 351 NLRB at 438; see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) ("[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.").

⁶ *Dana*, supra at 441, 443. In addition, if the notice and window-period requirements are not met, any postrecognition collective-bargaining agreement would not bar an election under the contract-bar doctrine. *Id.* at 435; see fn. 7, infra.

⁷ The Board's "bar" doctrines suspend the processing of election petitions in various circumstances, based on Board-applied presumptions of majority support, to advance the Act's interest in fostering stable collective-bargaining relationships. I agree with the rationale underlying some of the Board's bar doctrines, including, for example, the "irrebuttable presumption of majority support for the union during the year following certification." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 378 (1998); see also *Station KKHI*, 284 NLRB 1339, 1340 (1987), *enfd.* 891 F.2d 230 (9th Cir. 1989). The Board also applies a well-known "contract bar" rule, pursuant to which collective-bargaining agreements of definite duration "for terms up to 3 years will bar an election for their entire period," and "contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for only their initial 3 years." *General Cable Corp.*, 139 NLRB 1123, 1125 (1962) (footnote omitted); see also *NLRB v. Burns Security Services*, 406 U.S. 272, 290 fn. 12 (1972). During the "contract bar" period, the Board will dismiss all representation petitions unless they are filed during a 30-day "open period" that begins 90 days

¹ See Sec. 9(b), (c) (describing preelection hearings, the election process, and the Board's determination of appropriate bargaining units).

² See *Brooks v. NLRB*, 348 U.S. 96, 104 (1954) (approving Board's certification-year doctrine).

³ The Board's "bar" doctrines operate to prevent Board-conducted elections for prescribed, limited periods of time, based on a balancing of (i) the right of employees, protected by Secs. 7 and 9 of the Act, to participate in Board-conducted elections to decide questions of union representation, and (ii) the Board's responsibility to foster stability in labor relations and collective bargaining. See fn. 7, infra.

Rehnquist stated in *Allentown Mack Sales & Service*: “Stability, while an important goal of the Act, . . . is not its be-all and end-all. That goal would not justify, for example, allowing a non-majority union to remain in place (after a certification or contract bar has expired) simply by denying employers any effective means of ascertaining employee views.” 522 U.S. at 384 (Rehnquist, C.J., dissenting in part) (citation omitted).⁸

2. *The Recognition Bar: Lamons Gasket, the Bar’s Duration, and When it Commences.* In *Lamons Gasket Co.*,⁹ the Board overruled *Dana*, rejected the *Dana* notice and “window period” approach, and resumed the application of a “recognition bar” immediately upon recognition.¹⁰ The recognition bar under *Lamons Gasket* still has a limited duration: it continues only for a “reasonable” period of time. However, in *Lamons Gasket*, the Board identified “benchmarks for determining ‘a reasonable period of time’”¹¹ that introduced an ambiguity that my colleagues today resolve the wrong way.

In *Lamons Gasket*, the Board defined “a reasonable period of bargaining, during which the recognition bar will apply, to be no less than 6 months after the parties’ first bargaining session and no more than 1 year.”¹² As an initial matter, it is curious that the Board in *Lamons Gasket* identified the “first bargaining session” as a reference point because longstanding Board precedents have uniformly measured the recognition bar from the time the union receives recognition.¹³ The Board in *Lamons Gas-*

ket did not explain why the “reasonable period” should remain open-ended after the union receives recognition, with the clock starting to run only when the parties have their first bargaining session. Given that a recognition bar arises when the parties have voluntarily agreed to engage in bargaining, one would not anticipate a lengthy delay in the commencement of bargaining, particularly since the Act’s duty to bargain collectively requires both parties to “meet at reasonable times.”¹⁴ Moreover, if the employer and union substantially delay the commencement of bargaining following voluntary recognition, I do not believe this justifies denying employees for a longer period their right to have an election petition processed and an opportunity to vote on union representation in a Board-conducted election.

