

that an election be held among the employees in the appropriate unit. The motion of New Laxton to dismiss the petition is therefore hereby denied.

ORDER

IT IS HEREBY ORDERED that the name "J & W Coal Company" be, and the same hereby is, substituted in place and stead of the name "New Laxton Coal Company" as the Employer in the proceeding herein, and that an election be held among the employees in the appropriate unit.³

[Text of Fourth Direction of Election omitted from publication.]

MEMBER RODGERS, dissenting:

I would not issue this Fourth Direction of Election. I would dismiss the petition for the reasons set forth in the Second Supplemental Decision in this case—reasons which are not applicable to J & W Coal Company.

³The appropriate unit was described as follows in our Supplemental Decision, Order and Direction of Election, 130 NLRB 910, 911: "All employees at the Employer's Clinchmore, Tennessee, coal mine, excluding office clerical employees, engineering and technical employees, professional employees, guards, foremen, and all supervisors as defined in the Act."

Food Haulers, Inc. and District 50, United Mine Workers of America, Petitioner

Food Haulers, Inc. and John J. Uanis, Petitioner and Local Union 863, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Cases Nos. 22-RC-1078 and 22-RD-85. March 19, 1962

DECISION AND ORDER

Upon petitions duly filed and consolidated, a hearing was held before Richard W. Coleman, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organizations named below claim to represent certain employees of the Employer.¹
3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act for the following reasons:

¹The Petitioner in Case No. 22-RD-85 asserts that the Union is no longer the recognized bargaining representative of the employees in the unit as defined in Section 9(a) of the Act.

The employer and the Intervenor contend that their 5-year contract, executed on December 5, 1960, is a bar to the petitions herein, which were filed on December 15, and December 27, 1960, respectively. As the petitions were filed more than 150 days before the end of the first 2 years of the contract term, clearly the contract is a bar under our rules unless there is some defect making it invalid for contract bar purposes. *Deluxe Metal Furniture Company*, 121 NLRB 995.

The contract asserted as a bar contains the following provision:

It shall not be the duty of any employee nor shall any employee at any time be required to cross a picket line and resusal [sic] of any employee at any time to cross a picket line shall not constitute insubordination nor cause for discharge or disciplinary action.

Our dissenting colleagues contend that the above clause is unlawful under Section 8(e) of the Act² and that, therefore, the contract is not a bar under the holding in *Pilgrim Furniture Company, Inc.*, 128 NLRB 910 (Member Fanning, dissenting). The Board has reconsidered the *Pilgrim Furniture* decision and a majority now believes that it should no longer be followed.

The contract-bar rules are not prescribed by statute. They are a creation of the Board and have been changed from time to time.³ Their purpose is to strike a balance between the competing statutory objectives of stability in labor relations, and employee freedom of choice in selecting a bargaining representative.⁴ In the *Hager Hinge* case⁵ the Board said that it would not hold as a bar a contract containing an unlawful union-security clause because the "existence of such a provision acts as a restraint upon those desiring to refrain from

² Section 8(e) reads as follows:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process or production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

³ *Local 1545, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Merle D. Vincent, Jr. (Pilgrim Furniture)*, 286 F.2d 127 (C.A. 2).

⁴ *Boyd Leedom v. International Brotherhood of Electrical Workers (General Cable Corp.)*, 278 F.2d 237, 241-244 (C.A.D.C.); *General Motors Corporation*, 102 NLRB 1140.

⁵ *C. Hager & Sons Hinge Manufacturing Company*, 80 NLRB 163.

union activities within the meaning of Section 7 of the Act. . . ." In other words, such a clause interferes with one of the objectives sought to be balanced by the bar rules. As Member Fanning in his dissent in *Pilgrim* cogently pointed out, the majority in *Pilgrim Furniture* applied the existing contract-bar concept to an entirely different kind of situation. A "hot cargo" clause, although unlawful, does not in any sense act as a restraint upon an employee's choice of a bargaining representative.⁶

