

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MOUNTAIRE FARMS, INC.,)	
)	
Employer,)	
)	
and)	
)	
UNITED FOOD AND)	
COMMERCIAL WORKERS)	
UNION, LOCAL 27,)	Case No. 05-RD-256888
)	
Incumbent Exclusive Representative,)	
)	
and)	
)	
OSCAR CRUZ SOSA,)	
)	
Petitioner.)	

**EMPLOYER MOUNTAIRE FARMS, INC.’S BRIEF IN SUPPORT OF THE
REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

Barry M. Willoughby (No. 1016)
Lauren E.M. Russell (No. 5366)
Adria B. Martinelli (No. 4056)
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 571-6666
Email: bwilloughby@ycst.com

Dated: August 21, 2020

Attorneys for Mountaire Farms, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE.....	1
QUESTIONS INVOLVED.....	3
STATEMENT OF FACTS	3
ANALYSIS	5
I. THE REGIONAL DIRECTOR CORRECTLY DETERMINED THAT AGREEMENT CONTAINED AN UNLAWFUL UNION-SECURITY CLAUSE AND THEREFORE THE CONTRACT-BAR DOCTRINE COULD NOT BE APPLIED.....	5
A. The Union-Security Clause is Unlawful Because It Requires that Nonmember Incumbent Employees Become Union Members 31 Days Following the Beginning of Their Employment, Not 31 Days Following the Execution of the Contract.	5
B. The Union Security Clause is Incapable of Lawful Interpretation.....	8
II. THE CONTRACT-BAR DOCTRINE SHOULD BE ABOLISHED IN ITS ENTIRETY	12
III. IF THE BOARD RETAINS THE CONTRACT BAR DOCTRINE, IT SHOULD BE SUBSTANTIALLY MODIFIED	13
A. The Duration of the Bar Period and the Operation of the Current “Window” and “Insulated” Periods.....	13
B. The Formal Requirements for Affording Bar Quality to a Contract.....	15
C. Circumstances When Contract Provision Will Prevent the Application of a Contract Bar.....	16
D. The Effect of Changes in Circumstances During the Term of the Contract.....	19

CONCLUSION.....21

TABLE OF AUTHORITIES

Cases

<i>Ace Car and Limousine Service, Inc.</i> , 357 NLRB 359 (2011).....	19
<i>Appalachian Shale Products, Co.</i> , 121 NLRB 1160 (1958).....	15
<i>Checker Taxi Company, Inc.</i> , 131 NLRB 611 (1961).....	7
<i>Communications Workers of America v. Beck</i> , 487 U.S. 735 (1988)	19
<i>Gary Steel Co.</i> , 144 NLRB 470 (1963).....	6
<i>General Cable Corp.</i> , 139 NLRB 1123 (1962).....	12
<i>H.L. Klion, Inc.</i> , 148 NLRB 656 (1964).....	10
<i>Hickey Cab Co.</i> , 88 NLRB 327 (1950).....	17
<i>Local 357, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB</i> , 365 U.S. 667 (1961)	12
<i>Local No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Tech Weld Corporation)</i> , 220 NLRB 76 (1975).....	7
<i>Madelaine Chocolate Novelties, Inc.</i> , 333 NLRB 1312 (2001).....	15
<i>Martin Building Material Co., Inc.</i> , 431 F.2d 1246 (5th Cir. 1970).....	6