In any event, the Board in *Lamons Gasket* stated that the “reasonable period of bargaining, during which the recognition bar will apply” should be “no less than 6 months after the parties’ first bargaining session and no more than 1 year.”¹⁵ Accepting this language at face value, it may still be interpreted in two ways. It could mean that the bar period continues for no fewer than 6 months after the parties’ first bargaining session and no more than 1 year from the date of recognition. Or it could mean that the bar period continues for no fewer than 6 months after the parties’ first bargaining session and no more than 1 year after the parties’ first bargaining session. The Regional Director correctly chose the former interpretation. My colleagues choose the latter. In doing so, they create an upside-down regime under which, if employees elect a union, they cannot have another election for a year, but if the union becomes their representative without an election, they may be barred from casting ballots in a Board election for more than a year.

In this context, it is ironic that the Board recently adopted new, comprehensive regulations that dramatically change our representation-election procedures based in large part on a desire to make elections take place more quickly. Final Election Rule, 79 FR 74308 (Dec. 15, 2014) (referring to the “essential principle” that representation cases “should be resolved quickly”); *id.* at 74314 (“The Act enshrines a democratic framework for employee choice and . . . charges the Board to ‘promulgate

and ends 60 days before the contract expires, or during any period following expiration during which no contract is in effect. See *Leonard Wholesale Meats Co.*, 136 NLRB 1000, 1001 (1962).

⁸ On the same day that the Board issued *Lamons Gasket*, it reinstated a “successor bar” rule in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). I have already indicated I would refrain from applying a “successor bar.” Instead, I would adhere to the Board’s prior standard that “an incumbent union in a successorship situation is entitled to—and only to—a rebuttable presumption of continuing majority status, which will not serve as a bar whenever a rival petition is filed.” *FJC Security Services*, 360 NLRB 929, 930 (2014) (quoting *MV Transportation*, 337 NLRB 770, 770 (2002) (emphasis in original)).

⁹ *Supra*, 357 NLRB 739.

¹⁰ For the reasons stated in *Dana Corp.* and by Member Hayes in his *Lamons Gasket* dissent, I would adhere to the *Dana Corp.* requirement that an employer post an official Board notice that informs employees of their employer’s voluntary card-based recognition of a union bargaining representative, and to the employees’ right, within 45 days of that notice, to test the union’s claim of majority support through a Board-conducted secret-ballot election.

¹¹ 357 NLRB 739.

¹² *Id.* at 748.

¹³ The concept of a “reasonable period of bargaining” that was the Board’s focus in *Lamons Gasket* was derived from a refusal-to-bargain case, *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), *enfd.* 310 F.3d 209 (D.C. Cir. 2002). In *Lee Lumber*, the Board reconsidered its “reasonable period of time for bargaining” standard for cases involving an unlawful refusal to recognize and bargain with an incumbent union,” 334 NLRB at 399, and it is understandable in this

context that the Board concluded the “reasonable period for bargaining” would start with the first bargaining session—i.e., “when the offering employer commences bargaining in good faith.” *Id.* at 399 fn. 6. In the case of voluntary recognition, however, the Board has traditionally applied a “recognition bar” commencing when the union received recognition. See text accompanying fn. 23, *infra*.

¹⁴ Sec. 8(d).

¹⁵ 357 NLRB at 748.

rules . . . in order that employees' votes may be recorded accurately, efficiently and speedily.'").

In today's decision, my colleagues reverse direction from the Election Rule in three ways. First, they adhere to *Lamons Gasket* and continue to hold that when a union secures voluntary recognition, a "recognition bar" applies *immediately*, which means the Board will *not* process an election petition even if everyone in the bargaining unit expresses a desire for an election. Second, they also leave in place the rule of *Lamons Gasket* that recognition does not start the clock running on the "reasonable period" during which petitions are barred. Rather, although petitions are barred immediately upon recognition, the bar period remains open-ended until the parties' first bargaining session. Then and only then does the clock start to run on the "reasonable" election-bar period. Third, even though several months may pass after recognition before the parties begin to engage in collective bargaining, my colleagues today hold that the recognition bar may continue for up to a full year *after* the first bargaining session, which means that employees who have *never* voted in a Board election may be barred from doing so for a longer time than employees who participated in an election resulting in union certification. I respectfully dissent as to each of these aspects of the majority's decision.

