Nos. 08-2242, 08-2384

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOWN & COUNTRY PLUMBING & HEATING, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

PIPEFITTERS LOCAL 333

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Town & Country Plumbing & Heating, Inc. ("the Company") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, an Order of the Board finding that the Company violated Section 8(a)(5) and

(1) of the National Labor Relations Act ("the Act"), as amended.[1] The Board's Decision and Order, which it now seeks to enforce, issued on August 29, 2008, and is reported at 352 NLRB 1212. (A. 7-13.)[2] Pipefitters Local 333 ("the Union") has intervened on behalf of the Board.

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the Act.[3] The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act.[4] This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act,[5] the unfair labor practices having occurred in the state of Michigan.

The Company filed its petition for review on September 26, 2008. The Board filed its cross-application for enforcement on October 29, 2008. Both filings were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders.

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[1] 29 U.S.C. §§ 151, 158(a)(5) and (1).

[2] References are to the Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] 29 U.S.C. § 160(a).

[4] 29 U.S.C. § 160(e) and (f).

[5] 29 U.S.C. § 160(e) and (f).

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled principles to straightforward and undisputed facts, and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

STATEMENT OF THE ISSUE

Whether the Board reasonably found that the Company's withdrawal of recognition from the Union without having bargained in good faith for a reasonable period of time after entering into a formal settlement of unfair labor practice charges violated Section 8(a)(5) and (1) of the Act.

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company engaged in conduct that violated Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union without bargaining for a reasonable period of time after entering into a settlement of unfair labor practice charges. The parties jointly filed a stipulation of facts and motion to transfer proceedings to the Board, waiving a hearing and decision by an administrative law judge. The Board approved the stipulation and granted

the motion. Thereafter, the Board issued its decision finding that the Company violated Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company Recognizes the Union; the Parties Bargain But Do Not Reach Agreement and the Company Withdraws Recognition For the First Time; The Parties Enter Into A Formal Settlement Agreement of Charges Filed by the Union

The Company provides commercial and residential plumbing services out of its Bath, Michigan location. (A. 1; 17.) Following an organizing campaign among the Company's plumbers and helpers, the Union filed unfair labor practice charges alleging that the Company told employees that it had thrown out applications of known union supporters, drove in a threatening and hazardous manner toward employees engaged in union activities, and coercively interrogated employees about other employees' support for the Union. (A. 7; 17, 29.) Further charges alleged that the Company discriminatorily suspended and disciplined union supporters. (A. 7; 30.) In May 2000, the Board's Regional Director approved an informal settlement agreement between the Company and the Union pursuant to which the Company agreed to recognize the Union and bargain in good faith

toward a collective-bargaining agreement and pay backpay to 12 employees. (A. 7; 17, 28, 30.)

From May 2000 until March 14, 2002, the Company complied with the settlement agreement, recognizing and bargaining with the Union. (A. 7; 18.) No collective-bargaining agreement was reached, however. (A. 7; 18.)

On March 14, the Company withdrew recognition from the Union based on a petition from its employees. (A. 8; 18, 31.) In response, the Union filed unfair labor practice charges alleging that the Company unlawfully withdrew recognition from the Union, and engaged in other unfair labor practices. (A. 8; 18.) Specifically, the Union asserted that the Company impliedly threatened employees with loss of employment and wage freezes because of employees' support for the Union, told employees that other employees would not be recalled because of their support for the Union, and told employees that there would be no profits if the Union was their representative. The Union further asserted that the Company created the impression of surveillance, made implied promises of benefits to discourage support for the Union, characterized as disloyal employees' support for the Union, and told employees they should quit if they wanted to be represented by the Union. (A. 52-53.)

On October 29, 2002, the parties agreed on a formal settlement of the charges, in which the Company agreed to again recognize and bargain with the Union. (A. 8; 38.) The Company also agreed to place two employees on a preferential recall list and make them whole for losses suffered by reason of the Company's discrimination against them because of their support for the Union, to remove any reference in its files to the layoff of five employees, to make whole three employees for loss of pay due to the Company's failure to bargain with the Union over their layoffs, to redesignate one employee as a crew leader, and to provide two employees with the benefit of helpers and equipment, including a truck. (A. 54-55.)

