

Lift Truck Sales and Services, Inc. and William Hubbard, Petitioner and Building Materials, Excavating, Heavy Haulers, Drivers, Warehousemen and Helpers, Local Union No. 541, affiliated with International Brotherhood of Teamsters.
Case 14–RD–153982

July 12, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

The issue presented in this case is whether an incumbent union's representative status may be challenged within 6 months of the employer's having entered into an informal Board settlement agreement admitting that it had engaged in bad-faith bargaining. Guided by *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001) (*Lee Lumber II*), enfd. 310 F.3d 209 (D.C. Cir. 2002), we reverse the Regional Director and find that he should not have directed an election in these circumstances.

On June 25, 2015,¹ the Regional Director for Region 14 issued a Decision and Direction of Election in the instant decertification proceeding. Applying *Poole Foundry and Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952), the Regional Director found that the petition was filed after a reasonable period of time for bargaining had elapsed following the parties' post-settlement resumption of bargaining. The Regional Director therefore directed an election. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Union filed a timely request for review. In it, the Union contended that the 6-month minimum period for bargaining set forth in *Lee Lumber II* is applicable in this case. On December 2, the Board granted the Union's request for review. The Union filed a brief on review.

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

I. FACTS

The Employer operates a material handling and aerial lift equipment sales, service, and rental business from its facility in Kansas City, Missouri. The Union has represented the Employer's mechanics, parts, and utility employees for approximately 40 years. The parties' most recent collective-bargaining agreement expired on May 31, 2014.

¹ All dates are in 2015 unless otherwise indicated.

On September 25, 2014, employee William Hubbard filed a petition in Case 14–RD–137434, seeking to decertify the Union as the employee representative. On December 17, 2014, the General Counsel issued a complaint alleging that the Employer, “[b]y its overall conduct . . . had failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit,” in violation of Section 8(a)(1) and (5) of the Act.² In light of those allegations, which potentially tainted the decertification petition, the Regional Director administratively dismissed that petition on December 20, 2014.³

On February 17, 2015, the parties entered into an informal Board settlement agreement in which the Employer admitted “that since on or about May 22, 2014, it violated Sections 8(a)(1) and (5) of the National Labor Relations Act by engaging in bad faith bargaining designed to frustrate the parties’ ability to achieve agreement on a new collective bargaining agreement.” The admissions clause further stated that the Employer “acknowledges that its unfair labor practices admitted herein are sufficient to taint the petition in Case 14–RD–137434 filed on September 25, 2014, and to require the dismissal of the petition.”

After resuming bargaining in March, the parties reached agreement on April 20 on all but two outstanding issues. On May 27, the Employer confirmed that it had made its last, best, and final offer. On June 11, the Union presented the Employer's final proposal to the membership for a vote, and the proposal was unanimously rejected. That same day, Hubbard filed a decertification petition.⁴ The parties have not engaged in further negotiations or scheduled additional bargaining sessions.

² The complaint included allegations that the Employer unreasonably delayed furnishing the Union with requested necessary and relevant information about employee benefits costs, unilaterally implemented a wage increase for all bargaining unit employees during a period when the parties were negotiating and had not reached an impasse, and engaged in surface bargaining with no intention of reaching an agreement. The surface bargaining allegations included making regressive proposals that eliminated past contractual provisions, making proposals that were predictably unacceptable to the Union and designed to frustrate bargaining, insisting on proposals that granted the Employer the unilateral right to establish economic terms and conditions of employment of unit employees, refusing to negotiate mandatory subjects relating to the Employer's proposal for merit wage increases, delaying in furnishing the Union with requested necessary information, and failing to offer an explanation for its proposals.

³ The Board denied Hubbard's request for review of the dismissal on November 23, 2015.

⁴ The Regional Director conducted an election on July 15. The parties subsequently entered into an Agreement to Void and Set Aside Election and Conduct Rerun Election. The election was rerun on September 2, and the tally of ballots showed that out of 29 eligible voters, 3 cast votes for the Union and 23 against; there were no challenged ballots.

II. ANALYSIS

In *Lee Lumber II*, the Board reaffirmed its ruling in *Lee Lumber I*⁵ that an employer's unlawful failure or refusal to recognize or bargain with an incumbent union will be presumed to have caused any employee disaffection arising during the course of the unlawful conduct. *Lee Lumber II*, supra at 399. An employer can rebut the presumption only by showing that the disaffection arose after it resumed recognizing the union and bargained for a reasonable period of time, without committing other unfair labor practices that would adversely affect the bargaining. See *id.* The Board defined a reasonable time for bargaining as no less than 6 months. See *id.* at 399, 402.⁶ During that 6-month period, the union's majority status cannot be challenged. See *id.* at 399. The Board made clear, however, that the standard announced in *Lee Lumber II* applies only where employers "have unlawfully refused to recognize or bargain with incumbent unions." See *id.* at 399 fn. 7 (emphasis added). The Board specifically left open the question of what constitutes a reasonable period of time for bargaining in other contexts, including when an employer enters into a settlement agreement requiring bargaining.⁷ See *id.*

⁵ *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), *aff'd.* in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997).