Even if the Board applies a "recognition bar" immediately upon voluntary recognition, I believe it is unreasonable to bar petitions for an open-ended period that does not even begin running when the union receives recognition. I would hold that the recognition-bar "reasonable" period should begin to run on the date of voluntary recognition. But even under *Lamons Gasket*, I would construe the language at issue here—defining the "reasonable" recognition-bar period as "no less than 6 months after the parties' first bargaining session and no more than 1 year"—as limiting the bar period to no more than 1 year *from the date of recognition*. The language permits that interpretation, and it is consistent with the Act and more carefully balances labor relations stability and employee free choice.

Two other important points are relevant when evaluating the Board's multiple bar doctrines: they often operate in tandem with one another, and they are frequently difficult to understand. Thus, if a union receives voluntary recognition, the recognition-bar doctrine prevents the processing of any representation petitions for a period of time, the duration of which is in dispute in this case. If the employer and union enter into a collective-bargaining agreement while the recognition bar remains in effect, the new agreement—based on the Board's "contract-bar" doctrine—will then prevent the processing

of any representation petition for up to 3 additional years, with the sole exception of a 30-day period beginning 90 days and ending 60 days prior to contract expiration. See fn. 7, *supra*.

The facts in the instant case highlight the problems with the approach adopted by my colleagues today. The Employer voluntarily recognized the Union as the bargaining representative of warehouse employees on June 18, 2012. A first election petition was filed on November 19, 2012 (less than 6 months from the date of recognition), and the petition was dismissed by the Regional Director on December 21, 2012, because the minimum "reasonable period of bargaining" identified in *Lamons Gasket* had not elapsed.¹⁶ A second employee petition, filed on April 8, 2013, was dismissed by the Regional Director on May 23, 2013, also because a "reasonable period of bargaining" had not yet elapsed.¹⁷ A third decertification petition—the petition at issue here—was filed on June 28, 2013, *more than 6 months* after the first bargaining session (which occurred on October 9, 2012) and *more than 1 year* after the Union received recognition from the Employer. On June 29, 2013, employees ratified a new collective-bargaining agreement, potentially barring any election for 3 more years.¹⁸ Therefore, one determinative question in this case is whether the recognition bar ended 1 year after the date the Union received recognition (i.e., on June 18, 2013). If so, the employee's petition, filed 10 days later, should have been processed by the Board, resulting in an election.

My colleagues find there should be no election. They apply the recognition bar for an open-ended period beginning when the Union received recognition, and they read *Lamons Gasket* as setting the maximum duration of the recognition bar as 1 year *from the date of the first bargaining meeting*. In the instant case, as noted above, the first meeting did not occur until October 9, 2012.¹⁹

¹⁶ NLRB Case 25-RD-093419 (Reg. Dir. dismissal Dec. 21, 2012).

¹⁷ NLRB Case 25-RD-102210 (Reg. Dir. dismissal May 23, 2013), request for review pending.

¹⁸ The record reveals that bargaining resulted in a tentative agreement as to all issues on June 25, 2013. According to the Regional Director, a "complete draft" of all tentatively agreed-upon provisions was reviewed on June 26, 2013, and after minor changes, both parties agreed upon the revised "complete draft" that same day. And "[b]oth the Employer and the Union signed the contract on June 26, 2013." However, implementation of the parties' signed contract was contingent on employee ratification, which occurred on June 29, 2013.

¹⁹ The Union was not prepared to meet with the Employer until mid-September 2012. The parties held their first bargaining meeting on October 9, 2012, and met five additional times that October and November. Thereafter, the Employer was unable to meet until March 4, 2013, because its lead negotiator was dealing with the serious illness of a family member. The parties met eight additional times in March and April and reached a tentative agreement on all noneconomic provisions

My colleagues then reach several additional conclusions in rapid succession: (i) focusing on the fact that the June 28, 2013 petition was filed less than 9 months after the first bargaining meeting, and applying the multifactor test articulated in *Lee Lumber*, supra, my colleagues find that a “reasonable period” for bargaining had not yet elapsed when the petition was filed, which means the recognition bar remained in effect; (ii) they conclude the Board could not validly process the petition and conduct an election because the recognition bar required dismissal of the petition; and (iii) the new collective-bargaining agreement, ratified on June 29, 2013, imposed a contract bar that, as noted previously, prevents employees from filing any new election petition for another 3 years.