The formal settlement agreement further contained a stipulation for a consent order by the Board and judicial enforcement of the order. (A. 8; 18, 32-41.) The settlement, by its terms, was "subject to the approval of the Board, and it [did] not become effective until the Board ha[d] approved it." (A. 8; 34.)

B. The Union Says It Wants to Bargain; the Company Proposes Dates; the Company States Its Intention to Bargain Before It Is Required to By the Settlement

Following signing of the formal settlement agreement, Union Organizer David Knapp sent a letter on October 31 to Company President Bernie Deyarmond indicating that the Union had no objection to certain

company-proposed wage increases and that the Union was interested "in getting back to the table as soon as possible." (A. 8; 18, 63.) In response, company counsel Timothy J. Ryan sent a November 6 letter offering several bargaining dates in November. (A. 8; 18, 64.)

Following a further written exchange regarding bargaining dates, Ryan wrote to Knapp in a letter sent on November 20:

> I note that the formal settlement stipulation . . . requires that within fourteen (14) days of an order of the Board that [the Company] recognize your Union as the representative of its employees and engage in good faith collective bargaining. Since the Board has not yet issued any such order as a technical matter, the settlement agreement does not require [the Company] to recognize and meet with your union at this time. However, it is not [the Company's] intention to wait until the Order is actually issued.

(A. 8; 19, 67.) The parties eventually agreed to meet on December 5; however, Knapp became ill, causing the parties to reschedule the initial bargaining session. (A. 8; 19, 67, 70-71, 74-76.)

C. The Parties Meet for Their First Bargaining Session and Discuss Wages and the Portability of the Company's Work; The Board Approves and the Court Enforces the Settlement

On January 16, 2003, the parties met for their initial face-to-face bargaining session. (A. 8; 19.) Company president Deyarmond stated that he wanted a proposal from the Union that would keep the Company competitive. (A. 8; 20.) Union representative Jim Davis responded that the Company's current pay rates were close to union rates. (A. 8; 20.)

Deyarmond said that inclusion of union benefits could impact the Company's competitiveness. (A. 8; 20.) Davis requested information about the current cost of the Company's wage and benefit package, which the Company subsequently provided in part. (A. 8; 20, 77.)

Deyarmond also brought up the "portable" nature of the Company's work, and asked for assurance that its employees could work anywhere in the state without restriction. (A. 8; 20.) In response, Davis stated that the Union has a national residential agreement that could allow employees to work anywhere in the United States and Canada. (A. 8; 20.) Davis said he would bring the national agreement, with wage rates corresponding to the Company's geographic area, to the next meeting. (A. 8; 20.)

Shortly after this meeting, on February 3, the Board approved the formal settlement. This Court subsequently enforced the settlement on September 16, 2003. (A. 8; 18, 44-50, 52-60.)

D. The Parties Meet a Second Time; the Union Creates a Schedule A to Its National Agreement; the Company Sends a Counterproposal with Several Exceptions

On February 13, the parties met for a second time and continued discussing economic issues. (A. 8; 20.) Davis presented the Company with copies of the Union's national residential agreement to address the Company's concerns about its ability to work statewide. (A. 8; 20, 78-121.)

Davis then agreed to set up a Schedule A, which would be a special agreement for the Company governing the total wage and benefit package. (A. 8; 20.)

Davis faxed the proposed Schedule A to Ryan on March 7. (A. 9; 21, 122-24.) Ryan responded with a counterproposal on March 14 containing eight exceptions to the national residential agreement. (A. 9; 21, 127-28.)

E. The Parties Meet a Third Time and Discuss the Company's Counterproposal and Health Insurance Costs

On May 21, the parties met for their third and final bargaining session. (A. 9; 22.) Union organizer Knapp presented proposals covering commercial and residential work that the parties had previously discussed in 2001. (A. 9; 22, 135-89.) The parties also discussed the Company's March 14 counterproposal to the national residential agreement. (A. 9; 22.) Knapp indicated that the Union was willing to work with the Company on some items relating to the excavation side of its business. (A. 9; 22.)