<i>Mason v. Telefunken Semiconductors Am., LLC</i> , 797 F.3d 33 (1st Cir. 2015)	8
<i>Merico, Inc.</i> , 207 NLRB 101 (1973).....	16
<i>National Sugar Ref. Co.</i> , 10 NLRB 1410 (1939).....	12
<i>NLRB v. Gen. Motors Corp.</i> , 373 U.S. 734 (1963)	18
<i>NLRB v. Manitowoc Eng' g Co.</i> , 909 F.2d 963 (7th Cir. 1990).....	9, 10
<i>Pacific Coast Ass'n of Pulp & Paper Mfg.</i> , 121 NLRB 990 (1958).....	12
<i>Paragon Products Corp.</i> , 134 NLRB 662 (1961).....	6, 8, 11, 12
<i>Pirlott v. NLRB</i> , 522 F.3d 423 (D.C. Cir. 2008)	18
<i>Radio Officers' Union v. Labor Board</i> , 347 U.S. 17 (1954)	18
<i>Roosevelt Memorial Park, Inc.</i> , 187 NLRB 517 (1970).....	6
<i>Roza Watch Corp.</i> , 249 NLRB 284 (1980).....	7
<i>Stanford Ranch v. Md. Cas. Co.</i> , 89 F.3d 618 (9th Cir. 1996).....	10
<i>Television Station WVTV</i> , 250 NLRB 198 (1980).....	15
Statutes	
29 U.S.C. § 158(a) (3).....	6

Other Authorities

Black's Law Dictionary (11th ed. 2019).....10

INTRODUCTION

Mountaire Farms, Inc. (“Mountaire” or “Employer”), pursuant to the Board’s Notice and Invitation to File Briefs dated July 7, 2020, later modified in its Order dated July 23, 2020, hereby submits this brief in support of the Regional Director’s Decision and Direction of Election (“DDE”) dated April 8, 2020.

STATEMENT OF THE CASE

On February 22, 2020, Oscar Cruz Sosa (hereinafter “Petitioner”), filed a petition with the National Labor Relations Board (“NLRB” or “Board”) under Section 9(c) of the National Labor Relations Act (“Act”), seeking to decertify the Union as the exclusive bargaining representative of the employees in the bargaining unit. Following a hearing on March 10, 2020, the Regional Director for Region 5 (“Regional Director” or “RD”) ordered post-hearing briefing with respect to the Union’s contract-bar defense. The parties submitted post-hearing briefs on March 20, 2020.

On April 8, 2020, the Regional Director issued the DDE and held that because the collective-bargaining agreement (“Agreement”) contained an unlawful union-security clause, the Agreement could not serve as a bar. The Regional Director ordered an election at a date, time, place and manner to be determined at a later date as a result of the extraordinary conditions related to the COVID-19 pandemic. On April 10, 2020, the Regional Director issued a Notice of Election

and confirmed details for a live ballot election on June 17, 2020. On April 21, the Union filed a Request for Review of the RD's finding that the union-security clause in the Agreement was unlawful ("Union's Request for Review"). On April 28, 2020, the Petitioner and Employer filed oppositions to the Union's Request for Review.

On June 23, 2020, the NLRB granted the Union's Request for Review, finding that it raised substantial issues warranting review, and indicated that it would establish a schedule for the filing of briefs on review and inviting amicus briefs.¹ On July 7, 2020, the Board issued a Notice and Invitation to File Briefs. Specifically, the Board stated that in addition to the specific contract-bar issue presented in this case, parties and amici should address, with supporting arguments, whether the Board should (1) rescind the contract-bar doctrine, (2) retain it as it currently exists, or (3) retain the doctrine with modifications. On July 23, 2020, the Board entered an order extending the original deadline for initial briefs by the parties to August 21, 2020.

¹ In its June 23 order, the Board also stayed the election. On June 24, the Board granted the Employer's and the Petitioner's requests for extraordinary relief and rescinded the stay, while impounding the ballots pending resolution of the merits of the Union's Request for Review and reiterating its intent to issue an order soliciting briefing. On June 29, the Board denied the Union's motion to reconsider the June 24 order.

This is Employer's brief in support of the DDE. In addition, Employer submits that the contract-bar doctrine should be rescinded.

QUESTIONS INVOLVED

1. Did the Regional Director correctly determine that the collective bargaining agreement in this case contained an unlawful union-security clause and therefore the contract-bar doctrine could not be applied?
2. Should the contract-bar doctrine be abolished because it undermines employee free choice and has no statutory basis?
3. If the contract bar is retained, should it be substantially modified?