Unlike my colleagues, I believe the Regional Director properly decided that the Board was required to process the petition and conduct an election, even applying *Lamons Gasket*. Although the Regional Director recognized that *Lamons Gasket* does not expressly state that the recognition-bar period “cannot exceed a year from the time of voluntary recognition,” he held that “a reading of the entire decision leaves no other reasonable interpretation.”

Any other reading would mean that the Board intended to confer greater protection to voluntary recognition than Board certification. However, the Board stated in *Lamons Gasket* that “[a]n election remains the only way for a union to obtain Board certification and its attendant benefits. . . . Neither the pre-Dana law nor the law after today equates the processes of voluntary recognition and certification following a Board-supervised election.” . . .

Further, in *Lamons Gasket* . . . the Board in recognizing the practice of voluntary recognition states that the Board has permitted unions to petition for an election after being voluntarily recognized in order to obtain certification and the attendant statutory advantages flowing there from (emphasis added). Citing, *General Box Co.*, 82 NLRB 678 (1949). In *Lee Lumber* the Board, in defining that a reasonable period of time should not exceed one year, noted that the experience with the one year insulated period for newly certified

of the contract. The parties met an additional seven times in May and June and reached a tentative agreement on all economic provisions.

Although there was a roughly 1-month gap between the May and June meetings, the Union did not file a Board charge alleging that this delay was an unfair labor practice on the Employer’s part. The Union also did not file a charge alleging that the earlier delay in bargaining, because of the lead negotiator’s family crisis, constituted unlawful conduct.

unions demonstrates that one year is sufficient time for a union to demonstrate its effectiveness in negotiations on behalf of the employees. *Lee Lumber*, 334 NLRB at 402. To find that a “reasonable time to bargain” can extend beyond one year after voluntary recognition would result in voluntarily recognized representatives receiving an advantage beyond what the Board has stated is only available for certified bargaining representatives. Such a result was clearly not the intent of the Board in *Lamons Gasket*. A recognition bar for a time period extending no longer than 1 year from the date of voluntary recognition is consistent with Board doctrine.²⁰

Like the Regional Director, I believe it is incongruous to deny employees a right to file election petitions for a longer period after a union receives voluntary recognition (without an election) than the 1-year period after a union is certified by the Board (as the result of an election). As the Regional Director recognized, this is precisely what the Board stated in *Lamons Gasket* itself when it explained that “[a]n election remains the only way for a union to obtain Board certification and its attendant benefits,” and when it emphasized that “[n]either the pre-Dana law nor the law after today equates the processes of voluntary recognition and certification following a Board-supervised election.”²¹ Had the Union been certified on June 18, 2012, following a Board election, under our certification-year doctrine it would not have been shielded from the decertification petition. To quote again from the Regional Director’s decision, “[t]o find that a ‘reasonable time to bargain’ can extend beyond one year after voluntary recognition would result in voluntarily recognized representatives receiving an advantage beyond what the Board has stated is only available for certified bargaining representatives.” Unfortunately, the majority’s decision achieves just that incongruous outcome.²²

²⁰ Decision and Direction of Election (D&DE) at 4–5 (emphasis in original and added; citations and footnote omitted).

²¹ 357 NLRB at 748 (footnote omitted). Board precedent provides that at most, a voluntarily recognized union may gain up to the same rights as a certified union, but never more. See *Toltec Metals, Inc.*, 201 NLRB 952, 954 (1973) (the effect of voluntary recognition—for purposes of a petition bar—is “no different from that achieved as a result of a Board-certified election”).

²² *Lamons Gasket* itself—and common sense—refute any suggestion that a voluntarily recognized union needs a longer period of protection from an election petition to demonstrate its effectiveness in negotiations than does a union that has been certified following an election. In *Lamons Gasket*, the Board stated that “voluntary recognition is more likely” than certification to produce bargaining “as a method of defusing and channeling conflict between labor and management.” 357 NLRB at 746 (quoting *First National Maintenance Corp. v. NLRB*, 452

Moreover, separate and apart from the issue presented here, which turns on the interpretation of language in *Lamons Gasket* concerning the maximum duration of the “reasonable” recognition-bar period, the Board in *Lamons Gasket* also erred in its determination of when the clock starts running on the insulated “reasonable period.” Under *Lamons Gasket*, the recognition bar takes effect the moment recognition is extended, but the “reasonable period” does not begin to run at recognition. Again, *Lamons Gasket* defines the minimum “reasonable period” as “no less than 6 months after the parties’ first bargaining session.” Thus, the clock only starts to run on the insulated period when the employer and union first meet and bargain—even if that first bargaining session takes place *months* after recognition is extended, as happened here. For two reasons, I believe this aspect of *Lamons Gasket* was wrongly decided.