Deyarmond and Ryan expressed concern about the Union's health care proposal's per employee hourly cost. (A. 9; 22.) Knapp stated that he needed information about the Company's current health insurance costs, and he would then confer with Davis on the issue and present a counterproposal as to benefits at the next bargaining session. (A. 9; 22-23.) Ryan provided

the benefit cost information to Knapp in a letter dated June 10. (A. 9; 23, 190.)

F. The Company Withdraws Recognition for a Second Time; the Parties Had Agreed on Most Terms and Were Not at Impasse

On June 27, after only three, 2-hour bargaining sessions, the Company withdrew recognition from the Union based on a petition from a majority of the employees in the bargaining unit. (A. 9; 23, 191.) The parties had agreed on most terms of the contract and only economic issues separated them from entering into an initial collective-bargaining agreement. (A. 9; 23.) The parties were not at an impasse. (A. 9; 23.)

II. THE BOARD'S DECISION AND ORDER

On August 29, 2008, the Board (Chairman Schaumber and Member Liebman)[6] issued its Decision and Order finding that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from its

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[6] In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The First Circuit has agreed, upholding the authority of the two-member Board to issue decisions. *Northeastern Land Services, Ltd. v. NLRB*, __ F.3d __, 2009 WL 638248 (1st Cir. Mar. 13, 2009).

employees' designated collective-bargaining representative. (A. 7.) The Company's withdrawal of recognition violated the Act because the Company was obligated by the terms of the settlement agreement to bargain in good faith with the Union, as the exclusive representative of the Company's plumbers and helpers, for a reasonable period of time, which had not expired. (A. 7.)

The Board's Order requires the Company to cease and desist from unlawfully withdrawing recognition from the Union and refusing to bargain with it as the exclusive collective-bargaining representative of the bargaining unit employees. (A. 13.) Affirmatively, the Order directs the Company to, upon request, bargain with the Union concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. (A. 13.) The Company must also post a notice. (A. 13.)

SUMMARY OF ARGUMENT

There are no questions as to the timing, course, and nature of the parties' on-again, off-again bargaining relationship. The Company has twice agreed to recognize and bargain with the Union and has twice unlawfully withdrawn recognition before a collective-bargaining agreement could be achieved. After unlawfully withdrawing recognition the first time, the

Company entered into a formal settlement agreement—approved by the Board and enforced by this Court—requiring it to bargain in good faith with the Union for a reasonable time. After the Company withdrew recognition for the second time, the Board determined, by applying a multi-factor test from *Lee Lumber & Building Material Corporation*,[7] that the Company did not meet its obligation, having failed to bargain with the Union for a reasonable time before withdrawing recognition.

The Company argues that it did bargain for a reasonable period, an argument based in part on its assertion that bargaining commenced at an earlier date than the Board found. Based on the undisputed facts constituting the record as a whole, the Board found that the parties commenced bargaining no earlier than January 16, 2003, when they first met face-to-face after entering into the formal settlement agreement. Bargaining therefore lasted, at most, 5 1/2 months before the Company withdrew recognition in June.

The Company contends, however, that a longer time had elapsed when it withdrew recognition because it claims that October 29, the date that the Regional Director approved the settlement, should mark the beginning of the reasonable period for bargaining. The Board rightfully rejected this

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[7] 334 NLRB 399, 401 (2001), *enforced*, 310 F.3d 209 (D.C. Cir. 2002).

notion because the parties chose to enter into a formal settlement, which by its very terms requires approval of *the Board* before it becomes effective. Thus, because the settlement was not effective on October 29, the Board reasonably chose the first major milestone—face-to-face bargaining—as the earliest date on which the reasonable period could commence.

The Board did not even have the opportunity to reject the Company's other proffered date for the beginning of the reasonable period—a November 20 letter to the Union—because the Company never made any argument about that date to the Board. This Court, therefore, does not have jurisdiction to consider the Company's argument on that point.