STATEMENT OF FACTS

Employer operates a poultry processing plant in Selbyville, Delaware, at which it is engaged in growing, processing, and selling processed poultry products in wholesale and retail markets. The Union is currently the exclusive collective-bargaining representative for the following unit of employees ("Unit"):

All regular employees now employed or who may be employed by the Employer at their Selbyville, Delaware Poultry Processing Plant located at Hossier and Railroad Avenue on the Delmarva Peninsula, as follows: All production employees including but not limited to the following: live hangers, pinners, eviscerating, grading, cut-up, sawing, deboning, and other further processing employees, but excluding all employees currently covered under contract between Mountaire Farms of Delmarva and Local 355 of the Teamsters Union.

The Employer and the Union are parties to a collective-bargaining agreement (“Agreement”) governing the terms and conditions of employment of the Unit.

The preamble of the Agreement begins with the statement “THIS AGREEMENT effective the **22nd day of December 2018** by and between [the parties].” Exhibit A at 1 (emphasis in original).

Article 3 of the Agreement includes the union security clause, and is set forth below in its entirety:

ARTICLE 3 – UNION SECURITY AND CHECK-OFF

1. It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing, and those who are not members on the execution date of this Agreement shall, on or after the thirty-first day following the beginning of such employment, even if those dates are not consecutive, shall become and remain members in good standing in the Union.
2. The Employer shall deduct periodic dues and initiation fees uniformly required as a condition of membership in the Union, and regularly authorized assessments on a weekly basis from the wages of each employee covered by this Agreement who has filed with the Employer a written assignment authorizing such deductions, which assignments shall not be irrevocable for a period of more than one (1) year or beyond the termination date of this Agreement whichever occurs sooner. Such dues, initiation fees and assessments shall be forwarded

to the Union within fifteen (15) days. The Union will send the Employer a letter by certified mail notifying the Employer of any change in the amount of dues; initiation fees and assessments shall be kept separate and apart from the general funds of the Employer and shall be deemed trust funds.

3. The Union shall indemnify and hold the Employer harmless from any and all claims, demands, suits or other forms of liability which shall arise out of or by reason of action taken or not taken by the Employer in compliance with the provisions of Sections 1 and 2 of this Article.

Exhibit A at 2-3.

The Agreement concludes with the following language: “Signed this 8th day of February, 2019 by duly authorized representatives of the contracting parties hereto.” Exhibit A at 16.

ANALYSIS

I. THE REGIONAL DIRECTOR CORRECTLY DETERMINED THAT AGREEMENT CONTAINED AN UNLAWFUL UNION-SECURITY CLAUSE AND THEREFORE THE CONTRACT-BAR DOCTRINE COULD NOT BE APPLIED

A. The Union-Security Clause is Unlawful Because It Requires that Nonmember Incumbent Employees Become Union Members 31 Days Following the Beginning of Their Employment, Not 31 Days Following the Execution of the Contract.

The Board has long recognized that an existing collective bargaining agreement does not constitute a bar to the holding of a representation election

where the contract contains a clause that violates the Act. *Martin Building Material Co., Inc.*, 431 F.2d 1246 (5th Cir. 1970). See also *Gary Steel Co.*, 144 NLRB 470 (1963); *Paragon Products Corp.*, 134 NLRB 662 (1961). A contract containing an unlawful union-security provision that is unlawful on its face will not bar a representation petition. *Paragon*, 143 NLRB 662. The burden of proving that a contract acts as a bar to a representation election is on the party asserting the doctrine. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970). Section 8(a)(3) of the Act mandates a 30-day grace period before employees become Union members, and ties that period to the later of the contract’s effective date, or the date of employment. In relevant part, it states: “nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning or **such employment** or the effective date of the agreement, whichever is the later . . .” 29 U.S.C. § 158(a) (3) (emphasis added). The phrase “such employment” in this Section of the Act refers to the beginning of the employee’s employment, generally, not to employment covered by a collective bargaining agreement. See Union Post-Hearing Brief at 11-12.

The Agreement in this case ties the 30-day grace period to the *execution* date of the agreement, not the *effective* date. The Board in *Paragon* held that while

collective bargaining agreements did not have to quote the statute verbatim to be legal, they must still meet the requirements of the Act for a lawful grace period. In this case, the grace period afforded to incumbent nonmember employees does not meet the statutory requirement.