First, Board precedent long predating *Lamons Gasket* contemplates a recognition-bar period that runs from the date of recognition.²³ See, e.g., *Tajon, Inc.*, 269 NLRB 327, 327 (1984) (“[A] union which is recognized by the employer but not certified by the Board is, absent special circumstances . . . irrefutably presumed to have a majority status for a reasonable period of time *from the date of recognition.*”) (emphasis added); *Rockwell International Corp.*, 220 NLRB 1262, 1263 (1975) (“*Following a lawful grant of recognition* the parties are entitled to a reasonable period of time to permit them to attempt to negotiate a collective-bargaining agreement.”) (emphasis added). In *Keller Plastics*, supra, the Board left no doubt on this score. There, after holding that “the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining” following voluntary recognition, the Board found reasonable “the 3-week period from February 16[, 1965], the date recognition was lawfully accorded, until March 10, the date the contract was executed.” 157 NLRB at 587. Thus, in

U.S. 666, 674 (1981) (emphasis added)). As the Board recognized in *Lamons Gasket*, voluntary recognition is more likely to produce constructive negotiations than certification (following, perhaps, a hotly contested campaign), based on “the good faith with which employers take up their voluntarily assumed versus legally imposed obligation to bargain.” *Id.* at 746 fn. 26. See also *Toltec Metals*, 201 NLRB at 954 quoting *NLRB v. San Clemente Publishing Corp.*, 408 F.2d 367, 368 (9th Cir. 1969) (“‘To hold that only a Board-conducted election is binding for a reasonable time would place a premium on the Board-conducted election and would hinder the use of less formal procedures that, in certain situations, may be more practical and convenient *and more conducive to amicable labor relations.*’”) (emphasis added), *enfd.* 490 F.2d 1122 (3d Cir. 1974).

²³ My colleagues do not cite a single instance where the Board applied a “recognition bar” that commenced running on a date other than when the union received recognition, nor do my colleagues identify any Board case contrary to the precedents cited in the text.

Keller Plastics the Board measured the “reasonable time to bargain” from “the date recognition was lawfully accorded.”

Second, in measuring the “reasonable period” from the date of the first bargaining session, the *Lamons Gasket* Board relied on a refusal-to-bargain case—*Lee Lumber*, supra, 334 NLRB at 399—instead of cases applying a recognition bar. In *Lee Lumber*, as noted previously, the Board defined the duration of a reasonable time for bargaining *following an employer’s unlawful failure or refusal to recognize or bargain with a union.* To remedy that unfair labor practice, the Board issues a bargaining order, which insulates the union from any challenge to its majority status for a reasonable period of time. In that context, the Board held that the insulated “reasonable period” begins to run only when the employer commences bargaining in good faith. *Id.* at 399 fn. 6. The *Lamons Gasket* Board transferred this aspect of *Lee Lumber* to the recognition-bar context, disregarding that the rationale that applies in the *Lee Lumber* setting does *not* apply in the recognition-bar setting. When a bargaining relationship has been broken by an unlawful failure or refusal to bargain, the only logical starting point for the insulated period is the event that begins to repair the breach, i.e., the parties’ first bargaining session. But where an employer recognizes a union voluntarily, there is no breach to repair. Indeed, as the *Lamons Gasket* Board itself recognized, there may well be greater cordiality between the parties following recognition than between an employer and union following a sharply contested election campaign. See supra, fn. 22. Yet, in the election context, the insulated period runs from the date the union is certified, not the date the parties first bargain. All the more reason, in voluntary recognition cases, to run the insulated period from the date of recognition than from a date based on *Lee Lumber*, in which the employer had unlawfully ruptured the bargaining relationship. There is simply no good reason to create an indefinite period following recognition—preceding the first bargaining session—during which all petitions are barred, and where the “reasonable period” has not even started to run.²⁴