Thus, applying its well-established test to these undisputed facts, the Board reasonably found that the Company failed to bargain for a reasonable period after the first in-person meeting before withdrawing recognition from the Union for a second time. Specifically, in June 2003, when the Company withdrew recognition from the Union, the parties had been bargaining for, at most, 5 1/2 months and had held only three face-to-face bargaining sessions to try to reach an initial contract. When the Company withdrew recognition, the parties were concededly not at impasse and had reached agreement on many contract terms, leaving only economic issues to be agreed upon. The Board found that three factors—the parties were bargaining for their first

contract, they were not at impasse, and they held just three, 2-hour bargaining sessions—weighed in favor of concluding that the Company did not bargain for a reasonable period. The other two factors—the parties did not experience any particular bargaining complexities and were not on the verge of an agreement—respectively, weighed somewhat in favor of finding that a reasonable period had elapsed and did not weigh heavily in either direction. Balancing these factors, the Board reasonably concluded that the Company pulled the plug on negotiations too soon. The Court should enforce the Board's Order.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY'S WITHDRAWAL OF RECOGNITION FROM THE UNION WITHOUT HAVING BARGAINED IN GOOD FAITH FOR A REASONABLE PERIOD OF TIME VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

The two questions that the Board addressed in resolving this case are: (1) when did bargaining commence for purposes of dating the Company's obligation to bargain in the settlement agreement, and (2) whether the Company bargained in good faith for a reasonable period before withdrawing recognition from the Union. The Board concluded that bargaining began no earlier than the parties' first face-to-face meeting and that the Company withdrew recognition from the Union before bargaining for a reasonable period after committing its admitted unfair labor practices. As shown below, each of these conclusions was reasonable, and the Board's Order should be enforced.

A. The Company's Obligation to Bargain with the Union

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees . . . ."[8] When an employer has unlawfully refused to bargain with an incumbent union, the Board has held, with court approval, that there

[8] 29 U.S.C. § 158(a)(5).

subsequently should be an insulated period during which the union's majority status cannot be challenged.[9] Allowing the union a chance to succeed in bargaining without fear of decertification promotes, rather than undermines, employee free choice because, until the lingering effects of the employer's unlawful conduct are undone, the employees cannot exercise a *free* choice regarding the union's representative role. As the Supreme Court has stated, it is reasonable to conclude that unless the effect of the refusal to bargain "is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates."[10] Thus, the Board has concluded that such an insulated period would fulfill the central purposes of the Act, which are to promote collective bargaining and to protect employees' rights to freely choose or reject a collective-bargaining representative.[11]

Where, as here, an employer enters into a settlement agreement requiring it to bargain in good faith with a union, the Board will insulate the

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[9] *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 214 (D.C. Cir. 2002).

[10] *Int'l Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940).

[11] *Lee Lumber*, 334 NLRB 399, 401 (2001), *enforced*, 310 F.3d 209 (D.C. Cir. 2002).

union's majority status from challenge for a "reasonable" period of time. This Court has seconded the Board's policy: "[A]n employer must bargain with a union for a reasonable period without regard to its majority status where the bargaining relationship arose as a result of a settlement agreement."[12] As described below (pp. 26-33), the Board calculates that reasonable period on a case-by-case basis, applying factors first enumerated in *Lee Lumber & Bulding Material Corporation.*[13]

In reviewing this case, the Court should grant substantial deference to the Board. It is well-established, as the Supreme Court recognizes, that "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."[14] In doing so, the Board uses its "cumulative experience" to determine whether existing analytical models are responsive to actual conditions.[15] Here, the primary issue concerns the Board's evaluation of factors comprising a reasonable period of time for bargaining and those factors' application to withdrawals of recognition following

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[12] *NLRB v. Universal Gear Serv. Corp.*, 394 F.2d 396, 398 (6th Cir. 1968) (citing *Poole Foundry & Mach. Co. v. NLRB*, 192 F.2d 740, 743 (4th Cir. 1951)).

[13] 334 NLRB at 402.

[14] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

[15] *Id.*

formal settlements. Given that the facts here are uncontested, this question invokes the Board's "primary responsibility for developing and applying national labor policy."[16] Such questions run to the root of the Board's role, requiring "considerable deference" to the Board under Supreme Court precedent.[17]

B. The Board Reasonably Found That the Company Failed to Bargain for a Reasonable Period Before Withdrawing Recognition from the Union

The Company had an obligation to begin bargaining with the Union, upon request, after the Board approved the parties' formal settlement agreement on February 3, 2003. As discussed below, the Company began meeting that obligation no earlier than January 16, when the parties held their first face-to-face bargaining session since the Company had last unlawfully withdrawn recognition and prematurely cut off bargaining with the Union. Once at the bargaining table, however, the Company failed to follow through on its obligation to bargain for a reasonable period and, pursuant to the Board's application of its *Lee Lumber* test to undisputed evidence in the stipulated record, again unlawfully withdrew recognition. For the reasons demonstrated below, the Court should enforce that finding.