⁶ The Board clarified that a reasonable period of time is no less than 6 months, but up to 1 year, depending upon a multifactor analysis. See *id.* at 399, 402–405. The reasonable period begins when the offending employer commences bargaining in good faith. See *id.* at 399 fn. 6.

⁷ In *Lee Lumber II*, the Board cited *Poole Foundry*, supra, as an example of a case involving a settlement agreement. *Lee Lumber II* at 399 fn. 7. In *Poole Foundry*, the Board held that a union's majority status cannot be questioned until a reasonable period of time for bargaining has elapsed after the date of a settlement agreement that provides for bargaining. The Board found that the 3 ½-month period between the settlement and the employer's subsequent refusal to bargain did not constitute a reasonable time. 95 NLRB at 36. Subsequent cases applying *Poole Foundry* have used a multifactor test to determine whether a reasonable time has passed, but have not required any minimum reasonable period. Citing *Poole*, the Regional Director in the present case found that a reasonable time for bargaining had elapsed.

We find the Regional Director's reliance on *Poole* misplaced. First, *Lee Lumber II* did not hold that *Poole Foundry* must be used to calculate a reasonable period for bargaining following all settlement agreements, regardless of the agreements' content. Instead, *Lee Lumber II* specifically left open the question of what constitutes a reasonable period of time for bargaining following a settlement agreement. Second, we find *Poole Foundry* inapposite here as neither *Poole* itself nor the subsequent cases applying it involved a settlement with a clause admitting a refusal to bargain. Indeed, many cases applying *Poole Foundry* specify that the settlement agreement at issue contained a non-admissions clause. See, e.g., *AT Systems West*, 341 NLRB 57, 58, 61–62 (2004); *Freedom WLNE-TV, Inc.*, 295 NLRB 634 (1989); *Stant Lithograph, Inc.*, 131 NLRB 7, 12 fn. 6 (1961). By calculating the reasonable period under *Poole Foundry*, the Regional Director rendered superfluous the settlement agreement's clause admitting Respondent's unlawful refusal to bargain.

We now find that a settlement agreement containing an admission of unlawful bargaining behavior shall be treated in the same manner as a Board-adjudicated finding of unlawful conduct. Accordingly, we will apply the *Lee Lumber II* standard in cases where, as here, the employer has admitted in a settlement agreement that it unlawfully refused to bargain.

As explained in *Lee Lumber II*, following an adjudicated finding of an unlawful failure or refusal to recognize or bargain, "[i]t 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." *Id.* supra at 399. Further, as the Board reasoned in that case, an unlawful refusal or failure to recognize or bargain with an incumbent union warrants "an insulated period of a defined length during which the union's majority status cannot be questioned." *Id.* at 402. Such a period "will provide a measure of certainty" by giving "employers, unions, and employees advance notice that the bargaining relationship cannot be disturbed for that period" and will also "help to minimize litigation." *Ibid.*

The Board's reasoning in *Lee Lumber II* applies with equal force when an employer admits, in a settlement agreement, that it has unlawfully bargained in bad faith with an incumbent union. In both cases, the employer's unlawful conduct has been established, whether by virtue of a Board-adjudicated finding or by the employer's admission. Accordingly, the remedial period for bargaining pursuant to a settlement agreement containing an admission of an unlawful failure or refusal to recognize or bargain with an incumbent union should be calculated in the same manner as the remedial period following an adjudicated finding of such unlawful conduct.

Turning to the facts of this case, it is undisputed that less than 6 months had elapsed between the parties' resumption of bargaining and the filing of the decertification petition. In fact, less than 3 months had elapsed. Accordingly, there had not been a reasonable period of time for bargaining when the petition was filed, and the Union's majority status could not be questioned at that time. We therefore reverse the Regional Director's decision directing an election. We further order that the results of the September 2, 2015 election be set aside and the decertification petition dismissed.⁸

⁸ We find it unnecessary to reach the Union's additional contention that the Regional Director erred by applying *Master Slack Corp.*, 271 NLRB 78 (1984), instead of *Lee Lumber I*, supra, to find that the instant petition has not been tainted by the prior settled unfair labor practice charges.

ORDER

The Regional Director's finding that a reasonable period for bargaining had elapsed at the time the instant peti-

tion was filed is reversed. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision on Review and Order.