²⁴ Based on the obvious mismatch between the bargaining-order context in *Lee Lumber* and the recognition-bar context in *Lamons Gasket*, it is possible that the Board in *Lamons Gasket* inadvertently adopted, along with *Lee Lumber*’s multifactor test for determining whether a reasonable period of time has elapsed in a particular case, its holding that the bargaining-order bar commences with the first bargaining session, without reflecting on the absurdity of the outcome: the fact that voluntary recognition may end up barring a representation petition for a longer period of time than the certification year after employees participate in a Board election resulting in union certification. Indeed, although *Lamons Gasket* makes reference to “the parties’ first bargaining

More generally, today's decision fails to give parties—especially employees—concrete guidelines for determining when the Board will process election petitions. The Board has previously stated it was “convinced of the desirability of establishing *specific* periods for the timely filing of petitions.” *Vickers, Inc.*, 124 NLRB 1051, 1052 (1959) (emphasis in original). Having understandable standards is important so that “unions and employees will . . . know precisely when they may be expected to file a petition in order to obtain an election.” *Deluxe Metal Furniture Co.*, 121 NLRB 995, 998 (1958).²⁵

Today's decision runs afoul of these important principles. It would be far better to prescribe a fixed period, consistent with the Board's certification-year and contract-bar doctrines. Indeed, the record here vividly illustrates the problem. The Union received voluntary recognition on June 18, 2012, and the Board subsequently received *three* decertification petitions, filed on November 19, 2012, April 8, 2013, and June 28, 2013, respectively. My colleagues would find that none of the three election petitions was “timely,” and they find the employees have no right to have a Board-conducted election. Moreover, in view of the new agreement ratified on June 29, 2013, the Board's contract-bar doctrine will deny employees any potential participation in a Board-conducted election for up to an *additional* 3 years. Although the Board has long applied various bar doctrines for good reasons, I believe one cannot reconcile the outcome here with our responsibility “in each case . . . to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act.”²⁶

The instant case extends troubling trends suggested in *Lamons Gasket* and *UGL-UNICCO*. Both cases—like the majority's decision here—treat the Board's “bar” doctrines as essential means to protect unions from decertification or displacement by a rival union. It is not

session” (357 NLRB at 748), the Board in *Lamons Gasket* ostensibly reinstated the Board's pre-*Dana* recognition bar—described as “a return to formerly settled law” (id.) (capitalization omitted)—which the *Lamons Gasket* majority described as follows: “[P]rior to *Dana*, the Board precluded any challenge to a union's representative status for a reasonable period of time *after an employer voluntarily recognized the union.*” Id. at 744 (emphasis added; citations omitted). In any event, this case presents the Board with the opportunity to correct this problematic aspect of *Lamons Gasket*, and by failing to do so, I believe my colleagues misapply longstanding Board precedent.

²⁵ See also *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958) (Board reexamined “its contract bar rules with a view toward simplifying and clarifying their application wherever feasible in the interest of more expeditious disposition of representation cases and of achieving a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives.”).

²⁶ Sec. 9(b).

preordained, however, that a Board election would produce either result. The issue here is how long employees should be denied the *opportunity to vote* in a Board-conducted election. Just as troubling is the Board's imposition of more onerous obstacles when employees may have *never* voted in any prior election (i.e., where the union receives voluntary recognition from an employer or legal successor) in comparison to the bar that applies when employees *have* voted in an election resulting in union certification. In short, my colleagues hold here that employees may be denied the right to participate in a Board election, after voluntary recognition, for a longer period than would apply had they exercised their right to vote in a Board-conducted election. This runs counter to *Gissel Packing*, supra, 395 U.S. at 602, where the Supreme Court held that “secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.”

3. *The “Reasonable Period” for Bargaining Elapsed Before June 28, 2013.* Under the most expansive reading of the recognition bar as applied by my colleagues in reliance on *Lamons Gasket*, the “reasonable period” for bargaining precludes the Board from processing election petitions for a minimum of “6 months . . . and no more than 1 year” after “the parties' first bargaining session.”²⁷ Because the parties commenced bargaining on October 9, 2012, and the petition was filed on June 28, 2013, *Lamons Gasket* would require the Board to process the petition and conduct an election if the 8-1/2-month period between October 9, 2012, and June 28, 2013, was a “reasonable period of bargaining.” 357 NLRB at 748.