Moreover, the remedy applied against the alleged illegal "hot cargo" clause in a representation proceeding under the majority doctrine in *Pilgrim* is much more drastic than is permitted by the statute in unfair labor practice proceedings. Thus, Section 8(e) provides that any contract or agreement containing an unlawful "hot cargo" provision "shall be to such extent unenforceable and void." In an unfair labor practice proceeding, if the Board found after litigation that a disputed clause violated Section 8(e), it would not and could not set aside the entire contract but only the unlawful clause.⁷ Yet under the holding of the majority in *Pilgrim*, in a representation proceeding where the issue of legality of an alleged "hot cargo" clause is collateral at best, the entire contract would in effect be set aside on a finding that the contract contained a "hot cargo" provision. We can perceive no rational basis for a sanction so much more drastic in a representation than in an unfair labor practice proceeding, even assuming that the Board has the power so to do. In fact, such a drastic remedy seems to be inconsistent, as pointed out above, with the stated purport of Section 8(e).⁸

⁶The Board has consistently refused to permit litigation of unfair labor practice issues in representation proceedings. The exception was made in the case of unlawful union-security clauses, as pointed out above, because such clauses—unlike the clause here in issue—impinge directly upon an employees' free choice of a bargaining representative, which a representation proceeding is designed to ascertain. *Paragon Products Corporation*, 134 NLRB 662, dealt with the scope of this exception, and it is in this context that the language quoted by the dissent is to be read. Neither *Paragon* nor our decision herein constitutes an endorsement of unfair labor practices, real or alleged. On the other hand, both decisions are calculated to preserve the balance between stability and freedom of choice which the contract-bar policy is designed to achieve and, at the same time, to preserve as far as possible the difference in the functions designed to be served by representation proceedings and by unfair labor practice proceedings. This difference, we assume, our dissenting colleagues acknowledge.

⁷*American Food Company*, 134 NLRB 481

⁸We do not read the affirmance of *Pilgrim* in *Local 1545, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Merle D. Vincent, Jr.*, *supra*, as requiring a different result than that reached above. The court in the cited case recognized that contract-bar rules are a matter for the sound discretion of the Board which the Board may apply or waive in the interest of stability and fairness in collective-bargaining relations. The court did not approve the *Pilgrim* bar rule as such. All it held was that the adoption of the rule was not a violation of a "clear statutory command" within the meaning of *Boyd S. Leedom v. William Kyne*, 249 F. 2d 490 (C.A.D.C.), *affd.* 358 U.S. 184, so as to permit a suit to enjoin the enforcement of the Board's decision and direction of election. Judge Moore dissented and would have held *Leedom v. Kyne* applicable upon the ground that the majority in *Pilgrim* had "entirely misconstrued the import of a clear statutory provision in exercising its admittedly broad discretion." (286 F. 2d 127, 134.)

Accordingly, without deciding whether the clause set out above is violative of Section 8(e), we overrule the contract bar rule promulgated in the *Pilgrim* case, and find the existing contract a bar to the petitions in the present case.⁹ We shall therefore dismiss the petitions.

[The Board dismissed the petitions.]

MEMBERS RODGERS and LEEDOM dissenting:

For the reasons set forth in the principal opinion in *Pilgrim Furniture Company, Inc.*, 128 NLRB 910, and on the basis of the affirmance of the case by the United States Court of Appeals in *Local 1545, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Merle D. Vincent, Jr.*, 286 F. 2d 127 (C.A. 2), we would adhere to the holding of that case.¹⁰

The majority's decision to overrule *Pilgrim* reflects, in our opinion, a departure from the well-settled practice of this Board to refuse to consider as a bar to an election, a contract which directly contravenes the provisions of the Act.

In their recent opinion in the *Paragon* case, our colleagues stated:¹¹

Basic to the whole of contract-bar policy is the proposition that the delay of the right to select representatives can be justified only where stability is deemed paramount. Thus, the Board has excepted from the contract-bar rule certain types of contracts which in its considered judgment did not foster industrial stability such as . . . contracts which themselves were in conflict with the policies of the Act, e.g. a contract containing an illegal union-security clause. It has been the Board's view that any stability derived from such contracts must be subordinated to employees' freedom of choice because it does not establish the type of industrial peace the Act was designed to foster.

We are in complete agreement with the above statement, but we find the result and reasoning in the instant case inconsistent with it. Thus, according to the majority, contracts containing unlawful union-security clauses will not "establish the type of industrial peace the Act was designed to foster," and will not bar elections; but contracts containing unlawful "hot cargo" clauses will hereafter be found to establish the aforementioned type of industrial peace, and will be held to bar the employees' statutory right to an election.