As concluded by the Regional Director:

[A]ny incumbent employee who was hired prior to the Agreement's execution date—February 9, 2019—would have been denied the statutorily mandated 30-day grace period. Because Article 3, Section 1 mandated that nonmember employees become Union members after 31 days following the beginning of their employment, and not 31 days following the execution of the contract, Article 3 is unlawful.

DDE at 7.

It is not unprecedented for contracts to tie the union security clause to the execution date, rather than the effective date of the collective bargaining agreement. In order to be valid, however, such provisions must explicitly afford nonmembers the statutorily mandated grace period following the execution date of the agreement to become members in good standing. *See, e.g., Checker Taxi Company, Inc.*, 131 NLRB 611, 615 fn. 11 (1961); *Local No. 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Tech Weld Corporation)*, 220 NLRB 76 (1975); *Roza Watch Corp.*, 249 NLRB 284 (1980). In this case, the clause does not afford the nonmember incumbents the requisite period after contract execution. Therefore, it is illegal on its face.

B. The Union Security Clause is Incapable of Lawful Interpretation.

The Union argues that the clause at issue here is not clearly unlawful because “such employment” refers to “employment . . . covered by this agreement,” rather than earlier points in the incumbents’ employment history. Applying the Union’s strained definition of “such employment,” the statutory grace period for a nonmember employee employed sometime prior to the execution date would not begin to run until after the Agreement was executed.

The Union’s argument is counter to the Board’s holding in *Paragon*, as well as basic contract interpretation principles. “Employment” has a plain meaning, and that is not limited to employment only for a specified period of time (after the contract was executed). Here, the Union seeks to inject into the definition of “employment” a caveat that employment refers only to employment after the execution of the Agreement.

There is nothing ambiguous about the union security clause in this case. Courts examine whether the contractual language is susceptible to more than one reasonable interpretation; however “words are not infinitely malleable, and a contract term is not ambiguous simply because an imaginative party conjures up an alternate interpretation.” *Mason v. Telefunken Semiconductors Am., LLC*, 797 F.3d 33, 42 (1st Cir. 2015) (omitting internal citations). The Union’s urging of an unwritten limitation on the term “such employment” is just that—an imaginative

interpretation conjured up to save an illegal clause. A term with a plain meaning is not ambiguous because a party attributes to it caveats which are not a part of its plain meaning. *NLRB v. Manitowoc Eng' g Co.*, 909 F.2d 963, 969 (7th Cir. 1990).

In *Manitowoc Eng' g Co.*, the Court of Appeals for the Seventh Circuit held that the words in a collective bargaining agreement “meant what they said” and were not susceptible of lawful interpretation despite the company’s argument that the plain meaning of a term was actually qualified. *Id.* at 969. In that case, the collective bargaining agreement contained a clause providing that employees’ transfer or promotion would not diminish seniority and right to work in a bargaining unit. *Id.* at 965. However, another provision provided that transferred or promoted employees “shall maintain membership in the Union or obtain a withdrawal card in accord with the provision of the Union’s Constitution.” *Id.* The union’s constitution stated that a withdrawal card “may”—not “shall”—issue upon submission of an application, payment of a minimal fee, and payment of any overdue financial obligations. *Id.* at 965-66. The NLRB found the provision “unlawful on its face” because it contravened the language of Section 8(a)(3), which prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,” by encouraging individuals to remain members of the union, since the withdrawal card would not necessarily and only “might” issue. *Id.* at

968. The court rejected the argument that “may” was ambiguous and was limited to when minimal conditions were met, holding that “may” could not be construed as “shall” and that “[m]ay” means what it says.” *Id.* at 969.