The Board in *Lamons Gasket* stated that, in “determining whether a reasonable period has elapsed in a given case, we will apply the multifactor test of *Lee Lumber*,” i.e., “(1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and 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.” Id. at 748 & fn. 34 (quoting *Lee Lumber*, 334 NLRB at 402). Additionally, the Board in *Lamons Gasket* held—as did the Board in *Lee Lumber*—that *the General Counsel bears the burden of proof* “to show that further bargaining should be required.” Id. at 748.²⁸

²⁷ 357 NLRB at 748.

²⁸ As my colleagues note, the General Counsel is not a party to an election case, and the *Lamons Gasket* Board meant to say that the burden of proof to show that further bargaining is required rests on the party that invokes the recognition bar—here, the Union.

In a different case, it might be more difficult to determine whether a “reasonable period of bargaining” had elapsed when employees filed their June 28, 2013 petition. However, the record reveals that (i) the parties here *reached a complete tentative agreement on June 25, 2013*; (ii) a “complete draft” was reviewed in writing and agreed upon (after minor changes) on June 26, 2013; and (iii) as the Regional Director found, “*the Employer and the Union signed the contract on June 26, 2013*” (emphasis added). In other words, not only had a “reasonable period of bargaining” elapsed as of June 26, 2013, both parties *satisfied* all bargaining obligations *when they signed their written agreement on that date*. This conclusion is compelled by Section 8(d), 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). Given that the parties reached an *actual* agreement that was reduced to writing and signed on June 26, 2013, the General Counsel cannot possibly establish that “further bargaining [was] required” *after* June 26, 2013.

Indeed, if the Board concludes that a “reasonable period of bargaining” did not elapse in the instant case by June 26, 2013, I have difficulty imagining any circumstance when a recognition bar would end prior to the 1-year maximum period established in *Lamons Gasket*. This would do violence to *Lamons Gasket* itself, where the Board pointedly did *not* establish an inflexible 1-year recognition bar. Rather, the Board clearly stated the bar’s duration would be limited to a “reasonable period of bargaining” lasting “*no less than 6 months after the parties’ first bargaining session and no more than 1 year*.” *Id.* (emphasis added).

The Board must also consider the plight of employees who, in the instant case, supported the filing of *three* successive petitions, each one seeking a Board-

conducted election where they could vote on union representation. The Board should foster stable bargaining relationships that are advanced by various bar rules, but it undermines the Act’s more fundamental purpose to find, as my colleagues do, that no opportunity existed for these employees to file a timely election petition from June 18, 2012, when the Union received voluntary recognition, through June 29, 2013, when employees ratified the collective-bargaining agreement signed on June 26. It is all the more inappropriate to apply a recognition bar here since “[t]he burden is on the General Counsel to prove that a reasonable period of bargaining had not elapsed after 6 months,”²⁹ and the contract ratified on June 29, 2013, potentially bars the processing of any election petition for up to an additional 3 years.

Accordingly, in cases involving voluntary recognition, I would adhere to the modified recognition bar approach articulated in *Dana*, involving notice of recognition and a 45-day window for processing election petitions. However, under *Lamons Gasket*, the “reasonable period of time” during which the recognition bar is in place should commence running upon recognition, rather than when the parties meet for their first bargaining session. Next, even if the recognition bar is deemed to commence running only after the parties’ first bargaining session, I would resolve any ambiguity in the Board’s language in *Lamons Gasket* in favor of a maximum duration of 1 year from the date of recognition. Finally, I believe that under any reading of *Lamons Gasket*, a “reasonable period of bargaining” elapsed here (meaning the recognition bar ended) no later than June 26, 2013, when the parties reached and signed their actual agreement. The Board should process the June 28, 2013 petition and conduct an election.

For each of these reasons, I respectfully dissent.

²⁹ *Lamons Gasket*, supra at 748 fn. 34 (citing *Lee Lumber*, 334 NLRB at 405).