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[16] *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

[17] *Id*.

1. The Board reasonably found that the reasonable period for bargaining began no earlier than January 16, when the parties first met face-to-face following their signing of the formal settlement agreement

To determine whether a reasonable period for bargaining had elapsed following the unfair labor practice settlement, the Board first was required to determine when that period started. In their pleadings below, the Company and the General Counsel presented the Board with three options. (A. 10.) The Company asserted that the period began on October 29, the date the Regional Director approved the settlement and sent it to the Board for approval. (A. 10.) On the other hand, the General Counsel asserted that two different dates could provide a logical basis for commencing the reasonable period—either January 16, the first day of face-to-face negotiations, or February 3, the day the Board approved the settlement agreement. Using either of the General Counsel's dates, the parties would have bargained for at least 2 months less time than the Company contends. (A. 10.)

Rejecting the Company's argument and accepting the General Counsel's, the Board found that "the reasonable period for bargaining commenced *no earlier than* January 16." (A. 10 (emphasis added).) This Court has enforced the Board's previous practice of measuring insulated bargaining periods from the date "when the parties meet to begin

negotiations."[18] Here, measuring the date from the beginning of face-to-face negotiations, at the earliest, was reasonable and was certainly not a date pulled "out of thin air," as the Company states (Br. 21).

Prior to January 16, 2003, the parties had not been at the bargaining table since at least March 2002, when the Company last unlawfully withdrew recognition from the Union. That lapse in bargaining, combined with the other unfair labor practices the Company admittedly committed—including (A. 54-55) impliedly threatening employees, discriminatorily failing to recall employees from layoffs due to their support for the Union, and impliedly promising benefits to discourage support for the Union—clearly demonstrate that the parties were not in a bargaining posture. The parties were not exchanging or discussing proposals or otherwise engaging in any meaningful negotiations to reach a collective-bargaining agreement prior to January 16. There is no dispute, however, that the parties met on January 16 and began this process. Thus, the Board reasonably found (A. 10) that bargaining began no earlier than that date.

The Company argues (Br. 17), as it did to the Board, that the commencement date for the reasonable period should be October 29, when

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[18] *Van Dorn Plastic Mach. Co. v. NLRB*, 939 F.2d 402, 404 (6th Cir. 1991); *see also Jasco Indus.*, 328 NLRB 201, 201 (1999).

the settlement agreement was approved by the Board's Regional Director. The Board properly, within its discretion and based on its expertise, rejected this notion. The Company correctly notes (Br. 18) that the Board has, in *AT Systems West* and *Gerrino, Inc.*, commenced the reasonable period upon a Regional Director's approval of a settlement. In those cases, however, the Board's finding that the reasonable period for bargaining began when a Regional Director approved a settlement agreement turned on the fact that the settlement was an *informal* one that marked the end of the Board's involvement in the process.[19]

As the Board recognized (A. 10), a Regional Director's "approval of an informal settlement triggers the parties' duties under the settlement, including any provided-for duty to bargain." Once a Regional Director signs off on an informal settlement with a bargaining obligation, the parties must begin to comply, or the Regional Director will process the underlying unfair labor practice charges.[20] Very simply, it is the end of the line.

That is not what happens when a Regional Director signs a formal settlement agreement. At that time, pursuant to the Board's regulations, the

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[19] *AT Sys. West, Inc.*, 341 NLRB 57, 61 (2004); *Gerrino, Inc.*, 306 NLRB 86, 86 (1992).