Similarly in this instance, “employment” has a plain meaning and should not be construed to include unwritten limitations. “Employment” is the condition of working for pay, not the condition of working for pay only after the execution of an agreement. An employee is “any person in service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.” *Black’s Law Dictionary* (11th ed. 2019). The “employment” begins when the employment relationship begins: upon hire. *Id.*

The lawfulness of a union-security clause may be further informed by a review of the contract as a whole. *See H.L. Klion, Inc.*, 148 NLRB 656, 660 (1964). *See also Stanford Ranch v. Md. Cas. Co.*, 89 F.3d 618, 626 (9th Cir. 1996) (holding that the court must examine the contract in the context of the instrument as a whole to determine whether or not a contractual clause is ambiguous). Article 5 of the Agreement states that “whenever any employee covered by this Agreement is receiving a higher rate than the minimum rate provided for at the time of the signing of this Agreement, such differential shall continue for the term of this Agreement.” This indicates that “employee[s] covered by this Agreement”

includes employees already employed, whose terms of employment, after the execution of the Agreement, would become governed by the terms of the Agreement. Thus, the parties clearly considered that Mountaire, at the time the Agreement was executed, would have incumbent employees in its employ whose then-existing terms and conditions of employment would thereafter be governed by the Agreement. As noted by the Regional Director, when considered in light of Article 5, the Union's suggestion that it essentially disregarded any employment prior to the signing of the Agreement becomes even more implausible. Thus, the Regional Director's holding that the only "plausible interpretation of the phrase 'beginning of such employment' as used in Article 3, Section 1 is the beginning of an employee's employment with the Employer" is well supported.

The Union argues that this cannot be the proper interpretation because that would require "inferring the parties only *intended* to give employees who were hired on or after February 8, 2019 an opportunity to satisfy their obligation to the union and that they *intended* that all other employees who were nonmembers on the execution date could be immediately discharged." Union's Request for Review at 4-5 (emphasis added). The Union claims this is an absurd result and cannot be what the parties intended. The Union's argument based on the parties' alleged intent misses the mark. The Board in *Paragon* concluded that a clearly unlawful union-security provision will render it no bar, regardless of the parties' intent with

respect to such language. *Paragon*, 134 NLRB at 667. This is because it cannot be assumed “that the parties to [a] contract did not intend to adhere to its express language.” *Id.* at 665 (quoting *Local 357, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 365 U.S. 667, 676 (1961)). As held by the Board in *Paragon*, where contracts are illegal on their face, “extrinsic evidence of lack of enforcement or intent becomes immaterial.” *Id.* at 666.

II. THE CONTRACT-BAR DOCTRINE SHOULD BE ABOLISHED IN ITS ENTIRETY

Congress did not intend to establish a contract bar to employee free choice in the selection or non-selection of a representative for collective bargaining. The text of the Act does not include any reference to a contract bar. Instead, the contract bar doctrine was developed by the Board through *ad hoc* case rulings. The doctrine was first established in 1939 in *National Sugar Ref. Co.*, and at that time the bar acted only for one year. 10 NLRB 1410 (1939). Later Board decisions expanded the bar to two, then three, years. See *Pacific Coast Ass’n of Pulp & Paper Mfg.*, 121 NLRB 990 (1958); *General Cable Corp.*, 139 NLRB 1123 (1962).

Striking the appropriate balance between employee free choice on one hand, and stability of industrial relations on the other, is at the heart of these decisions. Congress considered these competing interests in the Act, and determined the

appropriate balance with the Election Bar. Section 9(c) (3) of the Act specifically prohibits representation or decertification elections in a bargaining unit within one year of a valid election. Nothing in the Act suggests that Congress intended to prohibit employee free choice in selecting their representative for any other reason. There is no legislative history supporting the administratively adopted contract bar doctrine that limits employee free choice.

III. IF THE BOARD RETAINS THE CONTRACT BAR DOCTRINE, IT SHOULD BE SUBSTANTIALLY MODIFIED

As it currently exists, the Contract Bar Doctrine is unduly complicated, overly restrictive, and almost impossible for Bargaining Unit Employees to understand if they wish to seek an election to decertify an incumbent Union.

A. The Duration of the Bar Period and the Operation of the Current “Window” and “Insulated” Periods.

The current NLRB Contract Bar Doctrine makes it extremely difficult for employees to file a petition seeking to decertify an incumbent Union. Under the current rule, a Decertification Petition may be filed only in the last 90 days of the period ending with the contract expiration and before 60 days from the end of the contract. In other words, employees have a narrow “window” of 30 days running from the 90th day to the 60th day before the end of the contract. The 60 days before the end of the contract constitute the “insulated” period during which a petition for an election may not be filed.