⁹ Cf. *Paragon Products Corporation, supra*.

¹⁰ Member Leedom, who dissented in the *Pilgrim* case on the ground that the contract therein was executed prior to the effective date of Section 8(e), later joined the majority of the *Pilgrim* case in *American Feed Company*, 129 NLRB 321. The contract in the latter case was executed subsequent to the effective date of Section 8(e).

¹¹ *Paragon Products Corporation*, 134 NLRB 662, in which we dissented from the majority's revision of the then applicable rule with respect to the type of union-security clauses which will remove a contract as a bar.

The majority would justify this inconsistent application of the Board's contract-bar rules on two grounds: First, that a contract with an unlawful "hot cargo" clause envisages "an entirely different kind of situation" from that involving a contract with an unlawful union-security clause; and second, that the "remedy" under *Pilgrim* is "much more drastic than is permitted by the statute in an unfair labor practice proceeding."

As to our colleagues' first ground, we do not believe that there is any difference in kind between an unlawful "hot cargo" clause and an unlawful union-security clause—merely a difference in form. The important factor which is common to both is that both clauses violate the Act and are "themselves . . . in conflict with the policies of the Act." Congress did not draw any distinction between the gravity of one unfair labor practice provision and another; a violation of Section 8(e) is thus no less onerous, and no less an infringement on the public rights the Act is designed to protect, than a violation of Section 8(a)(3). Thus, all contract clauses which are unlawful under the unfair labor practice provisions of the Act, should be treated as such for contract-bar purposes.

As to our colleagues' second ground, we fail to see how they can describe the "remedy" under *Pilgrim* as "drastic." In *Local 1545, Carpenters etc., supra*, the court was faced with the same argument made by our colleagues here, namely, that the Board in holding contract containing an unlawful "hot cargo" clause was not a bar to an election, had exceeded the statutory direction that "any contract . . . containing such an agreement shall be to such extent unenforceable and void." As stated by the court, at p. 1827:

The argument places too heavy a strain on the quoted words—their purpose seems to have been simply to make clear that the presence of a hot-cargo clause in an agreement should not invalidate other provisions such as those relating to wages and hours . . . it can hardly be contended that Congress meant to require the Board to give contract-bar protection to an agreement the making of which was an unfair labor practice.

Moreover, our colleagues are apparently applying a loose definition to the term "remedy," for the Board does not "remedy" unlawful contracts in representation proceedings. The Board, in such proceedings, merely determines whether a contract qualifies for contract-bar protection—and in determining that a contract is no bar, the Board does *not* set the contract aside, either in whole or in part. Although such remedial action may be taken in an unfair labor practice proceeding, in representation matters the contractual rights and duties of

the parties are completely unaffected by the Board's contract-bar resolution.

Accordingly, and assuming, as does the majority, that the clause herein violates Section 8(e), we would hold that the contract involved does not constitute a bar, and we would direct an election herein.

Orkin Exterminating Company of South Florida, Inc. and Jessie S. Glawson and Teamsters, Chauffeurs and Helpers, Local Union No. 79, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Cases Nos. 12-CA-2067-1 and 12-CA-2107. March 20, 1962*

DECISION AND ORDER

On January 10, 1962, Trial Examiner James V. Constantine issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with these cases to a three-member panel [Chairman McCulloch and Members Leedom and Brown].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the brief, and the entire record in these cases, and hereby adopts the Trial Examiner's findings,¹ conclusions, and recommendations.

For the following reasons, we agree with the Trial Examiner that the Respondent, by calling individual employees to the office of its general manager, Kolkana, on June 20, 1961, and interrogating them about union activities, violated Section 8(a)(1) of the Act: These inquiries were not shown to be for the purpose of determining the extent of the Union's representation for any legitimate objective; were not in all instances accompanied by assurances to the employees that there would be no reprisals; included an inquiry as to "who was in

¹ The Respondent appears to be one of many Orkin corporations located throughout the United States. As the Board has already asserted jurisdiction over the Orkin corporations in *Orkin Exterminating Company, Inc.*, 115 NLRB 622, we find, for the reasons there stated and in agreement with the Respondent's admission, that Respondent's operations meet the Board's jurisdictional standards.