[20] 29 C.F.R. § 101.7.

settlement is still contingent, and the Regional Director takes no further action whether or not the parties immediately begin complying.[21] The parties' formal settlement document here was absolutely clear on this point; settlement did "not become effective until the Board ha[d] approved it." (A. 10; 34.) Thus, on October 29—the date the Company proposes to commence the bargaining period—even though the Regional Director had signed the settlement, the parties were still under no obligation to begin bargaining. The Company itself acknowledged this understanding when it stated in its November 20 letter to the Union: "Since the Board has not yet issued [an] order . . . the settlement agreement does not require [the Company] to recognize and meet with [the Union] at this time." (A. 8; 67.) Thus, the settlement's status on October 29 was "tentative and conditional," as the Board observed (A. 10), and it soundly rejected the Company's suggestion to begin the reasonable period on that date.

The Company correctly points out (Br. 20) that the two types of settlements are no different in one respect because parties may voluntarily comply with a formal settlement—just like they would with an informal settlement—upon the Regional Director's approval. But this fact has no bearing on when the parties are *obligated* to comply or face the

[21] 29 C.F.R. § 101.9(c)(2).

consequences of noncompliance. A party could also voluntarily comply before a settlement is approved by a Regional Director and, again, it does not change when compliance is *required* by the agreement. Given the Board's regulations, the language of the settlement agreement, and the Company's own understanding that the formal settlement was contingent on Board approval, the Company's argument that the reasonable period began on October 29 was rightfully rejected by the Board.

Next, the Company chooses another date, November 20, for the beginning of the reasonable period. As discussed, the Company stated in a November 20 letter that it did not intend to wait for Board approval of the settlement before bargaining with the Union. (A. 8; 67.) The Company now argues (Br. 22) that the Board ignored its own precedent—specifically, Board law holding that employers may create a new, binding bargaining obligation by voluntarily recognizing a union—in not applying voluntary recognition principles to its November 20 letter. Without going so far as to assert that it actually voluntarily recognized the Union on November 20, the Company posits (Br. 23) that "far more ambiguous statements have been held to constitute voluntary recognition."

The Company, however, never made this argument to the Board and thus, it is not properly before this Court. Under Section 10(e) of the Act,

"[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."[22] This Court strictly enforces that provision, holding consistently that a litigant's failure to present a question to the Board precludes this Court from subsequently asserting jurisdiction on appeal.[23] This Court has held that the "specificity required for a claim to escape the bar imposed by § 10(e) is that which will apprise the Board of an intention to bring up the question."[24]

In this case, the Company jointly moved to transfer the proceedings to the Board with a stipulated record. The Company then filed a brief directly with the Board setting forth its arguments as to when the reasonable period for bargaining commenced, and asserted that date was October 29. (A. 9.) The Company never mentioned November 20 as a commencement date for

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[22] 29 U.S.C. § 160(e).

[23] *See District 30, United Mine Workers v. NLRB*, 819 F.2d 651, 655 (6th Cir. 1987) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)); *accord Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 690 (6th Cir. 2006); *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 843 (6th Cir. 2003).

[24] *Temp-Masters*, 460 F.3d at 690 (quoting *NLRB v. United States Postal Serv.*, 833 F.2d 1195, 1202-03 (6th Cir. 1987)).

the reasonable period of bargaining, despite ample opportunity to do so.[25] The Board had no notice of the Company's argument, and Section 10(e) precludes it from being raised here for the first time. In any event, the Company's hesitates even now—and does not actually assert that it voluntarily recognized the Union.

In sum, the Board properly rejected the Company's proposed date to begin the reasonable period for bargaining. And, as discussed below, neither of the remaining options for beginning the period—January 16 or February 3—gave the parties sufficient bargaining time to satisfy the *Lee Lumber* test for a reasonable period for bargaining.

2. The Board properly found that the Company failed to bargain for a reasonable period before withdrawing recognition from the Union

The Board reasonably found, based on the undisputed facts and applying its expertise, that the Company unlawfully withdrew recognition from the Union before bargaining in good faith for a reasonable period. To determine whether a reasonable period for bargaining following a settlement agreement has elapsed, the Board looks to the following factors:

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[25] The Company's Brief to the Board has been lodged with the Court as part of the certified record in this case. (*See* A. 2 (certified list of pleadings).)