This very narrow window makes it extremely difficult for employees seeking to decertify an incumbent union by obtaining the necessary signatures for an election and complying with the procedural formalities to successfully file a decertification petition, even if a majority of the unit employee wishes to decertify the union. In most cases, employees who are dissatisfied with the representation supplied by an incumbent union will not have the benefit of counsel. Rank and file employees are generally unable to successfully navigate the NLRB Decertification process in the narrow window the Board currently applies.

Mountaire believes that if the Contract Bar Doctrine is retained at all,² the duration of the Bar should not be longer than the Election Bar as set forth in Argument II above. Further, if the contract bar is extended beyond one year, the “window” should be much wider than that allowed by existing Board policy.

The window for Decertification should run from the period beginning six months before the expiration of the contract, and ending on the day of the expiration of the contract in effect, regardless of whether the union and the employer reach agreement on a successor contract during this time. In addition, Mountaire believes that employees ought to be allowed a second window of shorter duration after a successor contract is reached to allow incumbent

² As noted above, Mountaire believes that the contract bar doctrine should be abolished.

employees and new hires the opportunity to determine whether they wish to seek an election to retain the incumbent union.

The reality is that union ratification procedures vary widely. As a practical matter, incumbent employees and new hires may not have the opportunity to fully understand a proposed successor agreement and to determine whether they wish to be represented by the incumbent union. In addition, union leadership often manipulates the ratification process to obtain approval of a contract that the union may find beneficial to its institutional interests, but which may not benefit bargaining unit employees. Accordingly, Mountaire believes that employees should also have a period of 60 days *after* the ratification of a contract to file a decertification petition.

B. The Formal Requirements for Affording Bar Quality to a Contract.

Except as noted below, the Board requirements for affording bar quality to a contract should remain consistent with the Board's current rules. For example, the contract must be in writing and signed by the parties; provide terms and conditions sufficient to provide a stable collective bargaining relationship; and not be terminable in the discretion of either party. *Appalachian Shale Products, Co.*, 121 NLRB 1160 (1958); *Madelaine Chocolate Novelties, Inc.*, 333 NLRB 1312 (2001); *Television Station WVTM*, 250 NLRB 198 (1980). To ensure employee free choice, however, ratification of the collective bargaining agreement should be required in

all cases before affording contract bar quality even if the contract itself does not state that ratification is required. *See Merico, Inc.*, 207 NLRB 101 (1973).

C. Circumstances When Contract Provision Will Prevent the Application of a Contract Bar.

- 1. Contracts including a union security clause compelling the employer to terminate non-members, even if lawful, should preclude the application of a contract bar.**

Mountaire submits that the Contract Bar Doctrine should not be applied to any contract in which the incumbent union has negotiated a union security clause that compels bargaining unit employees to become members of the union or face termination.³ Union security provisions of this type benefit the union's institutional interests, not bargaining unit members. Union security provisions give an incumbent union undue leverage over bargaining unit employees and can be used to suppress dissent. Such heavy-handed provisions, *even if lawful*, should not allow an incumbent union to prevent employees the opportunity to freely choose their representative.

³ This rule should apply equally to right-to-work states. Union contracts in such jurisdictions are usually artfully worded to state that "membership" only means paying the union's dues and assessments. The effect on employees is the same as termination, because to retain their jobs they must comply with the union's financial demands. Further, it is questionable whether lay employees understand the subtle definitional difference resulting from the artful wording unions often negotiate.

In other words, if the union negotiates such terms for its own institutional benefit, it should not also be permitted to prevent employees who are dissatisfied with the union's representation from seeking an election to determine whether the incumbent union should continue to represent them. Fundamental fairness requires that incumbent employees and new hires have the opportunity to exercise industrial free choice concerning whether they wish to be represented by an incumbent union that places its institutional interest in collecting dues over the employees' interest of continued employment. *See Hickey Cab Co.*, 88 NLRB 327, 329-30 n. 25 (1950) (the "very existence in the contract of the union security provision . . . acts as a restraint upon employees desiring to refrain from union activities").