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.[26]

The Board's test is drawn from *Lee Lumber*,[27] which requires a presumptive 6-month minimum bargaining period following an adjudicated unfair labor practice but analyzes these factors to determine whether more than 6 months of bargaining is necessary. In the context of a settlement agreement, however, the Board has adhered to the multifactor analysis without setting a presumed minimum reasonable period for bargaining.[28]

Here, the Board concluded that three of the five *Lee Lumber* factors weighed in favor of finding that the reasonable period (starting from either the January 16 face-to-face meeting or the February 3 Board approval of the settlement agreement) had not elapsed when the Company withdrew

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[26] *Lee Lumber*, 310 F.3d at 214; *see also AT Sys. West*, 341 NLRB at 61.

[27] 310 F.3d at 214.

[28] *AT Sys. West*, 341 NLRB at 61. *See also Lee Lumber*, 334 NLRB at 399 n.7.

recognition on June 27. Specifically, the Board found that the fact that the parties were not at impasse, that they were bargaining for an initial contract, and that they did not bargain long enough or hold enough bargaining sessions, favored finding that a reasonable period of time had not elapsed. (A. 11.) The other two factors, the complexity of the issues and the amount of progress, respectively, weighed "somewhat" in favor of finding that a reasonable period for bargaining had elapsed, and was neutral on the subject. (A. 11.) Overall, the Board concluded that "application of the pertinent factors . . . here demonstrates that the parties did not bargain for a reasonable period of time before [the Company] withdrew recognition." (A. 11.)

In its brief, the Company concedes (Br. 32 n.1) that the parties were not at impasse and that the parties were bargaining for an initial contract (Br. 27), and fails to discuss either the complexity of the issues or the progress of negotiations. Instead, it proffers three arguments against the Board's findings. First, while conceding that the negotiations were for an initial contract, the Company asserts that the Board misallocated that factor because the circumstances here are different from typical first contract bargaining. Second, it claims that the Board should have found that the passage of time and number of bargaining sessions weighs in favor, not against, finding that the parties bargained for a reasonable period. Finally,

the Company contends that earlier negotiations and certain mail correspondence sufficed to fulfill the bargaining obligation within the reasonable period. For both substantive and factual reasons, these arguments fail, and the Board's balancing of the factors should be affirmed.

Initial Contract Bargaining. The Board has long recognized that where the parties are bargaining for an intitial contract there are "attendant problems of establishing initial procedures, rights, wage scales, and benefits in determining whether a reasonable time has elapsed."[29] While conceding that the parties were bargaining for a first contract, the Company first attempts (Br. 27-28) to negate that fact by stating that the record does not contain evidence of an acrimonious atmosphere during the bargaining period following the settlement agreement. The Board's test, however, does not require a finding of acrimony.[30]

The Company's further argument (Br. 29) to explain away the classic difficulties of first contract bargaining—that the parties' bargaining here was "like renewal bargaining" because the Union proposed a national agreement as a starting point on some matters—ignores the fact that the Company and

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[29] *Ford Ctr. for the Performing Arts*, 328 NLRB 1, 1 (1999) (citing *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71-72 (1965)).

[30] *See Lee Lumber*, 310 F.3d at 214; *AT Sys. West*, 341 NLRB at 61.

Union clearly had some of the same issues that any parties encounter when bargaining for a first contract. These difficulties are evidenced by their inability to reach agreement during several bargaining periods spanning the course of more than 24 months of total bargaining. "Since the parties were bargaining for a first contract and had no common experience to draw upon for the expeditious resolution of their differences,"[31] the Board properly found that this factor weighs in favor of finding that a reasonable period for bargaining had not elapsed.

Passage of Time and Number of Bargaining Sessions. The Board found (A. 11) that, beginning on January 16, the Company met with the Union for only 3 bargaining sessions in a period of, at most, 5 and 1/2 months, and broke off negotiations when the parties were far from impasse, and indeed had reached agreement on several issues. The mere 3 bargaining sessions were just 2 hours each and, as the Board found (A. 11 n.17), the parties "engaged in constructive, albeit very limited contract discussions" during that time. Consistent with its conclusion here, the Board has

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[31] *Blue Valley Mach. & Mfg. Co.*, 180 NLRB 298, 304 (1969), *enforced*, 436 F.2d 649 (8th Cir. 1971).

previously found that spending only 6 hours in negotiations is simply not enough time to reach a collective-bargaining agreement.[32]

Furthermore, the 5 and 1/2 months of bargaining from January to June in this case is significantly less than the time that passed in *Ford Center for the Performing Arts*, where 9 months had gone by and the parties were on the verge of a complete agreement when the employer unlawfully withdrew recognition because a reasonable period for bargaining had not elapsed.[33] Indeed, the Board has previously found that an even greater number of bargaining sessions than the three meetings that the parties had here, failed to fulfill an obligation to bargain for a reasonable period. For example, in *Shangri-La Health Care Center*, the reasonable time had not elapsed where the parties met 5 times during a 2-month period.[34] Even closer to the facts of this case, the reasonable time had not elapsed in *N.J. MacDonald & Sons, Inc.*, despite a total of 9 bargaining sessions during a 6-month period.[35] In

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[32] *Stant Lithograph, Inc.*, 131 NLRB 7, 8 (1961), *enforced*, 297 F.2d 282 (D.C. Cir. 1961).

[33] *Ford Ctr. for the Performing Arts*, 328 NLRB at 2.

[34] *Shangri-La Health Care Ctr., Inc.*, 288 NLRB 334, 336, 338 (1988).

[35] *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71 (1965), *enforced*, 62 LRRM 2296 (1st Cir. 1966).

sum, the parties' negotiations post-settlement simply did not include enough face-to-face time at the bargaining table over a long enough period.

Prior Negotiations and Letters in the Mail. Next, the Company argues (Br. 32) that a reasonable period did elapse if the Board counts the approximately 20 months that it contends the parties bargained pursuant to previous settlement agreements. Contrary to the Company, however, the Board has rejected this approach of splicing together prior unsuccessful bargaining periods to increase the elapsed time. For example, in *AT Systems West*, the Board assessed the reasonableness of 3 months spent bargaining post-settlement, even though the parties had previously bargained for 17 months toward the same contract.[36] Simply put by the Board in *Colfor, Inc.*, a case involving a lapse in bargaining that was enforced by this Court, "[i]t is unreasonable to conclude that . . . parties could resume negotiations at the point where they left off over 2 years ago, or that fruitful negotiations could take place during a mere 2 months of bargaining after such a hiatus."[37]

Finally, while the Company cites (Br. 29-31) numerous letter exchanges that it asks the Court to consider as bargaining, the Board

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[36] *AT Sys. West*, 341 NLRB at 62.

[37] *Colfor, Inc.*, 282 NLRB 1173, 1175 (1987), *enforced*, 838 F.2d 164 (6th Cir. 1988).

recognized (A. 11) that, of those letters, the Company and Union had only one substantive exchange via fax and mail, on the topic of the national residential agreement. The Union sent a copy of a proposed addendum to the agreement, and the Company responded with proposed exceptions. (A. 9; 21, 122-28.) The additional correspondence that the Company lists (Br. 29-31) as evidence of time spent bargaining was confined to scheduling bargaining sessions and sending notifications of proposed wage increases to the Union.

Further, while the Board did consider the parties' written substantive exchange of ideas, the Board has long recognized the importance of face-to-face meetings in reaching agreement: "The Act encourages parties to meet face-to-face and engage in dialogue in order to mutually resolve differences. The point is that mutual communication enhances the prospects for labor and management to work out better solutions to problems facing them and thereby achieve more stable relations."[38] Given the importance of face-to-face bargaining, the Board concluded (A. 11) that "[b]y any standard" the parties had "only a small amount of actual bargaining time," which "indicates that a reasonable period of bargaining had not elapsed when [the Company] withdrew recognition."

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[38] *Contract Carriers Corp.*, 339 NLRB 851, 852 (2003).

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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April 2009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOWN & COUNTRY PLUMBING & HEATING, INC.	*	
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Petitioner/Cross-Respondent	*	
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	*	Nos. 08-2242
v.	*	08-2384
	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	07-CA-46572
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
PIPEFITTERS LOCAL 333	*	
	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,756 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 9th day of April 2009

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and	*	
	*	
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	*	
Intervenor	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent the Board's brief to the Clerk of the Court by electronically filing in accordance with Fed. R. App. P. 25(d) and to counsel:

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