2. Illegal contract terms such as unlawful union security provisions should prevent the application of the contract bar.

Existing rules prohibiting the application of a contract bar to collective bargaining agreements containing unlawful provisions should continue to apply if the contract bar is not abolished. This includes an illegal union security clause. A union ought not to benefit from a union security clause that is unlawful.

Likewise, the Board should expand its examination to include union check off provisions, including the forms unions negotiate to compel bargaining unit employees to pay dues and other assessments. In other words, if there is a question

about whether the union dues and assessments extend beyond core financial payments, the contract bar ought not to apply.

In addressing the permissible scope of a union security clause, NLRB guidance provides that a fee provision is permissible, but requiring union membership or continued membership as a condition of employment is unlawful. *See* “Basic Guide to the National Labor Relations Act,” at 2 (NLRB, 1997); *see also Pirlott v. NLRB*, 522 F.3d 423, 427 (D.C. Cir. 2008) (“The Supreme Court has long limited the permissible scope of union-security clauses by holding that when employees object to union membership, their obligation to the union is restricted to its ‘financial core’—*i.e.*, objecting nonmembers can be required to pay their dues to the union but nothing more”); *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963) (“This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees.”) (*quoting Radio Officers’ Union v. Labor Board*, 347 U.S. 17, 41 (1954)).

Requiring employees to pay union “assessments” violates the U.S. Supreme Court’s mandate that unions may only require payment of the “financial core” required for its representation of the bargaining unit. If the Contract Bar rule is retained, the Board should modify *Paragon* to allow the Regions to determine whether a union’s “check off” authorization violates the Act by requiring

collection of impermissible assessments. *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Ace Car and Limousine Service, Inc.*, 357 NLRB 359 (2011), the Board held a provision requiring the payment of “assessments” is illegal.

Other long-established illegal terms such as those prohibiting racial, gender, and other forms of illegal discrimination should continue to be applied.

D. The Effect of Changes in Circumstances During the Term of the Contract

The Board has also asked the parties to comment on how a change in circumstances during the term of the contract (including changes to the Employer or its operation, organizational changes within the Labor Organization, or conduct by and between the parties) may affect the application of a contract bar.

A number of changed circumstances may support the need for a representation election to establish whether the incumbent union represents a majority of the workforce. For example, the number of bargaining unit employees may have been greatly increased, because the unit may have been subject to accretion. Employees who become covered by a collective bargaining agreement through accretion may include a substantial number of employees with different interests and/or views of whether they wish to be represented by the incumbent union or any union at all. If a sufficient number of employees in such a bargaining unit have signed a decertification petition, the Board should allow employees the

opportunity to vote for a representative of their own choosing or to be unrepresented. Artificial rules such as the contract bar stifle such free choice.

A union organizational change or merger represents another circumstance in which the contract bar should not apply. Under such circumstances, the members of the bargaining unit are no longer represented by the same union that was elected to be their representative. If thirty percent of the bargaining unit have expressed an interest in obtaining a new representative (or not being represented), considerations of industrial democracy dictate that such employees should be able to decide representational questions for themselves.

Other circumstances could arise in which a substantial change to the makeup of the bargaining unit may raise doubts about the incumbent union's representation. If thirty percent or more of the bargaining union employees petition for an election, Board policy favoring industrial free choice should prevail over union claims that workplace stability will be undermined.

CONCLUSION

For the foregoing reasons, the Regional Director's Decision and Direction of Election dated April 8, 2020, should be upheld. In addition, the contract-bar doctrine should be rescinded or modified as discussed above.

Respectfully Submitted,

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

/s/ Barry M. Willoughby

Barry M. Willoughby (No. 1016)

Lauren E.M. Russell (No. 5366)

Adria B. Martinelli (No. 4056)

1000 North King Street

Wilmington, DE 19801

Telephone: (302) 571-6666

Email: bwilloughby@ycst.com

Attorneys for Mountaire Farms, Inc.

Dated: August 21, 2020